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SCOTT NAGO, in his official capacity as
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

VINCENTE TOPASNA BORJA,
EDMUND FREDERICK
SCHROEDER, JR., RAVINDER
SINGH NAGI, PATRICIA ARROYO
RODRIGUEZ, LAURA CASTILLO
NAGI, and EQUALLY AMERICAN,

Plaintiffs,

vs.

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

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

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CIVIL NO. 20-00433 JAO-RT

STATE'S REPLY TO PLAINTIFFS'
COMBINED REPLY IN SUPPORT
OF THEIR MOTION FOR
SUMMARY JUDGMENT AND
OPPOSITION TO DEFENDANTS'
CROSS-MOTIONS FOR
SUMMARY JUDGMENT, FILED
ON JANUARY 21, 2022 [ECF #151]

Hearing

Date: March 4, 2022

Time: 9:00 a.m.

Judge: Honorable Jill A. Otake

No Trial Date Set

UNITED STATES OF AMERICA,

LLOYD J. AUSTIN III, in his official
capacity as Secretary of Defense,

FEDERAL VOTING ASSISTANCE
PROGRAM, and

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

Defendants.

STATE’S REPLY TO PLAINTIFFS’ COMBINED REPLY IN
SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANTS’ CROSS-MOTIONS FOR
SUMMARY JUDGMENT, FILED ON JANUARY 21, 2022 [ECF #151]

Because Plaintiffs devote the majority of their combined reply/opposition to their primary equal protection challenge of UOCAVA, they offer meager responses to the State’s cross-motion for summary judgment. Plaintiffs’ responses and, in some cases, lack of response, only reinforce their inability to establish all of the essential elements of their claim against the State. The Court should therefore deny Plaintiffs’ motion for summary judgment as to the State, and grant the State’s cross-motion for summary judgment.

I. PLAINTIFFS ARE NOT SIMILARLY SITUATED UNDER UMOVA

Plaintiffs take issue with the State’s argument that Plaintiffs are not similarly situated to those who are enfranchised under UMOVA. Pltfs’ Reply/Opp.,

ECF #151, at 13-14. They contend that the State's argument is predicated on the notion that Plaintiffs must be defined as "overseas voters" under UMOVA in order to be similarly situated. *Id.* at 14. Plaintiffs misconstrue the State's argument. The State is not arguing that they must be defined as "overseas voters" to be similarly situated; the State is arguing that Plaintiffs must show that they resemble UMOVA's "overseas voters" in respects relevant to the State's challenged policy in order to be similarly situated and that they cannot do so. State's Memo, ECF #142-1, at 7-13.

In enacting UMOVA, the Legislature found that, "military personnel and overseas civilians face a variety of challenges when voting in United States elections," and that UOCAVA and the MOVE Act had "not been wholly effective in overcoming the difficulties overseas voters face." *Id.* at 1-2. It further found that the "lack of uniformity between jurisdictions and the non-applicability of federal law complicate efforts to engage voters and represents a major impediment to the ability of military personnel and overseas civilians to vote." *Id.* at 2. UMOVA's "overseas voter" policy was therefore fashioned to address issues which would otherwise serve as impediments to eligible U.S. citizens living abroad being able to exercise their right to vote and participate in elections. *See id.* at 1-2.

There is no dispute that Plaintiffs, as residents of the U.S. territories of Guam and the U.S. Virgin Islands, are registered to vote and are active voters in

the United States. *See* Pltfs’ Response to Fed Defts’ CSOF, ECF #150, p. 5, ¶¶3-4; *see also* Joint Stip., ECF #136, at ¶¶9-13; Borja Dec, ECF #138-2, at ¶9; Schroeder Dec, ECF #138-4, at ¶11; Nagi Dec, ECF #138-5, at ¶6; Rodriguez Dec, ECF #138-6, at ¶8. Because there is nothing precluding Plaintiffs from exercising their right to vote and participating in elections in the United States, it is in this respect that Plaintiffs are not similarly situated in respects relevant to the State’s “overseas voters” policy. *Cf. Romeu v. Cohen*, 265 F.3d 118, 124-25 (2nd Cir. 2001) (noting that “citizens who move outside the United States . . . might be completely excluded from participating in the election of governmental officials in the United States but for the UOCAVA. In contrast, citizens of a State who move to Puerto Rico may vote in local elections for officials of Puerto Rico’s government (as well as for the federal post of Resident Commissioner).”).

Even if the Court were to disregard the State’s argument, Plaintiffs’ challenge of UMOVA would still fail because, as the party who has the burden of proof at trial, Plaintiffs have not established that they are similarly situated, which is an essential element of their claim. *See Boardman v. Inslee*, 978 F.3d 1092, 1117 (9th Cir. 2020). Despite having ample opportunity to do so, at no time have Plaintiffs asserted any facts or offered any evidence establishing how they are similarly situated with the State’s “overseas voters” groups. And when the State highlighted Plaintiffs’ failure, Plaintiffs’ opposition failed to refute the State’s

argument by pointing to facts or evidence, let alone an explanation, establishing how they are similarly situated. *See* State’s Memo, ECF #142-1, at 12; *see also* Pltfs’ Reply/Opp., ECF #151.

If anything, Plaintiffs’ own arguments suggest that Plaintiffs are *not* similarly situated with “overseas voters” who live abroad because U.S. citizens who live abroad are beyond the reach and protection of the federal government. *See* Pltfs’ Reply/Opp., ECF #151, at 22 (“[F]ormer state residents living in the territories . . . are subject to federal law in far more ‘numerous and vital ways’ than their fellow citizens living abroad (or indeed, even in the states).”); *see also* Pltfs’ MSJ, ECF #137-1, at 19 (“The federal government has broad authority over the territories and the lives of territorial residents . . . but little power within another country’s borders.”). This underscores that Plaintiffs cannot establish an essential element of their claim, thereby precluding summary judgment in their favor. *See Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018) (It is only after finding that the state’s classified group and control group are similarly situated that the court then determines the appropriate level of scrutiny and applies it.); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (FRCP Rule 56 mandates the entry of summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”).

II. STRICT SCRUTINY IS INAPPLICABLE TO UMOVA

Plaintiffs contend that UMOVA cannot avoid “strict scrutiny as an incremental expansion of the franchise of the type approved in *Katzenbach v. Morgan*, 384 U.S. 641 (1966)” because it “expanded voting rights to everyone living outside the states but the residents of four territories” and that such a “broad expansion” is inconsistent with the “incrementalism principle applied in *Katzenbach*[.]” Pltfs’ Reply/Opp, ECF #151, at 9-10, 19. This argument fails for three reasons.

First, Plaintiffs’ “broad expansion” argument is misleading. The extension of absentee voting rights to eligible U.S. citizens living abroad did not happen all at once, but rather incrementally. In 1986, UOCAVA expanded absentee voting rights in elections for federal offices to former state residents who reside outside of the “United States” (defined to include Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa). 52 U.S.C. § 20302(a)(1), § 20310(8). Then, in 2012, UMOVA “extend[ed] the assistance and protections for military and overseas voters under existing federal law to state elections.” Rep. No. 2450, ECF #143-4, at 2. Thus, the “broad expansion” alleged by Plaintiffs is actually comprised of incremental changes by different statutes at different points in time.

Second, UMOVA does not distinguish between residents of the territories. *See* Haw. Rev. Stat. § 15D-2. Plaintiffs acknowledge this. *See* Pltfs’ MSJ,

ECF #137-1, at 5 (“UMOVA itself does not extend the vote to former state residents who move to any U.S. territory.”).

Third, whether strict scrutiny is applied turns on the distinction being challenged; it does not turn on an “incrementalism principle.” *Katzbach*, 384 U.S. at 657. If the distinction is being challenged as an unconstitutional limitation on a law which does not restrict or deny the franchise, but instead extends the franchise, then *Katzbach* provides that it is not subject to strict scrutiny. *Id.* Such is the case with UMOVA. UMOVA does not restrict or deny the franchise, but instead extends it to eligible U.S. citizens living in a foreign country. Haw. Rev. Stat. §§ 15D-2 to -3, 15D-6 to -7. Inasmuch as Plaintiffs claim that UMOVA is unconstitutionally underinclusive because it does not include residents of the U.S. territories, *Katzbach* instructs that strict scrutiny is not applicable. 384 U.S. at 657; *cf. Romeu*, 265 F.3d at 124 (concluding that “the UOCAVA’s distinction between former residents of States now living outside the United States and former residents of States now living in the U.S. territories is not subject to strict scrutiny.”).

III. LEMONS IS DISTINGUISHABLE FROM THE INSTANT CASE

Notwithstanding the fact that *Katzenbach* forecloses the application of strict scrutiny to UMOVA, Plaintiffs advocate for strict scrutiny by attempting to analogize the instant case to *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008). Pltfs’ Reply/Opp, ECF #151, at 8. However, as Plaintiffs, themselves, admit, *Lemons* is distinguishable because it “expressly involves ‘burdens’ placed on already *established* voting rights[.]” *Id.* (emphasis added). Because no such rights are at issue here, attempting to analogize *Lemons* to the instant case is an exercise in futility.

Plaintiffs argue that the right to vote being subjected to severe restrictions (and strict scrutiny under *Lemons*) is analogous with the instant case because former state residents who move to a U.S. territory lack the right to vote in presidential and congressional elections. *Id.* It is by no means analogous. A right that does not exist cannot be subject to severe restrictions.

Plaintiffs next argue that some residents in a geographically defined governmental unit being precluded from voting (recognized by *Lemons* as being subject to strict scrutiny) is analogous to UMOVA “expanding the franchise to former residents who move anywhere but the disfavored territories” and defining the “relevant ‘unit’ of analysis as former state residents who do not obtain the right to vote in their new homes.” *Id.* UMOVA did no such thing. UMOVA only

extended the franchise to eligible U.S. citizens who live in a foreign country; it did not extend the franchise to those who move to any U.S. territory, the other 49 states, or the District of Columbia. Moreover, the analogy fails because the alleged ‘unit’ is not geographically defined and former Hawaii residents who move to another part of the United States have no established right to vote in Hawaii under UMOVA. In other words, a person who does not have a right to vote cannot be precluded from doing so. Plaintiffs’ attempt to analogize the instant case to *Lemons* therefore fails.

IV. CONCLUSION

The State respectfully requests that the Court deny Plaintiffs’ motion for summary judgment, and grant the State’s motion for cross-summary judgment.

DATED: Honolulu, Hawai‘i, February 11, 2022.

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