No. 22-16742

In the
United States Court of Appeals
for the Ninth Circuit

VICENTE TOPASNA BORJA, ET AL.,

Plaintiffs-Appellants,

v.

SCOTT T. NAGO, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Hawaii, Case No. 1:20-cv-00433-JAO-RT,
Hon. Jill A. Otake, *United States District Judge*

VICENTE TOPASNA BORJA, ET AL.'S REPLY BRIEF

Jeremy Patashnik
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001

Zachary Martin
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
500 Boylston St.
Boston, MA 02116

Neil C. Weare
RIGHT TO DEMOCRACY PROJECT
1300 Pennsylvania Ave., NW
Washington, DC 20004

Shay Dvoretzky
Geoffrey M. Wyatt
Parker Rider-Longmaid
Counsel of Record
Steven Marcus
Andrew Hanson
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
Telephone: 202-371-7000
parker.rider-longmaid@skadden.com

Counsel for Plaintiffs-Appellants Vicente Topasna Borja, et al.
(additional counsel information on inside cover)

Additional counsel information continued from front cover

Vanessa L. Williams
LAW OFFICE OF
VANESSA L. WILLIAMS
414 W. Soledad Ave., Ste. 500
Hagåtña, GU 96910

Pamela Lynn Colon
LAW OFFICES OF PAMELA
LYNN COLON, LLC
2155 King Cross St., Ste. 3
Christiansted, St. Croix 00820
U.S. Virgin Islands

Anthony "T.J." Quan, Jr.
THE QK GROUP
707 Richards St., PH-7
Honolulu, HI 96813

Counsel for Plaintiffs-Appellants Vicente Topasna Borja, et al.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

RULE

OTHER AUTHORITIES

GLOSSARY

OCVRA	Overseas Citizens Voting Rights Act of 1975
UMOVA	Uniform Military and Overseas Voters Act, Haw. Rev. Stat. §§ 15D-1 to -18, and an implementing regulation, Haw. Code R. § 3-177-600(d)
UOCAVA	Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311

INTRODUCTION

The federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301–20311, and Hawaii's Uniform Military and Overseas Voters Act, Haw. Rev. Stat. §§ 15D-1 to -18, and an accompanying regulation, Haw. Code R. § 3-177-600(d) (together, UMOVA), draw an unconstitutionally discriminatory line. Although they consider former Hawaii residents part of Hawaii's political community for purposes of voting for President, Senators, and Representatives, they grant the vote only to former residents living in foreign countries and certain favored territories like the Northern Mariana Islands, while denying it to those living in the disfavored territories of Guam, the U.S. Virgin Islands, Puerto Rico, and American Samoa. That selective vote denial violates the Constitution's equal-protection guarantee. Over a century of Supreme Court precedent makes clear that the right to vote is fundamental, and decision after decision of both the Supreme Court and this Court holds that the right to vote, once extended, must be extended equally to all members of the political community, or else satisfy strict scrutiny. And Appellees don't claim that UOCAVA or UMOVA can meet that exacting test.

Appellees try out an array of arguments to avoid this core principle, which emanates from the essence of our democratic system of government. The United States first says Appellants lack standing to challenge UOCAVA, blaming Hawaii for implementing but failing to proactively fix UOCAVA's discriminatory command (and ignoring the anticommandeering problem). Then Appellees argue that voting isn't a fundamental right unless it's "a constitutional right to vote in the first place." U.S. Br. 22. But that's just wrong under binding precedent. The right to vote for school board members (which has no basis in the Constitution), or for President, once extended, is just as fundamental as any other voting right. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 629 (1969); *Bush v. Gore*, 531 U.S. 98, 104 (2000).

In the end, Appellees' core argument is that strict scrutiny for voting, if it ever applies to nonconstitutional rights to vote, applies only for those "physically resident within the geographic boundaries of the governmental entity concerned." U.S. Br. 24 (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68 (1978)). But that's not right, either. To be sure, a government can restrict the vote to those who live within its borders based on a particular conception of political community. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). But Supreme Court precedent also makes clear that once the

government defines its political community, it must extend the vote *uniformly* within that political community or meet exacting scrutiny. And UOCAVA and UMOVA define Hawaii's political community to include former Hawaii residents. That choice may not itself be constitutionally required, but it is constitutionally permissible. The constitutional consequence is that neither Congress nor the Hawaii legislature may pick and choose which former Hawaii residents may exercise the fundamental right to vote for President, Senators, and Representatives.

UOCAVA's and UMOVA's discriminatory line violates the equal-protection guarantee. The Court should reverse and sever UOCAVA's and UMOVA's discriminatory exclusion of former Hawaii residents living in U.S. territories so that the right to vote extends evenhandedly to all former state residents. That's the course Congress would have taken had it known of the constitutional infirmity, and the United States, fixating on the Northern Mariana Islands, doesn't argue otherwise. The only other option would be to withdraw the vote from all former state residents, but Congress, as UOCAVA's very existence and legislative history confirms, was committed to extending the vote precisely because it thought that former state residents were part of the state and national political community.

STANDING

As the district court correctly held, ER-103-24, Appellants have standing to challenge UOCAVA and UMOVA. Appellees' enforcement of those laws unequally denies Appellants the right to vote in Hawaii elections, and an order mandating equal treatment would redress those injuries.

All Appellees agree that Appellants have standing to challenge UMOVA. U.S. Br. 16-19; Hawaii Br. 10 n.5. But the United States alone contends that Appellants' harm is traceable *only* to UMOVA, not UOCAVA. According to the United States, UOCAVA "creates a statutory floor" that Hawaii (and every other state) can "go beyond." Br. 16-19. Thus, the government claims, Appellants' "differential treatment" "flows not from UOCAVA, but from [Hawaii's] legislative judgment" not to extend the right to vote to former Hawaii residents living in the territories. Br. 17.

That argument makes no sense. Appellants challenge UOCAVA's discriminatory classification, which UOCAVA requires states to accept. *See* 52 U.S.C. § 20302 ("State responsibilities"). Congress told Hawaii and all other states that they must "permit … overseas voters" to vote absentee, *id.* § 20302(a), and embedded the discriminatory classification Appellants challenge in the definition of "overseas voter," *see id.* § 20310(5), (6); Borja Br. 7-

8. Put simply, UOCAVA established, and UMOVA incorporated, that discriminatory classification, which causes Appellants' injury.

To escape this straightforward conclusion, the United States says that Appellants' injuries "result[] from the independent action" of UMOVA. Br. 17 (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). Again, that's false. On the United States' own theory, Appellants' injuries result from Hawaii's *inaction*, not any independent intervening action, in declining to enact additional legislation to fix UOCAVA's discriminatory classification. The situation is thus nothing like the challenge in *Simon* to an IRS ruling that "encouraged" independent third-party hospitals to deny services to plaintiffs, such that granting the requested relief would merely "discourage" denying those services. 426 U.S. at 42. Granting Appellants their requested relief by severing UOCAVA's unequal treatment would redress their injuries, confirming that those injuries are traceable to UOCAVA.

What's more, the United States' theory raises significant Tenth Amendment anticommandeering concerns. The government's theory is that, if UOCAVA creates an equal-protection problem, Hawaii has to fix it. "Hawaii has opted not to do so," the government quips, "but that was the State's

choice." Br. 17. But that gets federalism backwards. To be sure, the Supremacy Clause requires Hawaii to respect the floor UOCAVA sets. But Congress cannot tell the states to enact laws to clean up Congress' discriminatory mess, because Congress cannot "command a state government to enact *state* regulation," as the Supreme Court has reiterated. *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018) (quoting *New York v. United States*, 505 U.S. 144, 178 (1992)).

The United States also says that Appellants' injuries "would subsist" "if Congress repealed UOCAVA tomorrow," because UMOVA would still discriminate. Br. 19. But that argument only proves that *both* laws cause Appellants' injuries. And if Congress repealed UOCAVA, UMOVA would no longer need to perpetuate UOCAVA's discriminatory denial of the right to vote. Moreover, the United States misunderstands traceability, which asks only whether the challenged conduct *caused* the injury. *See, e.g.*, *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014). The United States cannot seriously dispute that UOCAVA created (and forced upon Hawaii) the discriminatory classification Appellants challenge.

Finally, the United States protests that Appellants try "to characterize their injury as an abstract harm from differential treatment." Br. 18. But as

the government immediately concedes, Appellants claim that they are unequally unable "*to vote* absentee in Hawaii," *id.* (emphasis added)—a clear, tangible injury. And "[f]or standing purposes," the Court must "accept as valid the merits of [Appellants'] legal claims," *FEC v. Cruz*, 142 S. Ct. 1638, 1647-48 (2022), meaning it must assume that Appellants' equal-protection challenge will succeed and that the Court will sever UOCAVA and UMOVA, permitting Appellants to vote absentee.

For all these reasons, the United States' argument that Appellants "fail[] to distinguish" *Segovia v. United States*, 880 F.3d 384, 387 (7th Cir. 2018), Br. 18, gets it nowhere. *Segovia* misunderstands basic standing principles, as the district court recognized, ER-112-13, because it wasn't Illinois' job, any more than it's Hawaii's job, to enact state regulation to address a discriminatory classification established by Congress.

ARGUMENT

I. UOCAVA and UMOVA violate the equal-protection guarantee.

The Constitution's guarantee of equal protection requires strict scrutiny when the government purports to pick and choose who gets to enjoy fundamental rights. UOCAVA and UMOVA do just that, extending the fundamental right to vote to some, but not all, former Hawaii residents.

Appellees insist that the right to vote is not fundamental because the Constitution does not independently give territorial residents the vote, and that the government can discriminate beyond its borders. Precedent, logic, and basic democratic principles foreclose that argument.

A. Strict scrutiny applies to laws that selectively withhold the right to vote from some citizens—no matter whether the Constitution or some other law extends that right.

1. Well-established equal-protection principles resolve Appellants' constitutional challenge.

Three long-settled equal-protection principles apply to laws that selectively extend the right to vote, and they resolve this case. Borja Br. 19-28. *First*, "a statutory classification [that] significantly interferes with the exercise of a fundamental right" is subject to strict scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). And for over a century, the Supreme Court has recognized that "the right to vote [is] a 'fundamental political right.'" *Charfauros v. Board of Elections*, 249 F.3d 941, 950 (9th Cir. 2001) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Thus, when "a challenged statute grants the right to vote to some citizens and denies the franchise to others," the equal-protection guarantee demands strict scrutiny. *Dunn*, 405 U.S. at 337.

Second, the fundamental nature of the right to vote does not depend on whether the Constitution or some other law confers the right to vote. *E.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966); *see* Borja Br. 23-26; Campaign Legal Ctr. Br. 11-16. Strict scrutiny thus applies to selective extensions of the right to vote no matter whether the Constitution or some other law extends the right. *Kramer*, 395 U.S. at 629 (1969).

Finally, to survive strict scrutiny, the government must show that challenged voting restrictions are "both necessary and narrowly tailored to serve [a] compelling interest." *Charfauros*, 249 F.3d at 952; *see* Borja Br. 26-28.

2. Appellees' responses contravene Supreme Court precedent and basic tenets of constitutional law.

Appellees agree that the government's "interference with a fundamental right" would "require heightened scrutiny" and that the "right to vote" can be "fundamental." U.S. Br. 20, 22, 26; *see* Hawaii Br. 10-11. And they say nothing about how the government can satisfy strict scrutiny. Appellees instead focus their challenge on the principle that the right to vote is always fundamental. According to Appellees, "[i]n the absence of a *constitutional* right to vote in the first place," a law that selectively disenfranchises some citizens "cannot burden a 'fundamental right' triggering heightened

scrutiny." U.S. Br. 22 (emphasis added; quoting ER-29); *see* Hawaii Br. 11. Put another way, Appellees contend that unless a right to vote is protected by the Constitution, lawmakers can selectively enfranchise some citizens and not others so long as they have a rational basis for doing so. That argument defies decades of precedent and ignores basic principles of democratic government.

a. Start with precedent. The Supreme Court has repeatedly and directly rejected Appellees' argument. For example, the Court has observed that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States" while holding that, "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Bush*, 531 U.S. at 104. The Court has also held that "no less a showing of a compelling justification" for selectively denying the right to vote (*i.e.*, strict scrutiny) "is required merely because the question scheduled for the election need not have been submitted to the voters." *Kramer*, 395 U.S. at 629 & n.11.

Indeed, almost all the voting cases the parties discuss address a right to vote extended by state or local law, not the Constitution. For instance, both the Supreme Court and this Court have applied strict scrutiny to laws that

selectively disenfranchised or otherwise distinguished between voters in cases involving school-board elections, *id.* at 627-28, 633, elections on utility revenue bonds, *Cipriano v. City of Houma*, 395 U.S. 701, 705-06 (1969) (per curiam), petitions for ballot initiatives, *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1077-78 (9th Cir. 2003), and decisions about municipal annexation, *Hussey v. City of Portland*, 64 F.3d 1260, 1263 (9th Cir. 1995)—even though that the Constitution doesn't afford anyone the right to vote in any of those contexts. Borja Br. 24-27. Given those holdings, Appellees cannot show that strict scrutiny applies only where a *constitutional* right to vote is selectively denied.

b. Appellees' argument also conflicts with fundamental principles of constitutional law because it ignores the reasons *why* selective denials of the right to vote trigger strict scrutiny.

As the Supreme Court has explained, "careful examination" of laws that selectively grant the right to vote "is necessary because … [a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer*, 395 U.S. at 626. That same insight applies whether the right to vote is guaranteed by the Constitution or, as in many

cases (and in *Kramer* itself), some other law grants the right. No matter its source, the right to vote exists to allow participation in representative government. That is true whether the representatives are U.S. Senators, state senators, city councilmembers, school-board members, or any other public officials elected by the political community. It thus makes sense to apply strict scrutiny to selective vote denials no matter the source of the right to vote, as Supreme Court precedent requires. *Supra* pp. 10-11.

These basic values of democratic governance show why Appellees cannot be right that only selective constitutional extensions of the right to vote receive strict scrutiny. If that were the case, then federal, state, and local lawmakers would have broad license to selectively disenfranchise voters any time the right to vote was not extended by the Constitution, so long as they could justify that disenfranchisement on some rational basis. On that view, the Constitution might permit a state to extend the right to vote for President or governor only to residents of certain counties, if the state could show that it was cheaper to administer elections in those counties. *See Irizarry v. Board of Educ.*, 251 F.3d 604, 610 (7th Cir. 2001). Or UOCAVA could extend the right to vote to former state residents who move to Europe, but not Africa, under a similar cost-saving theory.

That cannot be correct. Representative democracy is our Constitution's guiding light. The Constitution "guarantee[s] to every State in this Union a Republican Form of Government," U.S. Const. art. IV, § 4, "and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration," so that the government's "legitimate acts may be said to be those of the people themselves." *Duncan v. McCall*, 139 U.S. 449, 461 (1891). And because "the basis of representation is suffrage," "the right of suffrage must be protected." *Id.* The equal-protection guarantee drives that point home, requiring governments to adhere to the "the one-person, one-vote rule." *Evenwel v. Abbott*, 578 U.S. 54, 60 (2016). The United States' theory ignores all this.

B. UOCAVA and UMOVA are subject to, and fail, strict scrutiny.

UOCAVA and UMOVA are subject to strict scrutiny because they selectively enfranchise some former Hawaii residents but not others. And that discrimination is unconstitutional because it is neither necessary nor narrowly tailored to serve a compelling interest. Appellees' arguments that strict scrutiny doesn't apply contravene Supreme Court precedent, and Appellees don't even try to identify a compelling interest justifying the laws.

1. UOCAVA and UMOVA are subject to strict scrutiny because they selectively withhold the vote from former state residents living in U.S. territories.

a. UOCAVA and UMOVA must satisfy strict scrutiny because they extend the fundamental right to vote in a discriminatory manner. The laws grant the right to vote for President, Senators, and Representatives in Hawaii to former Hawaii residents living in foreign countries and some territories, while denying that right to former Hawaii residents living in most U.S. territories. Borja Br. 29-35.

That selective disenfranchisement must satisfy strict scrutiny even though there is no freestanding constitutional right for former Hawaii residents living in the territories to vote in Hawaii federal elections. To be sure, Congress and the Hawaii legislature were not *required* to extend the right to vote in federal elections to anyone living outside Hawaii. *See Holt Civic Club*, 439 U.S. at 68-69; Borja Br. 31, 39. But UOCAVA determined that former Hawaii residents are "people []of" Hawaii for purposes of federal elections. U.S. Const. amend. XVII; *see id.* art. I, § 2. Thus, "lines may not be drawn" between those former residents that "are inconsistent with" the equal-protection guarantee. *Harper*, 383 U.S. at 665.

Strict scrutiny is especially important in protecting the fundamental right to vote when the individuals selectively denied the right to vote for government officials are subject to those officials' power. For example, the Supreme Court applied strict scrutiny and struck down a Maryland statute that denied the right to vote to residents of a federal enclave within that state, reasoning that the individuals disenfranchised by the law in "numerous and vital ways" were "affected by [Maryland] electoral decisions," because of where they lived. *Evans v. Cornman*, 398 U.S. 419, 424 (1970). That same logic makes strict scrutiny essential here. There are "numerous and vital ways," *id.*, in which territorial residents are affected by federal officials and the laws they make, given those officials' broad authority over the territories. *See* U.S. Const. art. IV, § 3, cl. 2; Borja Br. 34-35.

b. Appellees' arguments for rational-basis review fail.

i. Appellees insist that UOCAVA's and UMOVA's discrimination does not trigger strict scrutiny because residents of the territories "lack a constitutionally protected right to vote" in Hawaii federal elections, and so "UOCAVA [and UMOVA] cannot burden a 'fundamental right.'" U.S. Br. 22-23 (quoting ER-29); *see* Hawaii Br. 11-12. Even putting aside the

binding precedent discussed above (at 10-11), that reasoning ignores how the Constitution works.

Constitutional guarantees regularly apply to a government's choice to extend a right or a benefit, even when the Constitution does not separately guarantee that right or benefit. For example, the Constitution does not require welfare or other government benefits. But if the government chooses to provide them, the due-process and equal-protection guarantees regulates their distribution. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977). Similarly, the Constitution does not guarantee a criminal defendant the right to appeal, *see McKane v. Durston*, 153 U.S. 684, 687 (1894), but if a state *has* conferred that right, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution," *Evitts v. Lucey*, 469 U.S. 387, 393 (1985), and the Sixth Amendment requires constitutionally effective counsel, *see Roe v. Flores-Ortega*, 528 U.S. 470, 484-86 (2000). In short, as the Supreme Court has put it in the due-process context, "state-created right[s]" may "beget yet other rights to procedures essential to the realization of the parent right." *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 68 (2009) (citation omitted).

That basic insight refutes Appellees' argument. The right to vote for President is not a freestanding constitutional right; neither is non-current residents' right to vote for Senators or Representatives. Borja Br. 23-26. But the Constitution regulates the extension of those rights to vote all the same. Once UOCAVA and UMOVA expanded the electorate to include former residents—*none* of whom have a freestanding constitutional right to vote in Hawaii federal elections—the equal-protection guarantee kicked in, prohibiting picking and choosing among former residents absent a compelling, narrowly tailored justification.

Appellees' argument—that strict scrutiny does not apply because the right at issue is (supposedly) not fundamental—implicitly subordinates current UOCAVA voters to other voters in Hawaii elections. Under Appellees' logic, when current Hawaii residents vote in Hawaii federal elections, those citizens are exercising a fundamental right. But when UOCAVA voters vote in the *same* elections they are, apparently, exercising a non-fundamental right. That's wrong: "When the state legislature [or Congress] vests the right to vote," the exercise of that right "as the legislature has prescribed is fundamental." *Bush*, 531 U.S. at 104.

ii. Appellees are also wrong that "the core" of the fundamental right to vote "is applicable" only to those "'physically resident'" in the relevant jurisdiction. U.S. Br. 24 (quoting *Holt Civic Club*, 439 U.S. at 68).

The Constitution gives governments some leeway to define the political community for an election. Borja Br. 31. But that latitude doesn't let governments discriminate among residents within the political community unless doing so satisfies strict scrutiny. Although the Constitution does not *require* UOCAVA or UMOVA to define Hawaii's political community to include former residents, Congress and Hawaii have adopted that definition. That decision has consequences: absent a compelling and narrowly tailored justification, the definition must be uniform, without discriminating *among* former residents.

For that reason, *Holt Civic Club*'s undisputed observation that "a government unit may legitimately restrict the right to participate in its political process to those who reside within its borders," 439 U.S. 68-69, doesn't answer the question here. That proposition says a government does not *need* to extend the right to vote to anyone beyond the jurisdiction's borders, but it says nothing about what happens when a government *chooses* to expand the right to participate in its political process to those beyond its borders but fails

to do so evenhandedly. But other precedent from the Supreme Court and this Court *do* supply the answer: because the right to vote is fundamental *whenever* it is extended, *see supra* pp. 10-13, selective disenfranchisement violates the equal-protection guarantee unless it satisfies strict scrutiny.

The United States' own arguments support this basic point. The government notes that the permissible "geographical limitations" on the right to vote "stem from the basic conception of a political community." Br. 26. The Supreme Court has recognized that a government has "broad power to define its [own] political community," *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973), and that preserving that "basic conception of a political community"—through a residency requirement or otherwise—is a compelling interest that "could withstand close constitutional scrutiny," *Dunn*, 405 U.S. at 344. But that does not mean that a government can escape strict scrutiny simply because it claims to be preserving its political community. To the contrary, *Dunn* expressly noted that even a classification intended to promote political community is subject to "close constitutional scrutiny" and that such a classification must be "appropriately defined and uniformly applied." *Id.* at 343-44. That's why "strict scrutiny applies to state laws" that

treat voters within a political community "unequally on the basis of geography." *Idaho Coalition*, 342 F.3d at 1077.

That's also why UOCAVA and UMOVA are subject to strict scrutiny. The parties agree that the relevant political community "is Hawaii." U.S. Br. 28; *see* Borja Br. 30-32. They also agree that, through UOCAVA and UMOVA, Congress and Hawaii "appropriately defined," *Dunn*, 405 U.S. at 343-44, that political community to include current *and former* Hawaii residents. Borja Br. 7-8, 31; U.S. Br. 7-8; Hawaii Br. 3-5. In other words, UOCAVA and UMOVA make former Hawaii residents "people []of" Hawaii. U.S. Const. amend. XVII; *see id.* art. I, § 2. But the United States and Hawaii have failed to "uniformly appl[y]" their definition of the political community. *Dunn*, 405 U.S. at 343-44. Appellees suggest no reason why former Hawaii residents who move to foreign countries are any more members of Hawaii's political community than are former residents who move to the territories. Indeed, if former Hawaii residents living in foreign countries—as members of Hawaii's political community—are "uniquely positioned to elect government officials who will represent the interests of the local communities and [Hawaii]," U.S. Br. 26, then so too are former Hawaii residents living in U.S. territories. In fact, former Hawaii residents in the territories are

better positioned than those in foreign countries to participate in Hawaii's federal elections, because the federal officials the Hawaii political community elects exert greater control over former Hawaii residents in the territories than those in foreign countries. *Supra* p. 15; Borja Br. 33-35.

When Congress enacted UOCAVA's predecessor, a Senate report explained that American citizens living outside the states "have their own Federal stake—their own U.S. legislative and administrative interests—which may be protected only through representation in Congress and in the executive branch." S. Rep. No. 93-1016, at 6 (1974). While those "interests may not completely overlap with those of citizens residing within the State," the report observed, they were not "any less deserving of constitutional protection," especially because "[t]he President and Congress are concerned with the common interests of the entire Nation." *Id.* Former state residents living in U.S. territories are indisputably part of that same political community, yet UOCAVA and UMOVA selectively withhold from them the right to vote.

iii. The United States notes (Br. 27, 33) that UOCAVA and UMOVA also exclude former Hawaii residents who move to another state from voting in Hawaii federal elections. But that doesn't change the equal-protection

analysis here. Even assuming that former residents who move to another state might be equally part of the Hawaii political community as former residents who move to a foreign country or U.S. territory, their exclusion from voting in Hawaii elections satisfies strict scrutiny because of the one-person, one-vote principle—they can vote in their new states. Borja Br. 40-41; *supra* p. 13. Appellees don't argue otherwise.

For similar reasons, the United States' repeated reference to "various forms of non-voting representatives" from the U.S. territories doesn't help its case. Br. 40-41; *see* Br. 6, 23. As Appellees concede, the Constitution does not afford residents of the territories or the federal delegates they elect any voting power. U.S. Br. 22-24, 26-27; Hawaii Br. 11-13. So unlike with former Hawaii residents who move to other states, the one-person, one-vote principle cannot justify denying former Hawaii residents in the territories the right to vote in Hawaii elections for President, Senators, and Representatives when UOCAVA and UMOVA grant that right to former Hawaii residents in foreign countries.

iv. Finally, neither the United States nor Hawaii spends much time defending the core of the district court's decision: that strict scrutiny doesn't apply because, under *Katzenbach v. Morgan*, 384 U.S. 641 (1966), Congress

was free to selectively extend absentee voting rights. *See* ER-26-29. The United States suggests in passing that UOCAVA's "line-drawing does not impose the type of direct burden on the franchise that triggers heightened scrutiny." Br. 27. UOCAVA selectively *denies* the same vote to some former Hawaii residents while extending it to others; a mere "burden" isn't the issue. The United States' own parentheticals (Br. 27) thus prove that *Katzenbach* doesn't support its argument, because the issue here isn't "eliminating an existing barrier to the exercise of the franchise," 384 U.S. at 657, or "mak[ing] voting more available to some groups who cannot easily get to the polls," *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807-08 (1969). UOCAVA and UMOVA "grant[] the right to vote to some citizens and den[y] the franchise to others," *Dunn*, 405 U.S. at 337, so strict scrutiny is the rule that applies. *Supra* pp. 10-11; Borja Br. 21-22, 46-49; Campaign Legal Ctr. Br. 16-21.

2. UOCAVA and UMOVA fail strict scrutiny.

UOCAVA and UMOVA cannot satisfy strict scrutiny. For UOCAVA and UMOVA to survive that "careful examination," *Kramer*, 395 U.S. at 626, Appellees must prove that the laws are "both necessary and narrowly tailored to serve [a] compelling interest," *Charfauros*, 249 F.3d at 952. Borja Br.

26-28, 35-37. But Appellees don't even try to make that showing, functionally conceding that if strict scrutiny applies, the laws are unconstitutional. *See United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012).

C. UOCAVA and UMOVA are unconstitutional even under lower levels of scrutiny.

Although strict scrutiny is the right test, UOCAVA and UMOVA also fail heightened scrutiny. The laws discriminate against politically powerless residents of the territory, and in the worst possible way: by withholding the keys to political power (the right to vote). And even if rational-basis review applied, the laws would still be unconstitutional.

1. UOCAVA and UMOVA are at least subject to heightened scrutiny, which they cannot meet.

a. The district court should have applied strict scrutiny, but UOCAVA and UMOVA trigger at least heightened scrutiny because they discriminate against territorial residents, a class that "has been historically subjected to discrimination," can "contribute to society," "exhibits obvious, immutable" characteristics, and is "politically powerless." *Karnoski v. Trump*, 926 F.3d 1180, 1200 & n.17 (9th Cir. 2019); *see* Borja Br. 50-52. Under heightened scrutiny, a "classification must substantially serve an important governmental interest," and the government must provide an "exceedingly

persuasive justification." *Sessions v. Morales-Santana*, 582 U.S. 47, 59 (2017) (citation omitted). That standard fits perfectly here, where UOCAVA and UMOVA withhold voting rights from an already-powerless minority. Appellees can no more satisfy that heightened standard than they can satisfy strict scrutiny—and, once again, they do not attempt to.

b. Appellees' two counterarguments fail.

First, Appellees are wrong that UOCAVA and UMOVA do not discriminate against a suspect class. The class is territorial residents, not "former Hawaii residents who have moved to Puerto Rico, Guam, the Virgin Islands, and American Samoa." U.S. Br. 29-30; *see* Hawaii Br. 14-15. Appellees' argument would allow the government to avoid heightened scrutiny just by defining a class with greater particularity. It is undisputed that UOCAVA and UMOVA extend the right to vote to former Hawaii residents, and the differential treatment turns on whether those former residents live in a territory or a foreign country. The suspect class triggering heightened scrutiny thus is territorial residents. And Appellees' suggestion that those residents could avoid discrimination simply by moving back to Hawaii, U.S.Br. 30-31; Hawaii Br. 15, is wrong. Former Hawaii residents living in the territories should not be "required to abandon" their home and identity to

regain the right to vote. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005). UOCAVA and UMOVA don't require that sacrifice for those who move to foreign countries.

Second, *United States v. Vaello Madero,* 142 S. Ct. 1539 (2022), doesn't support rational-basis review here. *Contra* U.S. Br. 31-32. *Vaello Madero* addressed the "limited question" whether Congress had to "extend Supplemental Security Income to residents of Puerto Rico to the same extent as to residents of the States." 142 S. Ct. at 1544. The Court explained that "Congress may distinguish the Territories from the States *in tax and benefits programs*" so long as it "has a rational basis for doing so." *Id.* at 1542-43 (emphasis added). The Court focused on the "far-reaching consequences" of applying heightened scrutiny to tax-and-benefits programs, but the Court didn't say that residents of the territories can *never* be a protected class deserving heightened scrutiny. *Id.* at 1541-43. There are no such concerns here. And unlike tax legislation, UOCAVA and UMOVA go to the heart of political powerlessness by depriving residents of the territories the right to vote.

2. UOCAVA and UMOVA fail rational-basis review.

a. UOCAVA and UMOVA are unconstitutional even under rational-basis review because they don't "bear[] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). There is no legitimate reason to withhold the right to vote in Hawaii federal elections from former residents living in certain U.S. territories while extending that right to former residents living in other territories and foreign countries. In fact, former Hawaii residents living in U.S. territories have a *greater* interest in voting for President, Senators, and Representatives than former Hawaii residents living in foreign countries because former state residents living in the territories are subject to the federal government's direct control. *Supra* pp. 15, 20-21; Borja Br. 34-35.

b. Appellees' counterarguments are unpersuasive.

First, the United States revives its "super citizens" argument (though without using that term), claiming that it is rational to exclude former state residents living in the territories from the state's electorate so that all U.S. citizens in the territories have the same right—none—to vote for President, Senators, and Representatives. U.S. Br. 34-35. That is not a rational basis for discriminatory treatment. This Court "should categorically reject the idea"

that former Hawaii residents living in a U.S. territory cannot "have their rights vindicated" simply because the Constitution denies the right to vote for President, Senators, or Representatives to residents of the territories in general. Virgin Islands Bar Ass'n Br. 6-7.

Second, the United States claims it is rational for UOCAVA and UMOVA to enfranchise former Hawaii residents in the Northern Mariana Islands, but not the other inhabited territories. For starters, that argument, like the government's remedial argument, *infra* pp. 32-33, is unresponsive to the central equal-protection problem: the differential treatment of former Hawaii residents living in U.S. territories compared with former Hawaii residents living in foreign countries. In any event, the United States cannot justify favorable treatment today for those living in the Northern Mariana Islands by pointing to the political situation at "the tim[e] of UOCAVA's enactment," U.S. Br. 35, 38-39, because the law must advance some government interest *today*. "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938). What's more, giving Northern Mariana Islands residents special treatment not afforded to other territorial residents

offends the principle, "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection … that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, 517 U.S. at 633.

Third, Appellees insist that it is rational for Congress and the Hawaii legislature to ensure that former Hawaii residents living in foreign countries, but not those living in U.S. territories, "retain[] some opportunity to remain connected" to elections for federal officials in Hawaii. U.S. Br. 40-41; *see* Hawaii Br. 16-17. But the non-voting representatives territorial residents may elect provide, by definition, no real representation in the federal government, and territorial residents cannot vote for President. *Supra* p. 22.

Fourth, the United States says "[t]here is nothing irrational about Congress's decision to define the Territories as part of the 'United States.'" U.S. Br. 43 (citing 52 U.S.C. § 20301(8)). But the problem is the selective extension of the vote, not the *mechanics* (which Appellants have explained, Br. 7-8) by which Congress accomplished that discrimination.

Finally, the United States claims that Appellants substitute their "own normative judgments for the legislature's," Br. 44, when Appellants explain that former Hawaii residents in the territories have more at stake in voting

for President, Senators, and Representatives than former Hawaii residents in foreign countries. But rational-basis review requires the government to explain "the relation between the classification adopted and the object to be attained," *Romer*, 517 U.S. at 632, and on this point, the United States falls silent. The government suggests no reason why former Hawaii residents living in France have more at stake than former Hawaii residents living in Guam. That's because it's the other way around. *Supra* pp. 15, 20-21.

II. The remedy for UOCAVA's and UMOVA's equal-protection violations is to sever the laws' discriminatory exclusion of former state residents living in the territories.

A. The proper remedy is severing UOCAVA's and UMOVA's discriminatory exclusion of former state residents living in the territories to extend the right to vote with an even hand.

The proper remedy here is to sever UOCAVA's and UMOVA's discriminatory provision to allow former state residents to vote no matter where they live. The only alternative would be to *withdraw* the right to vote from former state residents, but that would nullify UOCAVA's and UMOVA's entire purpose, which was to extend the franchise.

1. As Appellants explained (Br. 55-58), a court confronting an unconstitutional statute typically severs the unlawful portions and enforces the rest of the law. *Barr v. American Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335,

2350 (2020) (plurality). In an equal-protection case, the "appropriate" result of the severance inquiry "is a mandate of equal treatment." *Morales-Santana*, 582 U.S. at 73. Although equal treatment can be accomplished by extending the benefit to the excluded class or by withdrawing it from the favored class, in the "typical case," a court should "extend favorable treatment," rather than withdraw it. *Id.* at 77. To conduct the inquiry, a court should identify the statute's "general rule" or "main rule" (as opposed to the exception) and the "intensity of [the legislature's] commitment" to that general rule so that the remedy can "abrogate[] [the] exception" rather than the "main rule." *Id.* at 75-76. Appellees do not dispute these basic remedial principles.

2. The correct remedy here, as Appellants explained (Br. 58-61), is to sever UOCAVA and UMOVA so that the laws extend voting rights to former Hawaii residents living in the territories. That's the course Congress would have chosen if it had been aware of the equal-protection violation. UOCAVA's "main rule," *Morales-Santana*, 582 U.S. at 75, is to allow former residents of a state who would otherwise lose the right to vote for President, Senators, or Representatives. Indeed, Congress specifically enacted UOCAVA to expand voting rights. *See* H.R. Rep. No. 94-649, pt. 1, at 3 (1975);

Borja Br. 6-7, 59. Put another way, extending the franchise is the entire point of UOCAVA.

Withdrawing the right to vote from former Hawaii residents living in foreign countries and the Northern Mariana Islands cannot be the correct remedy, because that approach would be an effective repeal of UOCAVA altogether. There would be nothing left of the law, despite Congress' commitment to extending the right to vote to former residents. Borja Br. 59-60.

B. Appellees' counterarguments lack merit.

1. Appellees ignore most of Appellants' arguments. *See* U.S. Br. 46-49; Hawaii Br. 17-18. Instead, Appellees assert that, if there is an equal-protection violation, "the proper remedy would be to include the Northern Mariana Islands in UOCAVA's [and UMOVA's] definition of 'United States,'" thus taking the vote away from former state residents living in the Northern Mariana Islands. U.S. Br. 46; *see also* Hawaii Br. 17. But that suggestion does nothing to remedy the unconstitutional disparate treatment of former Hawaii residents who move to U.S. territories compared with those who move to foreign countries. In fact, withdrawing the right to vote from former Hawaii residents living in the Northern Mariana only makes that problem worse. *See* Borja Br. 62.

And on that point, Appellees fall silent. They make no argument about the proper remedy if this Court determines that UOCAVA's and UMOVA's disparate treatment of former Hawaii residents living in U.S. territories compared to those living in foreign countries violates the Constitution's equal-protection guarantee. Simply put, they don't dispute that the proper remedy in that case is to extend the right to vote to former Hawaii residents living in the territories. *See Castillo-Marin*, 684 F.3d at 919.

2. Without offering an alternative (other than withdrawing the vote from former state residents living in the Northern Mariana Islands), the United States conclusorily complains that extending the right to vote to former Hawaii residents in the U.S. territories "would create distinctions of its own." Br. 34, 49. In the United States' view, Appellants "offer no cogent rationale for why Congress would prefer that scheme to one where someone who moves out of a State but stays within the country is placed on equal footing with fellow residents in her new State or Territory." Br. 49. That argument fails, and the government does not even try to engage with the Appellants' arguments on the point. *See* Borja Br. 63-66.

As Appellants explained, UOCAVA and UMOVA draw exactly the same distinction between a former Hawaii resident living in (for example)

France and a U.S. citizen living in France who has never lived in Hawaii or any U.S. state. Borja Br. 64-65. In both cases, only the former Hawaii residents are within the relevant political community (*i.e.*, Hawaii). Everyone agrees that it is constitutionally permissible to distinguish between U.S. citizens living in foreign countries, depending on whether they formerly resided in Hawaii (or any state)—that is, after all, the entire point of UOCAVA and UMOVA.

The United States doesn't address this point. Nor does the United States suggest that there is any *constitutional* problem with distinguishing between former state residents living in a territory and everyone else living in the territory, apparently abandoning the district court's erroneous suggestion. *See* Borja Br. 65. Instead, the United States claims only that there's no apparent reason Congress would prefer that result. But there is, indeed: it's the only way to constitutionally extend the vote to former state residents living abroad, and Congress was committed to that outcome, having chosen to include former state residents in the state's political community in the first place. *See supra* pp. 18-21. The correct question is whether Congress would have preferred to extend voting rights to former state residents living in the U.S. territories if necessary to extend voting rights to former state residents

living in foreign countries, and the answer is yes, because Congress would have preferred that outcome to eliminating UOCAVA altogether.

CONCLUSION

The Court should reverse the district court's grant of summary judgment and sever UOCAVA's and UMOVA's unconstitutional provisions so that the laws equally extend the right to vote for President, Senators, and Representatives to former state residents living in foreign countries or U.S. territories.

Dated: September 20, 2023

Respectfully submitted,

/s/ Parker Rider-Longmaid

Jeremy Patashnik
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001

Zachary Martin
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
500 Boylston St.
Boston, MA 02116

Neil C. Weare
RIGHT TO DEMOCRACY PROJECT
1300 Pennsylvania Ave., NW
Washington, DC 20004

Vanessa L. Williams
LAW OFFICE OF
VANESSA L. WILLIAMS
414 W. Soledad Ave., Ste. 500
Hagåtña, GU 96910

Shay Dvoretzky
Geoffrey M. Wyatt
Parker Rider-Longmaid
Counsel of Record
Steven Marcus
Andrew Hanson
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
Telephone: 202-371-7000
parker.rider-longmaid@skadden.com

Pamela Lynn Colon
LAW OFFICES OF PAMELA
LYNN COLON, LLC
2155 King Cross St., Ste. 3
Christiansted, St. Croix 00820
U.S. Virgin Islands

Anthony "T.J." Quan, Jr.
THE QK GROUP
707 Richards St., PH-7
Honolulu, HI 96813

Counsel for Plaintiffs-Appellants Vicente Topasna Borja, et al.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 22-16742

I am the attorney or self-represented party.

This brief contains 6,987 **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)*:

- (•) 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/ Parker Rider-Longmaid **Date** 09/20/2023
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2023, I electronically filed this brief and addendum with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 20, 2023

Respectfully submitted,

/s/ Parker Rider-Longmaid

Parker Rider-Longmaid
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
202-371-7000
parker.rider-longmaid@skadden.com

Counsel for Plaintiff-Appellants
Vicente Topasna Borja, et al.