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

PUBLIC INTEREST LEGAL FOUNDATION, INC., Plaintiff, v. MEAGAN WOLFE, in her official capacity as Administrator of the Wisconsin Elections Commission, Defendant.	Civil Action No. 24-cv-285-jdp

REPLY BRIEF OF THE UNITED STATES ON THE CONSTITUTIONALITY OF SECTION 4(b)(2) OF THE NATIONAL VOTER REGISTRATION ACT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Federal Statutes

Federal Legislative Materials

State Statutes and Regulations

Additional Authorities

INTRODUCTION

The United States has established that Plaintiff, the Public Interest Legal Foundation (PILF), lacks the requisite individual interest to press an equal sovereignty challenge to the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501-11 (NVRA), that the equal sovereignty principle does not apply to the NVRA, and that the NVRA does not raise equal sovereignty concerns under the Elections Clause or congruence and proportionality concerns under the Fourteenth Amendment. U.S. Br., ECF No. 26. PILF's response fails to undermine those core principles. Instead, PILF laments that Congress chose not to enact an election transparency bill governing all 50 states, one that would confer an actual interest in the documents it demands. *See* PILF Resp., ECF No. 29. But that is not the statute the Congress wrote. Instead, Section 4(b)(2) of the NVRA, 52 U.S.C. § 20503(b), is carefully crafted, effective, and—above all—constitutional.

PILF's alleged informational injury remains incognizable. It lacks standing to assert a third-party's interests. And its recasting of *Bond v. United States*, 564 U.S. 211 (2011), into an all-purpose workaround for civil plaintiffs lacking such standing does nothing to change that. PILF is also wrong to demand that this Court impose equal sovereignty requirements on Elections Clause legislation based on PILF's incorrect theory that regulation of federal elections is a "reserved state power[]." PILF Resp. 15. And rather than undertake an appropriate "equal sovereignty" analysis, PILF instead derides Congress's policy preferences. *Id.* at 16-19. Finally, PILF fails to explain why this Court should venture on a needless congruence and proportionality analysis of legislation that is already fully supported by the Elections Clause. *Id.* at 19-21. PILF's wayward constitutional challenge to the NVRA must be rejected.

ARGUMENT

I. An Alleged "Informational Injury" Does Not Authorize PILF to Invoke the Constitutional Rights of the States.

PILF cannot press the equal sovereignty rights of the states. PILF confirms that it "is not asserting third party standing on behalf of a state," PILF Resp. 7, and that it instead relies entirely on *Bond v. United States*, 564 U.S. 211 (2011), to establish a purported personal interest in its equal sovereignty argument. But *Bond* cannot rescue PILF's ill-fated claim. *Bond* is a criminal case implicating core liberty interests and is limited to its singular circumstances. In *Bond*, the Supreme Court held that "[i]n *this* case" a criminal defendant "is not forbidden to object that her injury results from disregard of the federal structure of our Government." *Id.* at 225-26 (emphasis added). Those structural principles were "not for the States *alone* to vindicate," *id.* at 222 (emphasis added), but could also be pressed by "a person indicted for violating a federal statute," *id.* at 214, to avoid an unconstitutional conviction and the resulting deprivation of her "individual liberty," *id.* at 223. The criminal defendant in *Bond* thus had an individual interest in structural principles, not just because she had "suffer[ed] [an] otherwise justiciable injury," but because she alleged that "the constitutional structure of our Government that protects individual liberty [was] compromised." *Id.* at 223; *see id.* at 226 (Ginsburg, J., concurring) ("Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law." (citations omitted)).

PILF stretches *Bond* beyond recognition. First, and as noted, *Bond* is a criminal case implicating core liberty interests applied to its unique facts and circumstances. It may not properly be grafted here. Nor does PILF explain how its "individual liberty," *id.* at 223, is implicated by the denial of information to which by law *it is not entitled*. And whatever PILF's informational interest here, it is simply not akin to the "individual liberty" interest of an indicted

person facing prison at stake in *Bond*. PILF's demand that this Court expand *Bond* into an all-purpose workaround for plaintiffs who lack standing to assert third-party constitutional claims in civil cases asks too much. *Bond* applies only "in a proper case." *Id.* at 220. This is no such case.[1]

II. Congressional Regulation of the Times, Places, and Manner of Federal Elections Is Not Subject to an Equal Sovereignty Principle.

PILF's attempt to import an equal sovereignty principle from *Shelby County v. Holder*, 570 U.S. 529 (2013), to this case also fails. No court has held that an equal sovereignty principle applies to laws passed under Congress's Article I powers, and PILF provides no reason to do so here.[2] PILF ignores the textual and historical evidence that Article I contained no uniformity guarantee. *See* U.S. Br. 17-18 & n.9. And PILF's failure to grapple with Congress's Elections Clause powers is particularly telling, as is its flatly incorrect claim that "elections [are an] activity at the heart of reserved state powers." PILF Resp. 15. For in fact, the Elections Clause, U.S. Const. art. I, § 4, cl. 1, is one the few "limited contexts" in which "the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *see also*

[1] For these same reasons, *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), does not grant PILF an individual interest in the equal sovereignty of the states. The plaintiff in *Gillespie* alleged that that a federal statute infringed on the Tenth Amendment's "guarantee of state sovereignty by rendering individuals with convictions for misdemeanor domestic violence," like himself, "unable to carry firearms and, as a result, ineligible to participate in state militias." *Id*. at 697, 700. Like the criminal defendant in *Bond*, the Court found his injury was plausibly related to the "div[ision] of authority between federal and state governments for the protection of individuals"—specifically, the federal government's ability to regulate the firearm ownership by citizens of Indiana. *Id.* at 703 (quoting *New York v. United States*, 505 U.S. 144, 181-82 (1992))).

[2] *Coyle v. Smith* merely applied the Equal Footing Doctrine, which requires that newly admitted states enter the Union "on an equal footing with the original states," to authorize Oklahoma to establish its own seat of government. 221 U.S. 559, 579 (1911) (emphasis omitted). *World-Wide Volkswagen Corp. v. Woodson* applied "minimum contacts" requirements for state courts to exercise personal jurisdiction over nonresidents, ensuring that states do not impinge on each other's sovereignty. 444 U.S. 286, 291-92 (1980). Neither concerns Congress's exercise of its Article I powers.

Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 8-9, 13-14 (2013) (noting the Elections Clause presents diminished federalism concerns). And while PILF ponders where Congress's powers reside, it offers no answers beyond noting that the extent of Congress's legislative authority "lurk[s] in the relevant analysis" yet still asserting without explanation that the issue "need not be addressed at this stage." PILF Resp. 7 n.3.

Congress's authority to legislate under the Elections Clause is clear. PILF is wrong to suggest that Elections Clause legislation may be more susceptible to equal sovereignty challenges than other legislation simply because it involves elections. PILF Resp. 14. And it overlooks that the preclearance provision at issue in *Shelby County* was passed under the Reconstruction Amendments and not the Elections Clause. *See* 570 U.S. at 536. PILF thus errs when claiming that *all* election regulations are "at the heart of reserved state powers." PILF Resp. 15 (citing *Mayhew v. Burwell*, 772 F.3d 80, 95-96 (1st Cir. 2014)). *But see Mayhew*, 772 F.3d at 95-96 (describing "a state's ability to regulate the conduct of *its elections*" as a "core sovereign state function" (emphasis added)); U.S. Br. 18-19 (explaining Congress's preeminent power and preemptive authority to regulate federal elections). Because the equal sovereignty principle does not apply to Elections Clause legislation, PILF's attack on Section 4(b)(2) fails at the outset.

III. The NVRA Does Not Raise Equal Sovereignty Concerns.

Although PILF takes exception to Section 4(b)(2)'s structure, it does not contest that the NVRA afforded each state a choice within a preemptive framework: adopt or maintain polling place EDR or implement the NVRA framework for voter registration and list maintenance. PILF Resp. 6-7, 16; *see also, e.g.*, S. Rep. No. 103-6, at 52 (1993) (Senate Report) (minority views) ("It should also be noted that this bill provides states with a way to escape the expenses and rigors of the bill: adoption of election day registration."). PILF disparages each option as "a loss

of sovereignty." PILF Resp. 7, 16-17. But states suffer no loss of sovereignty when Congress chooses to regulate the manner of conducting federal elections. *See Inter Tribal Council*, 570 U.S. at 8 (citing *U.S. Term Limits*, 514 U.S. at 804-05). That states might avoid federal regulation through adoption of an alternative regime affords greater deference to state preferences, not less. Because the NVRA applies the "same rule to each state," *Mayhew*, 772 F.3d at 94, the Act does not raise equal sovereignty concerns by "target[ing] only some parts of the country," *Shelby Cnty.*, 570 U.S. at 537.[3]

PILF also cannot sever the connection between the NVRA's "disparate geographic coverage" and "the problem that it targets." *Id.* at 542. Although PILF suggests that "Congress may not treat states differently without extraordinary justification," PILF Resp. 7, *Shelby County* merely requires rational design, *see* 570 U.S. at 550-53. Here, Congress applied NVRA procedures only to States that did not choose—before NVRA implementation—to enact or maintain polling place EDR, a practice that increases registration and participation and facilitates accurate registration rolls via Election Day corrections. *See* 52 U.S.C. § 20501(b); *see also* Senate Report at 22-23; H.R. Rep. No. 103-9, at 4-6 (1993) (House Report). PILF suggests that the NVRA does not respect equal sovereignty because the "problem" of a lack of transparency "is equally pervasive" in Wisconsin. PILF Resp. 18. But Congress did not share PILF's singular

[3] PILF suggests that Maine is subject to the NVRA only because the State briefly ceased using polling place EDR in 2011 and that "Maine's story" illustrates a lack of choice. PILF Resp. 16-17. This is incorrect. Maine was never exempted from the NVRA. *See* FEC, *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples* 1-2 (1994), https://perma.cc/SGA9-AP8V ("[E]lection day registration at the polls is not universal throughout the State."); *see also* 1994 Me. Laws ch. 695, subch. VI (NVRA implementing legislation). Nonetheless, the possibility remains that an exempt state might choose to eliminate polling place EDR in favor of NVRA procedures, and so coverage remains flexible. *But see* PILF Resp. 13 (falsely asserting that NVRA coverage is "static").

focus on record requests.[4] Transparency is not the NVRA's purpose; it merely furthers statutory goals. *See PILF v. Bellows*, 92 F.4th 36, 54-56 (1st Cir. 2024); *see also* PILF Resp. 18 (acknowledging that public disclosure is "a means to achieve . . . other purposes"). Section 4(b)(2)'s design meets the "rational" targeting requirements for legislation subject to *Shelby County*. 570 U.S. at 550 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966)).[5]

PILF also fails to grapple with the "current conditions" and "current needs" that justify the cutoff for states to opt out of the NVRA by adopting polling place EDR. *Shelby Cnty.*, 570 U.S. at 550 (citation omitted). As PILF acknowledges, more than thirty states do not use polling place EDR. *See* PILF Resp. 18. By including a cutoff after which states cannot terminate NVRA coverage, Section 4(b) of the NVRA ensures that these states are not pressured to adopt that procedure. *See* Senate Report at 22-23; 139 Cong. Rec. 9632 (1993) (statement of Sen. McConnell). Far from being the "policy preference" of Congress, PILF Resp. 7, polling place EDR was subject to security concerns among some senators, Senate Report at 52 (minority views), and so senators required insertion of the Section 4(b) cutoff "in exchange for breaking a filibuster," 139 Cong. Rec. 9221 (1993) (statement of Rep. Conyers). The fact that some states adopted polling place EDR without Congressional incentives does not undermine the "current need[]" not to pressure additional states to do the same. *Shelby Cnty.*, 570 U.S. at 550 (citation

[4] PILF also fails to consider state transparency provisions in Wisconsin and other states not subject to NVRA requirements. Wisconsin makes the information PILF seeks available to any requester. *See* Wis. Stat. § 6.36(1)(b)(1). Wisconsin simply exempts date of birth information for certain requesters, *see id.* § 6.36(1)(b)(1)(a), and charges a fee, *see id.* § 6.36(6). Wisconsin does not make list maintenance decisions "in the dark." PILF Resp. 2; *see also id.* at 18.

[5] PILF also suggests that "[t]he Exemption is cold comfort for a military service member or overseas citizen who requests a ballot and discovers they have been improperly removed from the rolls." PILF Resp. 5 n.1. However, the federal postcard application used by service members and overseas citizens to request a federal ballot *also* serves as a voter registration application, preventing any such problem. *See* 52 U.S.C. § 20301(b).

omitted). Moreover, each of those states has implemented the NVRA, and Congress could reasonably prefer that these states not unwind NVRA procedures. *See, e.g.*, 141 Cong. Rec. 27071-72 (1995) (statement of Sen. Ford).

Ultimately, PILF does not explain why an *exemption* from a generally applicable federal statute must be "justified under current conditions." PILF Resp. 16. Section 4(b)(2) does not impose "current burdens," and so "current conditions" have no bearing on this case. *See Shelby Cnty.*, 570 U.S. at 550. Rather, in lamenting the lack of "equal . . . transparency in the voter list maintenance process," PILF Resp. 19, PILF is focused on its *own* burden, that it cannot obtain local records it hopes will discredit the Electronic Registration Information Center (ERIC), an interstate voter list maintenance collaboration. *See also* PILF Records Request, ECF No. 1-1. *See generally* ERIC, *ERIC Overview*, https://perma.cc/7G2L-RJA7. PILF cannot use *Shelby County* to *increase* "federal intrusion" and impose *greater* "burdens" beyond those enacted by Congress merely to serve private ends. 570 U.S. at 545, 550 (internal citation and quotation marks omitted).

IV. Elections Clause Legislation Is Not Subject to the Congruence and Proportionality Test.

Finally, PILF fails to acknowledge that Congress requires only one source of constitutional authority to enact legislation. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 561, 574-75 (2012). PILF's allegation that Section 4(b)(2) of the NVRA is an invalid exercise of Congress's authority under the Fourteenth and Fifteenth Amendments is irrelevant. That contention is a legal theory. It is not presumed to be true on a motion to dismiss, and it requires no further factual development. *Cf.* PILF Resp. 19-20. Should this Court find that Section 4(b)(2) is valid Elections Clause legislation, that ends the matter. *See, e.g.*, *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 880 F. Supp. 1215, 1221 (N.D. Ill. 1995), *aff'd*, 56 F.3d

791 (7th Cir. 1995).

In any case, Section 4(b)(2) satisfies the congruence and proportionality test in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See* U.S. Br. 28-30. Section 4(b)(2) evinces Congress's intent to limit the NVRA's burdens to states where Congress had evidence of need, *see* U.S. Br. 29 (citing House Report at 2-3)—the very proportionality *City of Boerne* requires, *see* 521 U.S. at 530. PILF asks this Court to find Section 4(b)(2) unconstitutional for failing to impose greater burdens on states, PILF Resp. 20, but that is the mirror opposite of a *City of Boerne* argument, *see, e.g.*, *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (holding that nationwide legislation was not congruent and proportional to geographically limited legislative record); *see also Tennessee v. Lane*, 541 U.S. 509, 531 (2004); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 646 (1999); *City of Boerne*, 521 U.S. at 532-33. PILF cites no case where a court has struck down a law under *City of Boerne* for regulating states too little.

PILF's attempt to impose a current conditions analysis on the congruence and proportionality test, *see* PILF Resp. 19 (arguing the NVRA is "no longer congruent"), does not save its case. The congruence and proportionality inquiry focuses on the scope of the problem at the time of enactment, relying on the enacting Congress's legislative record and the plaintiff's showing of a statutory violation (or lack thereof) based on the specific facts of the case. *See Kimel*, 528 U.S. at 89-91; *Fla. Prepaid*, 527 U.S. at 640, 645-47; *City of Boerne*, 521 U.S. at 530-31; *see also, e.g.*, *Vote.Org v. Callanen*, 89 F.4th 459, 486-487 & n.11 (5th Cir. 2023) (upholding 1964 statute based on contemporaneous record).[6] Therefore, despite PILF's baseless contention, PILF Resp. 19, whether Section 4(b)(2) is congruent and proportional can be

[6] PILF suggests that this Court "[i]magine" discriminatory registration practices in Wisconsin. PILF Resp. 20. But a *City of Boerne* analysis relies on the legislative record, not a litigant's imagination.

resolved on a motion to dismiss and should be resolved here, *see, e.g.*, *Kimel*, 528 U.S. at 92 (upholding dismissal). And, of course, if this Court finds—as it should—that Section 4(b)(2) is valid Elections Clause legislation, the Court need not take up PILF's invitation to explore the NVRA's other constitutional underpinnings.

CONCLUSION

For the reasons set forth in the United States' opening brief and set forth above, the NVRA is constitutional, and Secretary Simon's motion to dismiss should be granted with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2024, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

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