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EQUALLY AMERICAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RANDALL JAY REEVES, VICENTE TOPASNA BORJA, EDMUND FREDERICK SCHROEDER, JR., RAVINDER SINGH NAGI, PATRICIA ARROYO RODRIGUEZ, LAURA CASTILLO NAGI, and EQUALLY AMERICAN,

Plaintiffs,

v.

SCOTT NAGO,
in his official capacity as the Chief Election Officer for the Hawaii Office of Elections,

GLEN TAKAHASHI,
in his official capacity as Clerk of the City and County of Honolulu,

No. CV 20-00433 JAO-RT

Honorable Judge Jill A. Otake

Honorable Magistrate Judge Rom Trader

PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MEMORANDUM IN SUPPORT [DKT. NOS. 74 AND 75], AND DEFENDANT SCOTT NAGO'S [DKT. NO. 78], GLEN TAKAHASHI'S [DKT. NO. 79], AND KATHY KAOHU'S [DKT. NO. 80] PARTIAL JOINDERS TO THE FEDERAL DEFENDANTS' MOTION TO

KATHY KAOHU,
in her official capacity as Clerk of the County of Maui,

UNITED STATES OF AMERICA,

LLOYD J. AUSTIN III,[1]
in his official capacity as the Secretary of Defense,

FEDERAL VOTING ASSISTANCE PROGRAM, and

DAVID BEIRNE,
in his official capacity as Director of the Federal Voting Assistance Program,

Defendants.

DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; DECLARATION OF ANTHONY "T.J." QUAN; EXHIBITS "1"-"4"; CERTIFICATE OF SERVICE

Hearing:
Date: March 5, 2021
Time: 9:00 a.m.
Judge: Honorable Jill A. Otake

PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MEMORANDUM IN SUPPORT [DKT. NOS. 74 AND 75], AND DEFENDANT SCOTT NAGO'S [DKT. NO. 78], GLEN TAKAHASHI'S [DKT. NO. 79], AND KATHY KAOHU'S [DKT. NO. 80] PARTIAL JOINDERS TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Lloyd J. Austin III (in his official capacity as the Secretary of Defense) is automatically substituted as a defendant for former Acting Secretary of Defense Christopher C. Miller, who likewise automatically substituted for the original defendant, Secretary of Defense Mark Esper.

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INTRODUCTION

If plaintiffs—all of whom are U.S. citizens who previously resided in Hawaii—lived in the Northern Mariana Islands ("NMI"), one of ten other U.S. Territories without permanent settlements, or any foreign country, they could vote for President and voting representation in Congress by voting absentee in Hawaii. But because plaintiffs live in Guam—just 50 miles south of the NMI—or in the U.S. Virgin Islands, they may not. This is not only unfair, it is an unconstitutional violation of equal protection for which plaintiffs have standing to challenge federal, state, and local defendants.

The original source of these arbitrary dividing lines is federal law—specifically, the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301 to 20311 ("UOCAVA"). It requires States to allow absentee voting in federal elections by citizens living in the NMI and ten other Territories without permanent settlements ("favored Territories") or a foreign country, but does not require, and in some cases forbids, absentee voting by citizens living in Guam, the U.S. Virgin Islands, American Samoa, or Puerto Rico ("disfavored Territories"). Consistent with federal law, Hawaii has adopted statutes authorizing overseas voting. H.R.S. §§ 15D-1 to -18 (the Uniform Military and Overseas Voters Act, or "UMOVA"). Hawaii's statutory laws make no distinctions among

the Territories, but its regulations adopt UOCAVA's discriminatory standards by reference as a necessary concession to the supremacy of federal law.

Despite the fact that federal law drives this arrangement, federal defendants[2] assert that ***only*** the Hawaii state and local defendants[3] are proper defendants in this case, and that plaintiffs lack standing to sue federal defendants or challenge the discriminatory federal law.

Federal defendants argue that federal law merely sets a "floor" but does not prevent the State from remedying the discrimination created by that floor by further expanding the right to vote, so therefore plaintiffs' injuries are not traceable to federal defendants. They further argue that plaintiffs' injuries are not redressable because the proper judicial remedy for UOCAVA's discriminatory treatment would be, in their view, to contract rather than to expand voting rights. Federal defendants are wrong. Plaintiffs clearly have standing to sue them.

First, plaintiffs have alleged an injury. Federal defendants do not directly dispute this, but the nature of the injury is important. Plaintiffs' injury is not merely the denial of the right to vote for President and voting representation in Congress, but also the discriminatory treatment ***itself***. That is, it is not just that

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[2] Federal defendants are the United States, Secretary Austin, the Federal Voting Assistance Program, and FVAP Director Beirne.

[3] State and local defendants are Messrs. Nago and Takahashi and Ms. Kaohu.

plaintiffs are denied their voting rights, it is that these rights are protected for other similarly situated individuals who reside in favored overseas locations. Federal defendants barely address this core aspect of plaintiffs' injury, arguing incorrectly that it is not alleged in the complaint.

Second, plaintiffs' injury is traceable to ***both*** the federal and state and local defendants. Fundamentally, it is federal law that creates the challenged discrimination. State law does perpetuate the federal discrimination by obeying the supreme command of federal law, but that does not insulate federal defendants or make state and local defendants solely responsible for plaintiffs' injuries. Federal defendants' contrary arguments contravene Supreme Court precedent, misapprehend the federal role in denying plaintiffs' right to vote under UOCAVA, and pose serious federalism and other policy concerns inherent in a rule that would shield the federal government and force the States to indemnify it from liability any time federal law enacts discriminatory laws that the States ***could*** conceivably remediate but do not.

Third, plaintiffs' injury is redressable. Whatever remedy the Court adopts, be it expansion or contraction of voting rights, plaintiffs' injury resulting from their unequal treatment relative to other former Hawaii residents living overseas would be fully redressed. In any event, expansion rather than contraction is the default rule and clearly the proper remedy with respect to voting rights. Further, federal

defendants' press for contraction of voting rights is self-defeating: Hawaii cannot contract voting rights on its own without itself violating federal law—UOCAVA's requirements would still have to be enjoined, necessitating the presence of federal defendants.

Accordingly, and as elaborated in this brief, the motions should be denied.

BACKGROUND

When U.S. citizens moves outside the fifty states, they lose full enjoyment of their rights to vote unless Congress or her former state of residence acts through statute to protect those rights. Absent such action, a former state resident living overseas in a foreign country or U.S. Territory will be unable to vote for President or for voting representation in Congress. To protect the right to vote, Congress and state legislatures have for many years enacted legislation to extend absentee voting rights to U.S. citizens who would otherwise be denied that right because they moved overseas outside the fifty states.

Over forty years ago, Congress responded to inconsistencies in state laws governing the eligibility of citizens residing overseas to vote in federal elections by passing the Overseas Citizens Voting Rights Act of 1975. *See* H.R. Rep. No. 94-649, pt. 1, at 2 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 2358, 2359. As explained in the House committee report accompanying the legislation, state laws governing overseas voters often protected the right of military personnel and

federal employees residing overseas to vote, while not providing similar protections to "private citizen[s]" residing overseas. *Id.* at 1-3, 1975 U.S.C.C.A.N. at 2359-60.

The House committee recognized "this treatment of private citizens outside the United States to be highly discriminatory" and considered "this discrimination . . . to be unacceptable as a matter of public policy, and to be suspect under the equal protection clause of the 14th amendment." *Id.* at 3, 1975 U.S.C.C.A.N. at 2360. To remedy these problems, the 1975 Act provided that "[e]ach citizen residing outside the United States shall have the right to register absentee for, and to vote by, an absentee ballot in any Federal election in the State . . . in which he was last domiciled immediately prior to his departure from the United States" as long as he or she was qualified to vote, "even though while residing outside the United States he does not have a place of abode or other address in such State." Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, § 3, 89 Stat. 1142, 1142 (1976) (repealed 1986).

Congress "consolidated and updated" the 1975 Act and other prior law affecting overseas voters by passing UOCAVA in 1986. H.R. Rep. No. 99-765, at 6-7 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 2009, 2010-11. As relevant here, UOCAVA provides that "[e]ach State shall permit . . . overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special,

primary, and runoff elections for Federal office." 52 U.S.C. § 20302(a)(1). An "overseas voter" is defined to include "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." *Id.* § 20310(5)(C). And the "'United States,' where used in the territorial sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa"—but ***not*** the NMI or ten other favored Territories. *See id.* § 20310(8).[4] Consequently, federal law requires the states to provide for absentee voting by former residents who move overseas to another country or to one of ten favored Territories. But UOCAVA does not require states to provide similar rights to former state residents who move to one of four disfavored Territories,[5] even though the impact on their ability to vote for President or voting representation in Congress is the same.

[4] *See* Federal Defs.' Mem. in Supp. of Mot. to Dismiss ("MTD") at 5 n.1 (Dkt. No. 75).

[5] UOCAVA vests primary responsibility for enforcement of its requirements in a "Presidential designee." 52 U.S.C. § 20301(a). The current designee is the Secretary of Defense, Lloyd J. Austin III, *see* Exec. Order No. 12,642, 53 Fed. Reg. 21,975, 21,975 (June 8, 1988), and the Secretary's authority has been delegated to defendant Federal Voting Assistance Program, of which defendant David Beirne is the director and, in that role, has the authority to administer FVAP and carry out its statutorily assigned functions and responsibilities. *See* Department of Defense Instruction 1000.04 & Encl. 3 (Sept. 13, 2012).

In Hawaii, these federal requirements are implemented under UMOVA. It provides that U.S. citizens "living outside the United States" can vote by absentee ballot as Hawaii residents in federal elections for President and the U.S. House and Senate. H.R.S. §§ 15D-1 to -18. The Hawaiian statute defines the "United States," when used in the territorial sense, as "the several states, the District of Columbia, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States." *Id.* at § 15D-2. Thus, strictly read, Hawaii UMOVA does ***not*** extend absentee voting rights to former state residents who move to ***any*** Territory. Nevertheless, through the enactment of regulatory rules by the Hawaii Office of Elections, Hawaii allows absentee ballot packages to be issued "[p]ursuant to a request by a voter covered under . . . [UOCAVA]." *See* H.A.R. § 3-177-600.[6] In other words, Hawaii allows absentee voting from former Hawaii residents who reside in favored Territories ***only*** because it incorporates by reference the requirements of UOCAVA—a necessity given the preemptive effect of federal law.

Thus, federal and state law each—separately and together—discriminate and deny full enjoyment of the right to vote to former residents of Hawaii living in

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[6] Hawaii's Chief Election Officer recently adopted new voting regulations, but in substance they continue to authorize persons eligible to vote absentee under UOCAVA to vote absentee in Hawaii. *See* H.A.R. § 3-177-600(d)(4). The prior regulation addressing the same issue was previously codified at H.A.R. § 3-174-22 and has now been repealed.

disfavored Territories despite broadly extending that right to those former Hawaii residents who move to favored overseas locations.[7]

Individual plaintiffs Randall Jay Reeves, Vicente Topasna Borja, Edmund Frederick Schroeder, Jr., Ravinder Singh Nagi, Patricia Arroyo Rodriguez, and Laura Castillo Nagi are former residents of Hawaii who are denied the right to vote for President and voting representation in Congress because they reside in Guam and the U.S. Virgin Islands. Some of these individual plaintiffs have served their country in military or federal civil offices (or both). Each individual would vote for President and voting representation in Congress by absentee ballot in Hawaii if allowed to do so in the same manner as their fellow former Hawaii residents who reside almost anywhere else on Earth outside of the continental United States—including ten ***other*** Territories that receive favorable treatment under both UOCAVA and UMOVA.

Organizational plaintiff Equally American Legal Defense and Education Fund ("Equally American") is a nonprofit advocacy organization that counts

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[7] Moreover, Hawaii's laws permit U.S. citizens living overseas who have ***never*** resided in the state to vote absentee under Hawaii UMOVA if a parent or guardian was last domiciled in the state of Hawaii. But former residents of Hawaii who have relocated to disfavored Territories are denied such an opportunity. *See* H.R.S. § 15D-2; H.A.R. § 3-177-600(d)(4). This means that United States citizens who have never lived in Hawaii are eligible to vote for President and voting representation in Congress in Hawaii if they live in a favored overseas location, yet lifelong Hawaii residents instantly lose their ability to vote for President if they move to a disfavored Territory.

among its members residents of Guam, the U.S. Virgin Islands, Puerto Rico, and American Samoa who are former Hawaii residents. Equally American believes that if former state residents residing in disfavored Territories enjoyed the same voting rights as former state residents living in favored overseas locations, it would provide new opportunities for political engagement on the issues and causes Equally American supports.

LEGAL STANDARDS

Motions to dismiss for lack of standing are governed by Federal Rule of Civil Procedure 12(b)(1). *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). Where, as here, a defendant moves to dismiss under Rule 12(b)(1) for want of standing, the Court "must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Namisnak v. Uber Techs., Inc.*, 971 F.3d 1088, 1092 (9th Cir. 2020) (quoting *Maya*, 658 F.3d at 1068).

The doctrine of standing "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong" and "confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To have standing, a plaintiff must "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's

challenged behavior; and likely to be redressed by a favorable ruling." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (citation omitted).

ARGUMENT

The Court should deny federal defendants' motion because the allegations in the complaint—accepted as true and construed in favor of plaintiffs—make clear that plaintiffs have Article III standing to bring this action.

First, it is an undisputed fact that the individual plaintiffs are denied the right to vote for President and voting representation in Congress solely because they each reside in certain disfavored Territories excluded from the overseas voting protections created by UOCAVA and UMOVA. As a result, plaintiffs are treated differently than other former Hawaii residents living in favored overseas locations whose ability to vote for President and voting representation in Congress is protected. Accordingly, plaintiffs have suffered an Article III injury.

Second, plaintiffs' injury is fairly traceable to ***both*** UOCAVA ***and*** UMOVA. The thrust of federal defendants' contrary argument is that UOCAVA sets only a floor, so because states may build on that floor to further expand absentee voting rights, any injury stems solely from Hawaii's failure to act. But the Supreme Court's precedents squarely reject this kind of buck-passing theory of standing, under which any injury would be traceable only to the defendant who last failed to act. It is common for defendants to jointly cause or contribute to an

injury, and that is what has happened here. Federal defendants' argument would promote bad policy if accepted, effectively insulating the federal government from suit in any case where a state could theoretically remedy a plaintiff's injury but did not.

Finally, plaintiffs' injury is redressable. If the Court sustains plaintiffs' equal-protection challenge, it may remedy plaintiffs' injury to ensure equal treatment either through expansion or contraction of the rights afforded by UOCAVA and UMOVA.

I. PLAINTIFFS HAVE SUFFERED AN INJURY.

Plaintiffs have clearly suffered an injury as a result of both UOCAVA and UMOVA. Their injury takes two forms: denial of the right to vote; and discriminatory treatment with respect to voting relative to similarly situated former Hawaii residents living overseas whose right to vote remains protected.

First, it is undisputed that plaintiffs are unable to apply for absentee ballots in Hawaii to vote in federal elections as a result of both UOCAVA and UMOVA and are therefore injured. Even *Segovia v. United States*, the case on which federal defendants rely, agreed with this much. *See Segovia*, 880 F.3d 384, 388 (7th Cir. 2018) (concluding that plaintiffs who were unable to vote as a result of UOCAVA and Illinois law implementing UOCAVA "have suffered an injury-in-fact

sufficient to confer Article III standing"), *cert. denied*, 139 S. Ct. 320 (2018) (cited in MTD at 17-19).

Second, and more importantly, plaintiffs are also injured in the sense that they have not been ***treated equally*** with other former Hawaii residents living in favored overseas locations and, therefore, have been denied their constitutional right to the equal protection of the laws. It is unequal treatment—rather than the denial of voting rights itself—that is the heart of an equal-protection violation. *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (explaining that equal protection "is essentially a direction that all persons similarly situated should be treated alike").

Discriminatory allocation of the vote is, ***itself***, an equal-protection violation and injury. Federal defendants barely address this second type of injury in their brief. Their entire argument is reserved for a short paragraph at the end of the principal section of their brief, in which they assert that this equal-protection injury has not been alleged. Specifically, they contend that the "only Article-III injury that Plaintiffs clearly allege in the Second Amended Complaint is that they are not permitted to vote by absentee ballot in federal elections in Hawaii." (MTD at 19.) But the complaint unambiguously and repeatedly addresses disparate treatment as well as the denial of access to the vote: "Plaintiffs are individuals who are injured by virtue of the Defendants' disparate treatment of former state residents residing

in the Territories and overseas." (Second Am. Compl. ¶ 12; *see also id.* ¶ 63 (statement of cause of action) ("By treating similarly situated former state residents differently based on where they reside overseas, UOCAVA and Hawaii UMOVA violate the equal-protection and due process guarantees of the Fifth and Fourteenth Amendments and 42 U.S.C. § 1983."); *see also, e.g., id.* ¶¶ 3, 6, 8-10, 62.)

In short, plaintiffs have pled injury in two dimensions, both of which suffice to establish standing under Article III.

II. PLAINTIFFS' INJURY IS FAIRLY TRACEABLE TO UOCAVA AND UMOVA.

Plaintiffs' injury is also traceable to both UOCAVA and UMOVA because ***both*** operate to deny them the right to vote, and because the discriminatory treatment of plaintiffs results directly from the classifications made by the terms of these laws. Federal law expressly provides for discriminatory treatment, and Hawaii law yields to that federal command, enforcing it against plaintiffs. Both are required to produce plaintiffs' injury. Indeed, Hawaii law only draws a distinction between favored and disfavored Territories as a result of its incorporation of UOCAVA's requirements, making federal law the but for cause of this aspect of discrimination.[8]

[8] Both federal and state law treat plaintiffs differently from former Hawaii residents now living in foreign countries, and as to that form of discrimination, the laws jointly produce plaintiffs' injuries.

Federal defendants argue that plaintiffs lack standing to sue them on the theory that plaintiffs' injuries stem from state law and not federal law. As federal defendants see it, UOCAVA sets a federal "floor" on expanding voting rights, but does not prevent Hawaii from building on that floor to expand voting rights further. (MTD at 2, 14-19.) This argument was carefully considered and rejected in a lengthy discussion by the district court in *Segovia*. *Segovia v. Bd. of Election Comm'rs for City of Chi.*, 201 F. Supp. 3d 924, 934-37 (N.D. Ill. 2016).

The Seventh Circuit reversed on appeal, but its ruling was erroneous and should not be followed here. Specifically, the appellate ruling in *Segovia* contradicted Supreme Court standing precedents; it misapprehended the federal government's role in implementing UOCAVA; and it would promote bad policy of the sort the Supreme Court has rejected in other contexts.

At the threshold, *Segovia* contravened settled precedent. Its holding (and federal defendants' central contention here) rests on the mistaken premise that a plaintiff must prove something like proximate causation in order to establish standing—i.e., that the defendant is responsible for the last step in the causal chain leading to the plaintiff's injury.

But the Supreme Court has been clear that the "fairly traceable" requirement does not demand immediate directness between wrongful conduct and injury. It has stated that "[p]roximate causation is not a requirement of Article III standing,

which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 134 n.6 (2014); *cf. State v. Ross*, 358 F. Supp. 3d 965, 1006 (N.D. Cal. 2019) (noting that the "fairly traceable" element is "less demanding than a proximate cause standard"), *appeal dismissed sub nom. California by & through Becerra*, No. 19-15456, 2019 WL 4273893 (9th Cir. July 26, 2019), and *appeal dismissed sub nom. City of San Jose v. Ross*, No. 19-15457, 2019 WL 4273890 (9th Cir. July 30, 2019).

Similarly, the Supreme Court has said that a defendant need not be the "last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997); *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) ("Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's conduct comprise the last link in the chain."); *see also* 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3531.5 (3d ed. Oct. 2020 Update) ("It may be enough that the defendant's conduct is one among multiple causes.").

Contrary to federal defendants' cramped view of traceability, the Supreme Court has specifically recognized plaintiffs' standing to challenge government action that authorizes or fails to prevent injurious third-party actions. *See, e.g.*,

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986) (recognizing standing of plaintiffs who claimed injury based on the federal government's failure to adequately regulate whaling activities, even though the claimed injury stemmed from Japan's whaling activity, which plaintiffs alleged the federal government was compelled to condemn under federal law); *Barlow v. Collins*, 397 U.S. 159, 162-64 (1970) (recognizing standing of plaintiffs to challenge the validity of federal laws that they contended enabled a landlord to make extortionate demands of them); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 158 (1970) (recognizing standing to challenge a federal law that enabled third-party competitors to enter the market and thereby cause alleged injury to the plaintiff's business).

Notably, and in harmony with the foregoing principles, the First and Second Circuits considered constitutional challenges to UOCAVA brought against federal defendants and that, at least for standing purposes, are indistinguishable from this case.[9] *See Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001); *Igartúa de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994). The plaintiffs in *Igartúa* and *Romeu* similarly challenged the constitutionality of extending the right to vote to former

[9] A notable difference in these cases, which does not relate to standing, is that the plaintiffs did not raise UOCAVA's distinction between favored and disfavored Territories, but rather strictly between former state citizens residing in foreign countries and former state citizens residing in Territories generally.

State citizens residing overseas while withholding the same right from former State citizens living in the Territories. Both decisions necessarily recognized the plaintiffs' standing in reaching the merits of their claims. *See Romeu*, 265 F.3d at 127; *Igartúa*, 32 F.3d at 10-11; *see also Romeu v. Cohen*, 121 F. Supp. 2d 264, 272-74 (S.D.N.Y. 2000) (holding plaintiffs had standing to challenge both UOCAVA and the state law at issue); *see also Segovia*, 201 F. Supp. 3d at 396 (highlighting the fact that the *Igartúa* court "reached the merits," indicating there was no standing barrier to suing the federal defendants).[10] In *Segovia*, the Seventh Circuit ignored this implication of the First and Second Circuit rulings, and federal defendants do the same in their brief.

Moreover, *Segovia* plainly misunderstood the federal government's unique role in administering UOCAVA. *Segovia* stated that "the federal government doesn't run the elections in Illinois, so, UOCAVA or not, whether the plaintiffs can obtain absentee ballots is entirely up to Illinois," 880 F.3d at 389. That is, *Segovia*

[10] Although the First and Second Circuit decisions did not expressly address standing, the fact that the rulings reached the merits is an implicit but unmistakable determination that the plaintiffs had standing to challenge the federal law, even though there, like here, the States theoretically could have extended the right to vote to the plaintiffs in those cases. *Cf. Ankenbrandt v. Richards*, 504 U.S. 689, 696-97 (1992) (by hearing certain appeals, "this Court implicitly has made clear its understanding that the source of the constraint on jurisdiction . . . was *not* Article III; otherwise the Court itself would have lacked jurisdiction over [the] appeals").

assumed that the federal government plays no role in providing ballots to qualified overseas voters.

That is incorrect. Federal statute expressly assigns federal responsibilities that include the distribution and collection of absentee ballots and dissemination of information related to voting; the prescription of a standard federal postcard form for registration and absentee ballot application; and the creation and promotion of a federal write-in absentee ballot for use in the event that state absentee ballots are not provided. 52 U.S.C. §§ 20301(b), 20303. Notably, the federal write-in ballot, as a matter of federal law, "shall not be counted" if mailed from "any location in the United States," which (as defined by UOCAVA) would include the Territories where plaintiffs reside. *Id.* § 20303(b)(1); *see also Segovia*, 201 F. Supp. 3d at 936 (detailing some additional requirements of UOCAVA that indicate a federal share of responsibility for overseas voting). In short, it simply is not the case, as assumed by the Seventh Circuit in *Segovia*, that UOCAVA sets a "floor" and plays no further role in facilitating (or regulating) the exercise of overseas voting rights.

Finally, *Segovia*'s reasoning would promote bad policy that the Supreme Court has condemned in analogous circumstances. As the Supreme Court noted in *New York v. United States*, federal law that requires States to enact federal policy in a manner that shields the federal government from responsibility creates constitutionally problematic federalism and accountability problems. 505 U.S.

144, 168-69 (1992). While the facts in *New York* were different, the same policy concerns flow from *Segovia*'s reasoning in that it would hold States accountable for federal policy decisions. The fact that the State could remedy the federal discrimination by expanding voting rights further misses the point: Hawaii should have the freedom to make its own independent policy decisions without state inaction forcing it to indemnify the federal government for its discriminatory laws.

Under *Segovia*'s flawed logic, federal law would be immune from review if Congress provided that States must extend voting rights to white voters who move overseas; or to male voters who move overseas; or to voters whose last names begin with "Z" and move overseas—so long as a State could theoretically remedy Congress' discrimination by extending the right to other voters as well. As noted constitutional law scholars Joshua Sellers and Justin Weinstein-Tull argued in *Segovia*, such an arrangement would "create perverse standing doctrine among a wide scope of other federal laws."[11] This is not what is envisioned by the Constitution's Article III standing requirements or Supreme Court precedent.

For all these reasons, plaintiffs' injuries are fairly traceable to ***both*** UOCAVA and UMOVA, and the Court should reject federal defendants'

[11] *See, e.g.*, Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 5-13, *Segovia v. United States*, No. 17-1463 (U.S. June 2018) (attached as Ex. 1).

arguments and decline to follow *Segovia* because federal defendants' traceability requirements are contrary to Supreme Court precedent and sound policy.

III. PLAINTIFFS' INJURY IS REDRESSABLE.

Finally, the injury imposed by UOCAVA and UMOVA are both redressable through equitable relief by this Court. Federal defendants argue that plaintiffs' claims are not redressable because the only appropriate remedy would be to eliminate the preferential treatment for former State residents residing in the NMI. (MTD at 20-24.) State and local defendants join in this argument.[12] But it fails for at least three reasons: (1) the question of remedy does not go to redressability; (2) the proper remedy, in any event, is to expand rather than contract the right to vote; and (3) the allegation that contraction of voting rights is the proper remedy further compels the retention of federal defendants in the case because such relief could not be awarded in their absence.

First, the question of remedy here does not even relate to redressability. Any remedy enjoining defendants to treat plaintiffs on equal terms with other former Hawaii residents living in the favored overseas locations would fully

[12] *See* Def. Scott Nago's Partial Joinder to Federal Defs.' Mot. to Dismiss (Dkt. No. 78); Def. Glen Takahashi's Partial Joinder to Federal Defs.' Mot. to Dismiss (Dkt. No. 79); Def. Kathy Kaohu's Partial Joinder to Federal Defs.' Mot. to Dismiss (Dkt. No. 80).

redress plaintiffs' discriminatory treatment, whether that remedy provides for voting rights to be expanded or contracted.

A plaintiff may establish redressability by satisfying the "relatively modest" burden of showing that it is likely that the injury will be redressed by a favorable decision. *See, e.g.*, *Mahuka v. Alia*, No. CIVIL 19-00177 LEK-RT, 2020 WL 3513232, at *4 (D. Haw. June 29, 2020) (quoting *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)). That is clear here, regardless of what remedy the Court were to provide. Plaintiffs' injury is not merely the inability to vote, but the disparate treatment ***itself***. Even an order determining that the proper remedy to an equal protection violation would be to contract rather than expand the right to vote would fully redress plaintiffs' equal protection claim.

Federal defendants' principal authority, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017)—which they deem "instructive"—confirms their error. In *Morales-Santana*, the Supreme Court concluded, under the unique facts of that case, that the proper remedy was to contract rather than expand the rights at issue. But in doing so, the Supreme Court did not dismiss the case on standing or redressability grounds, even though plaintiff did not receive his desired remedy.

Nowhere do federal defendants even attempt to grapple with this key precedent, which by itself is fatal to their argument.[13]

Second, and in any event, the proper remedy in this voting-rights case is to expand the right to vote, not strip the right to vote. Expansion is the default rule, as *Morales-Santana* itself expressly acknowledged. 137 S. Ct. at 1701. In a long line of cases addressing entitlement to public benefits, the Supreme Court has ordered those benefits be extended to the disfavored group, rather than stripped from the favored group. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89, 93 (1979) (stating that "this Court has suggested that extension, rather than nullification, is the proper course" and affirming "the simplest and most equitable extension possible"); *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974) (remanding case to allow previously disfavored group "to establish . . . eligibility . . . under the Social Security Act"); *Frontiero v. Richardson*, 411 U.S. 677, 691 n.25 (1973) (invalidating statute that "require[d] a female [service] member to prove the dependency of her spouse" to obtain benefits for him). We are aware of no equal protection case—***none at all***—involving voting rights where the ordered remedy was to contract rather than expand voting rights. Prominent voting rights scholars

[13] Nor did *Segovia*, which pondered (but did not expressly adopt) this standing argument in a footnote. 880 F.3d at 389 n.1 (noting that there "may be" a redressability problem, and relying entirely on *Morales-Santana*).

who filed as *amici* in *Segovia* have similarly suggested that such a holding would be unprecedented.[14]

Moreover, every relevant consideration militates in favor of the default rule—extending favorable treatment to plaintiffs who challenge unconstitutional discrimination. Beyond that, the stated legislative intent of UOCAVA was to expand voting rights to reduce the unfairness inherent in allowing some former state residents, but not others, to vote. Expanding suffrage to those who move to the currently disfavored Territories is consistent with that purpose; denying it to residents of favored Territories and foreign countries would not. Moreover, the right to vote (unlike the rights to public benefits at issue in the cases above) is "fundamental" because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Thus, as a general matter, statutes that expand voting rights are considered to be remedial in nature and are to be "liberally construed to effectuate [their] purpose." 3B *Sutherland Statutory Construction* § 73:8 (8th ed.).[15]

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[14] *See* Brief of Voting Rights Scholars as Amicus Curiae Supporting Petitioner at 18, *Segovia v. United States*, No. 17-1463 (U.S. May 23, 2018) (attached as Ex. 2).

[15] It is also significant that in *Segovia* the governments of Puerto Rico and the U.S. Virgin Islands expressly argued for this remedy. *See* Brief of Commonwealth of Puerto Rico as Amicus Curiae in Support of Petitioners at 7-8, *Segovia v. United States*, No. 17-1463 (U.S. May 23, 2018) (attached as Ex. 3); Brief of Amicus *(cont'd)*

The few cases in which the Supreme Court remedied equal protection violations by contracting favorable treatment are demonstrably inapposite and only serve to underscore the propriety of expansion here. In *Morales-Santana*, for example, the Court concluded that the matter before it in that case was "hardly the typical case," because exclusion from citizenship had been the default rule, and favorable treatment to a discrete group the exception. 137 S. Ct. at 1699-1701. It contrasted that atypical case from others—like this one—in which favorable benefits had been denied to a discrete group, noting that, in such cases, extension of the previously denied favorable treatment is a proper remedy. *Id.* at 1699. That is this case. Former Hawaii residents who move to any foreign country or to ten of fourteen Territories are given the favorable treatment of being able to vote for President and voting representation in Congress by absentee ballot. It is only the discrete group of former Hawaii residents who move to four disfavored Territories that are denied protection of their right to vote—precisely the type of circumstance where the Court has "reiterated" that "extension, rather than nullification, is the proper course." *Morales-Santana*, 137 S. Ct. at 1699 (citation omitted).

Third, federal defendants' redressability and remedy arguments are internally inconsistent. If federal defendants are correct that contraction is the

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Curiae U.S. Virgin Islands in Support of Petitioners at 6, *Segovia v. United States*, No. 17-1463 (U.S. June 28, 2018) (attached as Ex. 4).

proper remedy, then they cannot be dismissed from the case, for the Court could not award such a remedy were only state and local defendants to remain. After all, in the absence of federal defendants, the Court would have no power to enjoin the enforcement of UOCAVA. And without such an injunction, state and local defendants would remain subject to its requirements, including that they accept absentee ballots from former Hawaii residents living in the NMI or other favored Territories. In short, it is ***dismissal*** of federal defendants, not their presence in the case, that would give rise to redressability problems under federal defendants' own theory of the case. This fact underscores the reality that both UOCAVA and UMOVA, working together, cause the injury to plaintiffs.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny federal defendants' motion to dismiss and related partial joinders by state and local defendants.

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Respectfully submitted,

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