UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Public Interest Legal Foundation, Inc.,

Plaintiff,

vs.

Steve Simon,

Defendant.

Case No. 0:24-CV-01561 (SRN - DJF)

DEFENDANT'S REPLY MEMORANDUM SUPPORTING MOTION TO DISMISS

Plaintiff Public Interest Legal Foundation, Inc. ("PILF") asks the Court to expand the National Voter Registration Act ("NVRA") beyond the scope established by Congress. Because Congress acted within its authority in enacting section 20503(b) of the NVRA, Minnesota is exempt from the NVRA and, as such, PILF has not stated a claim upon which relief can be granted.

ARGUMENT

PILF's argument rests entirely on the assertion that the NVRA applies in Minnesota. PILF argues that it has standing under the NVRA, but this could only be the case if the NVRA applied to Minnesota. Similarly, PILF cites the NVRA for the proposition that the Eleventh Amendment does not bar its claim. (Doc. 16, Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss ("Pl. Opp. Mem.") at 36.) But, as with the entirety of the NVRA, the private right of action provision does not apply. 52 U.S. § 20510(b). PILF insists that the NVRA preempts Minnesota's state laws. (Pl. Opp. Mem. 43.) Again, Minnesota's laws cannot be preempted by the NVRA when the

Act does not apply to this state. Ultimately, the heart of PILF's claim – that it was denied records requested under the NVRA's public disclosure provision – can only succeed if the NVRA applies. Because PILF has not shown that the NVRA applies to Minnesota, whether under *Shelby County v. Holder* and equal state sovereignty or under the principle of congruence and proportionality, PILF's claim fails.

I. PILF'S ASSERTION OF STANDING RESTS ON THE APPLICABILITY OF THE NVRA, FROM WHICH MINNESOTA IS EXEMPT.

Because PILF cannot show that the NVRA is applicable to Minnesota, PILF does not have standing under that statute.[1] As such, PILF's assertion that it is entitled to standing under the Information Injury Doctrine is mistaken. Citing *Federal Election Commission v. Akins*, 524 U.S. 11, 21 (1998), PILF argues that it has standing because it is being denied information it is entitled to under a federal statute. (Pl. Opp. Mem. 30.) That is incorrect. Minnesota is exempt from the NVRA, so PILF cannot look to the NVRA as a federal statute under which it may legitimately request information from the Secretary. *See* 52 U.S.C. § 20503(b). Notably, in *Akins*, the Supreme Court addressed the lack of exclusionary language and Congress' intent as to standing in the Federal Election Campaign Act. 524 U.S. at 20 (". . . nothing in [the Federal Election Campaign Act] . . . suggests Congress intended to exclude voters from the benefits of these provisions, or otherwise to restrict standing, say, to political parties, candidates, or their

[1] Likewise, PILF's only basis for arguing that the Eleventh Amendment does not bar its suit is the proposition that the NVRA applies to Minnesota. But Congress clearly did not intend to allow Minnesota to be sued for a violation of the NVRA. *See Allen v. Cooper*, 589 U.S. 248, 255 (2020) (requiring that Congress have enacted "unequivocal statutory language" abrogating the state's immunity before a federal court can entertain a suit against a nonconsenting state).

committees."). By contrast, here Congress pointedly and explicitly excluded Minnesota from the NVRA. Because the NVRA does not apply to Minnesota, PILF cannot establish standing by claiming that it suffered an informational injury under the statute.

PILF again provides broad references to its work but does not specifically state how it is impacted by the denial of the public information list.[2] Simply reiterating the type of work it does generally, PILF fails to describe a "concrete and demonstrable injury to [its] activities which drains its resources and is more than simply a setback to its abstract social interests." *Nat'l Fed'n. of the Blind v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999). Beyond vague categorizations, PILF does not specify the actual work that has been impacted by the denial. Moreover, PILF does not attempt to demonstrate that its work has been impacted by the nonapplicability of the NVRA. Nor does the organization assert that it cannot or does not already obtain public voter records through existing Minnesota law providing for disclosure of the public information list. *See* Minn. Stat. § 201.091, subd. 4 (2022). Because PILF has not stated how it has been harmed or how the Secretary's denial of PILF's NVRA request caused this harm, PILF lacks standing.

[2] PILF confirms that the resources it identified in its Complaint as its basis for standing are resources spent on litigation. (Pl. Opp. Mem. 33 ("Rather, the Foundation is alleging that this litigation is siphoning resources the Foundation would like to spend on other programming.").) Such expenses do not confer standing on a plaintiff. *WaterLegacy v. USDA Forest Serv.*, Case No. 17-CV-276 (JNE/LIB), 2019 WL 4757663, at *12 (D. Minn. Sept. 30, 2019). PILF cites to *Pavek v. Simon*, 467 F. Supp. 3d 718, 740 (D. Minn. 2020). PILF's reliance is misplaced as, in *Pavek*, the funds conferring standing were diverted from regular activities across the country to supporting candidates in Minnesota impacted by the challenged statute—not to litigating the *Pavek* case.

II. BECAUSE PILF HAS NOT SHOWN THAT THE NVRA MUST APPLY TO MINNESOTA, IT HAS NOT STATED A VALID BASIS FOR ITS CLAIM.

PILF's Complaint is based entirely on the proposition that the Court must expand the ambit of the NVRA and apply it to Minnesota. Doc. 1 ("Compl.") ¶ 5. PILF rests its argument against dismissal on this same contention. Section 20503(b) of the NVRA exempts states that either do not require registration in federal elections or have continuously allowed election-day polling-place voter registration since the enactment of the NVRA. 52 U.S.C. § 20503(b). By continuously permitting election-day polling-place voter registration since 1993, Minnesota is exempt from the NVRA. Contrary to PILF's assertion, the explicit exclusion Congress built into section 20503(b) of the NVRA remains valid and leaves PILF with no claim for which relief can be granted.

A. PILF Does Not Establish That the NVRA's Nonapplicability Provision Fails Under Either *Shelby County* or Equal Sovereignty.

PILF contends that *Shelby County. v. Holder*, 570 U.S. 529 (2013), requires this Court to invalidate section 20503(b) of the NVRA and extend the ambit of the Act far beyond Congress's explicit intent. On the contrary, *Shelby County* is not controlling here, and Minnesota's exemption from the NVRA does not violate equal sovereignty under *Shelby County*, for two reasons. First, the Voting Rights Act ("VRA") preclearance provision addressed in *Shelby County* is plainly distinguishable from the NVRA's scope restriction. Second, contrary to PILF's characterization, Minnesota's exemption from the NVRA aligns with current conditions.

PILF initially assumes that *Shelby County*'s holding regarding the VRA applies directly to the NVRA without acknowledging the significant differences between the two

Acts. While the VRA and the NVRA both concern elections, the NVRA's nonapplicability to Minnesota is entirely distinguishable from the VRA's preclearance formula. In both *Shelby County* and *Northwest Austin Municipal Utility District Number One v. Holder*, the Supreme Court specifically addressed the potency of the conditions applied by the VRA. *Shelby County*, 570 U.S. at 544; *Northwest Austin Mun. Util. Dist. No. One*, 557 U.S. 193, 202 (2009). The VRA imposed substantial burdens on state sovereignty by restricting nine states' ability to enact and execute laws, an ability that would have otherwise fallen squarely within those states' power. *Shelby County*, 570 U.S. at 544. Because of this divergence in delegation of authority, the Supreme Court concluded that the preclearance provision was "an 'extraordinary departure from the traditional course of relations between the States and the Federal Government.'" *Id.* at 545.

The preclearance coverage formula contrasts starkly with the NVRA's nonapplicability provision, which exempts states that have continuously allowed election-day polling-place registration from the Act's regulation of election registration processes. Nonetheless, PILF argues that the NVRA's nonapplicability provision likewise fails under *Shelby County.* (Pl. Opp. Mem. 16.) By applying the standards from *Shelby County* directly to the NVRA's nonapplicability provision without considering the difference between the Acts, PILF lifts the consideration of "disparate geographic coverage" from its full context. Both *Shelby County* and *Northwest Austin* note that the outcome of the coverage formula is that the VRA completely suspended a jurisdiction's ability to enact election legislation, no matter how small, without review and approval by the federal government. *Shelby County*, 570 U.S. at 544; *Northwest Austin*, 557 U.S. at 202. Because the VRA "sharply

depart[ed]" from the principles of sovereignty with only some states, the Supreme Court turned to the question of whether the departure was justified. *Shelby County*, 570, U.S. at 544.

The NVRA does not similarly infringe upon rights otherwise reserved by the states. Through the NVRA, Congress regulates the manner of elections, as permitted by Article I, Section 4 of the Constitution. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 2 (2013). That the NVRA does not apply to states with specific voter registration conditions neither burdens these states nor removes rights otherwise reserved to them. Further, in attempting to invoke the availability of a "leveling-down remedy," PILF has provided no facts to plausibly allege that Minnesota's exemption injures those states in which the NVRA does apply. PILF does not explain how any "disparate geographical coverage" resulting from the NVRA's election-day polling-place registration exemption impedes or burden states' sovereignty—and, in any event, PILF has no standing to invoke the legal interests of U.S. states that are not party to this action. If the states that Congress bound in the NVRA wish to argue that that Act unconstitutionally burdens them, they are more than capable of filing suit for themselves.

PILF next argues that Minnesota's exemption from the NVRA does not make sense and never did. (Pl. Opp. Mem. 16.) Here, too, PILF's argument fails. Through section 20503(b), Congress clearly expressed that it saw no need to apply new registration requirements to states that, since the creation of the NVRA, have unfailingly offered election-day polling-place registration. Minnesota remains exempt within those bounds as intended and explicitly established by Congress based on its continued provision of

election-day polling-place registration. PILF provides no justification for rejecting Congress's judgment and replacing it with PILF's own.

PILF misapplies the outcome of *Shelby County* to argue that Minnesota's exemption is no longer valid. In *Shelby County*, the question was whether a formula based solely on past conditions was still appropriate to restrict states' abilities to legislate. As outlined in the Secretary's primary brief, the coverage formula at issue in that case was based only on conditions from forty years earlier. *Shelby County*, 570, U.S. at 556. Notably, the Supreme Court explicitly stated that Congress could "draft another formula based on current conditions." *Id.* By contrast, through section 20503(b), the NVRA's application is not tied exclusively to conditions at the time of the Act's creation. Minnesota's exemption remains in place only so long as Minnesota maintains a voter's ability to register to vote on election day at their polling place.

PILF argues further that conditions have changed because Minnesota is one of many states with election-day registration. PILF takes issue with the NVRA's nonapplicability to Minnesota, while states that introduced election-day registration after 1993 remain subject to the act. But this argument ignores Congress' intent to exempt states that have *continuously* offered such registration. While states subject to the NVRA may have now adopted legislation permitting election-day voter registration, Minnesota differs from those states. Election-day polling-place voter registration has been unfailingly provided for Minnesotans since the creation of the NVRA.

While Minnesota's history of allowing election-day polling-place registration is considered by the NVRA, PILF mischaracterizes the exemption as "simply rely[ing] on the

past." (Pl. Opp. Mem. 20.) Section 20503(b) of the NVRA relies on both past and current conditions. Notwithstanding Minnesota's long history of offering election-day polling place registration, were Minnesota to eliminate election-day polling-place voter registration, the NVRA would apply.

PILF twists *Shelby County*'s assessment of whether the VRA's geographically disparate infringement on states' sovereign equality made sense forty years after its enactment into a question of whether it would make sense for the NVRA to apply in Minnesota. That is not the appropriate question before the Court. Rather, the only question conceivably raised by *Shelby County* is whether the NVRA's nonapplicability provision weighs on states' equal sovereignty and, if so, whether that provision remains current. The nonapplicability of the NVRA to Minnesota does not burden the states' sovereign equality. Further, the exemption is based on both past and current voter registration systems in Minnesota. The NVRA's exemption provision is valid and PILF therefore cannot establish a claim under the NVRA.

B. PILF's Argument that the NVRA Lacks Congruence and Proportionality Fails.

In support for its position that the NVRA must apply to Minnesota to achieve congruence and proportionality, PILF argues only that "injuries Congress sought to remedy are equally prevalent" in Minnesota. (Pl. Opp. Mem. 27.) In doing so, PILF asks this Court to use the congruence and proportionality requirement to expand the NVRA further than intended by Congress. This suggestion fails because the congruence and proportionality requirement only applies when assessing whether Congress, in enforcing the Fourteenth

and Fifteenth Amendments, has improperly abrogated a state's sovereign immunity, not whether it legislated far enough to address the injury.

PILF agrees that Congress derived power to enact the NVRA from the Elections Clause. (Pl. Opp. Mem. 27.) However, it argues that this constitutional authority is limited by Congress' authority to act pursuant to the enforcement clause of the Fourteenth Amendment. PILF presents no authority for the proposition that the enforcement clause of the Fourteenth Amendment can or should limit Congress when the Constitution otherwise grants Congress power to act. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) ("Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.").

Further, should the Court apply the requirement of congruence and proportionality, PILF provides no support for the contention that it can be used to expand legislation. PILF cites exclusively to authority in which courts assessed whether Congress exceeded its authority under the enforcement clause of the Fourteenth Amendment. (Pl. Opp. Mem. 15 (*citing City of Boerne v. Flores*, 521 U.S. 507 (1997)).) Conversely, ample authority exists for the contention that the requirements of congruence and proportionality mark the boundaries of Congress' Fourteenth Amendment enforcement power. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding RFRA exceeded Congress' power under the enforcement clause of the Fourteenth Amendment); *Coleman v. Ct. of Appeals of Maryland*, 566 U.S. 30, 43, (2012) (concluding Congress did not validly abrogate states'

sovereign immunity from suits for money damages in enacting FMLA's self-care provision); *Klingler v. Dir., Dep't of Revenue, State of Mo*., 455 F.3d 888, 893 (8th Cir. 2006) ("The relevant question here is whether that abrogation is consistent with the scope of the § 5 power.").

Rather than assessing the adequacy of the NVRA, the question in an application of the congruence and proportionality requirement is whether Congress exceeded its authority. The congruence and proportionality requirement in no way supports PILF's request that this Court expand the NVRA beyond the bounds set by Congress.

C. Because the NVRA Validly Exempts Minnesota, PILF Fails to State a Claim For Which Relief Can Be Granted.

The entirety of PILF's claim arises from its assertion that the Secretary violated the NVRA's public disclosure provision, 52 U.S.C. § 20507(i)(1), by failing to provide a copy of the statewide public information list to PILF. Because PILF does not and cannot show that the NVRA applies to Minnesota, PILF's claim therefore fails as a matter of law. PILF provides no alternative basis under which it is entitled to Minnesota's public information list or public registered voter information. The organization also provides no alternative grounds under which Minnesota's registered voter requirement could be preempted.[3] Because the entirety of its claim relies on the NVRA, from which Minnesota is exempt, PILF's claim necessarily fails.

[3] As the Secretary argued in his primary brief, federal law preempts state law only when, "under the circumstances of [a] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, (1941). Here, where the NVRA does not apply to Minnesota by its own design, Minnesota's law cannot stand as an obstacle to the NVRA.

CONCLUSION

"Striking down an Act of Congress 'is the gravest and most delicate duty that this Court is called on to perform.'"[4] *Shelby County*, 570 U.S. at 556 (citing *Blodgett v. Holden*, 275 U.S. 142, 148, (1927) (Holmes, J., concurring)). PILF asks this Court to do just that by improperly extending *Shelby County* to abrogate the extent to which Congress regulates the manner of federal elections. For the reasons stated herein, the Secretary respectfully requests the Court grant his motion to dismiss.

Dated: June 26, 2024

Respectfully submitted,

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[4] PILF continually refers to section 20503(b) as an exemption to the NVRA's disclosure requirements and claims only to challenge the validity of Minnesota's exemption from the NVRA's public disclosure provision. (Pl. Opp. Mem. 11 n.2.) Section 20503(b), however, exempts the qualifying states from the NVRA *as a whole*. The request PILF makes to this Court is therefore larger in scope and consequence than the single issue of disclosure, underscoring the error of the remedy PILF seeks in this matter.