No. 22-16742

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICENTE BORJA, et al.,

Plaintiffs-Appellants,

v.

SCOTT NAGO, et al.,

Defendants-Appellees.

Appeal from the U.S. District Court for Hawai'i
Honorable Jill Otake
Civil Action No. 1:20-cv-00433-JAO-RT

BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Campaign Legal Center is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of Campaign Legal Center.

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INTERESTS OF AMICI[1]

Amicus curiae Campaign Legal Center ("CLC") is a leading nonpartisan, nonprofit election law organization that advocates, litigates, and develops policy on a range of democracy issues. CLC aims to protect Americans' voting rights and secure equal access to the franchise for all Americans, including members of historically disenfranchised communities. CLC regularly represents plaintiffs and *amici* in cases involving constitutional challenges under the *Anderson-Burdick* framework to vindicate Americans' constitutionally-protected fundamental right to vote.

Amicus curiae Election Law Clinic at Harvard Law School ("ELC") is a clinical legal program committed to protecting free and fair elections through litigation and legal advocacy. Its mission is to train the next generation of election lawyers and to bring novel academic ideas to the practice of election law. ELC aims to build power for voters, not politicians, and recognizes that the struggle for voting rights is a struggle for racial justice. ELC has represented parties in racial gerrymandering and voter suppression litigation in state and federal court. *See e.g.*, *Jacksonville Branch of the NAACP v. City of Jacksonville*, 2023 WL 34716 (M.D.

[1] All parties have consented to the filing of this brief. No party's counsel or other person authored this brief, in whole or in part, or made a monetary contribution to fund its preparation or submission.

Fla. Jan. 4, 2023); *Citizens Project v. City of Colorado Springs,* No. 1:22-cv-01365 (D. Colo. 2022); *Mont. Democratic Party v. Jacobsen*, 410 Mont. 114 (Mont. 2022).

Amici write to clarify the appropriate standard for evaluating constitutional claims alleging burdens on the right to vote and to highlight several substantive legal errors in the district court's opinion below, and to urge this Court to ensure that the standard for evaluating voting rights claims in this Circuit remains consistent with both this Court's precedent and longstanding practice nationwide.

INTRODUCTION

This case involves a straightforward claim that the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311, and Hawai'i's Uniform Military and Overseas Voters Act (UMOVA), Haw. Rev. Stat. §§ 15D-1-18, are unconstitutional as applied to the plaintiffs because they severely and unjustifiably burden the right to vote. The legal standard for assessing a claim like this has been clear for decades: *Anderson-Burdick* sliding-scale scrutiny, named for the pair of Supreme Court cases that articulated this doctrine more than thirty years ago. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Yet even though this Court has recently stated that *Anderson-Burdick* is "*the* single analytical framework" for "constitutional challenges to voting restrictions," the district court did not use, or even cite, this framework. *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1194 (9th Cir. 2021) (internal quotation

marks omitted) (emphasis added). Instead, the court simply applied rational basis review.

Using the correct legal standard, it is clear that heightened scrutiny is appropriate for the challenged application of UOCAVA and UMOVA. Under *Anderson-Burdick*, the level of scrutiny applied to voting regulations varies in tandem with the severity of the burdens they impose on voting. Mild burdens trigger less exacting review. At the opposite end of the spectrum, severe burdens, especially burdens constituting or approaching outright disenfranchisement, result in the equivalent of strict scrutiny. Outright disenfranchisement is exactly what the plaintiffs have experienced here thanks to the challenged application of UOCAVA and UMOVA. They are completely unable to vote in federal elections in Hawai'i, simply because they moved from Hawai'i to one U.S. territory rather than another. Voting burdens this severe are rare in the modern era, but when they arise, they require the highest level of scrutiny.

In addition to its failure to cite and use *Anderson-Burdick*, the district court gave three flawed reasons for subjecting this application of UOCAVA and UMOVA to the most deferential possible review. First, the court reasoned that rational basis review is appropriate here because the plaintiffs, who are now residents of U.S. territories, have no *constitutional* right to vote in federal elections in Hawai'i. But the court's position that the franchise requires a constitutional source is a

fundamental error. The right to vote need not originate from a federal constitutional provision. Voting rights can be (and often are) derived from state constitutional protections or state or federal statutory grants. And "once the franchise is granted to the electorate"—regardless of its source—"lines may not be drawn which are inconsistent with the Equal Protection Clause." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966).

Second, the district court asserted that voting *expansions* (like UOCAVA and UMOVA) warrant less scrutiny than voting *restrictions*. The court thus attached critical importance to how a voting regulation changes the status quo ante. Under *Anderson-Burdick*, however, the direction of the shift from the status quo ante is irrelevant. What matters, instead, is the *absolute* burden that the challenged policy imposes on voting—not the *relative* burden compared to the state of affairs that preceded the policy's adoption. Again, this is a foundational point that this Court has recently acknowledged by applying *Anderson-Burdick* to a voting expansion. *See Ariz. Democratic Party*, 18 F.4th at 1186-94.

And third, the district court concluded that voting laws that differentiate between residents and non-residents are subject only to rational basis review. On this view, heightened scrutiny is reserved for voting laws that treat people unequally *within* a given jurisdiction. But there is no non-resident exception to *Anderson-Burdick*; the doctrine applies equally to burdens on the right to vote of resident and

non-resident plaintiffs. Using *Anderson-Burdick*, many courts have carefully reviewed analogous municipal electoral systems that enfranchise some, but not other, non-residents. Several of these systems have been found unconstitutional. *See, e.g.*, *Bd. of Cnty. Comm'rs of Shelby Cnty. v. Burson*, 121 F.3d 244 (6th Cir. 1997). And the extreme implications of the district court's decision are apparent. Under the court's logic, if UOCAVA and UMOVA authorized former Democratic but not former Republican residents of Hawai'i to vote absentee in federal elections in Hawai'i, this blatant viewpoint discrimination would be subject only to rational basis review.

Accordingly, because of the multiple errors that infect the decision below, this Court should reverse or vacate that fundamentally flawed decision.

ARGUMENT

I. *Anderson-Burdick* Sliding-Scale Scrutiny Is the Proper Framework for Voting Regulations and So Must Be Used Here.

This is a case about voting regulations: a federal statute (UOCAVA) and a state law (UMOVA) that, together, determine which former residents of Hawai'i may vote absentee in federal elections in Hawai'i. The district court correctly recognized that "this case broadly implicates voting rights." *Borja v. Nago*, 2022 WL 4082061, at *1 (D. Haw. Sept. 6, 2022). But the court then erred in selecting the applicable constitutional test. The court recited the three tiers of scrutiny as if this were a conventional equal protection case, not one that implicates the fundamental

right to vote. *See id.* at *5. The court considered at some length whether the plaintiffs are "members of a quasi-suspect class," in which case heightened scrutiny would apply. *Id.* at *8-9. And while the court agreed that "an infringement on the fundamental right to vote" was the plaintiffs' core allegation, *id.* at *5, it did not identify or utilize the correct legal standard for a claim of this kind. *Anderson-Burdick* sliding-scale scrutiny did not appear in the court's decision.

Both the U.S. Supreme Court and this Court have confirmed that *Anderson-Burdick* is indeed the correct standard for a case about voting regulations. In *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), the plurality stated that in "election cases we have followed *Anderson*'s balancing approach." *Id.* at 190 (plurality opinion). In his concurrence, Justice Scalia agreed that, "[t]o evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick*." *Id.* at 204 (Scalia, J., concurring in the judgment); *see also id.* at 205 ("Since *Burdick*, we have repeatedly reaffirmed the primacy of its two-track approach."); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (referring to "the traditional *Anderson-Burdick* balancing test").

This Court, too, has held that *Anderson-Burdick* is the "'single analytical framework'" for "constitutional challenges to voting restrictions." *Ariz. Democratic*

Party, 18 F.4th at 1194 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011)). Recognizing that "[t]he Supreme Court delineated the appropriate standard of review for laws regulating the right to vote in *Burdick*," *Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc), this Court has "applied [*Anderson-Burdick*] to a wide variety of challenges to ballot regulations and other state-enacted election procedures," *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018). *See also, e.g.*, *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 387 (9th Cir. 2016) (en banc) (explaining that "constitutional challenges to election laws" are resolved through the "framework [that] is generally referred to as the *Anderson/Burdick* balancing test").

The district court's failure to apply *Anderson-Burdick* in its decision below is a reversible error. In *Gill v. Scholz*, 962 F.3d 360 (7th Cir. 2020), the district court *did* invoke *Anderson-Burdick* in a challenge to a ballot access requirement, but did not actually apply sliding-scale scrutiny, instead thinking itself bound by an earlier Seventh Circuit ruling. *See id.* at 365. As the Seventh Circuit held, "this was in error. By relying on [the precedent], the district court neglected to perform the fact-intensive analysis required for the *Anderson-Burdick* balancing test." *Id.* Accordingly, the Seventh Circuit reversed the district court decision because it did not conduct the inquiry "the Supreme Court has stated must be considered by district courts when applying the *Anderson-Burdick* balancing test." *Id.* at 366.

Under *Anderson-Burdick*'s "sliding scale test[,]" "the more severe the [voting] burden, the more compelling the state's interest must be." *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016); *see also, e.g.*, *Dudum*, 640 F.3d at 1114 n.27 ("[A] sliding-scale analysis, rather than pre-set tiers of scrutiny, appl[ies] to challenges to voting regulations."). "At one end of the spectrum, 'severe' restrictions must be 'narrowly drawn to advance a state interest of compelling importance.'" *Tedards v. Ducey*, 951 F.3d 1041, 1066 (9th Cir. 2020) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). At the other end of the spectrum, where burdens are less severe, "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Even at that most deferential end, "the burdening of the right to vote always triggers a higher level of scrutiny than rational basis review." *Tedards*, 951 F.3d at 1066; *see also, e.g.*, *Public Integrity Alliance*, 836 F.3d at 1025 ("*Burdick* calls for neither rational basis review nor burden shifting.").

Applying *Anderson-Burdick*, it is undeniable that UOCAVA and UMOVA severely burden the plaintiffs' right to vote. After all, the statutes *completely prevent* the plaintiffs from voting in federal elections in Hawai'i—a right they would have enjoyed had they only moved to the Northern Mariana Islands or another country

rather than to Guam and the U.S. Virgin Islands.[2] Because of this outright disenfranchisement, this case more closely resembles precedents of an earlier era than most contemporary disputes about voting regulations. Denying the vote to certain former residents (but not others) of Hawai'i is analogous to disenfranchising Virginia residents who could not afford to pay a poll tax, *see Harper*, 383 U.S. at 664, or residents of a New York school district who did not own property or have a child enrolled in public school, *see Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969). The Supreme Court applied "exacting judicial scrutiny" to those "statutes distributing the franchise" to some people but not others, *id.* at 628. The same rigorous review is appropriate here. "Strict scrutiny is the standard for cases where 'the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote.'" *Mays v. LaRose*, 951 F.3d 775, 786 (6th Cir. 2020) (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973)).

Given plaintiffs' complete disenfranchisement, strict scrutiny is also necessary under modern *Anderson-Burdick* doctrine. In *Public Integrity Alliance*, this Court observed that voting is severely burdened by "[r]estrictions that block access to the ballot or impede individual voters or subgroups of voters in exercising

[2] UOCAVA and UMOVA similarly bar former Hawai'i residents living in American Samoa and Puerto Rico, including members of plaintiff Equally American, from voting in federal elections in Hawai'i.

their right to vote." 836 F.3d at 1024 n.2. As applied here, UOCAVA and UMOVA plainly "block access to the ballot" for former residents of Hawai'i who move to certain U.S. territories rather than to others or to a foreign country. *Id.* Indeed, the statutes do more than "impede" these former residents "in exercising their right to vote"—the laws entirely negate that fundamental right. *Id.* Under *Anderson-Burdick*, this Court has discerned a "severe burden" on voting where an early deadline for candidate nomination petitions meant that some voters might not be able to cast a ballot for their preferred candidate. *Nader v. Brewer*, 531 F.3d 1028, 1039 (9th Cir. 2008). Compared to the impediment in *Nader*, the barrier faced by the plaintiffs in this case is far more serious. The *Nader* plaintiffs could still vote for any other candidate on the ballot; the plaintiffs here cannot vote in federal elections at all.

Disturbingly, the United States has suggested in a related proceeding that the plaintiffs here are not severely burdened because they could simply return to Hawai'i (or to another state) to exercise their fundamental right to vote. According to the federal government, states' former residents are "free to move to any state of the United States, where they can take up residence and exercise their voting rights in local, state, and federal elections." U.S. Consolidated Response to Petitioners' Merits Submissions at 4, *Igartúa et al.*, Case 13.154, Inter-Am. Comm'n H.R. (June 28, 2018). The obvious flaw in this logic is that permanently changing one's residence is an extraordinarily burdensome act that entails packing and moving

belongings, saying goodbye to friends and relatives, and finding a new home and job hundreds or thousands of miles away. The Supreme Court did not tell the plaintiffs in *Harper* they could scrounge together the money to pay the poll tax, or the plaintiff in *Kramer* he could buy property or have a child. The United States' intimation that residents of U.S. territories must uproot their entire lives to enjoy the same basic constitutional guarantees as their fellow Americans is not only callous but out of step with all applicable precedent.

II. The Fundamental Right to Vote Need Not Be Derived from the Federal Constitution.

While the principal flaw of the decision below was its failure to cite, let alone use, the *Anderson-Burdick* framework, that mistake was compounded by several more errors. All those errors went the same way, improperly leading the court to subject this application of UOCAVA and UMOVA to mere rational basis review. First, the court improperly concluded that the fundamental right to vote couldn't have been burdened here because the plaintiffs have no *constitutional* right to vote in federal elections in Hawai'i. As the court put it, "U.S. citizens who move to a territory or another state have no *constitutional* right to vote in their former states of residence," *Borja*, 2022 WL 4082061, at *6 (emphasis altered), meaning that "no fundamental right mandating the application of strict scrutiny is affected," *id.* at *8.

This line of reasoning runs aground on the fact that the federal Constitution is not the only source from which the fundamental right to vote can be derived. To be sure, the Constitution *is* one such source. "[T]he right to vote in [U.S. House of Representatives] elections is conferred by Art. I, s 2, of the Constitution." *Harper*, 383 U.S. at 665. The right to vote in U.S. Senate elections is similarly conferred by the Seventeenth Amendment. *See* U.S. Const. amend. XVII; *see also, e.g.*, *Oregon v. Mitchell*, 400 U.S. 112, 138 (1970) (Douglas, J., concurring in part and dissenting in part) (referring to the right to vote as a "civil right deeply embedded in the Constitution"). For the most part, though, the Constitution leaves the regulation of voting to the federal government and the states, subject to certain constitutional restrictions. *See* U.S. Const. art. I, § 4 (empowering Congress to regulate congressional elections); *id.* art. II, § 1 (same for presidential elections); *id.* art. IV, § 4 (requiring states to maintain a republican form of government); *id.* amend. XV (prohibiting race discrimination in voting); *id.* amend. XIX (same for sex discrimination); *id.* amend. XXIV (same for poll taxes); *id.* amend. XXVI (same for age discrimination as to citizens older than eighteen).

Enacted pursuant to constitutional provisions enabling Congress to regulate federal elections, federal statutes are one non-constitutional source of the fundamental right to vote. Here, for example, UOCAVA entitles "overseas voters to use absentee registration procedures and to vote by absentee ballot in . . . elections

for Federal office." 52 U.S.C. § 20302(a)(1). Similarly, the 1970 amendments to the Voting Rights Act (VRA) guaranteed citizens over the age of eighteen the right to vote in federal and state elections. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 301–05, 84 Stat. 314, 318–19 (1970); *see also Oregon*, 400 U.S. at 117-18 (opinion of Black, J.) (upholding this provision with respect to federal elections). The 1970 VRA amendments further abrogated state residency requirements for voting for President, directing states to allow voters to register for presidential elections until thirty days before election day, and established that voters can vote absentee for President as long as they request their ballots at least seven days before the election. *See* § 202, 84 Stat. at 316-17.

State constitutions are another font of the fundamental right to vote. "Forty-nine states" (all but Arizona) "explicitly grant the right to vote through specific language in their state constitutions." Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 101 (2014). The right to vote delineated in state constitutions typically extends directly to state and federal elections. Through Article I, Section 2 and the Seventeenth Amendment, this right also applies indirectly to congressional elections insofar as state constitutional qualifications prescribed for state house elections must be the same for congressional elections. Lastly, state *statutes* can confer the fundamental right to vote as well. For instance, UMOVA creates a state right for overseas voters to vote absentee in federal elections

in Hawai'i that parallels the federal right announced by UOCAVA. *See* Haw. Rev. Stat. § 15D-4; *see also, e.g.*, *Kramer*, 395 U.S. at 622-23 (describing the New York law that established a right to vote in school district elections).

The district court's conclusion that no *fundamental* right to vote is at issue here because no *constitutional* right to vote is involved is therefore erroneous. The fundamental right to vote is often derived—and is no less precious when it flows—from a non-constitutional source. Because the court incorrectly believed that no fundamental right to vote is implicated here, the court also missed the next critical point. Once granted—by *any* legal provision—the fundamental right to vote is constitutionally protected against arbitrary or unjustified burdens.

The Supreme Court made this clear long ago. In *Harper*, Virginia law created a right to vote in Virginia elections, but limited this right to people who paid a poll tax. Even though this right's origin was non-constitutional, the Court ruled that it was constitutionally safeguarded. "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause." 383 U.S. at 665. In case there were any doubt, the Court repeated this rule in *Bush v. Gore*, 531 U.S. 98 (2000). Florida law created a right to vote for President, but a Florida court ordered a recount that threatened to treat differently presidential ballots for no sound reason. The U.S. Supreme Court stopped the recount, citing *Harper* and reasoning that, "[h]aving once granted the right to vote on equal terms, the State

may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05.

This Court, too, has refuted the district court's position that the fundamental right to vote must have a federal constitutional source. In *Green v. City of Tucson*, 340 F.3d 891 (9th Cir. 2003), this Court confronted an Arizona statute regulating voting on proposed municipal incorporations. This Court acknowledged that "there is no inherent right to vote on municipal incorporation under the federal constitution." *Id.* at 896. But immediately afterward, this Court held that "once a state grants its citizens the right to vote on a particular matter, such as municipal incorporation, that right is protected by the Equal Protection Clause." *Id.* at 897; *see also, e.g.*, *Hussey v. City of Portland*, 64 F.3d 1260, 1263 (9th Cir. 1995) ("[O]nce citizens are granted the right to vote on a matter, the exercise of that vote becomes protected by the Constitution even though the state was not obliged to allow any vote at all.").

The upshot of these cases is straightforward. Neither federal law nor state law *had* to establish a right of former residents of Hawai'i to vote absentee in federal elections in Hawai'i. But UOCAVA and UMOVA *did* establish that right. Having been established, that right is constitutionally protected against burdens alleged to be arbitrary or unjustified, including UOCAVA and UMOVA's restriction of the right to former residents of Hawai'i who move to some places rather than to others.

Of course, UOCAVA and UMOVA created (and limited) a non-constitutional right to vote. But so did the laws at issue in *Harper*, *Bush*, *Green*, and *Hussey*. Regardless of its source, the right to vote is protected by the Equal Protection Clause.

III. Voting Expansions and Restrictions Are Analyzed Under the Same Framework.

The district court's next mistake was to portray UOCAVA and UMOVA as expansions of, rather than restrictions on, the right to vote, and for that reason subject them to rational basis review. "[T]his case is about the constitutionality of the extension of the right to vote," the court stated, not "the denial of voting rights." *Borja*, 2022 WL 4082061, at *7-8. The court continued: "Where, as here, voting rights have been extended to some, strict scrutiny is not required[.]" *Id.* at *7.

The district court's demarcation between voting expansions and voting restrictions is irreconcilable with precedent. Under *Anderson-Burdick*, it is the *absolute* severity of a voting burden that determines the stringency of judicial review. *See, e.g.*, *Burdick*, 504 U.S. at 434 (referring to "*the extent* to which a challenged regulation burdens" voting (emphasis added)); *Anderson*, 460 U.S. at 789 (referring to "*the character and magnitude* of the" voting burden (emphasis added)). But under the court's approach, the critical factor is the *relative* severity of a voting burden compared to the status quo ante. A regulation that makes voting more difficult than it was before (i.e., a voting restriction) warrants heightened scrutiny,

while a regulation that makes voting easier than it used to be (i.e., a voting expansion) necessarily receives rational basis review.

To see how the district court's method diverges from *Anderson-Burdick*, suppose a challenged law limits early voting to the ten days before an election. Also imagine two alternative scenarios *before* this law was enacted: one where the early voting period lasted for fifteen days, and another where the early voting period was five days long. Under *Anderson-Burdick*, the two alternative scenarios are irrelevant. All that matters is the severity of the voting burden imposed by the current ten-day early voting period, which determines the stringency of judicial review. Under the court's reasoning, on the contrary, everything hinges on which alternative scenario preceded the adoption of the current ten-day early voting period. If the previous policy was a fifteen-day early voting period, then the challenged law is a voting restriction that warrants heightened scrutiny. But if the previous policy was a five-day early voting period, then the challenged law is a voting expansion that necessarily receives rational basis review.

Unsurprisingly, federal courts routinely reject arguments that voting expansions are categorically entitled to deferential review. In *Arizona Democratic Party*, this Court examined an Arizona law that expanded access to absentee voting by extending the deadline for voters to correct mismatched signatures on their absentee ballots (although not to affix signatures that had been omitted in the first

place). *See* 18 F.4th at 1181-85. Rather than automatically applying rational basis review to this voting expansion, this Court properly performed the usual *Anderson-Burdick* analysis. *See id.* at 1186-94.

Likewise, in *Harding v. Edwards*, 487 F. Supp. 3d 498 (M.D. La. 2020), the district court evaluated a Louisiana law that, like UOCAVA and UMOVA, selectively expanded access to voting by making absentee voting available to certain groups but not to others. *See id.* at 506-07. The court correctly applied *Anderson-Burdick* scrutiny, not rational basis review, to this voting expansion, and concluded that the policy "imposed an undue burden on [the] right to vote" of individuals whom the policy did not reach. *Id.* at 506-28. Consequently, the court ordered that these individuals be allowed to vote absentee if they completed an absentee ballot application. *Id.* at 528. Courts have further applied *Anderson-Burdick* where Illinois offered election day registration in some counties but not others, *see Harlan v. Scholz*, 866 F.3d 754, 759-60 (7th Cir. 2017), and where Florida gave certain voters, but not others, the opportunity to cure defective absentee ballots, *see Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *5-7 (N.D. Fla. Oct. 16, 2016).

To be sure, the ultimate *result* of applying *Anderson-Burdick* scrutiny may often be different for voting expansions than for voting restrictions. As a general matter, voting expansions may be more likely to impose lighter burdens on voting

and to advance more compelling governmental interests. But the point here is that *Anderson-Burdick applies* to both voting expansions and voting restrictions, meaning that the district court erred in failing to conduct this analysis and instead holding that voting expansions are necessarily entitled to rational basis review. *Cf. Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (criticizing the district court's "focus on the *changes* wrought by" a challenged regulation rather than the "'magnitude' of [its voting] burden").

To justify its view that voting expansions must receive deferential review, the district court relied heavily on *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *See Borja*, 2022 WL 4082061, at *7-8. In *Katzenbach*, the Supreme Court upheld a provision of the VRA that barred the use of the literacy test to disenfranchise individuals who had completed a certain grade level in non-English-language schools in Puerto Rico—but that did not extend this benefit to graduates of all non-English-language schools, including ones outside Puerto Rico. *See* 384 U.S. at 656-58. *Katzenbach*, however, long predates the Court's development of *Anderson-Burdick* sliding-scale scrutiny in the 1980s and 1990s. In *Katzenbach*, the Court also did not apply rational basis review to the challenged VRA provision, but rather declined to apply "the closest scrutiny." *Id.* at 657. This intermediate level of review is perfectly consistent with *Anderson-Burdick*, but gives little support to the district court's approach. Moreover, the Court gave many reasons for sustaining the VRA

provision beyond its expansion on the franchise: Congress's familiarity with Puerto Rico schools, the desirability of Puerto Rico schools teaching in Spanish, Congress's aim to promote migration from Puerto Rico to U.S. states, and so on. *See id.* at 657-58. That the VRA provision was a voting expansion was thus the beginning of the Court's analysis—not, as for the district court, the end of it.

The district court further cited *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), in this portion of its opinion. *See Borja*, 2022 WL 4082061, at *7-8. In *McDonald*, the Supreme Court turned down a challenge by jailed Chicago inmates to an Illinois law that permitted other groups, but not them, to vote absentee. *See* 394 U.S. at 806-11. But *McDonald* predates *Anderson* and *Burdick* by almost as long as *Katzenbach*. Additionally, the crux of the Court's logic in *McDonald* was not that the Illinois law was a voting expansion, but rather that the plaintiffs had failed to demonstrate that they were "absolutely prohibited from exercising the franchise." *Id*. at 809. This emphasis on the severity of the plaintiffs' voting burden, of course, is the hallmark of *Anderson-Burdick*. Furthermore, after deciding *McDonald*, the Court first limited that case to its facts and later abandoned its reasoning altogether. In *Goosby v. Osser*, the Court permitted claims from pretrial detainees similar to those in *McDonald* to proceed because, in "sharp contrast" to *McDonald*, alternative voting methods were unavailable to the plaintiffs. 409 U.S. 512, 521 (1973). The next year, in *O'Brien v. Skinner*, the Court observed that "the

Court's disposition of the claims in *McDonald* rested on failure of proof," and held that New York's failure to provide pretrial detainees with access to absentee ballots violated the Equal Protection Clause. 414 U.S. 524, 529, 531 (1974). Finally, in *American Party of Texas v. White*, the Court reversed a district court decision that, relying on *McDonald*, had upheld Texas's practice of allowing only major parties' primary voters to cast absentee ballots. 415 U.S. 767, 794-795 (1974). The Court declared that "the unavailability of the absentee ballot [to minor parties' primary voters] is obviously discriminatory" and that the district court "[p]lainly . . . employed an erroneous standard in judging the Texas absentee voting law." *Id*. at 795.

Accordingly, the district court erred by relying on Supreme Court precedents from the era before *Anderson* and *Burdick*, which do not use the modern framework for assessing voting regulations. Even if those old cases are still good law, they do not stand for the proposition for which the court invoked them, namely that voting expansions necessarily receive rational basis review. Voting expansions, like all voting regulations, are subject to sliding-scale scrutiny under *Anderson-Burdick*, and the court's failure to apply the proper legal standard is reversible error. *See Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011) (a trial court's failure to identify the correct legal standard is reversible error, even in an abuse of discretion context).

IV. Voting Regulations Affecting Residents and Non-Residents Are Analyzed Under the Same Framework.

The district court's final reason for subjecting UOCAVA and UMOVA to rational basis review was that the plaintiffs here, and all the individuals disenfranchised by these statutes, are non-residents of Hawai'i. According to the court, a citizen only enjoys the right to vote "on an equal basis with other citizens *in the jurisdiction*." *Borja*, 2022 WL 4082061, at *6 (internal quotation marks omitted). Heightened scrutiny would thus be available only in "cases involving disparate treatment in the voting context *within a single geographical jurisdiction*." *Id.* at *7.

To begin with, this Court need not resolve whether Hawai'i may constitutionally limit the franchise to its own residents. As the district court noted, such restrictions have generally been upheld because of a state's compelling interest in "preserv[ing] [its] basic conception of a political community." *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972). Here, however, the distinction is not between residents and nonresidents, but rather between different categories of nonresidents. Under UOCAVA and UMOVA, Hawai'i permits certain categories of former residents, including those living in the Northern Mariana Islands and outside of the United States, to vote by mail in the state, but prohibits others from doing so, including plaintiffs and other residents of the remaining inhabited U.S. territories.

Importantly, it is not uncommon for jurisdictions to extend the franchise to individuals living beyond their boundaries, as Hawai'i has done. Many localities

allow non-resident property owners or nearby individuals who live within the same larger entity (like a county) to vote in certain elections. These arrangements have led to substantial litigation, sometimes brought by non-residents seeking more voting rights, *see, e.g.*, *Wit v. Berman*, 306 F.3d 1256 (2d Cir. 2002), and elsewhere initiated by residents complaining about the dilution of their votes, *see, e.g.*, *May v. Town of Mountain Village*, 132 F.3d 576 (10th Cir. 1997). *See also generally* Richard Briffault, *Who Rules at Home? One Person / One Vote and Local Governments*, 60 U. Chi. L. Rev. 339, 396-401 (1993) (discussing some of these "expanded electorates" cases).

Federal courts consistently recognize that distinctions like these must be closely scrutinized. One circuit applies *strict scrutiny* to the local enfranchisement of some non-residents. *See, e.g.*, *Locklear v. N.C. State Bd. of Elections*, 514 F.2d 1152, 1154 (4th Cir. 1975). Most other circuits use a multifactor test that weighs a number of practical considerations. *See, e.g.*, *Duncan v. Coffee Cnty.*, 69 F.3d 88, 96 (6th Cir. 1995). Under these approaches, several city and county policies extending the right to vote to certain non-residents have been invalidated. *See, e.g.*, *Burson*, 121 F.3d at 249-51 (Shelby County, Tennessee); *Locklear*, 514 F.2d at 1154-56 (Robeson County, North Carolina); *Brown v. Bd. of Comm'rs of City of Chattanooga*, 722 F. Supp. 380, 397-400 (E.D. Tenn. 1989) (Chattanooga, Tennessee). These results are impossible to reconcile with the district court's theory

that heightened scrutiny applies only to "disparate treatment . . . *within a single geographical jurisdiction*." *Borja*, 2022 WL 4082061, at *7.

The cases applying heightened scrutiny to laws that selectively extend the franchise to non-residents fall neatly within the *Anderson-Burdick* framework. In *Anderson* itself, the Supreme Court declared that the freedom protected by the doctrine is "the *individual's*"—not the *resident's*—"right to vote and his right to associate with others for political ends." 460 U.S. at 788 (emphasis added). And this was no careless choice of words, as the *Anderson* Court explicitly acknowledged that state electoral regulations could have extraterritorial effects. "[I]n the context of a Presidential election, [a] state-imposed restriction[] . . . . has an impact beyond its own borders." *Id.* at 795. In like fashion, the Court observed in *Burdick* that "[e]lection laws will invariably impose some burden upon *individual voters*"—not individual *residents*. 504 U.S. at 433 (emphasis added). The *Burdick* Court elaborated that sliding-scale scrutiny safeguards "the First and Fourteenth Amendment rights of *voters*"—again, not *residents*. *Id.* at 434 (emphasis added).

The district court cited several Supreme Court cases in support of its decision to apply rational basis review. *See Borja*, 2022 WL 4082061, at *6-7. But cases like *Evans v. Cornman*, 398 U.S. 419 (1970), *Dunn*, and *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) hold only that jurisdictions *may* constitutionally limit the franchise to their own residents. *See Holt Civic Club*, 439 U.S. at 68-69

("[A] government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."); *Dunn*, 405 U.S. at 337 n.7; *Evans*, 398 U.S. at 421. These cases in no way imply that, having chosen to enfranchise *some* non-residents, jurisdictions can draw arbitrary or unjustified distinctions between different individuals in this category. Similarly, decisions of this Court like *Green*, 340 F.3d at 900, and *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008), merely identify certain electoral contexts in which the Supreme Court has in the past applied heightened scrutiny. *Green*'s and *Lemons*'s lists do not purport to be exhaustive, as shown by their omissions of, inter alia, party primary regulations, *see, e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), racial gerrymanders, *see, e.g.*, *Cooper v. Harris*, 581 U.S. 285 (2017), and racially dilutive practices, *see, e.g.*, *Rogers v. Lodge*, 458 U.S. 613 (1982).

Neither the Supreme Court's nor this Court's precedents, then, authorize rational basis review for voting regulations that selectively enfranchise non-residents. And for good reason. If jurisdictions could really draw *any* distinctions between non-residents, Hawai'i could, for example, authorize former resident Democrats but not former resident Republicans to vote absentee in federal elections in Hawai'i. The state could enfranchise wealthy former residents but not poor former residents, former residents from O'ahu but not former residents from other islands, former residents approved by the governor, but not former residents rebuffed. Maybe

some of these policies would fail even rational basis review, maybe not. The point is that the precious right to vote deserves more protection than that afforded by the most deferential standard known to constitutional law. And under *Anderson-Burdick* sliding-scale scrutiny, but not under the district court's approach, the franchise receives the security it is due.

This security, it is worth reiterating, does not condemn all voting regulations that distinguish between residents and non-residents (or even between different groups of non-residents). Supreme Court cases like *Evans*, *Dunn*, and *Holt Civic Club*, which confirm the constitutionality of limiting the franchise to residents, are fully compatible with the application of sliding-scale scrutiny. That is because, while the political exclusion of non-residents negates their right to vote in a given jurisdiction, this exclusion may directly advance the government's compelling interest in "preserv[ing] [its] basic conception of a political community." *Dunn*, 405 U.S. at 344. This exclusion "therefore could withstand close constitutional scrutiny." *Id.* Crucially, however, a jurisdiction that *does* grant the right to vote to some nonresidents can no longer credibly maintain that its conception of a political community is restricted to residents—particularly when it does so with respect to residents of certain United States territories but not others. The jurisdiction's partial enfranchisement of nonresidents undermines this otherwise valid interest, requiring it to assert other rationales for whichever lines it draws with respect to resident and

nonresident voting. These other rationales may be persuasive, or not, and they may be furthered by the jurisdiction's chosen policy, or not. The purpose of *Anderson-Burdick* sliding-scale scrutiny is to enable the federal courts to make these determinations, and thus to decide whether the jurisdiction's chosen policy is constitutional.

CONCLUSION

For the foregoing reasons, this Court should reverse or vacate the district court's fundamentally flawed decision.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32 because this brief contains 6,371 words, excluding the parts of the brief exempted by Rule 32(f).

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Dated: May 8, 2023

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