IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PUBLIC INTEREST LEGAL FOUNDATION, INC.,

Plaintiff,

v. Case No. 24-CV-285

MEAGAN WOLFE, in her official capacity as the Administrator of the Wisconsin Elections Commission,

Defendant.

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REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

The Foundation's lawsuit fails no matter how it is viewed. It seeks to invalidate a federal statute even though it has no underlying statutory or constitutional right that might support an access-to-information claim. Further, the Foundation's premise for this lawsuit—that *Shelby County v. Holder* and *City of Boerne v. Flores* somehow render an exemption in the National Voter Registration Act (NVRA) unconstitutional—is fundamentally misguided.

Nothing in the Foundation's response brief overcomes these flaws. The Foundation's own citations support that it cannot properly raise "equal sovereignty" here. For instance, *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), relied upon by the Foundation, holds that "equal sovereignty" cannot be applied in a way divorced from its context in *Shelby County*, which remedied extraordinary burdens on state sovereignty. Likewise, the Foundation does not

support its argument that *City of Boerne* has any application here and even attempting to apply its test to a statutory exemption does not make sense. The Court should dismiss the case.

ARGUMENT

I. The Foundation can identify no statutory or constitutional right to support its lawsuit seeking access to information; the suit similarly fails as a matter of standing.

The Foundation essentially asserts that, because the Supreme Court applied a principle of "equal sovereignty" in the "extraordinary" context of the Voting Rights Act's preclearance, then the Foundation can import the concept into a lawsuit seeking access to information under a statute that specifically exempts Wisconsin. That convoluted effort should be rejected for the threshold reasons that it lacks grounding in a cognizable right and that the Foundation lacks standing. (*See* Dkt. 15:8–12.)

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"'Equal sovereignty' among the States" is concerned with "federal intrusion into sensitive areas of state and local policymaking." *Shelby County, v. Holder*, 570 U.S. 529, 544–45 (2013) (citation omitted). Similarly, *City of Boerne*'s "congruence and proportionality" language is directed at "a considerable congressional intrusion into the States' traditional prerogatives and general authority." *City of Boerne v. Flores*, 521 U.S. 507, 532, 534 (1997). But the Foundation's desire to access records under the NVRA, despite Wisconsin's exemption, has no relationship to a potential right of states to be free of federal intrusion. Just the opposite; it seeks to impose more federal

intrusion on Wisconsin. The Foundation cannot cherry pick the words "equal sovereignty" or "congruence and proportionality" from the cases and manufacture a cause of action out of it for record access. It lacks a bona fide cause of action, which should doom its lawsuit.

For similar reasons, the Foundation lacks standing. It is not a state or a political subdivision, which are the challengers in the cases it cites. For instance, the Foundation relies on *Ohio v. EPA*, (Dkt. 16:29–30), but states raised "equal sovereignty" there. *See* 98 F.4th at 293 ("State Petitioners . . . claim that by granting a waiver to California alone, the EPA violated a constitutional requirement that the federal government treat states equally in terms of their sovereign authority."). Likewise, *Shelby County*'s challenger was a political subdivision. *Shelby County*, 570 U.S. at 540; *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 196–97 (2009) (challenge by a "political subdivision" (a utility district) covered by the VRA's preclearance requirement); *City of Boerne*, 521 U.S. 507 (city challenge to RFRA as beyond Congress's authority). The Foundation has no proper basis to invoke an injury to a state or political subdivision. *See Gometz v. Henman*, 807 F.2d 113, 115 (7th Cir. 1986) ("Ordinarily a litigant may present only his own rights as bases of relief."); *Blagojevich v. Illinois*, No. 21-CV-4103, 2024 WL 1214732, at *5 (N.D. Ill. Mar. 21, 2024) (stating the rule that "a plaintiff generally lacks standing to assert the rights of other.").

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The Foundation relies on *Bond v. United States*, 564 U.S. 2011 (2011), and *Gillespie v. City of Indianapolis*, 189 F.3d 693 (7th Cir. 1999), for the proposition that it can raise the equal sovereignty argument, but this is misplaced. Both cases involved statutes that would subject the party to criminal liability: *Bond* was a criminal prosecution, 564 U.S. at 214, while *Gillespie* was a challenge to the Gun Control Act, 185 F.3d at 697. Both cases involved arguments that Congress exceeded its powers under the Tenth Amendment when enacting a criminal statute. *Bond*, 564 U.S. at 214; *Gillespie*, 185 F.3d at 697. These courts held that the Tenth Amendment protects individual rights in addition to protecting states, and thus the parties were raising their own rights. *Gillespie* reasoned that "the Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals." 185 F. 3d at 697 (citing *New York v. United States*, 505 U.S. 144 (1992)). Similarly, *Bond* said that the Tenth Amendment's "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." 564 U.S. at 221 (citation omitted). Thus, it is not surprising that courts allow someone facing a criminal conviction to argue that Congress exceeded its powers in enacting the statute they were being prosecuted under.

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The Foundation cites no authority, in contrast, for non-state actors raising the equal sovereignty doctrine. The equal sovereignty principle does not protect individual rights. It protects states and localities, in some instances, from differing treatment by Congress. Further, *Shelby County*

applied this principle only to an "extraordinary" law that intruded on states' power to regulate elections, a "sensitive area[] of state and local policymaking." 570 U.S. at 545. The decision said nothing about protecting individual rights; it was protecting state and local governments from federal overreach. The Foundation is not raising its own rights but instead raising the rights of the non-exempt states and, in contradiction to *Shelby County*, is attempting to impose additional burdens on a state.

The Foundation argues it has standing because it has an "informational injury." (Dkt. 26:25.) It is mistaken. The cases it cites recognize a potential informational injury when someone seeks information that it may be *entitled to* under a statute—for example the Federal Advisory Committee Act in *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 449 (1989). *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), reiterates this dynamic: it concerned "obtain[ing] information *which must be publicly disclosed pursuant to a statute*. *Id.* at 21 (emphasis added). The same can be seen in *Project Vote/Voting For America, Inc. v. Long*, 752 F. Supp. 2d 697 (E.D. Va. 2010), which concerned an effort to access records under the NVRA from a non-exempt state; the plaintiff satisfied the requirement that it "must first allege that *the statute* confers upon it an individual right to information." *Id.* at 702 (emphasis added).

That is absent here: under the relevant statute, the NVRA, Wisconsin's records are exempt. (Dkt. 1 ¶¶ 20–21.) The statute confers no relevant right on

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the Foundation.[1] It follows that the Foundation lacks standing because it has no "an injury to an interest 'that the law protects when it is wrongfully invaded.'" *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) (citation omitted).

II. There is no coherent way to apply *Shelby County*'s principles to this lawsuit; even if applied here, the result would be the same.

Even if the Foundation could somehow invoke *Shelby County*'s "equal sovereignty," it would not apply to its effort to invalidate an exemption from the NVRA. *Shelby County*'s "equal sovereignty" doesn't supply a constitutional right to voter records, and it provides no basis for increasing federal encroachment on states. It asks whether "current burdens" on states are "justified" when those burdens are an "extraordinary departure from ordinary federalism," where the states enjoy "broad autonomy" regarding "residual sovereignty." 570 U.S. at 536, 543–44 (citation omitted); *see also id.* at 545 (explaining the concern was with "federal intrusion into sensitive areas of state and local policymaking").

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The Foundation speeds past these conceptual flaws and attempts to apply a "current burdens" versus "current needs" test in the abstract. But it supplies no bona fide explanation of how *Shelby County* and its application of extraordinary Voting Rights Act burdens could apply to a nonprofit's quest for

[1] To the extent that the Foundation is arguing that the NVRA preempts Wisconsin law, that cannot be true because the statute specifically exempts Wisconsin.

records or to an effort to increase federal encroachment on a state under the NVRA. (*See* Dkt. 15:13–15.) In fact, a case the Foundation relies upon holds that *Shelby County*'s principles cannot simply be applied willy-nilly. (Dkt.29–30.) *Ohio v. EPA* holds that *Shelby County* is limited to where, under the Fifteenth Amendment, Congress "*intruded on* states' powers," encroaching on powers that "the Constitution intended the States to keep for themselves" and doing so in an "extraordinary" manner. 98 F.4th at 309 (emphasis added; citations omitted). That decision also collects "the two other circuits to have considered the issue," both of which rejected an attempt to extend *Shelby County*. *Id.* at 307. For instance, the First Circuit held that *Shelby County*'s "equal sovereignty" was special to that case's "intrusion into" state and local policy making that was an "extraordinary" departure from principles of federalism. *Mayhew v. Burwell*, 772 F.3d 80, 94–95 (1st Cir. 2014). On the other hand, "[f]ederal laws that have differing impacts on different states are an unremarkable feature of, rather than an affront to, our federal system." *Id.* at 95.

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The courts' reasoning in these cases presents essentially the same argument made by Defendant here. The Foundation's own citation undermines its theory.

And even if examined more, the Foundation's effort to shoehorn *Shelby County* into this case also comes with additional problems: namely, its "current burdens" versus "current needs" test makes no sense applied to an exemption

because there is no burden to measure. *See Shelby County*, 570 U.S. at 550–51.

Further, even if one were to attempt to apply just the "current conditions" aspect of the test, the current conditions in Wisconsin continue to justify the exemption. As the Foundation pled, Wisconsin continues to offer same day registration, which is what animated the exemption. (Dkt. 1 ¶ 21.) And as explained in the first brief, there are multiple reasons why a state with same day registration would be exempt from the NVRA. For instance, same-day registration promotes the NVRA's purpose of "increase[ing] the number of eligible citizens who register to vote" and "enhance[ing] the participation of eligible citizens as voters." 52 U.S.C. § 20501(b)(1)–(2). Someone having the ability to register or correct registration on the spot also helps "to ensure that accurate and current voter registration rolls are maintained," 52 U.S.C. § 20501(b)(4), as it allows voters to provide the details for voting on the spot. (*See* Dkt. 15:18–21.) While the Foundation asserts it is interested in identifying people who have been incorrectly removed from the rolls (Dkt. 16:9), same day registration likewise provides a fix for those people (whether they were removed through the ERIC process or otherwise), who can register on the spot. These justifications would satisfy any potentially applicable test.

The Foundation wants more: it wants transparency so that it can evaluate voter rolls. (Dkt. 16:9.) To be clear, Wisconsin law already provides transparency, just not in the way the Foundation wants: the list is open for

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public inspection for a fee, but with dates of birth and some other data redacted. *See* Wis. Stat. § 6.36(1)(b)1.; (Dkt. 1 ¶¶ 86–89).

In any event, "transparency" is not one of the statutory goals. *See* 52 U.S.C. § 20501(b). Perhaps more to the point, whether a statutory exemption is ideal (in the mind of the Foundation) has no bearing on whether it is valid. Congress is free to legislate based on any rational basis, not necessarily the one that a litigant wishes were paramount. Rather, it is a challenger's burden "to negative every conceivable basis" that might support a law. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (citation omitted). Just pointing to a desire for more transparency does nothing to undermine the NVRA's exemption and its rational basis, which can be based on "speculation" and thus requires no fact-finding. *Id.*

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The Foundation points out that additional states have since enacted same day registration but are not exempt. (Dkt. 16:19.) But that there may be a basis to exempt additional states does not change the rationale for exempting the existing ones. The lines drawn by Congress need not include every entity that might be covered by a law. "Defining the class of persons subject to a regulatory requirement . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Beach Commc'ns, Inc.*, 508 U.S. at 315–16 (citation omitted). That is, "[t]his

necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Id.* at 316. In other words, it doesn't matter that it might be the case that, now, some other states could make a pitch for also being subject to the exemption. That changes nothing about Wisconsin's exemption continuing to be justified.

The remedy the Foundation seeks further shows that its legal theory is misguided. It asserts that, if its theory holds water, then Wisconsin should *lose* its exemption. (Dkt.16:11–12.) But that assertion makes little sense when applying *Shelby County*, which was concerned about federal intrusion into state affairs. Rather, a state with standing and a valid claim would be entitled to access the "favored treatment"—being exempt because they also have same day registration. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315–16. It makes no sense to remove an exemption that is a rational part of legislation just because it might also be rational to include additional states in that exemption because of their same day registration.

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The Foundation claims that a law may be "level[ed] down" in the sense that Wisconsin would be newly subject to the NVRA. (Dkt. 16:29–30.) But it fails to persuasively explain why "leveling down" by removing an exemption would make sense here, especially given its reliance on *Shelby County*, which specifically turned on relieving "burdens" on state sovereignty. *Shelby County*, 570 U.S. at 536, 543–45. The Foundation cannot simultaneously use *Shelby*

County as the lynchpin for its case and then ignore the substance of its principles.

The Foundation cites *Heckler v. Mathews*, 465 U.S. 728 (1984), (Dkt. 16:29), which addressed gender-based classifications in the Social Security Act. But that was not an "equal sovereignty" case, and its discussion was about standing vis-à-vis benefits, explaining that the possibility of "withdrawal" or "extension" of "benefits" meant standing was present. *Id.* at 740. Further, *Heckler* involved a federal statute that specifically stated that, if the challenged provision were to be invalidated as to some people, then its application "to any other persons or circumstances shall be considered invalid." *Id.* at 734 (quoting the statute). None of this has any bearing on whether it would make sense, under the NVRA and *Shelby County*'s rationale, to "level down."[2]

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The Foundation also cites *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), (Dkt. 16:29–30), which, as noted above, cuts against the Foundation's theory in two ways: it supports (1) that the proper parties to raise equal sovereignty are states or political subdivisions and (2) that equal sovereignty does not generally apply to laws classifying states but rather is limited to extraordinary encroachments into traditional state powers under the Fifteenth Amendment. *Id.* at 293, 309. In addressing the standing of the plaintiff states, *Ohio v. EPA*

[2] In addition, *Heckler* upheld the classification there—it had no occasion to "level down." *Heckler v. Mathews*, 465 U.S. 728, 750–51 (1984).

commented that the possibility of a leveling down remedy supported a finding of redressability; the court, however, ultimately ruled that the waiver was valid. *Id.* at 307. Overall, if anything, this citation shows why the Foundation's resort to "equal sovereignty" holds no water—it is neither the right party to raise "equal sovereignty" nor can that concept simply be imported into legislation enacted under the Elections Clause.

In all, whether the NVRA's exemptions can be "level[ed] down" is ultimately irrelevant because the Foundation lacks a cause of action, standing, a bona fide explanation of how *Shelby County* supports its position, and a coherent application of its test. However, it makes no sense to impose more federal intrusion upon a state when applying a principle concerned about excessive federal intrusion upon the states.

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III. The "congruence and proportionality" language from *City of Boerne* has no application here, and it would not invalidate the exemption, anyway.

The Foundation also fails to support either that *City of Boerne* has any application or that its proposed application of "congruence and proportionality" makes sense when applied to the NVRA's statutory exemption.

As explained in the first brief, *City of Boerne* is off point: it is about RFRA and whether, under the section 5 of the Fourteenth Amendment's "enforce" language, Congress could effectively changes substance of the Fourteenth Amendment applied to states. *City of Boerne*, 521 U.S. at 517. The Foundation

cites foreign authority for the proposition that the NVRA also was passed under Congress's Fourteenth Amendment authority. (Dkt. 16:5.) The Seventh Circuit, however, has explained it was passed pursuant to Article I, section 4, of the Constitution. *See Ass'n of Cmty. Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793, 795 (7th Cir. 1995). And the Foundation cites no authority applying *City of Boerne* to a law that was enacted under the Elections Clause in combination with the Fourteenth Amendment. In any event, *City of Boerne* was about a particular mechanism under the Fourteenth Amendment: whether the power to "enforce" bled over into changing the Fourteenth Amendment's substance. In contrast, there is no issue here of the NVRA changing the substance of the Fourteenth Amendment.[3]

City of Boerne specifically crafted its "congruence and proportionality" test in that context, specifically, of RFRA's "[s]weeping coverage" that "displac[ed]" laws "at every level of government" such that it was "a considerable congressional intrusion into the States' traditional prerogatives and general authority." 521 U.S. at 532, 534. The whole purpose of the "congruence and proportionality" test was, in that context, to determine

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[3] The Foundation says "the Supreme Court recently cited City of Boerne with approval in *Trump v. Anderson*, 601 U.S. 100 (2024), a case involving ballot access." (Dkt. 16:32.) But this was because the case involved an attempt to keep a candidate off the ballot under section 3 of the Fourteenth Amendment. *Id.* at 104. The court merely said that congressional legislation under section 3 would be subject to the same congruence and proportionality test as legislation under section 5. *Id.* at 115.

whether "legislation may become substantive in operation and effect." *Id.* at 520.

The Foundation ignores this. It discusses a layperson's concept of "congruence and proportionality" divorced from the test's purpose to discern where legislation attempts to change the constitution substantively and in ways that intrude on state authority. And the Foundation's unmoored use of the terms "congruence and proportionality" make little sense, anyway. The Foundation says that the principle is violated because Congress's so-called oversight and transparency goals (which, again, are not actually the goals stated in the statute, *see* 52 U.S.C. § 20501(b)), apply equally to Wisconsin. But the Foundation doesn't address the fact that same-day registration provides benefits to voters and a way to ensure currentness and accuracy, which Congress could have properly relied upon. Just asserting that this is incongruent or disproportionate isn't a bona fide legal argument. That is doubly true because the test is meant to capture "[s]weeping coverage" that "displac[es]" state law, not the opposite. *City of Boerne*, 521 U.S. at 532.

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The Foundation's response to the Defendant's motion helps demonstrate why this case should be dismissed. Its own citations go to show that it has no business raising "equal sovereignty" both because it lacks a cause of action or standing and because the concept cannot simply be imported into a completely different context. And its attempted application of *City of Boerne* likewise is

unmoored from the express explanation of what the "congruence and proportionality" test is for. The Foundation's lawsuit fails as a matter of law no matter how it is viewed.

CONCLUSION

For the reasons stated above and in the opening brief, the Court should dismiss the case with prejudice and enter judgment accordingly.

Dated this 8th day of July 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 8, 2024, I electronically filed the foregoing *Reply Brief in Support of Motion to Dismiss* with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 8th day of July 2024.

s/Brian P. Keenan
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