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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RANDALL JAY REEVES, *et al.*, *Plaintiffs*, v. SCOTT NAGO, in his official capacity as Chief Election Officer for the Hawaii Office of Elections, *et al.*, *Defendants*.[1]	CIVIL NO. 20-00433 JAO-RT FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION Hearing Date: March 5, 2021 Time: 9:00 a.m. Judge: Hon. Jill A. Otake

FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF 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 Secretary of Defense) is automatically substituted as a defendant for former Acting Secretary of Defense Christopher C. Miller.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Legislative Materials

None of the parties disputes the core premise of Federal Defendants' motion to dismiss: if UOCAVA were repealed, Plaintiffs would remain ineligible to vote absentee in Hawaii—because of Hawaii law. Likewise, no party disputes that "State law could provide the plaintiffs the ballots they seek; it simply doesn't." *Segovia v. United States*, 880 F.3d 384, 388 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 320 (2018). That creates a traceability problem: "the reason the plaintiffs cannot vote in federal elections in [Hawaii] is not the UOCAVA, but [Hawaii's] own election law." *Id.*

As for redressability, the State and County Defendants agree that, even if there were an equal protection violation, the appropriate remedy would be to *eliminate* any preferential treatment for former Hawaii residents who now live in the Commonwealth of the Northern Mariana Islands (CNMI). But that would still leave Plaintiffs unable to vote absentee in Hawaii—again, because of Hawaii law. So any "victory" here would not redress Plaintiffs' injuries. That is independently fatal to Plaintiffs' Article III standing.

In response, Plaintiffs (and in some instances, the State and County Defendants) rely on a Northern District of Illinois opinion that was reversed in relevant part by a unanimous Seventh Circuit, and several cases that never discussed standing. Plaintiffs also try to shore up their standing by mischaracterizing UOCAVA, and by recasting their injuries as some abstract harm of "unequal treatment"—divorced from their actual inability to vote. All of these arguments fail.

For the reasons set forth below and in Federal Defendants' opening brief, all of Plaintiffs' claims challenging UOCAVA, and all of Plaintiffs' claims against the Federal Defendants, should be dismissed for lack of subject-matter jurisdiction.

I. Plaintiffs' injuries are not traceable to UOCAVA or the Federal Defendants.

a. Plaintiffs begin by materially mischaracterizing UOCAVA. On the first page of their brief, Plaintiffs claim that UOCAVA "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." Pls.' Br. 1 (emphasis added), ECF No. 84. That is incorrect. In fact, nothing in UOCAVA "prevent[s] any State from adopting any voting practice which is less restrictive than the practices prescribed by this Act." H.R. Rep. No. 99-765, at 19 (1986), *as reprinted in* 1986 U.S.C.C.A.N 2009, 2023. That is no small error: if UOCAVA prohibited Plaintiffs from voting absentee in federal elections in Hawaii, then their injuries *would be* traceable to federal law. Critically, although UOCAVA does not require Hawaii to allow Plaintiffs to vote absentee, it also does not prohibit Hawaii from doing so. That distinction is at the core of Plaintiffs' traceability problem, and their failure to appreciate it is telling.[2]

b. Plaintiffs repeatedly imply that Hawaii's hands are tied by federal law. But they are not—at least, not in any respect that is material here. Notwithstanding the floor set by UOCAVA, "it is *Hawaii* that has the ultimate authority over the full scope of who may vote absentee in Hawaii." Fed. Defs.' Br. 16, ECF No. 75. As the Federal Defendants explained in their opening brief, *id*. at 15-16, for confirmation of the fact that Plaintiffs' injuries are traceable to Hawaii law rather

[2] Defendant Glen Takahashi errs similarly by pointing to the possibility of federal enforcement actions. *See* Honolulu Br. 2-3, ECF No. 86. Although the Federal Defendants can surely enforce federal law (and the Supremacy Clause) if States enact laws that conflict with UOCAVA, what matters here is that it would *not* conflict with UOCAVA for Hawaii to extend absentee voting rights to Plaintiffs.

than UOCAVA, consider the approach taken by other states. For example, former Illinois residents who move to American Samoa may vote absentee in federal elections in Illinois, *see* 10 Ill. Comp. Stat. Ann. 5/20-1(1), but former Hawaii residents who move to American Samoa cannot, *see* Haw. Rev. Stat. § 15D-2; Haw. Admin. R. § 3-177-600. That differential treatment cannot be explained by UOCAVA, which applies identically to both states. There is no reason that Hawaii (or Illinois, or any other State) could not extend those same absentee voting rights to residents of all U.S. territories. But Hawaii's decision to take a more restrictive approach than that permitted by federal law—indeed, a more restrictive approach than that taken by other states, like Illinois—cannot be attributed to UOCAVA, or to any of the Federal Defendants. Neither Plaintiffs nor any of the State or County Defendants offer any response to this argument.

Likewise, in some respects, even Hawaii law itself departs from the floor set by UOCAVA. For example, "Hawaii's laws permit U.S. citizens who have *never* resided in Hawaii to vote absentee under Hawaii UMOVA if a parent or guardian was last domiciled in the state of Hawaii." Second Am. Compl. ¶ 10, ECF. No. 73 (citing Haw. Rev. Stat. § 15D-2; Haw. Admin. R. § 3-177-600). In addition, "[i]f ineligible to qualify as a voter in the state to which the voter has moved, any former registered voter of Hawaii may vote an absentee ballot in any presidential election occurring within twenty-four months after leaving Hawaii." Haw. Rev. Stat. § 15-3. Nobody disputes that "[t]hose choices by Hawaii unquestionably had nothing to do with UOCAVA, which contains no parallel provisions." Fed Defs.' Br. 16. Again, neither Plaintiffs nor any other party offers any response to this argument, which is

sufficient to show that it is state law, not federal law, that has marked the outer bounds of absentee voting rights in Hawaii.

c. Plaintiffs rely heavily on the district court's opinion in *Segovia*—an opinion that was reversed in relevant part by a unanimous Seventh Circuit panel. *See* 880 F.3d at 384. Plaintiffs argue that the Seventh Circuit's opinion "was erroneous and should not be followed here," relying largely on the same arguments that their counsel previously presented to the Seventh Circuit, and then to the Supreme Court in an unsuccessful petition for a writ of certiorari. Pls.' Br. 14. But those arguments neither persuaded the Seventh Circuit, nor moved the Supreme Court to review the matter. The same disposition is appropriate here.

For instance, Plaintiffs cite various cases in which the Supreme Court has purportedly "recognized plaintiffs' standing to challenge government action that authorizes or fails to prevent injurious third-party actions." Pls.' Br. 15-16. But the cases Plaintiffs cite do not directly address the Article III traceability requirement at all. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (rejecting the argument "that no private cause of action [wa]s available to" the plaintiffs, because a right of action was "expressly created by the Administrative Procedure Act," and the plaintiffs' claimed injury was "within the 'zone of interests' protected by" the statute invoked); *Barlow v. Collins*, 397 U.S. 159, 164 (1970) (holding that plaintiffs "have the personal stake and interest that impart the concrete adverseness required by Article III"); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-153 (1970) (concluding that the plaintiffs had "allege[d]

that the challenged action has caused [them] injury in fact," and that plaintiffs' interest was "arguably within the zone of interests to be protected").

The federal actions challenged in those cases, moreover, had the legal effect of "authoriz[ing]," Pls.' Br. 15, third parties to injure the plaintiffs. *See Japan Whaling Ass'n*, 478 U.S. at 226-29 (Secretary of Commerce declined to certify Japan's fishing in excess of treaty quotas, where certification would have "require[d] the imposition of sanctions" under federal law); *Barlow*, 397 U.S. at 160-63 (Secretary of Agriculture promulgated regulation authorizing landlords to seek certain payments from tenants); *Camp*, 397 U.S. at 151 (Comptroller of the Currency issued ruling authorizing banks to "make data processing services available to other banks"). UOCAVA has no similar "authorizing" effect here: Wholly irrespective of any federal requirement, Hawaii "law could provide [petitioners] the ballots they seek; it simply doesn't." *Segovia*, 880 F.3d at 388.

d. Plaintiffs also rely heavily on the fact that two other courts of appeals have rejected similar equal protection challenges to UOCAVA on the merits. *See* Pls.' Br. 16-17 (citing *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001); *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (per curiam)). Yet neither case discussed (let alone ruled upon) standing. Plaintiffs admit this in a footnote, but insist that "the fact that the rulings reached the merits is an implicit but unmistakable determination that the plaintiffs had standing to challenge the federal law." Pls.' Br. 17 n.10.

Plaintiffs are mistaken. The Supreme Court has repeatedly cautioned that even *its* "'drive-by jurisdictional rulings' . . . should be accorded 'no precedential effect.'" *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co. v.*

Citizens for a Better Env't, 523 U.S. 83, 91 (1998)); *see also, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (in the context of a case in which "standing was neither challenged nor discussed," noting that the Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect"); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("[T]his Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."). The same is true *a fortiori* for drive-by jurisdictional rulings from courts that would not have bound this Court even if they had addressed standing. The value of out-of-circuit authority stems from its reasoning, and on the subject of standing, neither *Romeu* nor *Igartua* includes any.

e. The Federal Defendants' standing argument also does not conflict with cases that have found standing in circumstances of "multiple" or "concurrent" causation. *See* Pls. Br. 14-15. This is just not one of those circumstances: Plaintiffs' injury is not caused by UOCAVA at all, but by Hawaii law alone. As the Seventh Circuit put it, "there is *nothing* other than [State] law preventing the plaintiffs from receiving ballots." *Segovia*, 880 F.3d at 389 (emphasis added).[3]

f. Ultimately, Plaintiffs' primary argument on traceability relies on first recasting their alleged injury-in-fact, by retreating from the (undisputed) injury that

[3] For similar reasons, Plaintiffs' identification of other provisions of UOCAVA that have nothing to do with the actual right to vote—for example, "the prescription of a standard federal postcard form for [voter] registration," Pls.' Br. 18 (citing 52 U.S.C. § 20301(b))—are no help to their standing here. Those unrelated provisions are not challenged here, and have not caused Plaintiffs any injury.

is actually alleged in the complaint. Plaintiffs' Second Amended Complaint took pains to allege that each individual Plaintiff (as well as, named members of the organizational Plaintiff) wished to vote absentee in federal elections in Hawaii, but is unable to do so because of their residence. *See* Second Am. Compl. ¶ 14(a) ("Defendants will not permit Mr. Reeves to vote for President or for voting members of Congress by virtue of his residence in Guam."); *see also id.* ¶¶ 15(a), 16(a), 17(a), 18(a), 19(a), 20(a). In other words, as originally pled and understood, this lawsuit was about Plaintiffs' inability to vote—a classic (and undisputed) Article III injury.

Faced with the Federal Defendants' motion to dismiss, however, Plaintiffs now reimagine (at least in the alternative) their alleged injury *not* as the inability to vote, but as "unequal treatment" in the abstract. Plaintiffs assert—in a sentence followed by no citation—that "[d]iscriminatory allocation of the vote is, ***itself***, an equal-protection violation and injury." Pls.' Br. 12. Plaintiffs then try to point to UOCAVA—not just Hawaii law—as the source of that alleged injury (because UOCAVA lists Plaintiffs' home territories as part of the "United States," but omits the CNMI, which Plaintiffs believe to be unconstitutional "disparate treatment"). But this argument nonetheless fails for several reasons.

1. As the Federal Defendants already explained, "even assuming that Plaintiffs' injuries could be divorced from their actual eligibility to vote absentee in Hawaii, and instead be characterized as some abstract or psychological harm from the 'preferential treatment' afforded to citizens in the Northern Mariana Islands, that alleged harm would still not be attributable to UOCAVA." Fed. Defs.' Br. 19. That is because "[f]ederal law does not require such differential treatment; Hawaii law

does." *Id.* In other words, nothing in federal law prevents Hawaii from affording absentee voting rights "to former residents in Guam, Puerto Rico, [American Samoa,] and the Virgin Islands. . . . [I]t simply doesn't." *Segovia*, 880 F.3d at 388.

2. More fundamentally, the Supreme Court has repeatedly (and recently) rejected the idea that abstract, psychological harm arising from disagreement with a law, or a belief that it is unconstitutional, is sufficient for Article III standing. *See, e.g.*, *Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (plaintiff subject to allegedly unconstitutional selection criteria for state judgeship lacked standing because of insufficient evidence that plaintiff actually intended to apply to become a judge). So while Federal Defendants have never disputed that Plaintiffs' *inability to vote* absentee in Hawaii is an Article III injury, Plaintiffs' generic allegations that UOCAVA subjects them to "disparate treatment" are insufficient, standing alone.

To illustrate, even if Hawaii changed its election laws tomorrow to permit absentee voting by any former resident who now lives in any territory—as it could—UOCAVA would still list Plaintiffs' home territories, but not the CNMI, which is allegedly the source of this "disparate treatment." Nevertheless, upon Hawaii's decision to allow Plaintiffs to vote absentee, this case would plainly present no case or controversy. Even if Plaintiffs insisted that UOCAVA still provides for "disparate treatment," that allegation, standing alone, could not support federal jurisdiction.

3. In any case, Plaintiffs did not actually include any plausible allegations to support a standalone "unequal treatment" injury in their complaint. Plaintiffs point to their allegation that they "are injured by virtue of the Defendants' disparate treatment of former state residents residing in the Territories and overseas." Second

Am. Compl. ¶ 12. But that conclusory allegation (and others like it) are not entitled to the presumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 679-80 (2009), as it offers only a legal conclusion about "disparate treatment"—rather than any factual allegation about an actual, real-world *injury* suffered by any of the Plaintiffs.

There are no allegations here, for example, that UOCAVA "generates a feeling of inferiority as to [Plaintiffs'] status in the community that may affect [children's] hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ.,* 347 U.S. 483, 494 (1954). Nor could there be any plausible allegation of that sort: when UOCAVA was enacted, it treated all inhabited territories *identically*, and the mere fact that Congress did not later recalibrate the statute's definitions section upon finalization of the United States's covenant with the CNMI carries no stigma or sanction, nor any badge of inferiority.

* * *

For these reasons, Plaintiffs cannot solve their traceability problem by recasting their injury-in-fact as the generic harm of "disparate treatment" in the abstract, divorced from their actual inability to vote absentee in federal elections in Hawaii. The fact that it is Hawaii law—and only Hawaii law—which actually prohibits Plaintiffs from voting thus remains fatal to Plaintiffs' Article III standing to sue the Federal Defendants.[4]

[4] Defendant Scott Nago argues that "to the extent Plaintiffs are alleging that the named Defendants erected a barrier that makes it more difficult for [Plaintiffs] to vote absentee in Hawaii . . . , Plaintiffs' injury in fact is the denial of equal treatment, not the inability to vote." Hawaii Br. 6, ECF No. 85. But in fact, UOCAVA is *not* "a barrier" to voting rights in Hawaii—it is Hawaii law alone that forms a "barrier" to Plaintiffs voting absentee in federal elections in Hawaii.

II. Plaintiffs' claims are not redressable by a favorable decision with respect to UOCAVA or the Federal Defendants.

Even if Plaintiffs had suffered injuries-in-fact that were fairly traceable to UOCAVA or the Federal Defendants, they would still lack Article III standing, because their injuries are not likely to be redressed by a favorable decision. That is because, even if Plaintiffs were right that former Hawaii residents who live in the Northern Mariana Islands receive unconstitutional preferential treatment under UOCAVA, the appropriate remedy would be to *eliminate* that preferential treatment, by treating the CNMI as UOCAVA already treats all of the other territories listed in the statute. In other words, the most that would result from a "victory" here would be the withdrawal of certain voting-related benefits for some residents of the CNMI—but that would not alter Plaintiffs' inability to vote absentee in Hawaii. Plaintiffs lack Article III standing for this additional and independent reason.

a. Plaintiffs start their discussion of redressability by rehashing the argument that their "injury is not merely the inability to vote, but the disparate treatment itself," which means (on Plaintiffs' view) that "[e]ven 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." Pls.' Br. 21 (emphasis omitted). This argument fails for the reasons above: Plaintiffs have not suffered any standalone "disparate treatment" injury, divorced from their actual inability to vote, which could support Article III standing. *See supra* at 6-9.

If anything, that common-sense conclusion is even clearer in the redressability context: if the goal of this lawsuit is not for these Plaintiffs to gain the right to vote,

but rather is about disfranchising others who are not before the Court, then it is hard to see how there could even be an Article III case-and-controversy. After all, presumably, no party here actually wants any former Hawaii residents in the CNMI to lose their absentee voting rights. *Cf., e.g.*, *Alvarez v. Smith*, 558 U.S. 87, 93 (2009) (dismissing case as moot, even though the parties "continue to dispute the lawfulness of the State's hearing procedures," because "that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights").

Likewise, if Plaintiffs' only remaining goal is a judicial pronouncement that UOCAVA is unconstitutional—without any accompanying relief that actually affects their legal rights—that would be a quintessential advisory opinion, which is impermissible under Article III. *See, e.g.*, *Steel Co.*, 523 U.S. at 107 ("[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.").

b. The Federal Defendants' brief explained why *Sessions v. Morales-Santana* demonstrates Plaintiffs' redressability problem, Fed. Defs.' Br. 21-23, by making clear that the remedy for an equal protection violation "can be accomplished" either "by withdrawal of benefits from the favored class" or "by extension of benefits to the excluded class." 137 S. Ct. 1678, 1698 (2017). *Morales-Santana* further confirms that that remedial question is "is governed by the legislature's intent, as revealed by the statute at hand." *Id.* at 1699. Accordingly, even if Plaintiffs were right on the merits, "the proper remedy would be to treat CNMI like the four major

territories that Congress already expressly addressed in the statute," Fed. Defs.' Br. 22—which would not alter Plaintiffs' inability to vote absentee in Hawaii.

In response, Plaintiffs offer two arguments, neither of which has merit. First, citing only cases that predate *Morales-Santana* by nearly fifty years, Plaintiffs argue that "[e]xpansion" of equal protection rights "is the default rule." Pls.' Br. 22. But regardless of whether that is so, it is little help to the Court in applying the actual inquiry required by *Morales-Santana*, which focuses on hypothetical congressional intent. And as the Federal Defendants already explained, "[t]he text, structure, and history of UOCAVA all point" in the same direction here, Fed. Defs.' Br. 22—particularly given that the omission of the CNMI from the specified list of territories in UOCAVA is easily explained by the fact that the CNMI had not yet completed the process of becoming a territory at the time of the statute's enactment. *See Segovia*, 880 F.3d at 389 n.1 ("Under *Morales-Santana*, we should presume that Congress would have wanted the general rule—that U.S. territories are part of the United States—to control over the exception for the Northern Marianas.").[5]

Second, Plaintiffs place great weight on the fact that, in *Morales-Santana*, the plaintiffs were denied relief on the merits, and "the Supreme Court did not dismiss the case on standing or redressability grounds." Pls.' Br. 21. Although Plaintiffs

[5] Contrary to the phrasing in their complaints, Plaintiffs' brief now suggests that "ten of fourteen Territories are given the favorable treatment" they complain of—not just the CNMI. Pls.' Br. 24. That ten-of-fourteen phrasing is misleading, however, given that *nine* of those ten territories contain no permanent residents. *See* Fed. Defs.' Br. 9 n.3. In fact, UOCAVA defined all inhabited territories that were possessed by the United States at the time the statute was enacted as part of the United States, and only one new territory has come along since: the CNMI.

believe that to be "fatal" to the Federal Defendants' redressability argument, *id.* at 22, this is just another example of Plaintiffs overlooking the settled principle that "the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis*, 518 U.S. at 352 n.2; *see also supra* at 5-6. The Seventh Circuit did not make that mistake; it expressly relied on *Morales-Santana* in the context of redressability and standing. *See Segovia*, 880 F.3d at 389 n.1 ("[I]nstead of extending voting rights to all the territories, the proper remedy would be to extend them to none of the territories. That means a holding that the UOCAVA violates equal protection would not remedy the plaintiffs' injuries.") (citing *Morales-Santana*).

c. Plaintiffs also contend that the Federal Defendants' "redressability and remedy arguments are internally inconsistent," because if "contraction is the 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." Pls.' Br. 24-25. This argument fails, for reasons both legal and practical.

1. As a legal matter, this argument is irrelevant. Regardless of any practical consequences, if a federal court lacks subject-matter jurisdiction, it must dismiss. "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Indeed, the Supreme Court's "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (citation omitted). So it

simply does not matter what practical consequences follow from a legally correct ruling on the Federal Defendants' motion to dismiss.[6]

2. In any case, there is no practical concern here, for several reasons. First, it is incorrect that the presence of the Federal Defendants will be necessary to provide relief. It is the State and County Defendants who actually administer federal elections in Hawaii, and they would surely comply with an order prohibiting former Hawaii residents who reside in the CNMI from voting absentee in Hawaii—regardless of whether the Federal Defendants also remained in the case.

Second, if the Federal Defendants are right about redressability, then so are the State and County Defendants, who joined in that argument. *See* ECF Nos. 78-80. Although they did not file their own motions, this is a matter of subject-matter jurisdiction, so the Court would presumably also dismiss Plaintiffs' claims against

[6] This is also a complete response to Plaintiffs' repeated suggestions that it would "promote bad policy," Pls.' Br. 18, to grant the motion to dismiss. The Court's role in adjudicating this motion is not to make policy, it is to observe the jurisdictional limits imposed by Article III of the U.S. Constitution. In any case, Plaintiffs misunderstand Defendants' argument, and thus overstate the significance of their "policy" concerns. *See, e.g.*, *supra* at 6 (distinguishing this case from those involving concurrent causation).

The amicus briefs from *Segovia* that Plaintiffs attached to their opposition repeatedly make that same error. In any event, the Court should ignore those briefs, as they were filed without requesting (let alone obtaining) leave of the Court to file. *See, e.g.*, *Iyonsi v. United States*, No. 19-cv-00432-DKW-RT, 2019 WL 5058584, at *1 (D. Haw. Sept. 20, 2019) ("If Plaintiff indeed intended his document be an amicus brief to a particular case, he must request for leave to file an amicus brief and he must file his request in that case."), *report & recommendation adopted*, 2019 WL 5053077 (D. Haw. Oct. 8, 2019).

those Defendants. *See* Fed. R. Civ. P. 12(h)(3). No remedial dilemma would arise if *all* claims were dismissed.

Third, Plaintiffs never requested—and presumably, do not actually want—this Court to order that former Hawaii residents who reside in the CNMI should no longer be able to vote absentee in Hawaii. Plaintiffs' Second Amended Complaint requests an *expansion* of voting rights for Plaintiffs, but omits any request (even in the alternative) for a contraction of voting rights in the CNMI. *See* Second Am. Compl., Prayer for Relief ¶ b. That is not surprising: Plaintiffs have no legally cognizable interest in the voting rights of others, and Plaintiff Equally American's core mission would seem to be in strong tension with a request to disenfranchise those living in the CNMI. *See* Second Am. Compl. ¶ 20(c) ("Equally American's advocacy will not rest until every U.S. citizen is able to vote for President and has voting representation in Congress, whether they are a resident of a State or Territory."). For that reason too, this remedial question would never be presented—unless and until Plaintiffs actually request that relief from this Court.

Fourth, on the merits, UOCAVA and Hawaii UMOVA are both constitutional, so this question of remedy is purely academic.

CONCLUSION

For these reasons, Plaintiffs' claims challenging UOCAVA, and all of Plaintiffs' claims against the Federal Defendants, should be dismissed for lack of subject-matter jurisdiction.

Dated: February 12, 2021

Respectfully submitted,

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