No. 25-1703

IN THE

United States Court of Appeals

for the Eighth Circuit

PUBLIC INTEREST LEGAL FOUNDATION, INC.,

Plaintiff-Appellant,

v.

STEVE SIMON, in his official capacity as the Secretary of State for the State of Minnesota,

Defendant-Appellee,

v.

UNITED STATES OF AMERICA,

Intervenor Defendant-Appellee.

On Appeal from the United States District Court
for the District of Minnesota, Case No. 24-cv-01561
The Honorable Susan Richard Nelson Presiding

BRIEF OF PLAINTIFF-APPELLANT

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SUMMARY OF THE CASE

Most states must be transparent when they grant and remove voting rights. Not Minnesota. Treating states unequally and requiring transparency from most states, but exempting Minnesota offends the constitutional order. The NVRA's Transparency Exemption offends the standard applied in *Shelby County v. Holder* because the historical and precedential record demonstrates that Congress's Elections Clause powers, while expansive, are limited by the principle of equal state sovereignty. The District Court found that while the Foundation has Article III standing to pursue its constitutional claims, those claims fail as a matter of law because neither the equal sovereignty principle nor the congruence and proportionality principle "applies to the NVRA[.]" App. 66, R.Doc. 43, at 8, Add. 8. Specifically, the District Court found that "Congress's Elections Clause powers are not limited by the equal sovereignty principle." App. 70, R.Doc. 43, at 12, Add. 12. This appeal seeks review of that ruling.

Plaintiff-Appellant requests oral argument, 20 minutes per side, as this appeal involves important Constitutional questions.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, Plaintiff-Appellant Public Interest Legal Foundation does not have any parent corporation, and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Public Interest Legal Foundation, Inc., ("Foundation") brought a three-count complaint alleging violations of the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20507(i)(1). App. 7-39, R.Doc. 1, at 1-33.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, because the action arose under the laws of the United States, and 52 U.S.C. § 20510(b), because the action sought declaratory and injunctive relief under the NVRA.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The Foundation seeks this Court's review of the District Court's Order, App. 59-71, R.Doc. 43, at 1-13, Add. 1-13, and Judgment, App. 72, R.Doc. 44, at 1, dismissing the underlying action with prejudice. The Foundation timely filed a notice of appeal on April 8, 2024. App. 73, R.Doc. 45, at 1.

STATEMENT OF ISSUES

1. Did the District Court err when it decided that Congress has no limits when it exercises its Elections Clause authority, U.S. Const. Art. I, § 4, cl. 1, to override the sovereignty of only some states?

Apposite Cases and Statutes:

a. *Shelby County v. Holder*, 570 U.S. 529 (2013);

b. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009);

c. *Coyle v. Smith*, 221 U.S. 559 (1911).

2. Whether Congress's decision to exempt Minnesota from the transparency obligations of the National Voter Registration Act, 52 U.S.C. § 20507(i)(1), is unconstitutional because (1) it treats states differently without justification, *Shelby County v. Holder*, 570 U.S. 529, 535 (2013), and (2) there is insufficient "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)?

Apposite Cases and Statutes:

a. *Shelby County v. Holder*, 570 U.S. 529 (2013);

b. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

3. Did the District Court err when it dismissed the Foundation's complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6)?

Apposite Cases and Statutes:

a. Same as 1-2, above.

STATEMENT OF THE CASE

When Congress passed the National Voter Registration Act ("NVRA"), 52 U.S.C. §§ 20501 *et seq.*, it gave a small number of states then-offering voter registration on Election Day an exemption from the entire Act, 52 U.S.C. § 20503(b)(2). This appeal narrowly asks whether Congress's decision to exempt one of those states—Minnesota—from the NVRA's Public Disclosure Provision, 52 U.S.C. § 20507(i)(1), is unconstitutional because (1) it deprives other states of equal sovereignty without justification, *Shelby County*, 570 U.S. at 535, and (2) there is insufficient "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *City of Boerne*, 521 U.S. at 520.

The District Court held that the Foundation has Article III standing to pursue its constitutional claims, App. 66, R.Doc. 43, at 8, Add. 8, but that those constitutional claims fail as a matter of law because neither the equal sovereignty principle nor the congruence and proportionality principle "applies to the NVRA[.]" App. 66, R.Doc. 43, at 8, Add. 8. The District Court found that "Congress's Elections Clause

powers are not limited by the equal sovereignty principle." App. 70, R.Doc. 43, at 12, Add. 12. Consequently, the District Court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6). App. 71, R.Doc. 43, at 13, Add. 13. This appeal seeks review of that ruling.

NVRA Section 8(i)—the Public Disclosure Provision—provides, "Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]" 52 U.S.C. § 20507(i)(1). The only exempt records are those that "relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered." *Id*. Courts universally agree that state voter rolls are subject to disclosure under the NVRA's Public Disclosure Provision. *See* App. 27-28, R.Doc. 1, at 21-22. With limited exceptions, courts overwhelmingly agree that the NVRA preempts state-law restrictions that impede the NVRA's transparency goals. *See, e.g., Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 880 F. Supp. 1215, 1222 (N.D.

Ill. 1995) (declaring "that all provisions of Illinois law or regulations that conflict with the Act are pre-empted by the Act").

NVRA Section 4(b) provides that the NVRA does not apply to states that, on August 1, 1994, and continuously thereafter, did not have a voter registration requirement, or allowed all voters to register at the polling place on Election Day (hereinafter, "Election Day Registration" or "EDR"), 52 U.S.C. § 20503(b)(1)-(2). Minnesota has offered EDR continuously since at least August 1, 1994, and therefore textually qualifies for the NVRA exemption under 52 U.S.C. § 20503(b)(2).

Due to its NVRA exemption, Minnesota is currently not required to comply with the Public Disclosure Provision, which means Minnesota is not required to maintain all voter list maintenance records for at least two years, make all voter list maintenance records public, nor limit records-production costs to "photocopying at a reasonable cost." *See* 52 U.S.C. § 20507(i)(1). As a result, Minnesota limits disclosure of its official list of registered voters to Minnesota registered voters, Minn. Stat. § 201.091, Subdiv. 5. This appeal challenges Minnesota's

exemption from only the Public Disclosure Provision, 52 U.S.C. § 20507(i)(1) (hereinafter, "Transparency Exemption").

When reviewing an order dismissing a complaint under Fed. R. Civ. P. 12(b)(6), this Court "accept[s] the factual allegations in the complaint as true and construe[s] them in favor of the plaintiff." *Kulkay v. Roy*, 847 F.3d 637, 641 (8th Cir. 2017) (citations omitted). The relevant facts, stated succinctly, are the following:

1. The Foundation is a non-profit, non-partisan, 501(c)(3) organization that specializes in election and voting rights issues. App. 8-9, R.Doc. 1 ¶ 5, at 2-3. The Foundation is not a Minnesota registered voter.

2. For its work, the Foundation relies heavily upon the NVRA's Public Disclosure Provision. As an example, the Foundation uses records obtained through the NVRA to analyze the programs and activities of state and local election officials to determine whether lawful efforts are being made to keep voter rolls current and accurate, and to determine whether eligible registrants have been improperly

removed from voter rolls. The Foundation also educates the public and government officials about its findings. App. 8-9, R.Doc. 1 ¶ 5, at 2-3.

3. Minnesota requires voter registration and currently conducts numerous activities designed to keep its voter list current and accurate. *See* App. 13-20, R.Doc. 1 ¶¶ 26-61, at 7-14.

4. Minnesota law requires each county auditor to "make available for inspection a public information list which must contain the name, address, year of birth, and voting history of each registered voter in the county." Minn. Stat. § 201.091, Subdiv. 4. App. 26, R.Doc. 1 ¶ 97, at 20.

5. "The county auditors and the secretary of state shall provide copies of the public information lists in electronic or other media to any voter registered in Minnesota within ten days of receiving a written or electronic request accompanied by payment of the cost of reproduction." Minn. Stat. § 201.091, Subdiv. 5. App. 27, R.Doc. 1 ¶ 98, at 21.

6. On January 24, 2024, pursuant to the NVRA's Public Disclosure Provision, the Foundation requested the following records

from Defendant-Appellee Minnesota Secretary of State Steve Simon (hereinafter "Secretary"):

1. A current or most updated copy of the complete Minnesota Registered Voter List containing all data fields as described in Minnesota Statutes § 201.091(4) ("Statewide Public Information List").
2. "Deceased Reports" received from ERIC during the years 2020, 2021, 2022, and 2023 ("ERIC Reports").

App. 30, R.Doc. 1 ¶ 108, at 24 ("Request").

7. On February 21, 2024, the Secretary's office responded to the Request requiring "more context" or "authority" concerning the Foundation's belief that Minnesota is not exempt from the NVRA's Public Disclosure Provision. App. 31, R.Doc. 1 ¶ 113, at 25.

8. On February 22, 2024, the Foundation sent another letter to the Secretary, providing the requested context and authority. App. 31, R.Doc. 1 ¶ 114, at 25.

9. On March 1, 2024, the Secretary's office responded to the Foundation stating, "[W]e have reviewed the authority that you provided and have concluded this act does not apply to the State of Minnesota. See 52 U.S.C. § 20503(b). We therefore have construed your request to be made pursuant to the Minnesota Government Data

Practices Act, Minn. Stat. Ch. 13." App. 31, R.Doc. 1 ¶ 115, at 25. The Secretary's office then denied the Foundation's request, stating, "[T]he Foundation is an entity and not a registered voter in Minnesota. Because Minnesota Statutes section 201.091, subdivision 5 allows only registered voters in Minnesota to access this list, no data is being produced in response to this request. We will refund your fee that you previously provided." App. 31, R.Doc. 1 ¶ 117, at 25.

10. On March 5, 2024, the Foundation notified the Secretary that he was in violation of the NVRA for failure to permit inspection and reproduction of voter list maintenance records as required by 52 U.S.C. § 20507(i)(1). App. 32, R.Doc. 1 ¶ 118, at 26 ("Notice Letter").

11. The Notice Letter notified the Secretary that Minnesota's Transparency Exemption is no longer valid, App. 32, R.Doc. 1 ¶ 119, at 26, and that Minnesota's Statewide Public Information List is a record subject to disclosure under the NVRA, App. 32, R.Doc. 1 ¶ 120, at 26.

12. The NVRA ordinarily requires written notice and an opportunity to cure. 52 U.S.C. § 20510(b). In this case, the curative period was 20 days because the violation occurred within 120 days of a

federal election in Minnesota. App. 33, R.Doc. 1 ¶ 126, at 27; 52 U.S.C. § 20510(b)(2).

13. The Secretary did not cure his violation within 20 days of the Notice Letter, and to date, the Secretary has still not cured his violation. App. 33, R.Doc. 1 ¶ 129, at 27.

The Foundation filed this action on April 30, 2024. App. 7, R.Doc. 1, at 1. The Secretary moved to dismiss on May 22, 2024. App. 54, R.Doc. 10, at 1. On August 27, 2024, the United States intervened under 28 U.S.C. § 2403, App. 56, R.Doc. 25, at 1.

The District Court granted the Secretary's motion to dismiss on March 17, 2025, App. 59-71, R.Doc. 43, at 1-13, Add. 1-13, and entered judgment the same day, App. 72, R.Doc. 44, at 1. The Foundation timely filed a notice of appeal on April 8, 2025. App. 73, R.Doc. 45, at 1.

SUMMARY OF THE ARGUMENT

The question here is whether, under *Shelby County v. Holder*, 570 U.S. 529, 544 (2013), Congress may treat States differently under the NVRA *without justification*, and if not, whether the NVRA's Transparency Exemption is adequately justified under current conditions. It is not, because conditions have changed dramatically since 1993, and the Elections Clause is not an exemption from the principle of equal state sovereignty. Rather, equal state sovereignty is woven into the federalist arrangement of 1787. There would be no union without equal sovereignty. The Transparency Exemption challenged here offends the Constitutional arrangement.

In other words, the question here is not whether the Elections Clause permits Congress to enact the NVRA. It does. But regardless of the power under the Elections Clause to pass a given law, the question still remains whether Congress may treat States differently without justification. It may not.

Imagine a constitutional architecture where Congress may wield the Elections Clause's preemptive power to pick and choose winners and

losers, to reward allies and scald foes, to favor some states and punish others, or to favor some *voters* and punish others. Imagine if Congress required Georgians to show photo identification to vote but prohibited Florida's legislature from requiring photo identification. Imagine if Congress required Texans to vote on only one day but allowed Californians to adopt elongated mail ballot receipt deadlines after Election Day. Imagine if Congress required Arizonans to present documentary proof of citizenship to register to vote but allowed New Yorkers merely to check a box to do the same.

With the Elections Clause, the Founders gave Congress the "authority to provide a complete code for congressional elections[.]" *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Although regulatory authority is vested in the states by "default," Congress may "alter those regulations or supplant them altogether." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013) ("*ITCA*"). But this power does not extend to offending the core architecture of 1787: equal sovereignty.

Under the District Court's reasoning, Congress needs no justification to impose unequal laws across states, exempting some while imposing severe burdens on others. Congress may, the District Court concludes, exercise its Elections Clause authority in a way that treats states differently, and such exercises are not subject to the fundamental principle of equal state sovereignty that the Supreme Court relied upon in *Shelby County*, 570 U.S. at 544. To the District Court, then, such exercises need not "make[] sense in light of current conditions," *id.* at 553, or "be sufficiently related to the problem that [they] target[]," *id.* at 551 (citation omitted), or be targeted toward any problem whatsoever. The District Court erred when it so held.

Equal state sovereignty is not a narrowly construed byproduct of select Supreme Court jurisprudence. It does not spring to life only when Congress's actions strike the Court as "extraordinary." Equal state sovereignty is a bedrock principle upon which the nation was founded. Courts should *presume* that it qualifies Congress's power absent explicit evidence to the contrary. None exists here.

To be sure, the States surrendered some sovereignty when they ratified the Elections Clause. But the historical and legal record defies the conclusion that States surrendered their *equal* sovereignty, much less that the States consented to arbitrary or preferential enforcement schemes that favor some states over others in the administration of elections. In fact, the drafters designed the Elections Clause to preserve the Republic by ensuring *uniformity* in state election regimes. The District Court's reasoning cannot be squared with history or precedent.

When it must be justified under current conditions, Minnesota's Transparency Exemption cannot withstand scrutiny. In fact, the Transparency Exemption did not make sense when the NVRA took effect. It makes even less sense now, when many states offer registration and voting on the same day, the circumstance that supposedly justified Minnesota's exemption. Furthermore, Minnesota, like nearly all other states, is constantly granting and removing voting rights as part of its statutorily mandated voter list maintenance program. Forty-four states plus the District of Columbia must surrender their sovereignty and comply with the NVRA's transparency

mandates while Minnesota does not. There is no credible contemporary justification for such disparate treatment anymore.

ARGUMENT

I. Standard of Review

This Court "review[s] *de novo* the district court's decision granting a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), accepting as true all factual allegations and viewing them in the light most favorable to the nonmoving party." *Thompson v. Harrie*, 59 F.4th 923, 926 (8th Cir. 2023). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Brown v. Conagra Brands, Inc.*, 131 F.4th 624, 627 (8th Cir. 2025) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

II. Introduction and Background

Thirty years ago, Congress decided that decisions about who is and is not eligible to vote should be transparent and publicly accessible, so that voting rights are not lost to errors and inefficiencies, or worse, discrimination. The NVRA's Public Disclosure Provision embodies this decision, as it mandates public disclosure and reproduction of "all records concerning the implementation of programs and activities

conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]" 52 U.S.C. § 20507(i)(1).

Yet when Congress passed the NVRA, it gave exemptions to Minnesota and five other states because those states offered voter registration on Election Day (or, in the case of North Dakota, did not require voter registration). Those states were exempt from the entire Act, including its Public Disclosure Provision. *See* 52 U.S.C. § 20503(b)(1)-(2).

The Foundation's Complaint alleges that Minnesota's Transparency Exemption is invalid because Congress does not have justification for treating Minnesota differently from the non-exempt states. *See* App. 20-25, R.Doc. 1 ¶ 62-88, at 14-19. The Foundation relied primarily on "the principle that all States enjoy equal sovereignty," which the Supreme Court reaffirmed in *Shelby County*, 570 U.S. at 535.[1]

[1] The Foundation also alleges that the Transparency Exemption violated the congruence and proportionality requirement articulated in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

The District Court concluded that "*Shelby County* does not apply to the NVRA." App. 67, R.Doc. 43, at 9, Add. 9. Among the reasons, the District Court explained, are the "extraordinary" nature of the Voting Rights Act ("VRA"), App. 68, R.Doc. 43, at 10, Add.10, and what the District Court saw as a determinative difference—Congress's respective power-sources for the NVRA (Elections Clause) and the VRA (Fifteenth Amendment), App. 67-68, R.Doc. 43, at 10-11, Add. 10-11.

The District Court erred when it concluded that the Transparency Exemption is not subject to the principle of equal state sovereignty and the standard applied in *Shelby County*. The equal state sovereignty principle is core to the architecture of our nation's federalist design. It cannot be overridden absent justification. This Court should so hold.

For the foregoing reasons, the Foundation requests that this Court reverse the District Court's judgment and remand this action to determine whether the Transparency Exemption is adequately justified under *Shelby County* and *City of Boerne*.

A. The Equal State Sovereignty Principle

One-hundred and twenty-five years ago, the Supreme Court observed, "[T]he whole Federal system is based upon the fundamental principle of the equality of the States under the Constitution." *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900). The Court continued, "The idea that one State is debarred, while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution, that it cannot be entertained even if Congress had power to make such discrimination." *Id*.

These emphatic remarks were hardly the initial recognition of the States' equal sovereignty. In the Declaration of Independence, the States referred to themselves as "Free and Independent States."[2] "Under the law of nations, 'Free and Independent States' were entitled to the 'perfect equality and absolute independence of sovereigns.'" Anthony J. Bellia Jr. & Bradford R. Clark, Article: The International Law Origins of American Federalism, 120 Colum. L. Rev. 835, 937

[2] The Declaration of Independence, para. 32 (U.S. 1776).

(2020) (quoting *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812)). "The notion of a 'State' with fewer sovereign rights than another 'State' was unknown to the law of nations." *Id.* at 937-38. Eighty years after *Bolln*, the Supreme Court would reaffirm that the States' "status as coequal sovereigns in a federal system" is "implicit in … the original scheme of the Constitution[.]" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980).

The States are inherently sovereign. While they surrendered some of their sovereignty to the new federal government, their sovereign *equality* was not among the rights surrendered. *See* Bellia & Clark, *supra*, at 842 ("Under principles of the law of nations well known to the Founders, the 'States' would have been understood to retain their preexisting sovereign rights unless they clearly and expressly surrendered them.").

The Supreme Court first addressed the States' equal sovereignty in the context of admitting new States to the Union—describing what is often referred to as the "equal footing doctrine." *See Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845). In *Pollard v. Hagan*, the Supreme

Court recognized that every new State "has been admitted into the union on an equal footing with the original states." *Id.* In *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900), the Supreme Court again acknowledged that "a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations[.]"

The "'constitutional equality' among the States," *Franchise Tax Bd. v. Hyatt*, 578 U.S. 171, 179 (2016), requires equal treatment upon admission to the Union, but it also "remains highly pertinent in assessing subsequent disparate treatment of States," *Shelby County*, 570 U.S. at 544 (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) ("*Northwest Austin*")).

The Supreme Court recently addressed "subsequent disparate treatment of States" related to another federal election statute, the Voting Rights Act. In 1965, Congress passed the VRA, 52 U.S.C. § 10101 *et seq.*, to combat racial discrimination in voting. VRA Section 5 required states to obtain federal preclearance before any law related to

voting could go into effect. VRA Section 4 applied the preclearance requirement only to some but not all states, those that had used a forbidden test or device in November 1964 and had less than 50 percent voter registration or turnout in the 1964 Presidential election. 52 U.S.C. § 10303(b). In 1966, the Supreme Court upheld Section 4 against a constitutional challenge, explaining that "exceptional conditions can justify legislative measures not otherwise appropriate." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

VRA Section 4's coverage formula was elastic. The VRA contained a provision allowing covered states to "bailout" of Section 5's federal preclearance requirement by seeking a declaratory judgment from a three-judge panel in United States District Court for the District of Columbia. *See* 52 U.S.C. § 10303(a)(1). The VRA also contained a provision under which states could be "bailed in" to the federal preclearance requirement for committing violations of the Fourteenth or Fifteenth Amendment. 52 U.S.C. § 10302(c).[3]

[3] The NVRA has no bailout or bail-in provisions, which made the intrusion into equal state sovereignty particularly constitutionally problematic. *See* Section III.D.

In 2009, the Supreme Court considered an action brought by a Texas municipal utility district seeking relief from Section 5's preclearance requirement under the VRA's "bailout" provision. *Northwest Austin*, 557 U.S. at 197. Alternatively, the municipal utility district challenged the constitutionality of VRA Section 5. *Id*. The Supreme Court observed that in *Katzenbach*, the Court "concluded that 'exceptional conditions' prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system." *Id*. at 211 (citations omitted). The Court again acknowledged that the VRA "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'" *Id*. at 203 (citing *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). While "[d]istinctions can be justified in some cases," the Supreme Court explained, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id*. at 203.

The Supreme Court explained further that while the conditions that justified the VRA had "improved," "[p]ast success alone, however, is

not adequate justification to retain the preclearance requirements." *Id.* at 202. "[T]he Act imposes current burdens and must be justified by current needs." *Id.* at 203. Ultimately, the Supreme Court held that the utility district was eligible to seek a "bail out" under the VRA and declined to resolve the VRA's constitutionality. *Id.* at 211. The ability to bail out of the VRA's disparate burdens was thus important to the Supreme Court.

Four years later, in *Shelby County*, the Supreme Court held that VRA Section 4 was unconstitutional. 570 U.S. at 557. In doing so, the Court reaffirmed "the principle that all States enjoy equal sovereignty[.]" *Id.* at 534; *see also id.* at 544 ("[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.") (citations and quotations omitted). The Supreme Court instructed, with respect to a law that treats the States differently, "a statute's 'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'" *Id.* at 550-51 (quoting *Northwest Austin*, 557 U.S. at 203). Further,

"Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past." *Id*. at 553.

The Supreme Court is clear: "Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States." *Shelby County*, 570 U.S. at 544 (quoting *Northwest Austin*, 557 U.S. at 203). Equal state sovereignty is not just a byproduct of select Supreme Court jurisprudence; it is a bedrock principle upon which the nation was founded. *Shelby County*, 570 U.S. at 544 (citing *Coyle v. Smith*, 221 U.S. 559, 580 (1911)); *see also* Thomas B. Colby, In Defense of the Equal Sovereignty Principle, 65 Duke L.J. 1087, 1137 (2016) ("Sovereign equality of the member states is presumptively an essential, inherent structural feature of federalism itself."). Equal state sovereignty is inherent to our nation's federalist design. It cannot be overridden absent adequate justification. "[E]ven when Congress operates within its legitimate spheres of authority, it cannot limit or remove the sovereignty of some states, but not others." *Id*. at 1121.

Just as "[t]hese basic principles guide[d] [the Supreme Court's] review of the question" presented in *Shelby County*, 570 U.S. at 542, so too do these basic principles guide this Court's review of the questions presented here because these principles lie at the heart of the constitutional architecture of the nation. These constitutional designs are not confined to only the Civil War Amendments.

B. The Elections Clause

The Constitution's Elections Clause provides,

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. Art. I, § 4, cl. 1.

The Elections Clause "is broadly worded and has been broadly interpreted." *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) ("*ACORN*"). It "confers on Congress a 'general supervisory power,' under which it may 'supplement … state regulations or may substitute its own.'" *Id.* at 795 (internal citations omitted).

As Judge Richard Posner has prudently acknowledged, "[L]aws frequently outrun their rationales." *ACORN*, 56 F.3d at 794. Indeed, the Founders' vision for the Elections Clause was decidedly narrower than presently understood. In *ITCA*, the Supreme Court would describe the Elections Clause as "the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." 570 U.S. at 8. The historical record amply supports this targeted purpose. For example, Alexander Hamilton justified the Elections Clause as the federal government's "means of its own preservation." The Federalist No. 59, at 363 (A. Hamilton) (C. Rossiter ed., 1961). This preservation rationale finds more support in the same writing, where Hamilton describes Congress's supervisory authority as one to be exercised "in the last resort." The Federalist No. 59, at 378 (A. Hamilton) (R. Scigliano ed., 2000).

Another justification demonstrates a similar concern for behavior that would threaten Congress's ability to function as a representative body. The Supreme Court explains that the Elections Clause was also intended to "act as a safeguard against manipulation of electoral rules

by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 815 (2015).

Not everyone believed federal supervision over state elections was a good thing. Opponents of ratification described the Elections Clause "as a radical expansion of national power and a grave danger to liberty." *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 50 (2024) (Thomas, J., concurring). Antifederalist fears centered on the potential for misuse of power by those in office, even "predict[ing] that Congress's power under the Elections Clause would allow Congress to make itself 'omnipotent,' setting the 'time' of elections as never or the 'place' in difficult to reach corners of the State." *Rucho v. Common Cause*, 588 U.S. 684, 698 (2019) (citations omitted). Whatever the prospect of such abuses, Antifederalists insisted that "[i]t made no sense … to leave 'a door open to improper regulations.'" Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution 342 (2016) (quoting "Federal Farmer," *Letters to the Republican* (Nov. 8, 1787), Letter III).

In addition to Hamilton's preservation rationale, the Federalist defense advanced the notion that "Congress ought to have the power to insist on some uniformity in federal elections." Klarman, The Framers' Coup at 342. Other proponents "championed the Clause as necessary 'for securing to the people their equal rights of election.'" *S.C. State Conf. of the NAACP*, 602 U.S. at 51 (quoting 3 Debates on the Constitution 26 (J. Elliot ed. 1836) (Elliot's Debates)).

Divergent views dominated the debate over the Elections Clause. Between the divide, common ground emerged: the fear of unchecked power to set election rules.

C. The National Voter Registration Act of 1993

1. The NVRA's Public Disclosure Provision Is Designed to Protect the Right to Vote by Making Eligibility Determinations Transparent.

"For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in federal elections, but in 1993, with the enactment of the National Voter Registration Act (NVRA), Congress intervened." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 761 (2018). The Supreme Court has described the NVRA as "a complex

superstructure of federal regulation atop state voter-registration systems." *ITCA*, 570 U.S. at 5. Generally, the NVRA is a valid exercise of Congress's Elections Clause authority, *see ACORN*, 56 F.3d 791, because Congress's Elections Clause authority encompasses "regulations relating to 'registration.'" *ITCA*, 570 U.S. at 9 (quoting *Smiley*, 285 U.S. at 366). At least one court has acknowledged that Congress also acted under its power to enforce the Civil War Amendments, U.S. Const. Amend. 14, Sec. 5; U.S. Const. Amend. 15, Sec. 2. *Condon v. Reno*, 913 F. Supp. 946, 962 (D.S.C. 1995) ("The legislative history and the text of the NVRA are clear that Congress was utilizing its power to enforce the equal protection guarantees of the Fourteenth Amendment."); *see also id*. at 967 ("Congress had a sound basis on which to conclude that a federal voter registration law was an appropriate means of furthering the protections of the Fourteenth and Fifteenth Amendments.").

"The [NVRA] has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls." *Husted*, 584 U.S. at 761. At the same time, "Congress

was well aware of the 'long history of … list cleaning mechanisms which have been used to violate the basic rights of citizens' when it enacted the NVRA." *Id*. at 807 (Sotomayor, J., dissenting) (citation omitted). The NVRA's legislative history indicates that Congress intended to "reduce … obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9, at 3 (1993). Congress thus intended to address problems through the NVRA and the NVRA's findings and purposes reflect this goal.

When Congress passed the NVRA, it found,

> (1) the right of citizens of the United States to vote is a fundamental right;
>
> (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and
>
> (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

52 U.S.C. § 20501(a).

Congress enacted the NVRA for the following purposes:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C. § 20501(b).

The NVRA imposes various requirements on the States with respect to voter registration, including the requirement that state driver's license applications serve as applications for voter registration, 52 U.S.C. § 20504(a)(1), and the requirement that each state use reasonable efforts to remove the names of registrants who are ineligible due to death or a change in residency, 52 U.S.C. § 20507(a)(4)(A)-(B).

As explained, the NVRA's Public Disclosure Provision requires the States to allow public inspection and reproduction of voter list maintenance records. 52 U.S.C. § 20507(i)(1). The Public Disclosure Provision's goal is transparency, but not only for transparency's sake. Rather, Congress added the Public Disclosure Provision to ensure that the NVRA's other goals were achieved. Multiple courts have recognized this. According to the Fourth Circuit, the Public Disclosure Provision

"embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies." *Project Vote/Voting for Am., Inc. v. Long,* 682 F.3d 331, 334-35 (4th Cir. 2012) ("*Project Vote*"). The Fourth Circuit further acknowledged,

> It is selfevident that disclosure will assist the identification of both error and fraud in the preparation and maintenance of voter rolls. State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible. Without such transparency, public confidence in the essential workings of democracy will suffer.

Id. at 339. The First Circuit agrees, finding that the Public Disclosure Provision "evinces Congress's belief that public inspection, and thus public release, of Voter File data is necessary to accomplish the objectives behind the NVRA." *Pub. Int. Legal Found., Inc. v. Bellows*, 92 F.4th 36, 54 (1st Cir. 2024). Various United States District Courts accord. *See, e.g.*, *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12 (S.D. Fla., Mar. 30, 2018) (citing 52 U.S.C. § 20507(i)) ("To ensure that election officials are fulfilling their list

maintenance duties, the NVRA contains public inspection provisions."); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 721 (S.D. Miss. 2014) ("The Public Disclosure Provision thus helps 'to ensure that accurate and current voter registration rolls are maintained.'") (citations and quotations omitted).

In short, the Public Disclosure Provision exists so the public can evaluate the adequacy, effectiveness, and lawfulness of officials' voter list maintenance actions—namely, actions that grant and remove voting rights. For example, the NVRA's transparency allows individuals and advocacy groups like the Foundation to determine whether "accurate and current voter registration rolls are maintained," 52 U.S.C. § 20501(b)(4), or whether states are imposing "discriminatory and unfair registration laws and procedures," 52 U.S.C. § 20501(a)(3). Such "[p]ublic disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections." *Project Vote*, 682 F.3d at 339-40.

2. The NVRA Exempted Certain States Based on Conditions Existing Thirty Years Ago.

Minnesota's wholesale exemption to the entire NVRA was grounded in a small portion of the NVRA's requirements that happened to be the law's public face. That public face was the NVRA's "motor voter" feature, which required states to offer voter registration opportunities to driver's license applicants. 52 U.S.C. § 20504(a)(1). Congress reasoned that Election Day Registration was better than "motor voter," and so states offering the better option would not be burdened with the cost of implementing the "motor voter" requirements. *See* H.R. Rep. No. 103-9 at 6 (1993) ("The Committee believes that states which have implemented one or both of these exceptions have lessened the impediments to registration which goes significantly beyond the requirements of the bill."). Yet Congress did not limit the exemption to the NVRA's "motor voter" requirements. That would have been more congruent, proportional, and related to the registration deficit Congress was targeting with the Act's "motor voter" requirements. Instead, Congress much more broadly exempted states

with EDR from the entire NVRA, including the Public Disclosure Provision. *See* 52 U.S.C. § 20503(b)(1)-(2).

Minnesota has offered EDR continuously since at least August 1, 1994, and therefore technically qualifies for the exemption under 52 U.S.C. § 20503(b)(2). Nobody disputes this. Due to the NVRA Exemption, and because of the judgment below, Minnesota is not required to fulfil the Foundation's request on the NVRA's terms.

III. The District Court Erred When It Held that the Equal State Sovereignty Principle Does Not Apply to the NVRA.

The District Court improperly concluded that "*Shelby County* does not apply to the NVRA." App. 67, R.Doc. 43, at 9, Add. 9. This is wrong because the obligation of equal state sovereignty explained in *Shelby County* is the centerpiece of the constitutional architecture and is not limited to those laws passed to implement the Reconstruction Amendments. *Shelby County* reaffirmed "the principle that all States enjoy equal sovereignty[.]" 570 U.S. at 535. The Supreme Court also articulated a test to be applied when Congress departs from that principle: "Congress—if it is to divide the States—must identify those

jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past." *Id*. at 553. In other words, with respect to a law that treats the States differently, "a statute's 'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'" *Id*. at 550-51. The Court spoke broadly and articulated an equal state sovereignty mandate that runs throughout the Constitution. The District Court erred in finding that this mandate does not apply to the NVRA.

A. The Alleged "Burden versus Exemption" Distinction Does Not Dispositively Distinguish *Shelby County*.

The District Court found "for standing purposes" that the Foundation's "injury is redressable," App. 65, R.Doc. 43, at 7, Add. 7, but noted that "[i]nvalidating an exemption from federal regulation is an unusual remedy, indeed," *id*. That is ultimately a distinction without a difference. VRA Section 4 exempted some states from preclearance and had triggers subjecting others to the VRA's preclearance burdens. With both the VRA and the NVRA, some states retained more of their sovereignty than other states. What mattered under *Shelby County* and

the equal state sovereignty principle is that Congress treated the States differently without proper justification. *See Shelby County*, 570 U.S. at 554. With the Transparency Exemption, Congress has done that again. And the justification is non-existent here.

Shelby County speaks in terms of the unequal treatment of the States. And this makes sense, because the equal state sovereignty principle applies not only in situations where Congress means to impose additional burdens, as in *Shelby County*, but also in situations where Congress intends to elevate and favor certain states. Exempting a state and burdening a state are merely two sides to the differential treatment coin. Indeed, long ago, the Supreme Court held that "no compact" can "diminish or *enlarge*" a State's sovereignty upon entry to the Union. *Pollard*, 44 U.S. at 229 (emphasis added). The equal footing doctrine "negatives any implied, special limitation of any of the paramount powers of the United States *in favor of a State*." *United States v. Texas*, 339 U.S. 707, 717 (1950) (emphasis added). The logic of these equal footing doctrine cases applies with equal force in this action. Indeed, it would be illogical to require Congress to treat States equally upon their

admission, but later authorize Congress to discriminate without reason, and *Shelby County* forecloses such an absurd result.

Shelby County did not invent the principle of equal state sovereignty. Nor did it limit its application only to situations arising out of the VRA or even the Civil War Amendments. Most importantly, it did not confine its skepticism of unequal treatment of states only to situations where the challenger's complaint is focused on a statute's burden. Rather, *Shelby County* drew from a "historic tradition," 570 U.S. at 540, and affirmed a much broader rule. It cataloged a core constitutional architecture—equal state sovereignty, period. The District Court erred by confining its import.

B. Congress's Elections Clause Powers Are Qualified by the Principle of Equal State Sovereignty.

The District Court also improperly relied on a distinction in Congress's respective power-sources for the NVRA (Elections Clause) and the VRA's preclearance requirement (Fifteenth Amendment). App. 67-68, R.Doc. 43, at 9-10, Add. 9-10. In the District Court's opinion, Congress's Fifteenth Amendment powers are qualified by the principle of equal state sovereignty, but Congress's Elections Clause powers are

not. This distinction conflicts with the Supreme Court's articulation of a much more comprehensive constitutional architecture.

The States were sovereign equals when they formed this nation. The historical and legal record contains no evidence that the sovereign states surrendered their equality when they ratified the Elections Clause. To the contrary, the record indicates that both proponents and opponents of the Elections Clause were concerned about giving the government unchecked power to set elections rules. Furthermore, proponents—who ultimately got their way—intended the Elections Clause to establish *uniformity* and secure the peoples' *equal* rights of election. The Transparency Exemption does the exact opposite.

The Elections Clause was designed to preserve the Federal Congress. *ITCA*, 570 U.S. at 8. Relatedly, proponents also saw the Clause as a safeguard that would prevent "manipulation of electoral rules" by state officials intent on entrenching themselves by elevating their own interests above the people's interests. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 815. Opponents feared something similar: *Congress's* abuse of its power to override state law. *See* Section

II.B. Some opponents feared merely leaving the "'door open to improper regulations.'" Klarman, *supra*, at 342 (citations omitted).

The Seventh Circuit validated the Founders' concerns when it upheld the NVRA thirty years ago. Writing for the panel, Judge Posner remarked, "Any law that, like the 'motor voter' law, tinkers with the ground rules for elections is worrisome. It creates a danger of entrenchment—a danger that a temporary majority may make the repeal of the law exceptionally difficult by altering the composition of the electorate in its favor." *ACORN*, 56 F.3d at 795. The Seventh Circuit reminded us that it was not deciding such a challenge nor suggesting how one would be resolved. *See id.* ("The state does not attack the 'motor voter' law on that ground, however; nor do we suggest that such an attack would succeed.").

This Court is now hearing a challenge that asks whether Congress may enforce its Elections Clause power to set different "ground rules for elections" in different states *without justification*. By ruling that *Shelby County* does not apply to the NVRA, the District Court effectively decided that Congress needs no justification to treat the States

differently when exercising its Elections Clause powers. If not reversed, the District Court's reasoning invites the harm the Founders feared most: unchecked power to manipulate electoral rules.

This case also presents actual unequal treatment of States and voters. Some States are burdened with NVRA compliance and must be transparent when they grant and remove voting rights. Other States, like Minnesota, have no such burden and may choose to conceal such activities.

Disparate treatment, generally speaking, is not consistent with the original understanding of the Elections Clause. Opponents believed Congress should have the power to "insist on some uniformity in federal elections." Klarman, *supra*, at 342. Other proponents "championed the Clause as necessary 'for securing to the people their equal rights of election.'" *S.C. State Conf. of the NAACP*, 602 U.S. at 51 (quoting 3 Debates on the Constitution 26 (J. Elliot ed. 1836) (Elliot's Debates)). There is nothing uniform or equal about the Transparency Exemption.

The relevant question is not whether the States surrendered some sovereignty when they ratified the Elections Clause. They did. The

question is whether the States surrendered their *equal* sovereignty, such that Congress may treat States differently *without justification*. They did not. Constitutional scholars have summarized the inquiry in the following way:

> At the Founding, a 'State' possessed all of the rights and powers recognized by the law of nations minus only those it expressly surrendered. For this reason, the rights and powers of the American States were not conferred by, but predated, the Constitution. Thus, the relevant constitutional question is not whether the text expressly grants sovereign rights, powers, and immunities to the States, but whether it expressly takes them away.

Bellia & Clark, *supra*, at 896; *see also id.* at 842 ("[C]onstitutional silence on a question of federalism ordinarily signifies retention—rather than surrender—of the States' preexisting sovereignty."). The Elections Clause does not expressly take away the States' equal sovereignty. Such an extreme action requires some justification. *Shelby County* confirms that and provides a workable standard by which to judge the appropriateness of Congress's departure from basic federalism principles.

C. The "Extraordinary" Nature of the VRA's Preclearance Requirement Does Not Dispositively Distinguish *Shelby County*.

The District Court incorrectly found the VRA preclearance requirement was a more extreme species of unequal sovereignty than the challenged disparity here. The District Court has it backwards, the unequal treatment in the NVRA is more severe and supported with even less justification than the VRA.

To be sure, the VRA's preclearance requirement was an "extraordinary departure" from federalism norms. *Shelby County*, 570 U.S. at 557. The Supreme Court did not, however, establish an extraordinary-intrusion standard in *Shelby County*, nor should one be extracted from it. Intrusion is the wrong inquiry. Unequal treatment without justification is the proper inquiry.

Recall, the VRA's preclearance requirement was upheld against a constitutional challenge approximately forty-seven (47) years before *Shelby County*. *Katzenbach*, 383 U.S. at 334. The VRA was considered an "uncommon exercise of congressional power" from the very beginning. *Id*. It nevertheless survived challenge because it was

justified by the "exceptional conditions" then existing—namely, the need to remedy racial discrimination in voting. *Id.*; *see also Shelby County*, 570 U.S. at 555 ("*Katzenbach* indicated that the Act was 'uncommon' and 'not otherwise appropriate,' but was justified by 'exceptional' and 'unique' conditions."). In other words, the VRA's preclearance requirement survived a Supreme Court-imposed balancing test.

From an intrusion standpoint, the VRA's preclearance requirement did not become any more "extraordinary" over time. It was not struck down in *Shelby County* because the degree of intrusion suddenly shocked the Supreme Court's conscience. What changed is the conditions in the covered states. *See Shelby County*, 570 U.S. at 535 ("[T]he conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."); *see also id.* at 547, 551-53. The preclearance requirement was based on a formula that did not reflect "current conditions." *Id.* at 557. In other words, the preclearance requirement no longer satisfied the Supreme Court's balancing test.

Shelby County did not establish an intrusion threshold, short of which the States do not enjoy equal sovereignty and Congress need not justify its actions under current conditions. *Shelby County* reaffirmed that all states enjoy equal sovereignty, and that Congress must adequately justify its actions, with evidence, when it intrudes on that equality. A standard that looks only at the degree of intrusion and ignores the justification is not a workable standard. In fact, one might reasonably say that it is *always* "extraordinary" when Congress intrudes on the sovereignty of some states and not others. *See* Bellia & Clark, *supra*, at 937-38 ("The notion of a 'State' with fewer sovereign rights than another 'State' was unknown to the law of nations."). What is workable, and what is required by *Shelby County*, is a standard that asks whether Congress's disparate treatment of the states is justified under current conditions.[4]

[4] An "extraordinary" feature of the VRA's preclearance requirement was its application to laws governing state and local elections. *See Shelby County*, 570 U.S. at 545. This feature finds *de facto* presence in the NVRA as well. While the NVRA's requirements textually apply only to *federal* elections, this limitation is often meaningless because nearly all states administer federal, state, and local elections together. For example, when a person registers to vote, she gains voting rights in all

D. The States Subject to the NVRA Did Not Choose to Be Disparately Burdened.

It is true that Congress exempted States that offered EDR (or had no registration requirement) on August 1, 1994. 52 U.S.C. § 20503(b)(1)-(2). What Congress offered was not a true "choice," nor does it change the result here even if it was.

When the NVRA became law, each State was given a short window to change its laws to enact EDR—what Congress considered "[t]he most controversial method of registration," H.R. Rep. No. 103-9 at 4 (1993)—or be subject to extensive and costly federal legislation for all time. At best, this was a choice between a loss of sovereignty—by enacting Congress's preference for polling place EDR—or a loss of

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elections. Almost every state, including Minnesota, maintains one voter roll for all elections. By regulating voter registration for federal elections, the NVRA thus intrudes into state and local elections. A state can escape this intrusion only by bearing the cost of bifurcating federal and state election administration. To the Foundation's knowledge, only Arizona has chosen to do this. *See Strong Cmtys. Found. of Ariz. Inc. v. Richer*, No. CV-24-02030-PHX-KML, 2024 U.S. Dist. LEXIS 185909, at *8 (D. Ariz. Oct. 11, 2024) ("Arizona's system of voter registration is bifurcated such that some voters are only eligible to vote in federal elections and not state or local ones.").

sovereignty—by subjecting itself to the entire NVRA. In neither instance could a state retain its sovereignty. *See*, *e.g.*, *New York v. Yellen*, 15 F.4th 569, 584 (2d Cir. 2021) ("'Congress may use its spending power to create incentives for States to act in accordance with federal policies,' as long as 'pressure [does not] turn[] into compulsion.'") (citations omitted). In other words, the States were offered a Hobson's Choice, *i.e.*, one that is no choice at all.

Even if the NVRA offered States a true choice, it does not change the result. The VRA also offered States a choice. The VRA contained a provision allowing covered states to "bailout" of the VRA's federal preclearance requirement by seeking a declaratory judgment from a three-judge panel in United States District Court for the District of Columbia. *See* 52 U.S.C. § 10303(a)(1). To be eligible for a "bailout," States needed to choose to eliminate racial discrimination in elections for a period of ten years. *See* 52 U.S.C. § 10303(a)(1)(A)-(F) (describing eligibility requirements for "bailout").

Shelby County was decided four decades after the VRA's enactment. *Shelby County*, 570 U.S. 529. By then, every covered

jurisdiction had adequate time (multiple times over) to make choices to qualify for a "bailout." Yet the Supreme Court still struck down VRA's preclearance requirement in *Shelby County*. The availability of that escape valve did not save the VRA.

Unlike the VRA, the NVRA has no escape valve. There is no statutory mechanism that allows it to adapt to current conditions. In the NVRA, it is 1994 forever. The NVRA has no bail-in or bailout feature. Non-exempt States cannot regain their sovereignty by choosing EDR in 2025. Even those States that have now chosen EDR are still burdened by the NVRA. And the States that are currently exempt can lose their sovereignty by just momentarily eliminating EDR. The NVRA is even more inflexible than the VRA, and in light of *Shelby County*, cannot be upheld based on a phantom choice offered more than thirty (30) years ago.

IV. Minnesota's Transparency Exemption Violates the Principle of Equal State Sovereignty.

A. Minnesota's Transparency Exemption Is Not Justified Under Current Conditions.

The Foundation's Complaint plausibly alleges that the Transparency Exemption departs from the principle of equal state sovereignty because it treats six states—including Minnesota—differently than other states without adequate justification.

For starters, the NVRA's "disparate geographic coverage" is not "sufficiently related to the problem that it targets." *Shelby County*, 570 U.S. at 551 (citing *Northwest Austin* at 203). The Public Disclosure Provision is designed to make the voter list maintenance process transparent. *See Project Vote*, 682 F.3d at 339 ("It is selfevident that disclosure will assist the identification of both error and fraud in the preparation and maintenance of voter rolls…Without such transparency, public confidence in the essential workings of democracy will suffer."). In other words, the "problem" is the need for transparency and oversight in the process that determines who is eligible to vote. That "problem" exists equally in Minnesota; there is no reason

Minnesota should have a lesser transparency obligation imposed on it than any other state.

Minnesota, like 48 other states, currently requires voter registration. *See* App. 13, R.Doc. 1 ¶ 26, at 7. Minnesota also currently conducts a robust and multi-faceted voter list maintenance program, which is designed to grant, preserve, and remove voting rights. *See* App. 13-20, R.Doc. 1 ¶¶ 26-61, at 7-14. One of these practices—the work performed by the Electronic Registration Information Center ("ERIC")—has been criticized as inaccurate and discriminatory, *see id.* ¶¶ 54-61, 12-14—two problems at which the NVRA takes aim, *see* 52 U.S.C. § 20501(a)(3), (b)(4). Barbara Arnwine, the former executive director of the Lawyers' Committee for Civil Rights Under Law, stated, "ERIC should be called ERROR because it's that erroneous and that full of flaws." Palast, ERIC Crow, Jim Crow's liberal twin (July 15, 2020), https://www.nationofchange.org/2020/07/15/eric-crow-jim-crows-liberal-twin/ (last accessed May 30, 2025). The Brennan Center for Justice reported the following in a 2019 report about Minnesota's neighbor, Wisconsin:

> Wisconsin … reported that although ERIC was helpful in updating more than 25,000 registration addresses in 2017 and 2018, it also resulted in more than 1,300 voters signing 'supplemental poll lists' at a spring 2018 election, indicating that they had not in fact moved and were wrongly flagged.

App. 19, R.Doc. 1 ¶ 57, at 13 (citing Brater et al., Purges: A Growing Threat to the Right to Vote at 9 (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf (last accessed May 30, 2025)). A Yale University-led study of ERIC in Wisconsin "found that at least 4% of people listed as suspected 'movers' cast ballots in 2018 elections using addresses that were wrongly flagged as out of date. Minority voters were twice as likely as white voters to cast their ballot with their original address of registration after the state marked them as having moved..." App. 19, R.Doc. 1 ¶ 59, at 13 (citing Yale University, Study uncovers flaws in process for maintaining state voter rolls (Feb. 26, 2021), https://phys.org/news/2021-02-uncovers-flaws-state-voter.html (last accessed May 30, 2025)). The study's lead author, political scientist Gregory A. Huber, stated,

> **The process of maintaining states' voter-registration files cries out for greater transparency[.]** … Our work

> shows that significant numbers of people are at risk of being disenfranchised, particularly those from minority groups. Unfortunately, we don't know enough about the process used to prune voter rolls nationwide to understand why mistakes occur and how to prevent them.

App. 20, R.Doc. 1 ¶ 60, at 14 (citing Yale University, *supra*) (emphasis added).

Put another way, Minnesota might suffer from the very voting discrimination the NVRA was designed to combat, but we will never know. Unless reversed, there is no NVRA transparency in Minnesota. The NVRA exempts a state where the "problem" is equally pervasive, and the "disparate geographic coverage" is not "sufficiently related to the problem that [the NVRA] targets." *Shelby County*, 570 U.S. at 551 (citation omitted).

The NVRA's "current burdens" are not justified by "current needs," and Minnesota is a great example. *Shelby County*, 570 U.S. at 550 (citation omitted). Forty-four states are burdened by a loss of sovereignty and by compliance with the Public Disclosure Provision. Minnesota is not. Do "current needs" justify those disparate burdens? No.

Congress also identified the other problems it was targeting when it passed the NVRA. *See* 52 U.S.C. § 20501(a)-(b) (NVRA findings and purposes). The Act's purposes include eliminating discriminatory registration practices, increasing registration rates, and maintaining election integrity. These goals are currently of equal importance and relevance in Minnesota compared to other states. As many courts have found, the Public Disclosure Provision is a means to achieve these other purposes through oversight and accountability. *See Bellows*, 92 F.4th at 54-55. For example, the NVRA's transparency mandate allows individuals and advocacy groups like the Foundation to determine whether "accurate and current voter registration rolls are maintained," 52 U.S.C. § 20501(b)(4), or whether states are imposing "discriminatory and unfair registration laws and procedures," 52 U.S.C. § 20501(a)(3). An improper cancellation of a voter's registration, for example, cannot be understood, remedied, or prevented absent transparency. The NVRA's other objectives are equally relevant in Minnesota. Yet Minnesota is exempt from the transparency mandate meant to achieve those objectives. The NVRA's "disparate geographic coverage" is thus

again not "sufficiently related to the problem that [the NVRA] targets." *Shelby County*, 570 U.S. at 551 (citation omitted).

Minnesota's offering of polling place EDR does not affect the outcome. The EDR process is not immune from discriminatory application, inefficiency, error, or mistake. *See Project Vote*, 682 F.3d at 339. Like all mechanisms that grant and remove voting rights, the EDR process needs the NVRA's transparency. *See Project Vote*, 682 F.3d at 339-40 ("Public disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections."). And notwithstanding its EDR process, Minnesota has the need and desire to do the very same things Congress designed the NVRA to do: protect the fundamental right to vote, remove unfair registration laws, protect the integrity of the electoral process, and maintain accurate voter rolls. That is why Minnesota has at least some state laws requiring voter list maintenance. *See, e.g.*, Minn. Stat. § 201.071. Transparency in the EDR process is an important means to achieve these goals.

Furthermore, polling place EDR—the original and sole condition for the NVRA's exemption—is no longer unique to the exempt states. Many other states and the District of Columbia have implemented EDR. *See* National Conference of State Legislatures, *Same-Day Voter Registration*, https://www.ncsl.org/elections-and-campaigns/same-day-voter-registration (last accessed May 30, 2025). The majority of those states and the District of Columbia are subject to the NVRA's Public Disclosure Provision, while Minnesota and five other states are not. Put differently, it makes no sense that Minnesota should be exempted from the Public Disclosure Provision, while Iowa is not. Under "current conditions," the NVRA's disparate treatment does not "make[] sense." *Shelby County*, 570 U.S. at 553. Even if the Transparency Exemption was justified in 1994, it cannot be sustained under "current conditions."

B. The *Shelby County* Standard Requires Evaluation of Facts, Making Dismissal Inappropriate.

At worst, the District Court should be reversed to allow for a more searching inquiry into the current justifications for the unequal treatment of the States than can be appropriately set forth in a complaint. Fed. R. Civ. P. 8(a) ("A pleading that states a claim for relief

must contain: … (2) a *short* and *plain* statement of the claim showing that the pleader is entitled to relief" (emphasis added)). The *Shelby County* standard requires actual evidence to justify disparate treatment of the States. Indeed, "Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act" in 2006. *Shelby County*, 570 U.S. at 553. That evidence was held inadequate to justify the preclearance requirement under current conditions. *Id*. at 554 ("Congress did not use the record it compiled to shape a coverage formula grounded in current conditions."). The Supreme Court gave Congress the option of compiling evidence of current conditions and drafting a new preclearance coverage formula. *See id*. at 557 ("Congress may draft another formula based on current conditions."). The lesson of *Shelby County* is unmistakable: unequal intrusions into state sovereignty must be justified by actual evidence.

Whether the Transparency Exemption is justified under current conditions is a factual question that is not appropriately resolved on a motion to dismiss the complaint. The Foundation plausibly alleges a violation of the equal state sovereignty principle. *See* Section IV.A.

Whatever factual defenses the Secretary plans to raise should not yet be debated in this Court but should be heard for the first time after discovery.

V. The Requested Remedy Is Appropriate and Lawful.

A. A "Leveling Down" Remedy Is an Available Remedy for Federalism Claims.

The District Court found "for standing purposes" that the Foundation's "injury is redressable," App. 65, R.Doc. 43, at 7, Add. 7, but claimed that "[i]nvalidating an exemption from federal regulation is an unusual remedy, indeed," *id.* However, the Supreme Court has approved of so-called "leveling down" remedies. "[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original) (quoting *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931)).

In *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), the D.C. Circuit reasoned that a "leveling-down" remedy could apply in equal state

sovereignty cases. There, the EPA argued that redressability was lacking where states did "not ask th[e] court to increase their own sovereign authority over motor vehicle emissions," but instead sought "to reduce California's authority." *Id.* at 307. The D.C. Circuit explained,

> Respondents have not identified—and we do not perceive—any material reason to treat the right to equal sovereignty claimed here any differently for standing purposes. And under the logic of the Equal Protection cases, holding Section 209(b) unconstitutional and vacating the waiver would redress the claimed constitutional injury by leaving all states equally positioned, in that none could regulate vehicle emissions.

Id. at 307-08. Similarly, the Foundation's injury will be remedied if Minnesota is subject to the Public Disclosure Provision and required to produce the requested records on the NVRA's terms. The D.C. Circuit was therefore correct when it reasoned that a "leveling-down" remedy is available for federalism claims "under the logic of the Equal Protection cases[.]" *Ohio*, 98 F.4th at 307-08.

In *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), the Seventh Circuit acknowledged that "the Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the

rights of individuals." *Id.* at 703 (citing *New York v. United States*, 505 U.S. 144 (1992)). Remedies for equal protection violations and remedies for federalism violations both ultimately protect the rights of individuals.

B. Severing the Transparency Exemption Is the Appropriate "Leveling Down" Remedy.

Severing an unlawful exemption is the appropriate and preferred "leveling down" remedy in equal-treatment cases. *Barr v. Am. Ass'n of Political Consultants*, 591 U.S. 610 (2020), is instructive in this regard. There, the Supreme Court heard a First Amendment challenge to the Telephone Consumer Protection Act of 1991 ("TCPA"). *Id.* at 613. The TCPA "generally prohibits robocalls to cell phones and home phones," but with a 2015 amendment, Congress exempted "robocalls that are made to collect debts owed to or guaranteed by the Federal Government." *Id.* The plaintiffs—political and nonprofit organizations who wanted to make political robocalls—sued under the First Amendment, claiming that "the 2015 government-debt exception unconstitutionally favors debt-collection speech over political and other speech." *Id.* at 613-14. For relief, the plaintiffs asked the Court "to

invalidate the entire 1991 robocall restriction, rather than simply invalidating the 2015 government-debt exception." *Id.* at 614.

Six Justices concluded that "Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment." *Id.* at 614. Seven Justices concluded that the proper remedy was not invalidating the entire TCPA, but rather severing and invalidating the 2015 government-debt exception. *Id.* Entities making government-debt calls were thus leveled down and made equal with the plaintiffs. The result: "plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech." *Id.*

The Supreme Court acknowledged that "equal-treatment cases can sometimes pose complicated severability questions." *Id.* at 632. The Court therefore offered guidance, explaining, "When the constitutional violation is unequal treatment … a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all." *Id.* (citing *Heckler*, 465 U.S. at 740). In such cases, the Supreme Court has

a "preference for extension" of burdens or benefits. *See id.* at 632-33 (collecting cases). Consequently, in *Barr*, "the correct result … [was] to sever the 2015 government-debt exception and leave in place the longstanding robocall restriction." *Id.* at 634.

In *Barr*, the Supreme Court took care to craft a remedy that "does not raise any other constitutional problems," *Barr*, 591 U.S. at 633, adhering to the principle that courts "cannot remedy an old constitutional problem by creating a new one," *Office of the United States Tr. v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487, 504 (2024). Subjecting all states to the VRA's preclearance requirement was not a proper remedy in *Shelby County* because such a remedy would not have been a constitutionally valid exercise of Congress's enforcement power under the Fifteenth Amendment.

Barr demonstrates that courts can remedy equal-treatment problems by severing and invaliding statutory exemptions. Such a remedy is appropriate here.

VI. Minnesota's Transparency Exemption Is Inconsistent with *City of Boerne's* Congruence and Proportionality Requirement.

The District Court concluded that *City of Boerne* has no bearing on this case because "the NVRA is Article I legislation." App. 70, R.Doc. 43, at 12, Add. 12. *City of Boerne* nevertheless remains relevant because the NVRA is also an exercise of Congress's authority to enforce the Fourteenth Amendment. *See Condon*, 913 F. Supp. at 967 ("Congress had a sound basis on which to conclude that a federal voter registration law was an appropriate means of furthering the protections of the Fourteenth and Fifteenth Amendments.").

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that when Congress enforces the Fourteenth Amendment through legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. The Foundation's Complaint alleges that Minnesota's Transparency Exemption lacks the required "congruence and proportionality." *See* App. 26, R.Doc. 1 ¶ 96, at 20. This allegation is

plausible because the ends Congress sought through the NVRA's Public Disclosure Provision are equally relevant in Minnesota. *Id*.

To be sure, the NVRA is Elections Clause legislation. *See ITCA*, 570 U.S. at 7-9, 13-15. Congress was also enforcing the Fourteenth and Fifteenth Amendments. *Condon*, 913 F. Supp. at 967. This makes sense because the NVRA was designed, in part, to reduce "discriminatory and unfair registration laws and procedures" which Congress found "can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3).

City of Boerne, was, of course, not the first time the Supreme Court considered whether an act of Congress was "appropriate" under Section 5 of the Fourteenth Amendment. For example, in *Katzenbach v. Morgan*, 384 U.S. 641, 643 (1966), the Supreme Court reviewed a portion of Section 4(e) of the Voting Rights Act of 1965. The Court, in framing the inquiry, stated:

> We therefore proceed to the consideration whether § 4 (e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch v. Maryland* standard, whether § 4 (e) may be regarded as an enactment to enforce

> the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."

Morgan, 384 U.S. at 651 (citations omitted). Importantly, the majority also countered the suggestion by the dissenting justices that the Court's opinion was authorizing Congress to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." *Morgan*, 384 U.S. at 651 n.10. The Supreme Court was clear: "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Id.*

The Public Disclosure Provision was designed, in part, to shed light on activities that might deny the right to vote or discriminate on the basis of race. Yet those protections are not afforded to the citizens of Minnesota. Congress has "no power" to "dilute" the Fourteenth Amendment's equal protection guarantees in this way. *Morgan*, 384 U.S. at 651 n.10. A law premised on equal protection, but which does not protect equally, cannot be considered "consistent with the letter and

spirit of the constitution." *Morgan*, 384 U.S. at 651 (citations and quotations omitted).

It is no more "appropriate" for Congress to "enforce" the Fourteenth Amendment in a way that treats States and their citizens unequally than it is for Congress to exceed its authority by enacting substantive legislation, as in *City of Boerne*. The congruence and proportionality test is an appropriate and useful check on the former situation, as much as the latter, because it helps ensure Congress is acting within its limited authority. The Transparency Exemption lacks congruence and proportionality—and is therefore not "appropriate legislation" under Section 5 of the Fourteenth Amendment—because it exempts states like Minnesota, where the injuries Congress sought to remedy are equally prevalent and Congress's transparency and oversight objectives are equally relevant. *See* App. 26, R.Doc. 1 ¶ 96, at 20.

CONCLUSION

The historical and legal record support the conclusion that Congress's Elections Clause powers have always been qualified by the principle of equal state sovereignty. If Congress treats the States differently, it must adequately justify its actions. The District Court erred when it concluded otherwise and dismissed the complaint. For the foregoing reasons, the Foundation respectfully asks this Court to reverse the District Court's judgment and remand this action with instructions to test the Transparency Exemption under the standards articulated in *Shelby County* and *City of Boerne*.

Dated: May 30, 2025.

Respectfully submitted,

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Dated: May 30, 2025.

CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief in searchable PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

/s/ Kaylan Phillips
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I hereby certify that on May 30, 2025, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

/s/ Kaylan Phillips
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