UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PUBLIC INTEREST LEGAL FOUNDATION, INC. *Plaintiff*, *v.* **STEVE SIMON,** in his official capacity as the Secretary of State for the State of Minnesota, *Defendant*.	Case No. 0:24-cv-01561-SRN-DJF

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

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. That decision is embodied in Section 8(i) of the National Voter Registration Act of 1993 ("NVRA"). Section 8(i) 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) ("Public Disclosure Provision").

When Congress passed the NVRA, it included exemptions for states offering voter registration on Election Day. These states were exempt from the entire law, which includes its transparency mandates (hereafter, "Disclosure Exemption"). Minnesota is one exempt state. Congress's decision to treat Minnesota differently than other states was extraordinary. The Constitutional architecture of the 1787 convention includes the assumption that the federal government would treat the sovereign states equally. *See Shelby County v. Holder*, 570 U.S. 529 (2013). When Congress departs from this founding principle it must have a reason "that makes sense in light of current conditions. It cannot rely simply on the past." *Id*. at 553.

As a threshold question, this case asks whether Congress's decision to exempt Minnesota from the Public Disclosure Provision "makes sense in light of current conditions." *Id*. The Foundation's complaint plausibly alleges that it does not. In fact, Minnesota's exemption did not "make sense" in 1993, and it certainly does not now in

light of intervening events. Minnesota currently conducts a robust and multi-faceted voter list maintenance program, which is designed to grant, preserve, and remove voting rights. The transparency, oversight, and franchise protection that the NVRA is designed to provide is therefore equally needed in Minnesota. It always was.

Minnesota (and other exempt states) are no longer unique in their offering Election Day Registration ("EDR"). The practice has expanded to more than twenty states, yet they are not exempt from transparency obligations of Section 8(i). There is no good reason, "in light of current conditions," that Minnesota should be exempt from the NVRA. Even assuming Minnesota's offering EDR justified its Disclosure Exemption in 1993 (it did not), it no longer does so.

When the NVRA is properly made effective in Minnesota, the Foundation's claim to relief under the NVRA is plausibly alleged. Courts universally agree that state voter rolls are subject to disclosure under the Public Disclosure Provision. Minnesota's Statewide Public Information List, *see* Minn. Stat. § 201.01, *et seq.*, is no different. Furthermore, state laws limiting disclosure of NVRA records—like Minnesota's residency requirement— are preempted because the NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution's Elections Clause. *See Arizona v. Inter Tribal Council of Ariz.*, Inc., 570 U.S. 1, 12-15 (2013) ("*Inter Tribal*"). Therefore, by denying the Foundation's records request because of the Foundation's residency, Minnesota is violating the NVRA.

Minnesota Secretary of State Steve Simon's ("Secretary") motion to dismiss relies primarily on the existence of the Disclosure Exemption the Foundation's Complaint

alleges is invalid. The Exemption, of course, must be *justified* under current conditions, not simply cited. The challenge here does not end by mere citation of the Exemption; the Exemption is under Constitutional challenge.

The Secretary does not justify the Exemption. Instead, he takes the unsustainable position that the Constitution's equal state sovereignty principle does not apply here. It does apply. The equal state sovereign principle is part of the fundamental bedrock of our federalist design that "remains highly pertinent in assessing subsequent disparate treatment of States." *Shelby County*, 570 U.S. at 544. It restrains Congress's power, even when Congress is exercising its legitimate authority. Neither Minnesota nor the NVRA is immune from this scrutiny.

Importantly, the Public Disclosure Provision is no ordinary transparency law. Its unique and expansive scope is deliberate because it is designed to protect the right that is "preservative of all rights"—the right to vote. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). To that end, Congress designed the Public Disclosure Provision to shed light on *all* activities that determine who belongs and who does not belong on the voter rolls. In Minnesota, those determinations are currently made in the dark.

The Foundation's Complaint plausibly alleges that Minnesota's Disclosure Exemption is unjustified under the principles reaffirmed in *Shelby County* and fails the Fourteenth Amendment's congruence and proportionality test. It is therefore invalid. The Foundation's Complaint also plausibly alleges that the Secretary is violating the NVRA by denying access to public records, and that the NVRA preempts Minnesota's residency requirement. The Secretary's motion to dismiss should therefore be denied.

BACKGROUND

The National Voter Registration Act of 1993

"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." *Inter Tribal*, 570 U.S. at 5. The NVRA, generally, is an exercise of Congress's authority under the Constitution's Elections Clause, U.S. Const. Art. I, § 4, cl. 1; *see also Inter Tribal*, 570 U.S. at 8-9, and the Fourteenth and Fifteenth 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. And 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." *Husted*, 584 U.S. at 807 (Sotomayor, J., dissenting). 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 106-07 (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 noted, the NVRA also requires the States to allow public inspection and reproduction of voter list maintenance records. 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 the identity of the voter registration agency through which any particular voter registered." *Id*.

The Public Disclosure Provision does not promote transparency for the mere sake of transparency. Rather, Congress included the Public Disclosure Provision to ensure that the Act's other goals were achieved, as multiple courts have recognized. In the words of 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 court recognized further,

> It is self-evident 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. In the words of the First Circuit, 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. *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—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.

The NVRA Exemption for States with EDR 30 Years Ago

NVRA Section 4(b) provides that the NVRA does not apply to states that, on August 1, 1994, did not have a voter registration requirement, or allowed all voters to register at the polling place on Election Day. 52 U.S.C. § 20503(b)(1)-(2) (hereafter, the "NVRA Exemption"). The NVRA's public face was its "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 EDR 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 110 (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."). Congress did not limit the exemption to "motor voter" requirements. That would have been more congruent and proportional. Instead, Congress exempted states with EDR from the entire NVRA, which includes the Public Disclosure Provision.

Minnesota has offered EDR continuously since at least August 1, 1994, and therefore presumably qualifies for the NVRA Exemption under 52 U.S.C. § 20503(b)(2). Due to the NVRA Exemption, Minnesota is currently 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).

The Foundation's Request for Records Under the NVRA

The Foundation is a non-profit, non-partisan, 501(c)(3) organization that specializes in election and voting rights issues. (Doc. 1 ¶ 5.) For its work, the Foundation relies heavily upon the Public Disclosure Provision. (*Id.*) Among other programming, the Foundation uses records compiled 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. (*Id.*) The Foundation educates the public and government officials about its findings. (*Id.*)

Minnesota requires voter registration (Doc. 1 ¶¶ 26-29), and currently conducts numerous voter list maintenance activities (Doc. 1 ¶¶ 30-55). Minnesota law requires the Secretary to provide copies of the "public information lists," which includes the "name, address, year of birth, and voting history of each registered voter in the county." (Doc. 1 ¶¶ 98-99); Minn. Stat. § 201.091, Subds. 4-5. Requestors may request a "Statewide Report" that includes all registered voters in Minnesota. (Doc. 1 ¶ 100); https://www.sos.state.mn.us/media/2641/registered-voter-list-request-form.pdf (last accessed June 12, 2024). All public information lists are available only to Minnesota registered voters. Minn. Stat. § 201.091, Subd. 5 ("Registered Voter Requirement").

On January 24, 2024, pursuant to the Public Disclosure Provision, the Foundation requested the following records from the Secretary's office:

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").

(Doc. 1 ¶ 108 ("Request").)

The Foundation included a "partially completed Registered Voter List Request"[1] and the required payment. (Doc. 1 ¶ 109, 111.) The Request acknowledged Minnesota's NVRA Exemption but explained its belief that "Minnesota is not exempt from the NVRA's public records provision, 52 U.S.C. § 20507(i)(1)." (*Id*. ¶ 112.)

The Secretary requested "more context" and "authority" for the Foundation's belief that Minnesota is not exempt from the Public Disclosure Provision, which the Foundation provided. (Doc. 1 ¶¶ 113-14.) The Secretary then denied the Foundation's Request, citing Minnesota's NVRA Exemption and Registered Voter Requirement as the basis for the denial. (*Id*. ¶¶ 115-17.)

The NVRA ordinarily requires written notice and an opportunity to cure. 52 U.S.C. § 20510(b). "The apparent purpose of the notice provision is to allow those violating the NVRA the opportunity to attempt compliance with its mandates before facing litigation." *Ga. State Conference of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1335 (N.D. Ga. 2012). In this case, there is no notice requirement or curative period because the violation occurred within 30 days of Minnesota's March 5, 2024, Presidential Primary, an election for federal office. (Doc. 1 ¶ 126); 52 U.S.C. § 20510(b)(2). The Foundation nevertheless provided written notice to the Secretary and "afford[ed]

[1] The Foundation did not sign the request form because, "[a]s a nonprofit law firm headquartered in Virginia, the Foundation (and its employees) cannot certify on the request form to being a registered voter in Minnesota." (Doc. 1 ¶ 110.)

Secretary Simon 20 days, or until March 25, 2024, to cure the violation." (*Id.* ¶¶ 127-28.) The Secretary did not cure his violation by March 25, 2024 and has not cured his violation as of the day this action was filed. (*Id.* ¶ 129.) To date, the Secretary has still not cured his violation.

STANDARD OF REVIEW

"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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Minnesota's Exemption from the Public Disclosure Provision Violates the Principle of Equal State Sovereignty.

For starters, it is irrelevant for purposes of the Secretary's motion that Minnesota is exempt from the Public Disclosure Provision on paper.[2] That is not disputed. Nor is it dispositive, as the Secretary argues. (Doc. 12 at 8.) What is in dispute is the *current validity of the exemption itself*. In other words, the Court must determine whether Congress may treat Minnesota differently than other states with respect to the NVRA's transparency mandate. To answer that question, the Court must look beyond the NVRA's text and evaluate whether the NVRA's "disparate geographic coverage is sufficiently related to the problem that it targets," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557

[2] To be clear, in this action, the Foundation's challenges only the current validity of the Minnesota's exemption from requirements of the Public Disclosure Provision. 52 U.S.C. § 20507(i).

U.S. 193, 203 (2009) ("*Northwest Austin*"), and whether Minnesota's exemption "makes sense in light of current conditions," *Shelby County*, 570 U.S. at 553.

When appropriately scrutinized, Minnesota's Disclosure Exemption did not make sense when the NVRA took effect in 1994. It makes even less sense now, when nearly half the states offer registration and voting on the same day, the circumstance that supposedly justified Minnesota's exemption. Most of those states are not exempt and the Foundation can obtain public records there. 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 must surrender their sovereignty and comply with the NVRA's transparency mandates while Minnesota does not. There is no credible justification for such disparate treatment anymore.

A. The Equal State Sovereignty Principle.

The United States 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); *see also PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012) ("[T]he States in the Union are coequal sovereigns under the Constitution."). Equal state sovereignty is not just a byproduct of select Supreme Court jurisprudence; it is a bedrock principle upon which the nation was founded. As the Supreme Court explains, "'[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.'" *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 ("Sovereign equality of the member states is presumptively an essential, inherent structural feature of federalism itself."). In other words, the equal state sovereignty principle is core architecture of our nation's federalist design that cannot be overridden. "[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. Throughout history, the Supreme Court has applied the equal state sovereignty principle in various contexts. *See*, *e.g*., *Coyle*, 221 U.S. at 567 (determining that the Oklahoma had the authority to change the location of its capital as the nation "is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980) (noting that the "concept of minimum contacts" in a personal jurisdiction analysis "ensures that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

More recently the Supreme Court addressed equal state sovereignty in the area of voting rights statutes. In 1965, Congress passed the Voting Rights Act ("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 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 not static. 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 Amendments. 52 U.S.C. § 10302(c).[3]

In 2009, the Supreme Court of the United States considered an action brought by a Texas municipal utility district seeking relief from Section 5's federal preclearance requirement under the VRA's "bailout" provision. *Northwest Austin*, 557 U.S. 193. Alternatively, the municipal utility district challenged the constitutionality of VRA Section 5. *Id*. at 197. 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. 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

[3] In contrast with constitutional implications, the NVRA has no bailout or bail-in provisions. *See infra* Section I.C.

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 further explained 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. The ability to bail out of the VRA's disparate burdens had significant import with the Supreme Court. The failure to include any bail-out or bail-in provision in the NVRA made the intrusion into equal state sovereignty particularly constitutionally ablative.

Four years later, in *Shelby County*, the Supreme Court held that VRA Section 4 was unconstitutional. In doing so, the Court reaffirmed "the principle that all States enjoy equal sovereignty[.]" 570 U.S. at 535; *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. 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. These principles control this Court's review of the Secretary's motion.

B. Minnesota's Exemption from the Public Disclosure Provision Is Not Justified Under Current Conditions.

The Foundation's Complaint alleges that the Disclosure Exemption departs from the principle of equal state sovereignty because it treats six states—including Minnesota—differently than other states with respect to transparency 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 (citation omitted). The Public Disclosure Provision is designed to make the voter list maintenance process transparent. *See Project Vote*, 682 F.3d at 339 ("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."). In other words, the "problem" is the need for transparency and oversight in the process that determines who is eligible to vote. That "problem" or need is equally prevalent in Minnesota; there is no reason Minnesota should have a lesser transparency obligation imposed on it under the NVRA than any other state.

Minnesota, like 48 other states, currently requires voter registration. (*See* Doc. 1 ¶¶ 26-29.) Minnesota law currently requires motor vehicle departments to facilitate voter registration, Minn. Stat. § 201.161, Subd. 1(a)(1), similar to the NVRA's "motor voter" requirement, 52 U.S.C. § 20504(a)(1); *see also* https://www.eac.gov/sites/default/files/2023-10/2022_EAVS_Data_Brief_MN_508c.pdf

(reporting that 27.4% of voter registration applications are processed at motor vehicle departments). Minnesota also currently conducts a robust and multi-faceted voter list maintenance program, which is designed to grant, preserve, and remove voting rights. (Doc. 1 ¶¶ 30-53.) One of these practices—the work performed by the Electronic Registration Information Center ("ERIC")—has been criticized as inaccurate and discriminatory, (*See* Doc. 1 ¶¶ 54-61)—two problems at which the NVRA takes aim, *see* 52 U.S.C. § 20501(a)(3), (b)(4). A professor who has studied these practices commented,

> **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.

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 June 12, 2024) (emphasis added).

As in all states, there is a need for transparency and oversight in the voter list maintenance process in Minnesota. Yet Minnesota is exempt from the NVRA's transparency mandate. Because the NVRA exempts a state where the "problem" is equally pervasive, the "disparate geographic coverage" is not "sufficiently related to the problem that the [NVRA] targets." *Shelby County*, 570 U.S. at 551 (citation omitted).

For the same reasons, the NVRA's "current burdens" are not justified by "current needs." *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. As explained, Minnesota is similar situated to nearly all other states currently subject to the NVRA in terms of voter registration and voter list maintenance "programs and activities," 52 U.S.C. § 20507(i)(1). There is plainly a "current need[]" for transparency in Minnesota. Indeed, the public in Minnesota and the exempt states also faces a considerable burden on its ability to oversee and scrutinize the activities that grant and remove voting rights.

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. The Secretary does not suggest otherwise. 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. 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 EDR does not affect the outcome. In fact, EDR is a voter list maintenance activity and Minnesota has enacted specific procedures to govern EDR. *See* Minn. Stat. § 201.121, Subd. 3. EDR registrants who fail address verification are "immediately" referred to the county attorney. Minn. Stat. Ann. § 201.121, Subd. 3. 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 id*. 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. Transparency in the EDR process is an important means to achieve these goals.

Furthermore, EDR—the original and sole condition for the NVRA Exemption—is no longer unique to the exempt states. Nineteen other states and the District of Columbia have implemented EDR. *See* https://www.ncsl.org/elections-and-campaigns/same-day-voter-registration (last accessed June 12, 2024). Thirteen states of those nineteen 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 and Illinois are not. Under "current conditions," the NVRA's disparate treatment does not "make[] sense." *Shelby County*, 570 U.S. at 553.

Even if the Disclosure Exemption was justified in 1994, it cannot be sustained under "current conditions." Minnesota currently has an equal need for transparency in the voter list maintenance process, and Congress's other findings (52 U.S.C. § 20501(a)) and the NVRA's other purposes (52 U.S.C. § 20501(b)) are equally relevant in Minnesota today, where voting rights constantly granted, preserved, and removed. The NVRA's departure from the equal state sovereignty principle is no longer justified.

C. Minnesota Offers No Valid Reason to Disregard the Equal State Sovereignty Principle.

The Secretary's motion relies primarily on the mere existence of the Disclosure Exemption. (Doc. 12 at 8-9.) But that is the very thing the Foundation challenges. The Supreme Court admonishes that departures from the equal state sovereignty principle "cannot rely simply on the past," *Shelby County*, 570 U.S. at 553, which is precisely what the Secretary does in merely citing the thirty-year-old Act as his primary defense. Instead, the Disclosure Exemption must be justified under "current conditions." *Id*. The Secretary does not justify the exemption, making the grant of a Rule 12 motion especially premature. At worst for the Foundation, this is a factual dispute not appropriate for a dismissal under Rule 12. Rather than justify the Disclosure Exemption, the Secretary offers various reasons why *Shelby County* is distinguishable. Whatever surface-level

differences *Shelby County* may have from the present case do not invalidate the equal state sovereignty principle, nor do they alter the ultimate outcome.

First, the Secretary claims *Shelby County* is distinguishable because it involved the VRA, not the NVRA. (Doc. 12 at 10-11.) It was, of course, not the VRA that necessitated the outcome in *Shelby County*; it was the equal state sovereignty principle. *See Shelby County*, 570 U.S. at 553 ("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. We made that clear in *Northwest Austin*, and we make it clear again today."). The Secretary's argument on this point fails.

Furthermore, *Shelby County* repeatedly emphasized that the VRA was "extraordinary," 570 U.S. at 536, because it disparately intruded on states' power to regulate elections, a "sensitive area of state and local policymaking," *id*. at 545 (quoting *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999), which "'the Framers of the Constitution intended the States to keep for themselves," *id*. at 543 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-462 (1991)). The NVRA also intrudes into states' power to regulate elections, which makes *Shelby County* even more relevant.

Second, the Secretary claims *Shelby County* is distinguishable because the outcome depended on "a change in conditions that formerly justified the Act's coverage formula and preclearance remedy." (Doc. 12 at 11.) Here, the Secretary claims, "the condition exempting Minnesota from the NVRA has not changed[.]" (*Id*.) The standard articulated in *Northwest Austin* and *Shelby County* does not ask whether a change has occurred. It asks whether the departure from the Constitution's equal state sovereignty

principle is justified under "current conditions." *Shelby County*, 570 U.S. at 553. The standard remains the same, no matter when the law is reviewed. In fact, in *Shelby* County, the Supreme Court rejected the argument that the VRA required a weaker justification in 2006 than in 1965. *See Shelby County*, 570 U.S. at 556 (rejecting dissenting opinion argument that "the required showing can be weaker on reenactment than when the law was first passed"). In fact, the Court labeled distinctions that the Congress drew in 1965 "irrational" if applied to the states in 2006. Likewise, any attempted distinction between states with EDR and subject to the Public Disclosure Provision (Iowa) and states with EDR but exempt (Minnesota) today are "irrational." *See id*.

The Secretary's argument also presumes that the Disclosure Exemption made sense when the NVRA took effect in 1994. That presumption fails for the same reason the Disclosure Exemption fails under "current conditions." Transparency in the voter list maintenance process was always necessary in every state with voter list maintenance activities and EDR does nothing to change that.

Furthermore, a relevant change actually has certainly occurred. Nearly half of the states now offer the same EDR opportunities that supposedly justified Minnesota's NVRA Exemption. Continuing to treat Minnesota different from these other states currently makes no sense.

Recall that the VRA coverage formula was not static. 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 Amendments. 52 U.S.C. § 10302(c). In other words, the VRA contained a mechanism that allowed it to adapt to "current conditions." *See South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966) ("Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years."); *Briscoe v. Bell*, 432 U.S. 404, 411 (1977) ("Congress was well aware, however, that the simple formula of § 4(b) might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices. It afforded such jurisdictions immediately available protection in the form of an action to terminate coverage under § 4(a) of the Act.")

In *Northwest Austin*, the plaintiff argued that it was eligible to file a "bailout" suit and, if a bailout suit was not available to it, then Section 5 itself was unconstitutional. *See Northwest Austin*, 557 U.S. at 197. The Department of Justice also focused on the bailout mechanism, arguing that it was "a feature that this Court has repeatedly highlighted as indicative of Section 5's remedial nature and tailored reach…. Notably, the bailout provisions are considerably broader now than when the VRA was first upheld in South Carolina." Brief for the Federal Appellee, 2009 U.S. S. Ct. Briefs LEXIS 236 *69. The Supreme Court held the plaintiff was eligible to file a bailout suit, *Northwest Austin*, 557 U.S. at 211, and therefore did not reach the issue of Section 5's constitutionality, *Shelby*

County, 570 U.S. at 540 ("Ultimately, however, the Court's construction of the bailout provision left the constitutional issues for another day."). In other words, the VRA's bailout feature saved Section 5, at least for the moment. Four years later, the Supreme Court held that Section 5's preclearance requirement was unconstitutional, notwithstanding the VRA's bailout feature. *Shelby County*, 570 U.S. at 557.

In short, the VRA included a mechanism that allowed it to adapt to current conditions. Yet the Supreme Court struck it down in *Shelby County*. Unlike the VRA, the NVRA has no such mechanism. Non-exempt states cannot regain their sovereignty. The Disclosure Exemption's departure from the principle of equal state sovereignty being thus more egregious, it too cannot stand.

Third, the Secretary claims the Foundation's "concerns" are "already being remediated by Minnesota law." (Doc. 12 at 12.) The Secretary offers no support for this statement and there is none. At worst for the Foundation, this is a factual question not appropriate for resolution under Rule 12. If the Secretary means that EDR is a substitute for the Public Disclosure Provision, he is wrong. EDR is a voter registration option. The Public Disclosure Provision is an open records law, which broadly requires disclosure and reproduction of "all" voter list maintenance records. 52 U.S.C. § 20507(i)(1). As method for granting voting rights, EDR actually *enhances* the need for transparency.

The Secretary's argument also fails as a matter of law. If the Secretary means that Minnesota's more restrictive state provisions are sufficient to satisfy the NVRA's federal demands, that is wrong under basic conflict preemption principles. Minnesota's weaker disclosure requirement and limitation to only Minnesota residents plainly conflict with

the NVRA and undermine its purpose to ensure transparency in state voter rolls and registration procedures. There can be no argument that a lesser form of transparency is adequate for Congress' purposes. Congress did not give states discretion under the Public Disclosure Provision. Instead, Congress mandated disclosure of "all records" concerning voter list maintenance, 52 U.S.C. § 20507(i)(1). *Project Vote*, 682 F.3d at 336 (interpreting the NVRA's Public Disclosure Provision and explaining, "[T]he use of the word 'all' [as a modifier] suggests an expansive meaning because 'all' is a term of great breadth").

Fourth, the Secretary claims *Shelby County* is distinguishable because "[t]he NVRA did not seek to 'target a problem' within the exempted jurisdictions[.]" (Doc. 12 at 12.) The Secretary misunderstands the inquiry. The standard articulated in *Northwest Austin* and *Shelby County*, that "any disparate geographic coverage must be sufficiently related to the problem that it targets," *Shelby County*, 570 U.S. at 551 (citations and quotations omitted), is a requirement whenever Congress departs from the equal state sovereignty principle. It applies no matter where the "problem" occurs. As explained, Congress was plainly targeting problems in the states when it enacted the NVRA. Those problems were and are equally relevant in Minnesota, notwithstanding its offering EDR. The Secretary cannot escape the Constitution simply because Congress may have overlooked the need for transparency in Minnesota when it enacted the NVRA.

Fifth, the Secretary claims *Shelby County* is distinguishable because "Minnesota's exemption from the NVRA does not impose a federal 'burden' on Minnesota or its residents." (Doc. 12 at 13.) As with the "problem," the equal state sovereignty principle

applies whenever Congress burdens the States unequally. Forty-four states are burdened by a loss of sovereignty and by compliance with the Public Disclosure Provision, while Minnesota is not. In other words, Congress has given some States, like Minnesota, more sovereignty than others. That unequal treatment violates the equal state sovereignty principle unless justified. As the Foundation's Complaint plausibly alleges, it is not justified.

Sixth, the Secretary claims *Shelby County* is distinguishable because its remedy relieved a burden rather than applied the burden equally among the States. (Doc. 12 at 13.) That aspect of *Shelby County* makes no difference here. The Supreme Court has approved of so-call "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 such remedies 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 "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.

II. Minnesota's Exemption from the Public Disclosure Provision Violates the Fourteenth Amendment's Congruence and Proportionality Requirement.

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 Secretary concedes this. (Doc. 12 at 14.)

The Foundation's Complaint alleges that Minnesota's Disclosure Exemption lacks the required "congruence and proportionality." This allegation is plausible for the same reasons the Foundation's equal state sovereignty allegations are plausible, *supra* Section 1.B— namely, because the NVRA exempts Minnesota, where the injuries Congress sought to remedy are equally prevalent and Congress's transparency and oversight objectives are equally relevant. (*See* Doc. 1 ¶ 89-96.)

The Secretary argues that this claim must be dismissed because "it is the Elections Clause, not the Fourteenth Amendment, that provides Congress' authority for the NVRA." (Doc. 12 at 14.) To be sure, the NVRA is Election Clause legislation. *See Inter Tribal*, 570 U.S. at 7-9, 13-15. That was not Congress's only authority. As stated in *Condon v. Reno*, "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." 913 F. Supp. 946, 967; *see also id*. at 962. 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).

Imagine election officials refusing to process registration applications for students at a historically black college or university and refusing to provide the records that were part of the decision to deny voter registration. Those were the facts in *Project Vote v. Long*. *See Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, at 699 (E.D. Va. 2010). An advocacy group used the Public Disclosure Provision to compel election officials to produce those records. *See Project Vote*, 682 F.3d at 340. That would not be possible in Minnesota, even though the same risk of discrimination exists. The required "congruence and proportionality" between the remedy sought and means adopted is thus lacking. *City of Boerne*, 521 U.S. at 520.

The Secretary's Election Clause defense fails, and his motion based on that defense must also fail.

III. The Foundation States a Plausible Claim for an NVRA Violation.

When the Public Disclosure Provision is properly made effective in Minnesota, the Foundation's claim to relief under the NVRA is plausibly alleged. Courts universally agree that the NVRA requires disclosures of state voter rolls. Minnesota's Statewide Public Information List is no different. Furthermore, the NVRA preempts state laws

banning disclosure of NVRA records—like Minnesota's Registered Voter Requirement—because the NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution's Elections Clause. *See Inter Tribal*, 570 U.S. at 12-15. Therefore, by denying the Foundation's records request because of Foundation's residency, Minnesota is violating the NVRA.

A. The Foundation Has Standing.

1. The Foundation Plausibly Alleges an Informational Injury.

The Foundation has standing because the Foundation plausibly alleges an informational injury (Doc. 1 ¶ 133) that is causing additional adverse consequences—namely, the inability to do the very things Congress envisioned when it crafted the Public Disclosure Provision. The Secretary's arguments to the contrary simply ignore the Foundation's allegations, and depend further on the remarkable and untenable position that he does not violate the NVRA until he engages in a pattern of unlawful behavior. (*See* Doc. 12 at 6-7 (stating that a "single unsuccessful attempt" to request records cannot amount to injury).)

The Informational Injury Doctrine is decades old. In *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989), the Supreme Court explained that to establish standing in public-records cases, the plaintiff does not "need [to] show more than that they sought and were denied specific agency records." There, the plaintiff sought records pursuant to the Federal Advisory Committee Act ("FACA"). The Supreme Court held that FACA created a public right to information by requiring advisory committees to the executive branch of the federal government to make available to the

public its minutes and records, with some exceptions. 491 U.S. at 446-47. The defendant asserted that the plaintiff did not "allege[] [an] injury sufficiently concrete and specific to confer standing." *Id*. at 448. The Supreme Court "reject[ed] these arguments." *Id*. at 449.

> As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.

Id. In other words, the inability to "scrutinize" the activities of government "constitutes a sufficiently distinct injury." *Id*. The Court reaffirmed the holding of *Public Citizen* in *FEC v. Akins*, 524 U.S. 11 (1998), explaining, "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id*. at 21.

Citing *Public Citizen* and *Akins*, the Eastern District of Virginia rejected a similar attack on standing under the NVRA, explaining that "[f]or a plaintiff to sufficiently allege an informational injury, it must first allege that the statute confers upon it an individual right to information, and then that the defendant caused a concrete injury to the plaintiff in violation of that right." *Project Vote*, 752 F. Supp. 2d at 702. The court first recognized that "the NVRA provides a public right to information." *Id*. at 703. Where there is "no dispute that the plaintiff has been unable to obtain the [r]equested [r]ecords," "the plaintiff's alleged informational injury is sufficient to survive a motion to dismiss for lack of standing." *Id*. at 703-04.

For similar reasons, the Southern District of Texas ruled that the Foundation had standing to compel list maintenance records under the NVRA. *Pub. Interest Legal Found.*

v. Bennett, No. H-18-0981, 2019 U.S. Dist. LEXIS 39723, at *8-*10 (S.D. Tex., Feb. 6, 2019) (denying motion to dismiss), *adopted by Pub. Interest Legal Found., Inc. v. Bennett*, No. 4:18-CV-00981, 2019 U.S. Dist. LEXIS 38686 (S.D. Tex., Mar. 11, 2019). The Southern District of Indiana accords. *See Judicial Watch, Inc. v. King*, 993 F.Supp.2d 919, 923 (S.D. Ind. 2012) (citing *Akins*, 524 U.S. at 24-25) ("With regard to the Records Claim, the Defendants do not—and cannot—assert that the Plaintiffs lack standing.").

The Secretary does not address the Information Injury Doctrine and any challenge to it should be considered waived.

2. The Foundation Plausibly Alleges Additional Adverse Consequences Caused by the Informational Injury.

The Foundation also alleges *four* additional adverse consequences caused by the Secretary's failure to provide the requested records, which have a clear and direct nexus to the interest Congress sought to protect.

First, the Foundation "cannot evaluate and scrutinize Minnesota's voter list maintenance activities" (Doc. 1 ¶ 135), because the Secretary "refuses to produce the requested records, (*id*. ¶ 138). The Secretary's denial of the Foundation's request is a "refusal to permit [the Foundation] to scrutinize the [Secretary's] activities to the extent [NVRA] allows." *Public Citizen*, 491 U.S. at 499. The Public Disclosure Provision was designed to allow oversight, evaluation, and scrutiny of voter list maintenance activities, and therefore denying the Foundation the ability to "scrutinize" those activities in Minnesota "constitutes a sufficiently distinct injury to provide standing to sue." *Id*.

Second, the Secretary's actions "are impairing the Foundation's educational programming." (Doc. 1 ¶ 139.) The Foundation "uses public records and data to educate the public and election officials about numerous circumstances, including the state of their own voter rolls." (*Id*. at ¶ 140.) The Foundation also "educate[s] members of Congress about numerous circumstances, including the effectiveness of federal laws such as the NVRA, HAVA, and the [VRA], possible amendments to these federal laws, and state officials' compliance with these federal laws." (*Id*. ¶ 141.) The Foundation plausibly alleges that its "ability to perform these educational functions is impaired because Secretary Simon is refusing to produce the requested records." (*Id*. ¶ 143.)

Third, the Secretary's actions "actions are impairing the Foundation's institutional knowledge upon which it depends for its programming." (Doc. 1 ¶ 144.) "The Foundation must continually keep its institutional knowledge current and accurate so that it can operate efficiently, timely, and effectively, including for the purposes that Congress intended under the NVRA, such as oversight, remedial programs, law enforcement, and education. (*Id*. ¶ 145.) Institutional knowledge helps dictate "where, when, and how [the Foundation] deploy['s] its resources." (*Id*. ¶ 146.) By impairing the Foundation's institutional knowledge, the Secretary is thus impairing the Foundation's programming. (*Id*. ¶ 147.)

Fourth, the Secretary's actions "are harming the Foundation by forcing it to re-prioritize its resources to the detriment of other programmatic priorities." (Doc. 1 ¶ 148.) 149. Specifically, the Foundation "must expend additional resources and staff to counteract Secretary Simon's actions, which limits the Foundation's ability to fund some

of its other programming, which includes research, analysis, remedial programming, and law enforcement." (Doc. 1 ¶ 149.)

The Foundation injury is not the cost of this litigation, as the Secretary suggests. (Doc. 12 at 6 n.3.) Rather, the Foundation is alleging that this litigation is siphoning resources the Foundation would like to spend on other programming. Such a diversion of resources is enough to establish injury, especially at the pleading stage. *See Pavek v. Simon*, 467 F. Supp. 3d 718, 741 (D. Minn. 2020) (Nelson, J.) ("And at this stage in the litigation—notably, prior to summary judgment and trial—precise measurements of the diverted amount of resources are not necessary to show an injury.") "[E]ven if the diversion is 'slight,' standing is still satisfied." *Id.* at 740 (citation omitted).

To the extent the Foundation must allege "downstream consequences" stemming from its informational injury, *see Delgado v. Midland Credit Mgmt.*, No. 23-cv-2128 (ECT/JFD), 2024 U.S. Dist. LEXIS 52127, at *13 (D. Minn. Mar. 25, 2024), the Foundation has done so.

The Secretary does not dispute *any* of the Foundation's allegations concerning the Foundation's mission, the Foundation's intended activities, the Foundation's inability to engage in those activities. Those allegations are presumed true, in any event. *Ingram v. Ark. Dep't of Corr.*, 91 F.4th 924, 927 (8th Cir. 2024). The Secretary instead, suggests that a "single unsuccessful attempt" to request public records "dos[es] not amount to concrete and demonstrable injury." (Doc. 12 at 6-7.) The Secretary's argument is contrary to the NVRA's text and every court decision on this issue.

The Public Disclosure Provision requires public disclosure of "all records" concerning voter list maintenance activities. 52 U.S.C. § 20507(i)(1). When an election official refuses even a single request, he violates the plain text of the law. *See, e.g.*, *Bellows*, 92 F.4th at 54 (affirming summary judgment where Maine Secretary of State denied single request for copy of state voter roll); *Project Vote*, 682 F.3d at 333 (affirming summary judgment where election official denied single request for copies of completed registration applications). The NVRA's private-right-of-action provision confirms that a civil action may proceed based on a single violation. *See* 52 U.S.C. § 20510(b)(1) ("A person who is aggrieved by **a violation** of this Act may provide written notice of the violation to the chief election official of the State involved.") (emphasis added); *id*. § 20510(b)(2) (permitting aggrieved party to file a civil action if "**the** violation is not corrected" within the time afforded) (emphasis added). The Secretary effectively asks this Court to establish a rule under which the State may deprive its citizens of their rights at least once before it must comply with the law. Naturally, the consequences of such a rule would be disastrous, especially in the realm of voting rights.

3. The NVRA Confers Standing on Organizations like the Foundation.

The Secretary erroneously claims that the NVRA confers standing only on *individuals* who allege that their rights to vote in an election for federal office have been impaired. (Doc. 12 at 7.) This argument is without any merit as it is contrary to the NVRA's text and weight of legal authority.

NVRA Section 11(b) provides a private right of action to an "aggrieved person," 52 U.S.C. § 20510(b)(2), who has complied with the Act's pre-litigation notice

requirements, *id*. § 20510(b)(1). The NVRA does not define the word "person," therefore it takes its meaning from the Dictionary Act, 1 U.S.C. § 1, which provides, in relevant part, "In determining the meaning of any Act of Congress, unless the context indicates otherwise … the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals[.]" In fact, the Secretary's very argument was squarely raised and rejected in *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999):

> In addition, we are unconvinced by the appellees' argument that the word "person" before "aggrieved" in the NVRA evidences an intent by Congress to limit standing to individuals, as opposed to corporations. First, although 'person' is not defined in the NVRA, 1 U.S.C. § 1 provides that "in determining the meaning of any Act of Congress, unless the context indicates otherwise … the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."
>
> Second, an examination of the legislative history of the NVRA makes clear that Congress intended that organizations be able to sue under the Act. An earlier version of the Act allowed a private cause of action for an aggrieved "individual," but the later version that was passed into law used the term "person." In explaining the change, Senator Ford, a sponsor of the bill, noted that "the modification will permit organizations as well as individuals, and the Attorney General to bring suits under the act." 138 Cong. Rec. S6329 (daily ed. May 7, 1992) (statement of Sen. Ford).

Id. at 364.

Adding to the weight of supporting authority are the Supreme Court's decisions in *Inter Tribal*, 570 U.S. at 7 and *Husted*, 584 U.S. at 766, NVRA cases that proceeded to the highest level of review with organizational plaintiffs, and the numerous challenges

filed by the Foundation on its own behalf, none of which were dismissed because the Foundation is an organization.[4]

The trial court authorities on which the Secretary relies (Doc. 12 at 7) do not mention the legislative history discussed in *Fowler* or the Dictionary Act, nor do they even squarely address the issue presented here. Furthermore, the Secretary's citations trace their origin to an Eighth Circuit case decided in 1989, years before the NVRA was enacted. (*See* Doc. 12 at 7 (citing *Krislov v. Rednour*, 946 F. Supp. 563, 566 (N.D. Ill. 1996) (*in turn citing Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989)).)

4. The Eleventh Amendment Does Not Bar This Action.

The Eleventh Amendment is no bar to this action because Congress has abrogated the states' sovereign immunity through the NVRA's private right of action, 52 U.S.C. § 20510(b). *See Voice of the Experienced v. Ardoin*, No. 23-331-JWD-SDJ, 2024 U.S. Dist. LEXIS 85812, at *45 (M.D. La. May 13, 2024) ("With respect to Plaintiffs' NVRA claims, the Court finds that sovereign immunity is not implicated, as the Act establishes a

[4] *See*, *e.g.*, *Pub. Int. Legal Found., Inc. v. Bellows*, 92 F.4th 36 (1st Cir. 2024); *Pub. Int. Legal Found. v. Chapman*, 595 F. Supp. 3d 296 (M.D. Pa. 2022); *Pub. Int. Legal Found., Inc. v. Matthews*, 589 F. Supp. 3d 932 (C.D. Ill. 2022); *Pub. Int. Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257 (4th Cir. 2021); *Pub. Int. Legal Found., Inc. v. Knapp*, 3:24-cv-01276 (D. S.C., filed March 14, 2024); *Pub. Int. Legal Found., Inc. v. Dupuis*, 4:24-cv-00679-HSG (N.D. Cal., filed Feb. 5, 2024); *Pub. Int. Legal Found., Inc. v. Nago*, No. 1:23-cv-00389 (D. Haw., filed Sept. 9, 2023); *Pub. Int. Legal Found., Inc. v. Toulouse Oliver*, No. 1:23-cv-00169 (D. N.M., filed Feb. 27, 2023); *Pub. Int. Legal Found., Inc. v. Way*, No. 3:22-cv-02865 (D. N.J., filed May 17, 2022); *Pub. Int. Legal Found., Inc. v. Meyer*, No. 1:22-cv-00001 (D. Ak., filed Jan. 20, 2022);; *Pub. Int. Legal Found., Inc. v. Evans*, No. 1:21-cv-03180 (D.D.C., filed Dec. 6, 2021); *Pub. Int. Legal Found., Inc. v. Benson*, No. 1:21-cv-00929 (W.D. Mich., filed Nov. 3, 2021); *Pub. Int. Legal Found. v. Boockvar*, 1:20-cv-1905 (filed Oct. 2020). .

private right of action for aggrieved individuals."); *Stringer v. Hughs*, No. SA-20-CV-46-OG, 2020 U.S. Dist. LEXIS 221555, at *61 (W.D. Tex. Aug. 28, 2020) ("Congress's abrogation of immunity under the NVRA is clear and unequivocal."). The Secretary's argument to the contrary depends on its erroneous belief that the Disclosure Exemption is valid. The Foundation plausibly alleges it is not.

B. The Foundation Plausibly Alleges an NVRA Violation.

1. The Secretary Denied the Foundation's Request.

The Foundation alleges that it requested the Statewide Public Information List from the Secretary, that Secretary denied the request, and that the Secretary has not cured the NVRA violation about which he was notified. (Doc. 1 ¶¶ 108-130.) The Secretary cited the NVRA Exemption and the Registered Voter Requirement as the basis for the denial. (*Id*. ¶¶ 115-117.) These allegations are not disputed and are presumed true.

2. The Statewide Public Information List Is Subject to Disclosure Under the NVRA's Plain Language.

The Secretary does not move to dismiss on the grounds that the Statewide Public Information List is not within the NVRA's scope. Such an argument would fail, if made.

The NVRA's text and the uniform weight of authority supports the Foundation's allegation that the Statewide Public Information List is a record "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).

Courts universally agree that a state's voter roll is subject to disclosure under the Public Disclosure Provision. *See Bellows*, 92 F.4th at 49 (quoting 52 U.S.C. § 20507(i)(1)

("Maine's Voter File is a 'record[] concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters' and is thus subject to disclosure under Section 8(i)(1).") *Pub. Interest Legal Found. v. Matthews*, 589 F. Supp. 3d 932, 943-44 (C.D. Ill. 2022) ("Defendants acted in violation of the Public Disclosure Provision … when Defendants refused to make available for viewing and photocopying the full statewide voter registration list."); *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 438-442, 446 (D. Md. 2019) (holding, under the NVRA, that plaintiff "is entitled to the voter registration list for [a] County that includes fields indicating name, home address, most recent voter activity, and active or inactive status"); *True the Vote*, 43 F. Supp. 3d at 723 ("[T]he Voter Roll is a 'record' and is the 'official list[] of eligible voters' under the NVRA Public Disclosure Provision."); *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *13 (S.D. Fla. Mar. 30, 2018) ("[E]lection officials must provide full public access to all records related to their list maintenance activities, including their voter rolls."); *Voter Reference Found., LLC v. Torrez*, No. CIV 22-0222 JB/KK, 2024 U.S. Dist. LEXIS 58803, at *436 (D.N.M. Mar. 29, 2024) (quoting 52 U.S.C. § 20507(i)(1)) ("As is discussed above, the Court, concurring with all other federal courts that have considered this issue, concludes that a current list of a State's registered voters -- the core voter roll -- is a 'record[] concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.'"); *see also Ill. Conservative Union v. Illinois*, No. 20 C 5542, 2021 U.S. Dist. LEXIS

102543, at *15 (N.D. Ill. June 1, 2021) (holding, at the pleading stage, that statewide voter roll "falls within Section 8(i)'s disclosure provision").

The Foundation alleges that Minnesota's Statewide Public Information List is likewise subject to disclosure under the Public Disclosure Provision, because, *inter alia*, it reflects and is the end product of Minnesota's voter list maintenance activities. (Doc. 1 ¶ 103 (citing *Bellows*, 92 F.4th at 47 ("The Voter File can thus be characterized as the output and end result of such activities. In this way, the Voter File plainly relates to the carrying out of Maine's voter list registration and maintenance activities and is thereby subject to disclosure under Section 8(i)(1).").)

The United States of America concurs. In the case of *Public Interest Legal Foundation v. Bellows*, No. 23-1361 (1st Cir.), the United States filed an *amicus curiae* brief urging the appellate court to affirm the lower court's holding that Maine's voter roll is within the NVRA's scope. Doc. 00118033423, *Public Interest Legal Foundation v. Bellows*, No. 23-1361 (1st Cir., filed July 25, 2023). It is United States's position that the NVRA's "[s]tatutory text, context, and purpose establish that Section 8(i) covers records concerning both voter registration and list-maintenance activities, including voter registration lists such as the Voter File." *Id*. at 14.

A plain meaning analysis supports these interpretations. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009) (citations and quotations omitted). "It is well established that when the statute's language is plain, the sole function of the courts—at

least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (citations and quotations omitted); *See also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted). "Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (citations and quotations omitted).

In an opinion ultimately affirmed by the Fourth Circuit, the Eastern District of Virginia concluded that "a program or activity covered by the Public Disclosure Provision is one conducted to ensure that the state is keeping a 'most recent' and errorless account of which persons are qualified or entitled to vote within the state." *Project Vote*, 752 F. Supp. 2d at 706; *summary judgment granted by Project Vote/Voting for Am., Inc. v. Long*, 813 F. Supp. 2d 738 (E.D. Va. 2011), *affirmed by Project Vote*, 682 F.3d 331 (4th Cir. 2012); *see also True the Vote*, 43 F. Supp. 3d at 719-20 ("A list of voters is 'accurate' if it is 'free from error or defect' and it is 'current' if it is 'most recent.'") (citations omitted).

The Foundation alleges that the Minnesota election officials conduct programs and activities for the purpose of keeping the Statewide Public Information List current and accurate. (Doc. 1 ¶¶ 30-54; *see also* Doc. 12 at 2 ("Although it is not mandated by the NVRA, Minnesota has enacted multiple voter registration and voter-list protections. *See* Minn. Stat. §§ 201.01-.276").) Each of those activities is a "program" or "activity" within

the purview of the NVRA because it is conducted to make sure Minnesota's registration records and eligible voter list are "errorless" and contain the "most recent" information for each registrant. There is no compelling argument to the contrary.

The remaining question for the Court is whether the Statewide Public Information List "concern[s]" Minnesota's voter list maintenance programs and activities. 52 U.S.C. § 20507(i)(1). The common and ordinary meaning of the word "concern" is "to relate to." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/concerns?src=search-dict-hed (last accessed June 12, 2024). The Statewide Public Information List plainly relates to Minnesota's voter list maintenance activities in at least two ways.

First, as alleged, the Statewide Public Information List is the end product of Minnesota's voter list maintenance activities. (Doc. 1 ¶ 103.) The Secretary explains, "Under state law, the Secretary must 'maintain a statewide voter registration system to facilitate voter registration and to provide a central database containing voter registration information from around the state.'" (Doc. 12 at 3 (citing Minn. Stat. § 201.022).) When registration records are added, updated, or removed, the changes are reflected in that "central database." Indeed, the Statewide Public Information List is a "collection of voter data" derived from the central database. (*See* Doc. 12 at 2-3; *see also* Doc. 1 ¶¶ 97-100.) Because it is the "end product" of voter list maintenance activities, the Statewide Public Information List plainly "concerns"—or relates to—those activities and the Statewide Public Information List is therefore within the NVRA's scope.

The Statewide Public Information List is also a compilation of voter registration applications. The district court in *Pub. Interest Legal Found. v. Bellows* reasoned, "The Voter File is a compilation of voter registration applications," and "[w]hen a state registrar reviews voter applications and enters information from those applications into the 'central voter registration system' from which the Statewide Public Information List is produced, she engages in a 'program' or 'activity' within the meaning of the Public Disclosure Provision. 588 F. Supp. 3d at 133 (citations omitted); *see also Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d at 440-42 ("[A] voter list is simply a pared down compilation of voter registrations[.]")

Minnesota's Statewide Public Information List is likewise a "compilation of voter registrations." *Id*. at 440.

3. The NVRA Preempts and Supersedes Minnesota's Registered Voter Requirement.

Minnesota law restricts disclosure of the Statewide Public Information List to Minnesota registered voters. Minn. Stat. § 201.091, Subd. 5. The Foundation alleges that the NVRA preempts this Registered Voter Requirement because it invades a field occupied by Congress (*i.e.*, voter list maintenance records), and poses obstacles to Congress's objectives under the NVRA. (Doc. 1 ¶ 162-63.) The Foundation also identifies clear textual conflicts between federal and Minnesota law. The Secretary responds by again simply citing Minnesota's NVRA Exemption (Doc. 12 at 14-15), which, as explained, cannot alone justify dismissal.

The Foundation's preemption claim is more than plausibly alleged. For starters, the NVRA compels disclosure of "all records" concerning voter list maintenance, with just two narrow exceptions. 52 U.S.C. § 20507(i)(1) (exception only "records relate[d] to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered"). The Registered Voter Requirement *denies* records to everyone who is not registered to vote in Minnesota. The Registered Voter Requirement therefore poses a clear textual conflict.

While the textual conflict alone should doom the Registered Voter Requirement, the Court must also consider the NVRA's purposes because "the purpose of Congress is the ultimate touch-stone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations and quotations omitted). *See* 52 U.S.C. § 20501(b)(1)-(4). "To discern Congress' intent [the Court] examine[s] the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

The Public Disclosure Provision of course helps further Congress's goal of making voter list maintenance transparent and is also a means to accomplish the NVRA's other objectives. The Court should ask: Has the Foundation plausibly alleged that Minnesota's Registered Voter Requirement obstructs Congress's transparency goals and makes achieving the NVRA's purposes impossible or stands as obstacles to their fulfillment? The answer is "yes."

"[S]tate law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496

U.S. 72, 79 (1990). The Registered Voter Requirement does exactly that by limiting the population that may take advantage of federal rights in Minnesota.

The Registered Voter Requirement is also invalid under the conflict preemption doctrine. "Conflict preemption" occurs where "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (citations and quotations omitted).

Judicial Watch, Inc. v. Lamone is instructive in that regard. There, the court held that the Public Disclosure Provision preempts a Maryland law that required an applicant requesting a voter registration list to be a Maryland registered voter. 399 F. Supp. 3d at 443- 445. The court found that limiting access to Maryland voters "is an obstacle to the accomplishment of the NVRA's purposes"—namely, "protect[ing] the integrity of the electoral process," and "ensur[ing] that accurate and current voter registration rolls are maintained." *Id*. at 445 (citing 52 U.S.C. § 20501(b)(3)-(4)). The court specifically recognized that "Section 8(i) of the NVRA provides for the disclosure of voter registrations in order to 'assist the identification of both error and fraud in the preparation and maintenance of voter rolls.'" *Id*. (quoting *Project Vote*, 682 F.3d at 339). By limiting disclosure to Maryland voters, Maryland law "exclude[ed] organizations and citizens of other states from identifying error and fraud," contrary to the NVRA's purposes. *Id*. The court continued, "By excluding these organizations from access to voter registration lists, the State law undermines Section 8(i)'s efficacy." *Id*. "It follows that the State law is preempted in so far as it allows only Maryland registered voters to access voter registration lists." *Id*. By excluding those who are not or cannot register to vote in

Minnesota, the Registered Voter Requirement law likewise "undermines Section 8(i)'s efficacy." *Id*.

Other than cite the NVRA Exemption that is challenged herein, the Secretary offers no defense of the Registered Voter Requirement. Dismissal is inappropriate under Rule 12.

CONCLUSION

Minnesota's Disclosure Exemption is no longer justified. The Court should so rule and deny the Secretary's motion to dismiss.

Dated: June 12, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2024, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

/s/ Noel H. Johnson

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