No. 24-6629

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUBLIC INTEREST LEGAL FOUNDATION, INC.,

Plaintiff-Appellant

v.

SCOTT T. NAGO, IN HIS OFFICIAL CAPACITY AS THE CHIEF ELECTION OFFICER FOR THE STATE OF HAWAII,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Hawaii
No. 1:23-cv-00389-LEK-WRP
Hon. Leslie E. Kobayashi

PLAINTIFF-APPELLANT'S REPLY BRIEF

Joseph M. Nixon
Noel H. Johnson

Public Interest Legal Foundation, Inc.
107 S. West Street Suite 700
Alexandria, Virginia 22314
Tel: (703) 745-5870
Fax: (888) 815-5641

Attorney for Appellant
Public Interest Legal Foundation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution

Statutes

Regulations

INTRODUCTION

This case begins and ends with a question of preemption: Does the National Voter Registration Act ("NVRA") preempt a state-mandated maze of county-level procedures and regulations which makes it impossible to obtain an NVRA list maintenance record, that is, Hawaii's statewide voter file? If so, the district court erred in elevating Hawaii's statutory framework over the NVRA's and wrongly held that the Public Interest Legal Foundation ("the Foundation") had not presented a ripe claim. *Mi Familia Vota* controls this case.[1] *See Mi Familia Vota v. Fontes,* 129 F. 4th 691, 709 (9th Cir. 2025) ("*Mi Familia Vota*"). The NVRA preempts Hawaii's state statutes which defeat the clear language of the NVRA. The Foundation's NVRA claim for Hawaii's Voter File is ripe.

Mr. Nago's attempt to reframe this case as one about the Foundation's failure to complete "nominal steps" under Hawaii law ignores the plain language of the NVRA and controlling precedent. Mr. Nago failed to mention this Circuit's decision in *Mi Familia Vota* in his answering brief. Instead, Mr. Nago reiterates his incorrect argument that the Foundation, in making an NVRA request for the statewide Voter File, failed to follow Hawaii's mandate to obtain incomplete pieces of the list maintenance record from the county clerks and attempt to reassemble the document Mr. Nago must possess pursuant to 42 U.S.C § 15483 (a)(1)(A).

[1] This court issued its opinion in *Mi Familia Vota* on February 25, 2025, one business day after the Foundation's opening brief was filed, and thus, did not cite it earlier.

Mr. Nago admits the Foundation followed the NVRA's statutory process: the Foundation made a request of Hawaii's Chief Election Officer to produce the statewide Voter File; the Foundation provided written notice of a violation, that is, Mr. Nago's failure to provide the statewide Voter File; and, after more than 90 days passed without Mr. Nago producing the statewide Voter File, the Foundation filed suit. That is all the NVRA requires. Nothing in the NVRA requires "nominal steps" or conditions access to records on a requester's willingness to complete forms for every county clerk and the county's clerk arbitrary compliance with the requests.[2] Federal law makes the state election officer the custodian of the record sought and, here, the state's official custodian denied access.

The district court erred by subordinating federal disclosure rights to state direction to obtain piecemeal records from counties, and Mr. Nago's defense of that error underscores the need for reversal. The NVRA's public disclosure mandate is clear, its preemptive force is well established and recognized by this Circuit, and the record shows that the Foundation did everything Congress required. This Court should reverse the district court's dismissal and remand for compliance with this Court's opinion and mandate.

[2] Even the district court acknowledged that each county clerk is given discretion to determine whether the requestor's application complies with that clerk's understanding of Hawaii's laws and regulations relating to government or election purposes. ER-17-18.

REPLY POINTS

1. The NVRA preempts Hawaii's election laws, Haw. Rev. Stat. §§ 11-11, 11-14, 11-17, 11-97, and Haw. Code R. § 3-177-160, which collectively require the Foundation to make piecemeal requests for portions of the statewide Voter Files of each county clerk.
2. The NVRA preempts Hawaii's administrative rules, Haw. Code R. § 3-177-160, which limit use of the Voter Files to a "government or election" purpose.
3. Because the NVRA preempts Hawaii's conflicting election laws and administrative rules, the trial court erred in ruling the Foundation's NVRA claim against Mr. Nago was not ripe.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing this case for lack of ripeness. The Foundation made a request for records covered by the NVRA to Mr. Nago, the official 42 U.S.C. § 15483 (a)(1)(A) designated as the custodian of the requested record." Foundation received a final denial from Mr. Nago. The NVRA requires nothing more of a requestor.

First, the NVRA's text does not require requesters to exhaust arbitrary state-level processes with county clerks before seeking judicial enforcement. Section 8(i) provides a standalone right of public access to list maintenance records, and Section 11(b) sets forth a private enforcement mechanism that requires only a written notice of violation and a 90-day waiting period. 52 U.S.C. §§ 20507(i), 20510(b). The

Foundation followed that process in full.

Second, Hawaii's own election structure confirms that the Chief Election Officer is the proper recipient of NVRA requests for the statewide database mandated by 42 U.S.C. § 15483 (a)(1)(A). The State has centralized its voter registration system, designating the Chief Election Officer as the "single point of contact for all official election business." Haw. Rev. Stat. § 11-1.6(a)(3). Mr. Nago cannot avoid NVRA liability by deflecting responsibility to counties that act under his direction. This deflection defeats Congress' purpose of the NVRA, sending requestors on a piecemeal scavenger hunt for other NVRA covered documents. The counties do not have the statewide Voter File, period. Only the state does. Reassembling pieces of the file from different points in time cannot match the current statewide list maintenance document mandated by 42 U.S.C § 15483 (a)(1)(A).

Third, a case is ripe where, as here, a federal statute creates a cause of action upon final denial of a federal right. The Foundation alleged a concrete denial of access to federally protected records, and Mr. Nago's response was final. Because the Foundation complied with the NVRA's procedures and was denied access to covered records, its claim is ripe for adjudication.

ARGUMENT

I. Ripeness Under the NVRA is Not Disputed.

Ripeness turns on the presence of a legal issue fit for review and the existence

of a present, concrete injury. *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 752 (9th Cir. 2020). Both prongs are satisfied here, and Mr. Nago does not contest the underlying facts that establish them.

After submitting a written request to Mr. Nago under the NVRA for a list maintenance document he possesses, the Foundation received a clear, written denial from Mr. Nago. ER-282. He instructed the Foundation to request the statewide Voter File from county clerks who do not possess it. The Foundation then complied with the NVRA's pre-suit notice requirement, sending a notice of violation under 52 U.S.C. § 20510(b) and waiting more than 90 days before initiating suit. ER-266.

Mr. Nago does not dispute this chronology. He does not deny that the request was made. Mr. Nago does not deny that he formally responded and declined to produce the statewide Voter List. He does not deny that the Foundation followed the NVRA's notice process. Nor does he claim that any records were subsequently provided. Thus, the facts relevant to ripeness under the NVRA are uncontested.

Instead, Mr. Nago raises a flawed legal argument: that the Foundation's claim under the NVRA is not ripe because it did not pursue additional, state-created avenues for accessing piecemeal Voter Files. Unfortunately for Mr. Nago, the NVRA squarely preempts the frolic and detour to the counties mandated by Hawaii.[3]

Section 8(i)(1) of the NVRA mandates that "each State shall maintain for at

[3] Hawaii administrative code § 3-177-51, specifically states that the NVRA takes precedence over Hawaii's law and regulations.

least two years and shall make available for public inspection" all records concerning the implementation of programs to ensure accurate voter rolls. 52 U.S.C. § 20507(i)(1).[4] Section 11(b) provides that if a State fails to comply with a request for a record, a private party may provide written notice and, after 90 days failure to cure, bring a civil action. 52 U.S.C. § 20510(b). The NVRA does not require exhaustion of state administrative remedies or pursuit of alternative state procedures. Rather, exhausting state administrative procedures would defeat the purpose of Section 8(i) of the NVRA. As this Court held in *Mi Familia Vota*, the Election Clause of the United States Constitution confers on Congress the power to preempt a state created obstacle

[4] Hawaii does not dispute that its statewide Voter File is an election record under Section 8 of the NVRA. Courts agree with the parties. To the Foundation's knowledge, every single court addressing this question has found a state's Voter Roll to be covered by the NVRA. *See Pub. Interest Legal Found v. Bellows*, 92 F.4th 36, 49 (1st Cir. 2024) (Maine's Voter File is the culmination of its list maintenance activities); *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 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"); *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209 (D. Md. 2020) (holding that plaintiff is entitled to date-of-birth information under NVRA); *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."); *see also Ill. Conservative Union v. Illinois*, No. 20 C 5542, 2021 U.S. Dist. LEXIS 102543, at *15 (N.D. Ill. June 1, 2021) (holding, at the pleading stage, that statewide voter roll "falls within Section 8(i)'s disclosure provision")).

to implementing the purpose of a federal election statute. *Mi Familia Vota,* 129 F. 4th at 709.

Mr. Nago suggests the Foundation's claims are premature because it did not make follow-up requests to Hawaii's counties. That argument renders Section 8(i)(1) meaningless. The counties do not possess the list maintenance document sought. The Foundation did not request records from a local clerk or county registrar—it requested them from Hawaii's Chief Election Officer, who is mandated by 42 U.S.C. § 15483 (a)(1)(A) to possess the record sought. Mr. Nago is even designated by Hawaii law as the point of contact for all election business under the NVRA and is charged with managing the statewide voter registration system. Haw. Rev. Stat. § 11-1.6(a)(3), (b)(3). 52 U.S.C. § 20507(i)(1).

Moreover, Mr. Nago's response was unequivocal. He denied the request and told the Foundation to look elsewhere, from someone else. He admits this denial in his answering brief. DktEntry 18.1 14-16. That denial was not an invitation to negotiate. It was a final, conclusive rejection of the Foundation's NVRA rights. Ripeness does not require plaintiffs to chase theoretical alternatives when a statutory process has been completed, and a final denial issued. *Darby v. Cisneros,* 509 U.S. 137, 146 (1993).

To hold otherwise would frustrate the NVRA's enforcement scheme. A state could deny access to a variety of documents, then argue the claim is unripe until the

requester exhausts each subordinate office's requirements—no matter how burdensome, redundant, or inconsistent. That approach would create an exhaustion requirement Congress did not enact and would conflict with settled statutory interpretation principles. *Mi Familia Vota,* 129 F. 4th at 710 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

II. The NVRA Preempts Hawaii's Conflicting Election Laws

A. The Ninth Circuit's Decision in *Mi Familia Vota* Controls this Case.

In *Mi Familia Vota*, the Ninth Circuit reviewed a challenge to several provisions of Arizona's H.B. 2492. That law imposed new restrictions on voter registration, including a requirement that applicants using the Federal Form submit documentary proof of citizenship before being permitted to vote in presidential elections or by mail. This Court held that these provisions were preempted by Section 6 of the NVRA, 52 U.S.C. § 20505(a)(1), which requires states to "accept and use" the Federal Form as sufficient to register voters in federal elections without imposing additional documentary burdens beyond those specified on the form itself. *See Mi Familia Vota*, 129 F. 4th at 709.

Central to the holding was the total preemption of Election Clause legislation. This Court began its analysis by relying on the Supreme Court's holding in *Arizona v. Inter Tribal Council of Arizona, Inc.,* 570 U.S. 1 (2013), which squarely held that the NVRA completely preempts state laws requiring applicants to submit documentary proof of citizenship with the Federal Form. In *Inter Tribal*, the Court concluded that

Arizona could not require additional documentation as a prerequisite to registration using the Federal Form, because the NVRA mandates that states "accept and use" the Federal Form and "accept" means to treat the form as sufficient. *Id.* at 15. Relying on that authority, this Court concluded that Arizona's documentary proof-of-citizenship requirement was completely preempted and incompatible with federal law. *Mi Familia Vota,* 129 F. 4th at 712.

This Court also rejected Arizona's argument that the NVRA did not apply to presidential elections. Intervenors in *Mi Familia Vota* argued that the Constitution limits Congress's ability to regulate federal elections under the Elections Clause, U.S. Const. art. II, § 1, cl. 2. This Court rejected that argument as in conflict with over a century of binding Supreme Court precedent. As this Court explained, the Supreme Court has repeatedly affirmed Congress's power to regulate federal elections under both the Elections Clause and its enforcement powers under the Fourteenth and Fifteenth Amendments. *Id.* at 711.

This Court found additional support for complete preemption in the NVRA's purpose and structure. Congress enacted the NVRA to simplify voter registration for federal elections and eliminate barriers that had historically suppressed participation, particularly among racial minorities. 52 U.S.C. § 20501(a)(1) and (a)(3). By requiring uniformity and rejecting duplicative, state-imposed documentation requirements, Congress sought to ensure that all eligible voters could register for federal elections

using a single, simple process. *Id.* at 714.

The *Mi Familia Vota* decision stands for the principle that the four purposes of the NVRA are given priority over state statutes and regulation which defeat voter participation and transparency. The NVRA represents Congress's considered judgment about the requirements necessary to register to vote, protect the integrity of the electoral process, and ensure accurate and current voter registration rolls are maintained. 52 U.S.C. 20501(b). This Court's decision in *Mi Familia Vota* leaves no room for states to supplement or contradict these federal standards. Hawaii's election code imposes barriers on requestors of election records and violates the NVRA's core mandate to "ensure accurate and current voter registration rolls are maintained." *Id.* *Mi Familia Vota* controls this case and the challenged Hawaii provisions are preempted.

B. The NVRA Preempts Hawaii's Piecemeal Production of its Statewide Vote File

The NVRA requires that "[e]ach State shall maintain for at least two years and shall make available for public inspection" records related to list maintenance programs. 52 U.S.C. § 20507(i)(1). This includes the actual statewide list that is maintained and required by 42 U.S.C. § 15483 (a)(1)(A). *See Pub. Interest Legal Found v. Bellows*, 92 F.4th 36, 49 (1st Cir. 2024); *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d at 215-26. A State may not obstruct access by slicing responsibility across local subdivisions or by imposing process-heavy alternatives.

Mr. Nago argues the Foundation should have pursued county-level requests instead of seeking the complete statewide voter roll. This argument ignores Hawaii's own laws, which expressly vest the Chief Election Officer with control over the statewide database. Haw. Rev. Stat. § 11-1.6(b)(3). Hawaii centralizes its voter registration records, and the NVRA applies to Hawaii's Chief Election Officer. A list maintenance record that exists must be made publicly available under the NVRA.

The NVRA preempts Hawaii's fragmented access scheme because it conflicts with the NVRA's purpose and creates an obstacle to full enforcement. Under Hawaii's instructions here, access to the current and accurate statewide file is impossible. Counties do not possess the statewide Voter File. Requestors must contact multiple counties, pay multiple fees, navigate varying formats and redactions, all at different points in time and attempt to merge disparate records. The data change daily, even hourly. A registrant may be transferred from Kauai county to Maui County as the Foundation is flying from Maui to Kauai to get the records, and that registrant will never appear on either. List maintenance records are too fluid for a collection of county records to serve as a proxy for the state records mandated to be kept by 42 U.S.C. § 15483 (a)(1)(A). This shell game undermines the NVRA's transparency goals and the uniformity Congress intended. *See Inter Tribal,* 570 U.S. at 14 (NVRA preempts conflicting state law).

C. The NVRA Preempts Hawaii's Use Restrictions

Hawaii's statutory use restrictions are also preempted by the NVRA. Use restrictions are preempted when they conflict with federal access rights. *Bellows*, 92 F.4th at 49. Mr. Nago's relies on these use restrictions to deny production. See ER-266. His reliance on these use restrictions is all the more curious considering the Foundation conceded that neither apply to the Foundation's intended use.[5] The Foundation agreed to use the records consistent with the NVRA.

Even had the Foundation not conceded it has no purpose inconsistent with Hawaii's use restrictions, the NVRA contains no limitations on the use of disclosed records. Courts interpreting this provision have uniformly held that state laws may not add restrictions inconsistent with the NVRA. *Id.*

Mr. Nago suggests that the Foundation's request was invalid because the records might be used for political advocacy or commercial purposes. Courts have repeatedly rejected that argument too. See *Project Vote v. Long*, 682 F.3d at 336-38 (invalidating use restrictions on NVRA-covered records). The NVRA does not condition access on a requester's intended use, nor does it allow states to redefine the scope of disclosure through statutes which conflict with the NVRA. *Id.*

Mr. Nago cannot enforce a use restriction that conflicts with the NVRA.

[5] The Foundation concedes it has no commercial interest or purpose of use with the Voter File.

CONCLUSION

For the forgoing reasons, the Foundation prays this Court reverse the decision of the trial court, remand the case to the trial court for consideration of the case on the merits consistent with this Court's opinion and mandate, and for all other relief to which the Foundation may be entitled.

Date: May 14, 2025

/s/ Joseph M Nixon

Joseph M. Nixon (Texas Bar #15244800) (Federal Bar #1319)
Noel H. Johnson (Wisconsin Bar #1068004)
Public Interest Legal Foundation, Inc. 107 S. West Street Suite 700
Alexandria, Virginia 22314 3 Tel: (703) 745-5870 Fax: (888) 815-5641
njohnson@PublicInterestLegal.org
jnixon@publicinterestlegal.org
*Motion application for admission forthcoming

Attorneys for Appellant Public Interest Legal Foundation

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits of Fed. R. App. P. Rule 32(a) because this brief contains 2935 words.

This brief has been prepared in a proportionally spaced-type face using Microsoft Word in 14-point Times New Roman font.

/s/ Joseph M. Nixon
Joseph M. Nixon

Dated: May 14, 2025.

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2025, I electronically filed the foregoing using the Court's ECF system, which will serve this response on all parties.

/s/ Joseph M. Nixon
Joseph M. Nixon
Public Interest Legal Foundation, Inc.
107 S. West Street, Ste 700
Alexandria, VA 22314
(703) 745-5870
jnixon@publicinterestlegal.org

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 24-6629

I am the attorney or self-represented party.

This brief contains 2935 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

X complies with the word limit of Cir. R. 32-1.

☐ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

☐ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

☐ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

☐ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

☐ it is a joint brief submitted by separately represented parties.
☐ a party or parties are filing a single brief in response to multiple briefs.
☐ a party or parties are filing a single brief in response to a longer joint brief.

☐ complies with the length limit designated by court order dated .

☐ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature *(s/ Joseph M Nixon)* **Date** *(May 14, 2025)*