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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

PUBLIC INTEREST LEGAL  
FOUNDATION, INC.

Plaintiff,

v.

SCOTT T. NAGO, in his official  
capacity as the Chief Election Officer  
for the State of Hawaii

Defendant.

Civil No.: CV 23-00389 LEK-WRP

MEMORANDUM IN SUPPORT OF  
MOTION

**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION**

Plaintiff Public Interest Legal Foundation, Inc. (“Plaintiff”) filed its First Amended Complaint on September 22, 2023 (“FAC”) against Defendant Scott T. Nago, in his official capacity as Chief Election Officer for the State of Hawaii (“Defendant”). ECF No. 20. Plaintiff’s FAC alleges that Defendant violated section 8(i) of the National Voting Rights Act of 1993 (“NVRA”) (52 U.S.C. § 20507(i)) by denying access to, functionally denying access to, and unlawfully restricting Plaintiff from accessing voter registration data. ECF No. 20 at PageID# 78-82. However, because Defendant’s role and actions, along with state law, are consistent with federal law, Plaintiff’s allegations are misplaced.

As addressed further below, this Court should dismiss Plaintiff's FAC with prejudice because: (1) Plaintiff lacks Article III standing; (2) Plaintiff's FAC fails to state a claim for relief; and (3) Plaintiff's FAC fails to join indispensable parties. Alternatively, should this Court find that matters outside of the pleadings are presented to and not excluded by this Court, Defendant respectfully requests this Motion be treated as one for summary judgment and disposed of in accordance with Rule 56(a) of the Federal Rules of Civil Procedures ("FRCP").

## **II. FACTUAL BACKGROUND**

### **A. FACTS RELATING TO COUNTS I AND II OF THE FAC (ALLEGED DENIAL OF ACCESS TO VOTER INFORMATION UNDER THE NVRA)**

On April 6, 2023, Plaintiff emailed Defendant a letter citing 52 U.S.C. § 20507(i) and requesting Defendant to "reproduce or provide the opportunity to inspect . . . [a] current or most updated copy of the complete SVRS voter roll extract containing all data fields provided to requesters having a government or election purpose under H.R.S. § 11-97(a)." ECF No. 20-1 at PageID# 88.

On May 8, 2023 and May 10, 2023, Defendant responded to Plaintiff by directing it to contact the County Elections Divisions (i.e., the county clerks) with regard to its request. ECF No. 20-2 at PageID# 91-93.

Plaintiff subsequently responded to Defendant on May 17, 2023, claiming that Defendant's actions had resulted in violations of the NVRA. ECF No. 20-3 at



PageID# 96-97. Plaintiff read the NVRA in conjunction with Help America Vote Act of 2002 (“HAVA”) (52 U.S.C. §§ 20901-21145) to require the requested disclosure to be made by Defendant, as opposed to the county clerks. ECF No. 20-3 at PageID# 96.

Plaintiff also claimed that it did not satisfy the “election purpose” requirement of HRS § 11-97(a) to obtain the list as it did not “engage in candidate election-related activities.” ECF No. 20-3 at PageID# 96. Finally, Plaintiff cited 52 U.S.C. § 20510(b) to indicate an action would be filed within 90 days if the voter registration list was not disclosed and that “an award of attorney’s fees, expenses, and costs incurred are available under 52 U.S.C. § 20510(c).” ECF No. 20-3 at PageID# 97. At this point, it appears that Plaintiff had rejected Defendant’s position that it contact the county clerks and it had provided 90 days’ notice that would end on August 15, 2023.

In a letter signed by Defendant’s General Counsel on June 28, 2023, Defendant noted his disagreement with Plaintiff’s interpretation of the law and once again referred Plaintiff to the county clerks. ECF No. 20-4 at PageID# 99. Plaintiff apparently did not learn of the letter until it visited the Office of Elections on August 17, 2023, and stated that it had not received a written response to its earlier letter. Based on this, the Office of Elections emailed Plaintiff the letter that

day. Declaration of Aaron H. Schulaner (“Schulaner Dec.”) at ¶ 9; ECF No. 20-5 at PageID# 108.

As part of the referral in the letter, dated June 28, 2023, Defendant referenced Hawaii Administrative Rules (“HAR”) § 3-177-160 as the applicable rule that addressed what constituted an “election purpose” and stated that it “does not limit an election purpose to activities related to a candidate.” ECF No. 20-5 at PageID# 104. The eight-page letter cited extensively to the NVRA, HAVA, and Hawaii state law and explained the distinction between the duties and responsibilities of the Defendant and the county clerks in terms of voter registration. ECF No. 20-5.

Despite Plaintiff’s position that it did not need to contact the county clerks and the provision of a 90-day notice of a possible lawsuit, Plaintiff personally visited the offices of the county clerks for the County of Hawaii, County of Kauai, and City and County of Honolulu *in person*, during the week of August 14, 2023, but omitted the County of Maui due to the emergency declaration in that county. ECF No. 20 at PageID# 77. Specifically, Plaintiff visited the City and County of Honolulu on August 16, 2023, and the County of Hawaii and the County of Kauai on August 17, 2023. Schulaner Dec. at ¶ 10-12, Exs. 5-7. It is not clear why Plaintiff flew to Hawaii to personally visit the county clerks as opposed to reaching out to them by email or other means.

To date, it appears that Plaintiff has not submitted any of the application forms obtained from the county clerks. Subsequently, instead of submitting the application forms directly to the county clerks to complete their request, Plaintiff filed the instant FAC and now contends that the county clerks' requests to fill out an application equates to an outright denial of the requested information. *See* ECF No. 20 at PageID#77 (contending that Plaintiff "personally request[ed] a copy of each county's VRS data" and "[e]ach county denied the Foundation's requests under the NVRA"); Schulaner Dec. at ¶ 8.

**B. FACTS RELATING TO COUNT III OF THE FAC (ALLEGED UNLAWFUL USE RESTRICTIONS UNDER THE NVRA)**

As previously noted, Defendant referred Plaintiff to the county clerks and cited HAR § 3-177-160 as the applicable rule that addressed what constituted an "election purpose" and that it "does not limit an election purpose to activities related to a candidate." ECF No. 20-4 at PageID# 104. While the next logical step would have been for Plaintiff to submit the application directly to the county clerks to state their election purpose, Plaintiff chose instead to immediately challenge the administrative process instead of exhausting it.

On August 22, 2023, Plaintiff sent an email to Defendant alone, and did not include the county clerks, questioning whether its intended uses of the voter file constituted "election or government purposes" and stating that "[w]ithout such written assurances" it would "have no choice but to seek guidance from the

appropriate court on this issue” as it was concerned with the consequences for unauthorized use of the information. ECF No. 20-5 at PageID# 108-09. Copies of the county applications are attached for the Court’s convenience and indicate what information was required. Schulaner Dec. at ¶ 3-6, Exs. 1-4.

On September 1, 2023, General Counsel for Defendant responded to Plaintiff again referring it to the county clerks. ECF No. 20-6 at PageID# 111. Thereafter, Plaintiff delivered a series of letters dated September 7, 2023, to Defendant and each of the county clerks alleging violations of the NVRA and indicating a lawsuit would be filed within 90 days of the receipt of the notice if disclosure did not occur and that “an award of attorney’s fees, expenses, and costs incurred are available under 52 U.S.C. § 20510(c).” Schulaner Dec. at ¶ 10-12, Exs. 5-7. However, unexpectedly, on September 21, 2023, Plaintiff filed its initial Complaint solely against Defendant and did not include the county clerks. ECF No. 1. Plaintiff’s FAC, which was filed on September 22, 2023, again did not include the county clerks as defendants. ECF No. 20.

### **III. LEGAL STANDARD**

#### **A. LACK OF SUBJECT-MATTER JURISDICTION**

FRCP Rule 12(b)(1) requires that a case be dismissed for lack of subject-matter jurisdiction when the court lacks a constitutional or statutory basis to adjudicate the controversy. *Leeson v. Transamerica Disability Income Plan*, 671

F.3d 969, 975 (9th Cir. 2012). A challenge to the court’s subject-matter jurisdiction may be “facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual attack, the party challenging jurisdiction argues that the facts in the case, notwithstanding the allegations in the complaint, divest the court of subject-matter jurisdiction. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). No presumptive truthfulness attaches to the complaint’s allegations. *Id.* The party challenging jurisdiction must present “affidavits or other evidence properly brought before the court” indicating that subject matter jurisdiction is lacking. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

## **B. FAILURE TO STATE A CLAIM**

FRCP Rule 12(b)(6) addresses the dismissal of a claim for failure to state a claim upon which relief can be granted. “When ruling on a defendant's motion to dismiss for failure to state a claim, a judge must accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal citations omitted). “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 Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S at 556). The “tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S at 555). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* at 679 (citing *Twombly*, 550 U.S at 556).

Additionally, a review of an FRCP Rule 12(b)(6) motion to dismiss may include “documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice — without converting the motion to dismiss into a motion for summary judgment.” *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

### **C. FAILURE TO JOIN INDISPENSABLE PARTIES**

FRCP Rule 12(b)(7) provides for the dismissal of a case due to a “failure to join a party under Rule 19.” Fed. R. Civ. P. R. 12(b)(7). FRCP Rule 19 requires, in part, the consideration of whether the party’s absence would result in the Court not being able to “accord complete relief among existing parties.” Fed. R. Civ. P.

R. 19. Additionally, a court must consider whether the party has an interest in the matter and the resolution of the matter without their involvement would “impair or impede the person’s ability to protect the interest” or “leave an existing party subject” to some type of risk due to the interest. *Id.* Notably, Rule 19(c) requires the plaintiff to provide the reason for when joinder is not feasible. *Id.*

#### **IV. ARGUMENT**

This Court lacks subject-matter jurisdiction as Plaintiff lacks an “injury in fact” as it has not even submitted an application with its election purpose to the county clerks and thus has not been rejected at this time. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); Schulaner Dec. at ¶ 10-12, Exs. 5-7.

Similarly, Plaintiff’s FAC is premature because Plaintiff has not waited the requisite 90 days required under 52 U.S.C. § 20510 and noted in its letters to Defendant dated September 7, 2023. Schulaner Dec. at ¶ 10-12, Exs. 5-7. The related legal arguments that would support dismissal under FRCP Rules 12(b)(6) and 12(b)(7) are intertwined with whether the state law requirement to submit an application is preempted by federal law and the role of the county clerks under state and federal law.

Finally, on the topic of preemption, the three counts of Plaintiff’s FAC all claim incorrectly that our state laws have been preempted by federal law. ECF No. 20. With this in mind, the Constitution is clear that the states prescribe “[t]he

Times, Places and Manner” of federal elections, subject to the Congress passing laws to “make or alter such Regulations.” US Const. art. I, § 4, cl. 1.

In practice, the Clause functions as “a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.” . . . The power of Congress over the “Times, Places and Manner” of congressional elections “is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.”

*Arizona Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (internal citation omitted). In other words, the default is state regulation, subject to clear Congressional intervention, and Defendant’s position is that our state laws do not conflict with the text of the NVRA and HAVA, which acknowledges the important role of state law.<sup>1</sup> Simply put, “[t]he purpose of Congress is the ultimate touchstone” and will inform the resolution of this case. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (internal citation omitted).

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<sup>1</sup> The NVRA “erect[s] a complex superstructure of federal regulation atop state voter-registration systems.” *Husted v. A. Philip Randolph Inst.*, 584 U.S. \_\_\_, 138 S. Ct. 1833, 1838 (2018). HAVA notes “[t]he specific choices on the methods of complying with the requirements of this title [Title III – Uniform and Nondiscriminatory Election Technology and Administration Requirements, which contains Section 303 – Computerized statewide voter registration list requirements and requirements for voters who register by mail] shall be left to the discretion of the State.” 52 U.S.C. § 21085.



### A. PLAINTIFF LACKS ARTICLE III STANDING

Under Article III of the U.S. Constitution, federal court jurisdiction is limited to “cases” and “controversies.” *Lujan*, 504 U.S. at 559. And “[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The Supreme Court “ha[s] long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions.” *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) (internal citations omitted).

Here, Plaintiff have no genuine injury that would afford it Article III standing to bring suit. As stated above, Plaintiff failed to submit the county applications necessary to complete the information request process. Therefore, Plaintiff was never denied the information that they sought and cannot now claim an injury.

Rather, it appears that Plaintiff was already inclined to perceive a simple request to fill out an administrative application form as an outright denial. Plaintiff apparently spent considerable time and money to personally visit each county clerk’s office only to then fail to follow through on preliminary administrative requests to provide requested information. Plaintiff did not even allow the county clerks the opportunity to approve or deny their request and therefore no such

determination was made by the county clerks. Such actions alone are not sufficient to be deemed an injury sufficient to trigger Article III standing.

Additionally, Plaintiff has failed to comply with the statutory requirement of 52 U.S.C. § 20510(b) to initiate this action. Specifically, Plaintiff sent letters, dated September 7, 2023, jointly to Defendant and three of the county clerks alleging, “Failure to provide access to ‘all’ Voter File data.” The letters explicitly cited 52 U.S.C. § 20510(b) and indicated a lawsuit would be filed within 90 days of their receipt of the letter. Schulaner Dec. at ¶ 10-12, Exs. 5-7. However, the present lawsuit against Defendant was filed before the expiration of those 90 days on September 21, 2023, and then amended on September 22, 2023. ECF Nos. 1, 20.

It appears Plaintiff seeks to base its present lawsuit on its letter, dated May 17, 2023, that alleged “1. Failure to maintain and provide access to Voter File” and “2. Failure to provide access to ‘all’ Voter File data.” ECF No. 20-3 at PageID# 96-97. However, Plaintiff’s decision to send its September 7, 2023 letters to Defendant and the county clerks referencing many of the same events in its previous letter, dated May 17, 2023, effectively reset the clock and superseded its prior letter, resulting in the lawsuit not being able to be filed until December 7, 2023. Schulaner Dec. at ¶ 10-12, Exs. 5-7 (i.e., the ninetieth day after its most recent letters would be December 6, 2023).

Accordingly, this Court should dismiss Plaintiff's FAC with prejudice.

**B. PLAINTIFF'S FAC FAILS TO STATE A CLAIM UNDER EITHER THE NVRA OR HAVA**

In this case, Plaintiff claims the state's laws are preempted by the NVRA and HAVA and that those laws require Plaintiff to directly obtain the lists from the State. This would be comparable to a person having interactions with a federally regulated business and claiming under federal law to be able to go directly to the bank the business uses to review the bank statements of the business as opposed to getting whatever the business may be required to disclose directly from the business.

However, a plain reading of the NVRA and HAVA both show that state law is consistent with them (i.e. the county clerks handle voter registration and the State provides support, similar to a bank that holds the assets of a business). In fact, in this case state law is more expansive as it explicitly provides a voter list to anyone with a valid "election purpose." HRS § 11-97; HAR § 3-177-160. In contrast, the NVRA only provides for the disclosure of "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters," which does not necessarily include a voter list. *See* 52 U.S.C. § 20507(i).

**1. CONSISTENT WITH THE NVRA AND HAVA, THE COUNTY CLERKS ARE REGISTRARS THAT IMPLEMENT VOTER REGISTRATION AND ADDRESS RECORDS REQUESTS**

Given that the duties and responsibilities of the county clerks under state law are consistent with the duties of the “registrar” and the concept of a “registrar’s jurisdiction” under the NVRA, Plaintiff is mistaken in its contention in Counts I and II that a denial or functional denial of access to records under section 8(i) of the NVRA (52 U.S.C. § 20507(i)) occurred when Defendant directed Plaintiff to the county clerks.

As reflected in Defendant’s letter to Plaintiff, dated June 28, 2023, Defendant provided extensive information about the applicable federal and state laws and its position concerning why Plaintiff should contact the county clerks with its request. ECF No. 20-4. With that in mind, the following argument largely tracks what was previously stated to Plaintiff.

Plaintiff references subsection (i) of section 8 (52 U.S.C. § 20507(i)) in Counts I, II, and III. ECF No. 20. The complete text of 52 U.S.C. § 20507 lays out a variety of requirements concerning “the administration of voter registration for elections for Federal office.” 52 U.S.C. § 20507. Specifically, 52 U.S.C. § 20507 includes approximately twenty references to a “registrar” or “registrar’s jurisdiction.” *Id.* The text of 52 U.S.C. § 20507 does not prohibit state law from providing that the county clerks will perform the associated functions of a

“registrar” in the NVRA, including list maintenance. *Id.* In fact, the NVRA references the term “registrar’s jurisdiction” as including a county that maintains voter registration. 52 U.S.C. § 20507(j)(2).

In Hawaii, the duties of the registrar are performed by the four county clerks, and this would naturally include requests under state law, such as HRS § 11-97, and separately federal law, such as 52 U.S.C. § 20507(i). As it relates to state law, Hawaii’s Constitution provides that “[t]he legislature shall provide for the registration of voters and for absentee voting and shall prescribe the method of voting at all elections.” Haw. Const. art. II, § 4. A review of Chapter 11, Hawaii Revised Statutes, reflects Part II concerning registration. HRS §§ 11-11-26. This part contains the traditional functions of a voter registrar and associates them with the county clerk. *See id.*

For example, HRS § 11-11 provides that “[t]he county clerk shall be responsible for voter registration in the respective counties and the keeping of the general register and precinct lists within the county.” HRS § 11-11. As for voter lists or data, HRS § 11-14 refers to the county clerks releasing such information for election or government purposes in accordance with HRS § 11-97 and that data may be transmitted to a central file for administrative purposes. HRS § 11-14. The removal of voters from the voter registration rolls is a part of the duties of the county clerks. HRS § 11-17.

## **2. HAVA DID NOT TURN THE CHIEF ELECTION OFFICER INTO A REGISTRAR**

Given that HAVA did not turn the Chief Election Officer into a registrar and allowed the NVRA to remain largely intact with regard to the duties and responsibilities of the county clerks (i.e. registrars), Plaintiff is mistaken in its contention in Counts I and II that a denial or functional denial of access to records under section 8(i) of the NVRA (52 U.S.C. § 20507(i)) occurred when it was directed to the county clerks.

Specifically, Plaintiff appears to equate the requirement of a computerized statewide voter registration list at the state level under HAVA with the Chief Election Officer being functionally the registrar of a single registrar jurisdiction encompassing the entire state. This leads to Plaintiff's mistaken conclusion that the Chief Election Officer can provide access to the voter registration information of the entire state under 52 U.S.C. § 20507(i).

However, the Chief Election Officer is not a registrar and does not have a "registrar's jurisdiction" that encompasses the whole state. As previously noted, the NVRA defines a "registrar's jurisdiction" as essentially a unit of government or office that covers a specific geographic area and performs "all functions of a voting registrar." 52 U.S.C. § 20507(j). Instead, HAVA essentially creates a technical support role for the State to support the counties in terms of voter registration, as

opposed to directly replacing the county clerks. 52 U.S.C. §§ 21083(a)(1)(A), (A)(vii), and (a)(2).

Consistent with this understanding, the purposes of HAVA include “to establish minimum election administration standards for States and *units of local government* with responsibility for the administration of Federal elections.”

Pub. L. No. 107-252, 116 Stat. 1666, 1666 (emphasis added). Notably, HAVA provides for “a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level.” 52 U.S.C. § 21083(a)(1)(A).

In administering a statewide voter registration system, “*local election officials*,” which appear to be the equivalent of registrars, are expected to have immediate electronic access to the system and to, on an expedited basis, enter voter registration information into it as necessary. 52 U.S.C. §§ 21083(a)(1)(A)(v), (vi) (emphasis added). As a result, a State’s chief election official is expected to provide support to the “*local election officials*” to enter voter registration information into the system. 52 U.S.C. § 21083(a)(1)(A)(vii) (emphasis added). Accordingly, HAVA expressly provides that “[t]he appropriate State or *local election official* shall perform list maintenance” which includes the removal of ineligible voters from the official list of eligible voters pursuant to the NVRA. 52 U.S.C. § 21083(a)(2) (emphasis added).

On the topic of the “minimum standard for accuracy of state voter registration records,” 52 U.S.C. § 21083(a)(4) indicates it should include “[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote” and references the NVRA and its requirement to send a notice and wait for two general elections before removing the voter if they have not responded or voted during that time frame. 52 U.S.C. § 21083(a)(4)(A). It concludes with a requirement for “[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.” 52 U.S.C. § 21083(a)(4)(B). In essence, HAVA equates “accuracy” with the removal process.

Finally, HAVA notes “[t]he specific choices on the methods of complying with the requirements of [the title that Section 303 is contained in] shall be left to the discretion of the State.” 52 U.S.C. § 21085.

Against this backdrop, the chief election official hosts the statewide voter registration system and provides support to the county clerks to permit them to access the system, enter voter registration information into it, and to conduct “programs and activities . . . for the purpose of ensuring the accuracy of official lists of eligible voters.” 52 U.S.C. §§ 21083(a)(1)(A), (a)(1)(A)(vii), (a)(2); 52 U.S.C. § 20507(i). Consistent with this, a chief election official may delegate responsibilities, including receiving and responding to records requests, to their respective county clerks and likewise state law can explicitly state that the county



clerks are “responsible for voter registration in the respective counties and precinct lists within the county.” ECF No. 20-4; HRS § 11-11; HAR § 3-177-160. As such, requests for records related to voter registration were properly referred to the county clerks and were not preempted by HAVA or the NVRA.

**3. PREEMPTION IS NOT APPLICABLE AS THE HRS § 11-97 ELECTION PURPOSE REQUIREMENT DOES NOT CONFLICT WITH THE NVRA OR HAVA**

Count III contends that HRS § 11-97 constitutes an unlawful use restriction that conflicts with 52 U.S.C. § 20507(i) and is thus preempted. As a preliminary matter, Plaintiff is not necessarily entitled to the voter registration list it seeks under 52 U.S.C. § 20507(i) and Defendant does not waive this argument.<sup>2</sup> However, state law provides that a voter registration list containing certain information could be generated for those with an election purpose. HRS § 11-97; HAR § 3-177-160. Having said that, as previously noted, Plaintiff has declined to submit the required application form under HAR § 3-177-160(g). ECF No. 20-5 at PageID# 108-09.

As it would be the county clerks, as opposed to Defendant, who would process Plaintiff’s application, and we do not know conclusively what Plaintiff will

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<sup>2</sup> Plaintiff’s case is based on the premise that the voter registration list is covered by 52 U.S.C. § 20507(i), which has not been established in the Ninth Circuit. Plaintiff relies on *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2021) and its progeny.

attest to on the application or if it will seek to qualify its statements, Defendant cannot categorically state what the disposition of the application would be.

However, Defendant can still point out that the law itself does not on its face reflect that an application would be rejected if it did not fit within any of the broad examples provided.

Specifically, the administrative rule provides a “non-exhaustive list of election or government purposes,” which even Plaintiff admits. HAR § 3-177-160(e); ECF No. 20 at PageID# 71-72. The six examples provided are broad in nature, as opposed to being limited to candidates or campaigns, and consistent with the idea that they are reflective of a non-exhaustive list. HAR § 3-177-160(e). Among these are the broad purposes of “[t]o support or encourage voter registration or the voting process” and “[t]o challenge the right of any person to vote or to seek public office.” HAR §§ 3-177-160(e)(4) and (5). Therefore, at this juncture it would be unreasonable for Plaintiff to conclude any purpose it proposed would be rejected.

**C. PLAINTIFF FAILED TO JOIN THE COUNTY CLERKS AS INDISPENSABLE PARTIES**

Here, the county clerks are necessary parties to this action under FRCP Rule 19 because complete relief cannot be accorded between the existing parties as the county clerks have a legally protected interest in the outcome of this action.

*Shermoen*, 982 F.3d at 1317. This is because the relief and remedy that Plaintiff

seeks will effectively undercut the county clerks' duties and responsibilities under both state and federal law. *See True The Vote v. Hosemann*, 43 F. Supp. 3d 693, 712 (S.D. Miss. 2014) ("Other courts confronted with NVRA lawsuits have likewise recognized that Counties or County officials were proper parties to the suit"). Plaintiffs addressed their prelitigation letters alleging federal violations against both Defendant Nago and the counties. Schulaner Dec. at ¶ 10-12, Exs. 5-7. As such, Plaintiff recognized that the counties are indispensable parties. However, Plaintiff's instant Complaint is only against Defendant Nago. Because Plaintiff failed to join the county clerks as necessary parties, this Court should dismiss its FAC with prejudice.

## V. CONCLUSION

For the foregoing reasons, Defendant respectfully request this Court to dismiss Plaintiff's FAC with prejudice.

DATED: Honolulu, Hawai'i, November 28, 2023.

/s/ Aaron H. Schulaner

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as Chief Election Officer for the

State of Hawaii