JAMES HOCHBERG (HI Bar No. 3686)
ATTORNEY AT LAW, LLLC
700 Bishop St., Ste. 2100, Honolulu, HI 96813
Telephone: (808) 256-7382
E-mail: jim@jameshochberglaw.com

Attorneys for Plaintiff Public Interest Legal Foundation

United States District Court
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*.	Case No. CV-23-00389 LEK-WRP **PLAINTIFF PUBLIC INTEREST LEGAL FOUNDATION'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT [DKT 35-36] FILED ON NOVEMBER 28, 2023; EXHIBITS 1 - 2; CERTIFICATE OF SERVICE**

Noel H. Johnson* (Wisconsin Bar #1068004)
Maureen Riordan** (New York Bar #2058840)
Joseph M. Nixon** (Texas Bar #15244800)
Public Interest Legal Foundation, Inc.
107 S. West Street, Suite 700
Alexandria, Virginia 22314
Tel: (703) 745-5870
Fax: (888) 815-5641
njohnson@PublicInterestLegal.org

mriordan@PublicInterestLegal.org
jnixon@PublicInterestLegal.org
* Order Granting Motion for admission *pro hac vice*
Entered 10/26/2023 DKT 31
** Order Granting Motion for admission *pro hac vice*
Entered 09/25/2023 DKT 23 & 24

Attorneys for Plaintiff Public Interest Legal Foundation

Table of Contents

Table of Authorities

Cases

Statutes / Constitution

Other Authorities

Introduction

The National Voter Registration Act ("NVRA") unambiguously requires public inspection of all records "concerning" voter list maintenance activities. 52 U.S.C. § 20507 (i)(1). Hawaii's eligible voter list ("Voter File") is subject to full public inspection because it is the culmination of Hawaii's voter list maintenance activities. The Foundation is statutorily entitled to the Voter File.

Defendant Chief Election Officer Scott T. Nago's ("Mr. Nago") Memorandum in Support of his Motion to Dismiss or, in the alternative, Motion for Summary Judgment (Doc. 35-1) misunderstands the NVRA. Congress placed maintenance and records-production obligations explicitly on "[e]ach *State*," 52 U.S.C. § 20507 (i)(1) (emphasis added). Congress specifically mandated that the Voter File be "maintained, and administered at the State level." 52 U.S.C. § 21083(a)(1)(A). Mr. Nago's belief that the public must ask each county to amalgamate a centralized database is plainly inconsistent with Congress's language and intent, as well as the weight of authority. If Mr. Nago possesses the Voter File, he must, by federal law, make it available.

Next, Congress did not limit the NVRA's sweeping inspection rights to a state-limited subset of activities. Congress drafted the NVRA broadly, and that choice settles this question. Section 8(i)(1) of the NVRA, the public disclosure requirement, reads as follows:

> Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, *all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters*, …

52 U.S.C. § 20507 (i)(1) (emphasis added) ("Public Disclosure Provision"). The Voter File falls squarely within this mandate.

Worse, Hawaii does not permit the Foundation's intended use of the data. It is axiomatic that the Foundation need not risk prison or fines to settle the law's meaning. Congress created declaratory judgment actions precisely to avoid such pitfalls. Accordingly, at least one other court has refused to dismiss a claim as unripe because the requestor had not used the state-prescribed form. *See Pub. Interest Legal Found., Inc. v. Bellows*, 588 F. Supp. 3d 124, 131 n.3 (D. Me. 2022).

Congress intended voter list maintenance to be transparent. Allowing the public to monitor the activities of election officials who maintain the rolls safeguards the right to vote. Yet, by restricting the public from using Hawaii's Voter File to discover and fix list maintenance errors, Hawaii law frustrates Congress's transparency and enforcement goals, such as learning if duplicate registrations exist. Hawaii imposes penalties on good government efforts to improve the Voter File. The penalties frustrate the goals Congress articulated in the NVRA: monitor and scrutinize Hawaii's voter list maintenance program. States may not frustrate this goal. Hawaii's law is plainly an obstacle to the

accomplishment of the NVRA's purposes and is therefore preempted and invalid under Article VI, Clause 2 (the Supremacy Clause), and Article I, Section 4, Clause I (Elections Clause) of the United States Constitution, and the Supreme Court's NVRA decision in *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013) ("*Inter Tribal*").

The uniform weight of authority supports the Foundation's position that the Voter File is a record "concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C § 20507 (i)(1). The Foundation has standing, has stated plausible claims for relief, and has named the only necessary party. Mr. Nago's Motion to Dismiss and motion for Summary Judgment should be denied.

Factual and Procedural Background and Concise Statement of Facts pursuant to L.R. 56.1 (e)

I. Mr. Nago Admits Hawaii Has a Statewide Voter File.

Section 8(i)(1) of the NVRA is a potent federal freedom of information law, requiring election administration officials to "make available for public inspection … all records concerning the implementation of programs and activities[1] conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]" 52 U.S.C. § 20507(i)(1).

[1] These are referred to as "voter list maintenance" programs or activities.

Additionally, federal law explicitly mandates that Mr. Nago "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State…." 52 U.S.C. § 21083(a)(1)(A). The Foundation alleges that "[t]he statewide Voter File is maintained and administered at the State level and is otherwise in the possession, custody, and control of Mr. Nago." (Doc. 20 ¶ 28.)

The requested document exists. It is maintained at the state level, through the "TotalVote" statewide voter registration system, which was launched in 2015. HAWAII OFFICE OF ELECTIONS, FINAL STATUS UPDATE ON THE IMPLEMENTATION OF HAWAII'S NEW VOTER REGISTRATION SYSTEM (2016) at §3. Exhibit 1, pp. 6-11.[2]

Mr. Nago reported to the Legislature this document exists: "Specifically, with the enactment of the [HAVA], the Office of Elections became responsible for implementing a statewide voter registration system for use by the counties." Exhibit 1, p. 1. He further reported: "The system was originally built to serve as a statewide database as permitted by state law (i.e., 'voter registration information

[2] *Available at* https://ags.hawaii.gov/wp-content/uploads/2012/09/Office_of_Elections_Report_to_the_Legislature_12-27-2016.pdf (last visited Jan. 24, 2024). Exhibit 1.

that is collected and maintained by the clerk of each county may be transmitted to a central file for the purpose of correlating registration data to prevent or detect duplicate voter registrations and for the compilation of election reports.')." Exhibit 1, p. 2. Finally, Mr. Nago informed the Legislature on the new statewide system: "The new statewide voter registration system (TotalVote) was launched on August 3, 2015…." Exhibit 1. p. 6. Mr. Nago further reports how the new system is housed within the "Hawaii Government Private Cloud." Exhibit 1, p. 7.

The State's Office of Elections website also acknowledges the statewide Voter File, with a Frequently Asked Questions webpage stating: "Only State and County Election Officials have access to the statewide voter registration database."[3] These public statements corroborate the Foundation's allegations and are admissions that Mr. Nago *does* in fact have possession, custody, and control of the statewide Voter File.[4] The NVRA mandates public inspection and copying of all voter list maintenance records, which includes the Voter File.

[3] https://elections.hawaii.gov/voting/election-security/. Exhibit 2.

[4] In his official report to the Members of Hawaii's Legislature, Mr. Nago discussed in detail the development of the "Mainframe Statewide Voter Registration System" and the State's requirements under both the HAVA and the NVRA to create and maintain a statewide voter list. *Id*. at pp. 2-6. He further informed the Legislature how Hawaii would comply with those federal statutes and use the $4 million in federal funds given to Hawaii to implement the "Total Vote" statewide voter registration system.

II. The Foundation Requested the Voter File.

On April 6, 2023, the Foundation requested from Mr. Nago a copy of Hawaii's Voter File pursuant to the NVRA's Public Disclosure Provision. (Doc. 20 ¶ 17.) Mr. Nago denied the Foundation's request, telling the Foundation to redirect such inquiries to Hawaii's respective County Elections Divisions. (Doc. 20 ¶¶ 19, 20, 22, 25.)[5] In August 2023, the Foundation sent at sizeable expense representatives to the Counties of Hawaii, Kauai, and Honolulu to request a copy of each county's VRS data (forgoing the County of Maui due to the fire disaster and resultant emergency declaration). (Doc. 20 ¶ 26.) Each county denied the Foundation's requests. (Doc. 20 ¶ 26.)[6]

Contrary to the NVRA, only persons demonstrating approved "election or government purposes" may receive the full Voter File. HRS 11-97(d).[7] Requestors with a different purpose —like the Foundation—may receive only "[a] voter's full name, district/precinct designation, and voter status…." *Id*. This restriction conflicts with the NVRA's Public Disclosure Provision, which requires states to

[5] Mr. Nago admits to receiving and responding to the Foundation's request letter. (*See* Doc. 35-1 at 2-3.)

[6] These facts are admitted. (*See* Doc. 35-1 at 2-3; Doc. 35-2 at 3.)

[7] True and correct copies of each county's required affidavit are attached to Mr. Nago's Memorandum, (Docs. 35-3, 35-4, 35-5, 35-6), and verified by Mr. Schulander's Declaration, (Doc. 35-2).

make "all" voter list maintenance records available for "public inspection," 52 U.S.C. § 20507 (i)(1), and places no restrictions of such records' use.

III. The Foundation Sued Mr. Nago Pursuant to the NVRA for His Failure to Provide the Voter File and for Restricting Its Use.

On September 21, 2023—168 days after requesting the Voter File— the Foundation filed this action to compel production as required by the NVRA. (Doc. 1.) The Foundation filed an amended complaint on September 22, 2023. (Doc. 20.)

On November 28, 2023, Defendant moved to dismiss the Amended Complaint or, in the alternative, moved for summary judgment. (Doc. 35.)

Standard of Review and Summary of Argument

I. The Foundation Has Standing.

The Ninth Circuit holds that failure to provide statutorily required information creates an Article III injury to a private plaintiffs. When a statute provides a right to information, the deprivation of which leads to an "informational harm," violation of the statute gives rise to a cognizable, Article III "informational" injury. *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 826, 833 (9th Cir. 2021). Accordingly, the Foundation has Article III standing.

II. Mr. Nago's Rule 12(b)(6) Motion Should be Denied.

"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). A complaint survives if it "state[s] a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007). Here, the Foundation pleaded a plausible NVRA violation. Mr. Nago concedes he received a request from the Foundation and did not provide the Vote File he possesses.[8] These concessions are sufficient to deny the motion to dismiss and the motion for summary judgment.

III. The Counties Are Not Necessary Parties.

Federal Rule of Civil Procedure 19 requires consideration of whether a party's absence would result in the Court not being able to "accord complete relief among existing parties." Fed. R. Civ. P. 19. Additionally, Rule 19 considers whether the party has an interest in the matter and if 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. *Id*. Here, Mr. Nago has possession, custody, and control of the Voter File, as well as a federal statutory obligation to administer the Voter File. *See* fn. 3. Mr. Nago alone may be ordered to produce the Voter File. The Court may declare Hawaii's use and access restrictions invalid. The counties' participation is not needed. *See Democratic*

[8] Interestingly, Mr. Nago never argues that he is *not* the statewide official under the NVRA required to maintain the Voter File or that he does *not* have possession, custody and control of it.

Nat'l Comm. v. Ariz. Sec'y of State's Office, No. CV-16-01065-PHX-DLR, 2017 U.S. Dist. LEXIS 30318, *15 (D. Ariz. Mar. 3, 2017).

IV. Mr. Nago's Motion for Summary Judgment Should be Denied.

The elements of the Foundation's claims are simple: Mr. Nago is the chief election officer for the State of Hawaii pursuant to the NVRA. 69 C.F.R 14002, 14003 (2004); HRS § 11-1-6. The Foundation requested the Voter File. Mr. Nago refused to produce the Voter File. Further, Hawaii's statute and regulations limit, in contravention of the NVRA, the purposes for which the Voter File may be received and used. Hence, the Foundation also seeks declaratory relief.

Each element of the Foundation's claim is admitted to by Mr. Nago, either in court filings or publicly on his website. His alternative motion for summary judgment cannot be granted because the undisputed material facts do not entitle him to judgment as a matter of law. Fed. R. Civ. P. 56; L.R. 56(g) and (i). In fact, those facts prove the Foundation's case. Accordingly. Mr. Nago's alternative motion does not meet his burden under Fed. R. Civ. P. 56.

Argument

I. The Foundation Has Article III Standing.

Mr. Nago argues that this action should be dismissed due to lack of Subject-Matter Jurisdiction, stemming from a lack of Article III standing. (Doc. 35-1 at 6, 11-12.) Not so. The Foundation has standing because it has suffered an

informational injury in fact stemming from Mr. Nago's refusal to disclose Hawaii's Voter File, *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 826, 833 (9th Cir. 2021), and a favorable decision would encompass not only likely, but certain, redressability.

More specifically, the Foundation alleges multiple adverse impacts caused by its informational injuries—among them, the inability to do the very things Congress envisioned when it passed the NVRA: monitor and scrutinize Hawaii's voter list maintenance program. Mr. Nago fails to address these specific allegations. This Court should decline Mr. Nago's invitation to nullify a vital statutory oversight mechanism designed to safeguard the right to vote.

Mr. Nago contends that no informational deprivation has occurred because he directed the Foundation to the respective county clerks. The NVRA does not permit such an abdication of statutory obligations. He has possession, custody, and control of the requested record: a *statewide* Voter File which mandates public inspection rights. 52 U.S.C. § 20507(i)(1). Additionally, the State's statutory requirement of demonstrating approved "election or government purposes" as a prerequisite to obtain such information violates the NVRA, which calls for public inspection without qualification. *Id.*

A. The Informational Injury Doctrine Applies.

The Informational Injury Doctrine is decades old. In *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989), the Supreme Court held in public-records cases, a plaintiff does not "need [to] show more than that they sought and were denied specific agency records" to have standing. There, the plaintiff sought records pursuant to the Federal Advisory Committee Act ("FACA"). The Supreme Court held that FACA created a public right to information by requiring advisory committees to the executive branch of the federal government to make available to the public its minutes and records, with some exceptions. 491 U.S. at 446-47. The defendant in *Public Citizen*, as in this case, asserted that the plaintiff did not "allege[] [an] injury sufficiently concrete and specific to confer standing." *Id.* at 448. The Supreme Court "reject[ed] these arguments." *Id*. at 449.

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

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

The Ninth Circuit has also long recognized that failure to provide information as required by a statute can create Article III injury. *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 826, 833 (9th Cir. 2021).When a statute explicitly provides a right to information, the deprivation of which leads to an informational harm, violation of the statute gives rise to a cognizable informational injury. *Id*. *See also Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 419-420 (9th Cir. 2020) (finding informational injury when a tribal health foundation challenged amendments to a tribal health consortium's amendment to its code of conduct).

Lower federal courts have uniformly relied on these Supreme Court decisions to find that requestors have standing to compel production of records under the NVRA. *E.g.*, *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 702 (E.D. Va. 2010); *Pub. Interest Legal Found. v. Bennett*, No. H-18-0981, 2019 U.S. Dist. LEXIS 39723, at *8-*10 (S.D. Tex., Feb. 6, 2019) (denying motion to dismiss), *adopted by Pub. Interest Legal Found., Inc. v. Bennett*, No. 4:18-CV-00981, 2019 U.S. Dist. LEXIS 38686 (S.D. Tex., Mar. 11, 2019); *Judicial Watch, Inc. v. King*, 993 F.Supp.2d 919, 923 (S.D. Ind. 2012).

Here, there is undoubtedly an informational injury, as the NVRA provides a right to inspect "all" voter list maintenance records and Mr. Nago's refusal to

provide the information has resulted in cognizable informational harms and impediments to the Foundation's organizational mission. (Doc. 20 ¶¶ 55-62.)

B. The Foundation Has Pleaded Specific Informational Injuries.

Further, the Foundation alleges specific informational harms resulting from Mr. Nago's refusal to provide the requested information. The Foundation cannot determine whether Hawaii's voter registration records are accurate and current or determine whether Hawaii is complying with state and federal voter list maintenance laws. Efforts to assist Hawaii fix voter roll errors and programmatic deficiencies are stymied. (Doc. 20, ¶ 57.) The Foundation gathers information about voter rolls across the nation for the purpose of assessing the accuracy of rolls and whether there is compliance by these jurisdictions with state and federal voter list maintenance standards. The Foundation specifically desires to use the requested records to study and investigate Hawaii's compliance with state and federal law. The NVRA requires Hawaii to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of— (A) the death of the registrant[.]" 52 U.S.C. § 20507(a)(4)(A). The Foundation cannot evaluate whether Hawaii is complying with the NVRA (and other laws) because Defendant is denying access to the requested records.

Evaluating election officials' voter list maintenance activities is the Public Disclosure Provision's purpose. In the words of the Fourth Circuit,

> It is self-evident that disclosure will assist the identification of both error and fraud in the preparation and maintenance of voter rolls. State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible. Without such transparency, public confidence in the essential workings of democracy will suffer.

Project Vote/Voting for Am., Inc. v. Long, 682 F.3d 331, 339 (4th Cir. 2012).

The Southern District of Florida accords: "To ensure that election officials are fulfilling their list maintenance duties, the NVRA contains public inspection provisions." *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12 (S.D. Fla. Mar. 30, 2018) (citing 52 U.S.C. § 20507(i)).

By denying the Foundation access to the Voter File, Mr. Nago is "refus[ing] to permit [the Foundation] to scrutinize the [Defendant's] activities to the extent [NVRA] allows." *Public Citizen*, 491 U.S. at 499. Denying the Foundation the ability to "scrutinize" those activities in Hawaii "constitutes a sufficiently distinct injury to provide standing to sue." *Id.*

The Foundation has plausibly alleged a deprivation of information *and* multiple specific injuries caused by that deprivation that are directly traceable to Mr. Nago's refusal to disclose information under the NVRA. The Foundation thus

has standing under *Inland Empire Waterkeeper*, as well as *Akins* and *Public Citizen*.

C. The Foundation's Claims Are Ripe.

Mr. Nago is wrong that the Foundation must submit the state-prescribed request form to each county before the Foundation is injured. The Foundation alleges, and Mr. Nago does not dispute, that the Foundation requested the Voter File from Mr. Nago. The Foundation alleges, and Mr. Nago does not dispute, that he has not produced the Voter File. The Foundation alleges, and Mr. Nago does not dispute, that Hawaii law does not permit the Foundation's intended activities. As explained, these allegations give rise to a concrete informational injury.

Significantly, the Foundation cannot complete the request forms because the Foundation's purpose for obtaining the voter list is outside Hawaii's statutory and regulatory use restrictions. Additionally, any affiant for the Foundation (or an employee who uses the Voter File) could be charged with a Class C felony and subjected to 5 years in prison and a $10,000 fine. (Doc. 35-5 at 8.) Mr. Nago's suggestion in his motion to "fill out an affidavit and see what happens" is not satisfactory or a required precondition of the Foundation's standing. *See Desertrain v. City of L.A.*, 754 F.3d 1147, 1155 (9th Cir. 2014) ("A penal statute cannot require the public to speculate as to its meaning while risking life, liberty, and property in the process[.]").

An argument like the one made by Mr. Nago in his Memorandum was made and squarely rejected in *Pub. Interest Legal Found., Inc. v. Bellows*, 588 F. Supp. 3d 124 (D. Me. 2022). There, the Maine argued that the Foundation's challenge to certain voter file restrictions was not ripe because the Foundation had "not yet applied for the Voter File." *Id.* at 131 n.3. The Court rejected the argument, explaining that the Court was "satisfied of the ripeness" of the Foundation's claims. *Id.*

This action is also ripe because Mr. Nago has denied the Foundation access to the Voter File, the Foundation alleges that Hawai'i law does not permit the Foundation's intended uses, and Mr. Nago refuses to say what other uses are lawful and which uses will result in fines and punishment.

Mr. Nago is also wrong that the Foundation filed this action before the expiration of the NVRA's ninety-day curative period. (*See* Doc. 35-1 at 12 (citing 52 U.S.C. § 20510(b)).) The Foundation provided pre-litigation notice on May 17, 2023, (Doc. 20, ¶ 21), 127 days before filing suit, (*see* Doc. 1). Accordingly, the Foundation has satisfied the NVRA's pre-litigation notice requirement and this case is therefore ripe.

II. The Foundation's Amended Complaint States a Valid Claim for a Violation of the NVRA.

A. The Voter File Is Subject to Disclosure Under the NVRA's Plain Language.

Mr. Nago argues that the Voter File is not a "record[] concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." (Doc. 35-1 at 13.) This position is contrary to the NVRA's text and uniform authority. To the Foundation's knowledge, every single court addressing this question has found the voter roll, or a portion thereof, to be within the NVRA's scope. *See Pub. Interest Legal Found., Inc. v. Bellows*, No. 1:20-cv-00061-GZS, 2023 U.S. Dist. LEXIS 52315, at *9 (D. Me. Mar. 28, 2023) ("In evaluating Counts II and III, the Court determined that the Voter File falls within the ambit of the Public Disclosure Provision and is therefore subject to disclosure under the NVRA."); *Pub. Interest Legal Found. v. Matthews*, 589 F. Supp. 3d 932, 943-44 (C.D. Ill. 2022) ("Defendants acted in violation of the Public Disclosure Provision of the NVRA when Defendants refused to make available for viewing and photocopying the full statewide voter registration list."); *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 438-442, 446 (D. Md. 2019) (holding, under the NVRA, that plaintiff "is entitled to the voter registration list for [a] County that includes fields indicating name, home address, most recent voter activity, and active or inactive status");

True the Vote v. Hosemann, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014) ("[T]he Voter Roll is a 'record' and is the 'official list[] of eligible voters' under the NVRA Public Disclosure Provision."); *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *13 (S.D. Fla. Mar. 30, 2018) ("[E]lection officials must provide full public access to all records related to their list maintenance activities, including their voter rolls.").

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

Hawaii has an electronic election record keeping system—TotalVote. The Voter File is generated from information stored in TotalVote, including names and addresses, and is Hawaii's current eligible voter list. "The process of compiling, maintaining, and reviewing" the Voter File is an activity performed by Hawaii election officials "that ensures the official roll is properly maintained to be

accurate and current." *True the Vote*, 43 F. Supp. 3d at 723. The Voter File is a "record" of that activity and thus within the NVRA's broad scope.

B. County Clerks Are Not Indispensable Parties.

This case is about public access to public records, not what office manages voter registration or list maintenance duties; that the county clerks are "registrars" does not absolve Mr. Nago from responsibility under the NVRA. The NVRA clearly states that each *state*—not city, county, or any other registrar's jurisdiction—shall maintain and make available for public inspection the covered records. 52 U.S.C. § 20507(i)(1). "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (citations and quotations omitted); *See also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted). The fact that county clerks may maintain their respective records at the county level is irrelevant. The Voter File must be maintained at the state level, 52 U.S.C. § 21083(a)(1)(A), and Mr. Nago does in fact maintain it. Simply put, because Mr. Nago possesses or otherwise has access to the Voter File, he is legally obligated to publicly disclose it.

The party insisting the necessity of joinder bears the burden of persuasion in arguing for dismissal under Fed. R. Civ. P. 12(b)(7). *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The Ninth Circuit has further declared, "There is no precise formula for determining whether a particular nonparty should be joined under Rule 19(a)." *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982). Rather, courts are to consider a variety of factors, including "[p]laintiff's right to decide whom he shall sue, avoiding multiple litigation, providing the parties with complete and effective relief in a single action, protecting the absentee, and fairness to the other party." *Id*. Additionally, this determination does not follow a hardline rule, but rather looks to the facts and circumstances of each case. *Id*.

Here, Mr. Nago has simply claimed that the county clerks have a legally protected interest in the outcome of the litigation, and that relief would undercut their legal responsibilities. (Doc. 35-1 at 20-21.) Mr. Nago also notes that the Foundation sent prelitigation letters to both himself and the respective counties. *Id*. While the Foundation did involve the county clerks in *separate* prelitigation notices, Mr. Nago, is the only party the Foundation must sue to enforce its claim under the NVRA, because Mr. Nago is "responsible for coordination of State responsibilities under [the NVRA]," 52 U.S.C. § 20509. With little elaboration, and no acknowledgement of his legal responsibilities, Mr. Nago has failed to

establish the necessity of joining the county clerks. While county clerks may play some roles in the maintenance and management of the state's Voter File, they are not required defendants in an action to provide the file. *See Democratic Nat'l Comm. v. Ariz. Sec'y of State's Office*, No. CV-16-01065-PHX-DLR, 2017 U.S. Dist. LEXIS 30318, *11-*13 (D. Ariz. Mar. 3, 2017).

III. The NVRA and HAVA Preempt HRS § 11-97, HAR § 3-177-160, and Hawaii's Delegation Policy.

The United States Supreme Court has held, the NVRA is a "complex superstructure of federal regulation atop state voter-registration systems." *Inter Tribal,* 570 U.S. at 5. The multi-layered system in which the NVRA operates is permitted by the Constitution's Election Clause. U.S. Const. Art I § 4, cl 1. Upon the States, the Elections Clause "imposes the duty ("shall be prescribed"), to prescribe the time, place and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Inter Tribal,* 570 U.S. at 8. The Elections "Clause substantive scope is broad," and includes "regulations relating to registration."' *Id.* at 8-9. Under the Elections Clause, there is no presumption against preemption. *Id.* at 14. Instead, the Elections Clause – like the NVRA – must be read "simply to mean what is said." *Id.* at 15.

> The power of Congress over the "Times, Place 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."

Inter Tribal, 570 U.S. at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)). In *Inter Tribal*, the Supreme Court held that the NVRA is superior to any conflicting state laws. In such situations, "the state law, 'so far as the conflict extend, ceases to be operative.'" *Inter Tribal*, 570 U.S. at 9 (quoting *Ex parte Siebold*, 100 U.S. at 384).

A. The NVRA Does Not Allow Delegated, Piecemeal Production of a Record Maintained at the State Level in a Centralized Database.

Because "the purpose of Congress is the ultimate touch-stone in every pre-emption case," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations and quotations omitted), the Court must first consider the purpose of the relevant laws. "To discern Congress' intent [the Court] examine[s] the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). HAVA provides, that Hawaii must "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered **at the State level** that contains the name and registration information of every legally registered voter in the State…." 52 U.S.C. §21083(a)(1)(A) (emphasis added). Congress expressly addressed who maintains and therefore must produce the Voter File: the state.

"[S]tate law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Hawaii's delegation efforts are therefore invalid under the conflict preemption doctrine, which occurs where "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (citations and quotations omitted).

Exercising the federal right to inspect the Voter File in Hawaii is a burdensome process, and Defendant makes it more so. Although it is maintained at the state level, Mr. Nago argues requestors must contact—or personally visit—four different county offices to collect each county's piece of the Voter File. Hawaii makes exercising federal rights four times harder. Where Congress's goals are so frustrated, state law must yield. *See, e.g.*, *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d at 445 (finding state law that restricted access to Maryland registered voters was preempted by the NVRA because it "exclude[ed] organizations and citizens of other states from identifying error and fraud" and therefore "undermines Section 8(i)'s efficacy").[9]

[9] Courts have regularly invalidated state laws where those laws conflict with the NVRA. *See Project Vote/Voting for Am., Inc. v. Long*, 813 F. Supp. 2d 738 (E.D. Va 2011) at 743 ("[T]o the extent that any Virginia law, rule, or regulation forecloses disclosure of completed voter registration applications with the voters' SSNs redacted, the court FINDS that it is preempted by the NVRA."); *see also*

B. The NVRA Preempts Hawaii's Use Restrictions.

Worse, a member of public may not receive the Voter File unless she has an approved "election or government purpose[]. HRS § 11-97. Hawaii Administrative Rule 3-177-160(e) provides six approved purposes, none of which includes the Foundation's intended activities—namely, "research, analysis, law enforcement, education, and commentary," (Doc. 20, ¶ 39.) On its face, Hawaii Administrative Rule 3-177-160(e) excludes the Foundation's activities and denies the Foundation access under HRS § 11-97. This conflicts with the NVRA.

The Foundation's activities are precisely the activities Congress encouraged when it passed the NVRA. Yet Hawaii prevents the Foundation from using the Voter File to engage in those activities. As in *Pub. Interest Legal Found., Inc. v. Bellows*, No. 1:20-cv-00061-GZS, 2023 U.S. Dist. LEXIS 52315, at *20 (D. Me. Mar. 28, 2023), HRS § 11-97 and HAR § 3-177-160(e) pose impermissible obstacles to the NVRA's objectives and are therefore invalid and unenforceable.

Pub. Interest Legal Found., Inc. v. Bellows, No. 1:20-cv-00061-GZS, 2023 U.S. Dist. LEXIS 52315, at *20 (D. Me. Mar. 28, 2023) ("Thus, the Court cannot ignore the plain language of the NVRA and Congress's purposes to safeguard Exception J and its privacy protections. In sum, the Court concludes that the NVRA preempts Exception J."); *Pub. Interest Legal Found. v. Matthews*, 589 F. Supp. 3d at 944 ("The Foundation has also shown that Section 5/1A-25 conflicts with, and is preempted by, the Public Disclosure provision insofar as Section 5/1A-25 prohibits the photocopying and duplication of the same list.").

Mr. Nago responds that the NVRA does not preempt Hawaii law because the list of permissible uses found in HAR § 3-177-160(e) is "non-exhaustive." (Doc. 35-1 at 20.)[10] Mr. Nago's argument only begs the question: What else is a lawful election or government purpose? He won't say. Instead, Mr. Nago says the Foundation must ask the counties what the law means and hope for the best. Several problems plague this approach. First, applicants must risk crushing fines and even prison time by attesting to a purpose that's not enumerated in HAR § 3-177-1. (*See* Doc. 35-5 at 8.)[11] "A penal statute cannot require the public to speculate as to its meaning while risking life, liberty, and property in the process[.]" *Desertrain v. City of L.A.*, 754 F.3d 1147, 1155 (9th Cir. 2014).

Second, Mr. Nago, not the counties, writes the administrative rules and decides what uses are lawful. In fact, Chapter 177 is titled "Rules of the Office of Elections" and gives Mr. Nago the ability to propose changes on his "own motion." HAR § 3-177-1. Mr. Nago is best positioned to provide the Foundation guidance about the lawfulness of the Foundation's intended activities. But he refuses to do

[10] HAR § 3-177-160(e) is the "non-exhaustive" list. It is set out in full in the Complaint, (Doc. 20, ¶ 10).

[11] The application form threatens, "WARNING: PURSUANT TO CHAPTER 19 OF THE HAWAI'I REVISED STATUTES, ANY PERSON KNOWINGLY PROVIDING FALSE INFORMATION MAY BE GUILTY OF A CLASS C FELONY, PUNISHABLE BY UP TO 5 YEARS IMPRISONMENT AND/OR $10,000 FINE."

so, punting the issue to county officials who have no more guidance than the Foundation. It is unclear—and a factual question—whether county officials can even authorize disclosure of the Voter File for uses not enumerated in HAR § 3-177-160(e), given that only Mr. Nago has rule-making authority. Indeed, the county request form refers to Section 3-177-160(e), when asking the applicant to state his intended use, *see* Doc. 35-5 at 7, indicating that applicants and officials should rely on the law's enumerated uses.

Third, a non-exhaustive list risks inconsistent enforcement. One county may grant the request; one county may deny the request; one county may prosecute the applicant for making a false statement. This is not a speculative belief. Rather, "[i]t is 'self-evident' that an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.'" *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018). Mr. Nago's "apply and see what happens" approach is legally unworkable and involves risk that undermines the efficacy of the NVRA. The Foundation has thus stated a plausible claim that the NVRA preempts HRS § 11-97 and HAR § 3-177-160(e).

Conclusion

The Foundation's complaint states viable causes of action and pleads facts sufficient to support its claims and request for declaratory and injunctive relief. Mr.

Nago has failed to meet any burden on any issue for which he moved in the motion to dismiss or, alternatively, the motion for summary judgment.

Prayer

The Foundation prays the Defendant's Motion to Dismiss Plaintiff's First Amended Complaint Filed September 22, Doc. 20, Or, In the Alternative, Motion for Summary Judgment, Doc. 35, be denied, and that the Foundation have all such other relief, at law or in equity, to which the Foundation may be entitled.

Dated: January 26, 2024.

Respectfully submitted,

/s/ Joseph M. Nixon
Noel H. Johnson* (Wisconsin Bar #1068004)
Maureen Riordan** (New York Bar #2058840)
Joseph M. Nixon** (Texas Bar #15244800)
Public Interest Legal Foundation, Inc.
107 S. West Street, Suite 700
Alexandria, Virginia 22314
Tel: (703) 745-5870
Fax: (888) 815-5641
njohnson@PublicInterestLegal.org
mriordan@PublicInterestLegal.org
jnixon@PublicInterestLegal.org
* Order Granting Motion for admission *pro hac vice*
Entered 10/26/2023 DKT 31
** Order Granting Motion for admission *pro hac vice*
Entered 09/25/2023 DKT 23 & 241

/s/ *James Hochberg*
JAMES HOCHBERG (HI Bar No. 3686)
ATTORNEY AT LAW, LLLC
700 Bishop St., Ste. 2100, Honolulu, HI 96813

Telephone: (808) 256-7382
E-mail: jim@jameshochberglaw.com

Attorneys for Plaintiff Public Interest Legal Foundation

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

The foregoing memorandum does exceed the twenty-five (25) page limit of L.R. 7.4(a) and does not contain more than 6,250 words, in compliance with L.R. 7.5(b). According to the software used to generate the document. This memorandum contains 6,108 words.

Dated: January 26, 2024.

Respectfully submitted,

/s/ Joseph M. Nixon
Joseph M. Nixon
Public Interest Legal Foundation, Inc.
107 S. West Street, Suite 700
Alexandria, Virginia 22314
jnixon@publicinterestlegal.org
** Admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2024, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

/s/ Joseph M. Nixon
Joseph M. Nixon
Counsel for Plaintiff
njohnson@PublicInterestLegal.org