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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

VICENTE TOPASNA BORJA, *et al.*, *Plaintiffs*, v. SCOTT NAGO, in his official capacity as Chief Election Officer for the Hawaii Office of Elections, *et al.*, *Defendants*.	CIVIL NO. 20-00433 JAO-RT FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT Hearing Date: 9:00 a.m. Time: March 4, 2022 Judge: Hon. Jill A. Otake

FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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As a unanimous Seventh Circuit panel put it in rejecting materially identical claims, "[t]his is a strange case." *Segovia v. United States*, 880 F.3d 384, 392 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 320. Plaintiffs "seek the right to continue to vote in federal elections in [Hawaii] even though they are now residents of United States territories," *id.*—and even though many of them only ever lived in Hawaii briefly, decades ago. *See, e.g.*, Third Am. Compl., ¶ 15(c), ECF No. 105 (Plaintiff Borja lived in Hawaii "in 1990"); *id.* ¶ 16(a) (Plaintiff Schroeder lived in Hawaii "from 1976 to 1984"). "In effect, the plaintiffs are upset that the territories to which they moved are considered under federal and state law to be *part of the United States* rather than overseas." *Segovia*, 880 F.3d at 392. That is, Plaintiffs "would like overseas voting rights while still living within the United States." *Id.* But "[n]o court has ever held that they are so entitled," and this should "not be the first." *Id.*

Plaintiffs protest that "all [they] are asking for is the right to be treated like *normal* United States citizens, who generally enjoy the right to vote for President and voting representation in Congress." Pls.' Opp'n & Reply, ECF No. 151, at 16 (citation omitted). But citizens who live in the Territories do *not* "generally enjoy the right to vote for President and voting representation in Congress," *id.*—a well-settled state of affairs that the Ninth Circuit has held is "no constitutional violation." *Att'y Gen. of the Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984).

To the contrary, in many respects, significant distinctions between States and Territories are not just permitted, but expressly contemplated by the Constitution—which is why the Supreme Court has repeatedly applied rational-basis review to uphold legislation that bears only on the Territories. *See, e.g.*, *Califano v. Gautier Torres*, 435 U.S. 1, 4 (1978) (applying rational-basis review to reject the argument that "the Constitution requires that a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came"). It is also why Congress has long distinguished among various territories, in matters small and large.

Plaintiffs' desire for greater political participation is understandable, but "the judiciary is not the institution of our government that can provide the relief they seek." *Guam*, 738 F.2d at 1020. The Court should enter summary judgment for Federal Defendants on all claims.

ARGUMENT

I. Plaintiffs' claims are subject to rational-basis review.

"If the classification at issue does not involve fundamental rights or suspect classes, it must be upheld 'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). Accordingly, as every court to consider the question has concluded,

Plaintiffs' equal-protection claims are subject only to rational-basis review. *See Segovia*, 880 F.3d at 390; *Romeu v. Cohen*, 265 F.3d 118, 124 (2d Cir. 2001); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994).

A. UOCAVA does not burden a fundamental right.

"[R]esidents of the territories have no fundamental right to vote in federal elections," and these "plaintiffs have no special right simply because they *used* to live in a State." *Segovia*, 880 F.3d at 390. That is because the Supreme Court's "recognition of the right to vote has been consistently cabined by the geographical limits set out in the Constitution." *Igartúa v. United States*, 626 F.3d 592, 602 n.9 (1st Cir. 2010); *see also, e.g.*, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68 (1978) ("No decision of this Court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned.").

Plaintiffs' primary response is that "strict scrutiny is not reserved for voting rights expressly ordained in the Constitution." Pls.' Opp'n & Reply at 4. That is hardly helpful to Plaintiffs, however, who neither have a constitutional *nor* a statutory "freestanding right to vote" in the elections at issue. *Id.* And their continued emphasis on the (undisputed) principle that the Equal Protection Clause applies in the Territories, *see* Pls.' Opp'n & Reply at 9, says nothing about the appropriate standard of review, or whether UOCAVA survives it.

In any event, where (as here) Congress seeks to *expand* the franchise, "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights is inapplicable." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (citation omitted). Plaintiffs do not dispute that UOCAVA generally expands the franchise—indeed, in their arguments about remedies, they say that "[t]he entire thrust of the law is one of massive expansion" of the right to vote. Pls.' Opp'n & Reply at 23. Nevertheless, Plaintiffs claim that UOCAVA is different from the law at issue in *Katzenbach* because it "singles out groups for exclusion," by "extend[ing] the right to vote absentee to state residents who move to any of nearly 200 countries or the NMI, while denying it to those who move to four disfavored territories." *Id.* at 19. But that framing conveniently fails to acknowledge UOCAVA's application to those who move to any of the fifty States or to the District of Columbia—where it applies *identically* to those who move to Plaintiffs' home territories. And it fails to refute the key point about *Katzenbach*: that a "massive expansion" of the right to vote, Pls.' Opp'n & Reply at 23, should not be struck down as "invalid under the Constitution because it might have gone farther than it did," 384 U.S. at 657.[1]

Plaintiffs caricature Federal Defendants' position by imagining how it would apply to disparate treatment between Democrats and Republicans, or blondes and

[1] Plaintiffs continue to rely on cases that Defendants have already distinguished. *Compare* Pls.' Opp'n & Reply at 4-7, *with* Fed. Defs.' MSJ at 16-18.

brunettes, or straight voters and gay voters. *See* Pls.' Opp'n & Reply at 10. But UOCAVA bears no resemblance those hypotheticals, all of which would likely trigger strict scrutiny (or fail rational-basis review) for entirely independent reasons that do not apply here. *See, e.g.*, *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014) ("*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.").

B. UOCAVA does not discriminate against a protected class.

As already explained, "[r]egardless of whether all territorial residents could constitute a protected class for some purposes, former Hawaii residents who have moved to Puerto Rico, Guam, or the U.S. Virgin Islands do not." Fed. Defs.' MSJ, ECF No. 140, at 20. Here, the relevant group is comprised of individuals who want to vote in a State, but have voluntarily moved away from that State to certain territories. Plaintiffs have not shown that individuals with those characteristics form a "discrete and insular minorit[y]" that has historically been subjected to "prejudice" and are thus entitled to any form of heightened scrutiny. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938). The Seventh Circuit put it more starkly:

> The plaintiffs' current condition is not immutable, as nothing is preventing them from moving back to Illinois. And there has been no suggestion that the plaintiffs form a class of people historically subjected to unequal treatment. Indeed, we doubt that "people who move from a State to a territory" even constitute a class of people recognized by the law.

Segovia, 880 F.3d at 390.

In response, Plaintiffs argue that an entirely different group that is not before the Court—that is, *all* residents of *all* Territories—has "suffer[ed] from legislative neglect that has roots in the racist and colonial doctrines of the *Insular Cases*[.]" Pls.' Opp'n & Reply at 12-13. But even if that were correct as a matter of history, this argument would only ever be relevant to a claim that territorial residents *in general* have been denied their constitutional rights because of their inability to vote in federal elections. But the Ninth Circuit (and every other court of appeals to consider it) has already reached the opposite conclusion. *See Guam*, 738 F.2d at 1019 ("There is no constitutional violation."). Accordingly, even if territorial residents *in general* were a quasi-suspect class, that would not help these Plaintiffs.

In any event, Plaintiffs' theory is inconsistent with Supreme Court precedent, which has applied rational-basis review to uphold classifications that apply only to territorial residents—even in the precise context of claims brought by former State residents. In *Califano v. Gautier Torres*, the Supreme Court considered provisions of the Social Security Act making clear that "persons in Puerto Rico are not eligible to receive SSI benefits[.]" 435 U.S. 1, 2 (1978) (per curiam). That statute—much like UOCAVA—defined "the United States" as including "the 50 States and the District of Columbia," but not certain other territories. *Id.* So the plaintiffs in *Gautier Torres*—like Plaintiffs here—"received benefits as residents of

Massachusetts and New Jersey, respectively, but lost them on moving to Puerto Rico." *Id.* at 2-3. The Supreme Court rejected the challenge because the statutory classification was "rational, and not invidious," *id.* at 5, and that was enough.

The Supreme Court confronted a similar distinction in *Harris v. Rosario*, 446 U.S. 651 (1980), about benefits awarded under the Aid to Families with Dependent Children (AFDC) Program. There, it was undisputed that "Puerto Rico receives less assistance than do the States," so "AFDC recipients residing in Puerto Rico" argued that "the lower level of AFDC reimbursement provided to Puerto Rico violates the Fifth Amendment's equal protection guarantee." *Id.* The Supreme Court "disagree[d]," holding that Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Id.* at 651-52.

Plaintiffs note that both of those cases happened to "involve the provision of monetary benefits," Pls.' Opp'n & Reply at 13—but the Supreme Court in no way suggested that its holdings were limited to monetary benefits, and no principled constitutional basis for such a limitation is apparent. Instead, after emphasizing that Congress "is empowered under the Territory Clause of the Constitution, U.S. Const., Art. IV, § 3, cl. 2, to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,'" the Court flatly stated that Congress "may treat Puerto Rico differently from States so long as there is a rational basis." *Harris*, 446 U.S. at 651-52. That statement is impossible to square with Plaintiffs' position.

II. UOCAVA's definition of "the United States" is at least rational.

A. UOCAVA's treatment of Plaintiffs' home territories is rational.

UOCAVA's approach to Plaintiffs' home territories is to treat them the same way UOCAVA treats the fifty states and the District of Columbia. Accordingly, one who moves from one State to another State, or from one State to D.C., or from one State to Puerto Rico (or to any of Plaintiffs' home territories) is treated the same: UOCAVA protections do not apply, and the mover loses whatever voting rights they had in the State (or Territory) they left behind, gaining whatever voting rights they are entitled to in the State (or Territory) to which they have now moved.

This approach is far from irrational. Indeed, under *Plaintiffs'* preferred approach, whether citizens who reside in a Territory could vote in federal elections would turn on whether they had previously lived in a State—a regime that would be "arguab[ly] unfair[]" and "potential[ly] divisive[]," especially because it might, in practice, mean that voting rights would "effectively turn on wealth." *Romeu*, 265 F.3d at 124-25. Those "voters who could establish a residence for a time in a State would retain the right to vote for the President after their return," while "voters who could not arrange to reside for a time in a State would be permanently excluded." *Id.* If this Court were "to require [Hawaii] to grant overseas voting rights to all its former citizens living in the territories, it would facilitate a larger class of 'super citizens' of the territories." *Segovia*, 880 F.3d at 391.

Plaintiffs do not deny that this result would be "bizarre and inequitable," Fed. Defs.' MSJ at 25, nor that it is rational for Congress avoid creating "bizarre and inequitable" voting regimes in its four largest and oldest territories (and all inhabited territories at the time UOCAVA was enacted). Instead, their primary response is that UOCAVA "already create[s] this problem in the NMI." Pls.' Opp'n & Reply at 16. Defendants will address UOCAVA's application to the CNMI below, and explain again why there is a rational basis for that distinction. *See infra* at 10-13. But Plaintiffs' framing is telling—the suggestion that UOCAVA "create[s]" a "problem" in the CNMI is, effectively, an implicit concession that it was not irrational for Congress to take a different approach to avoid that "problem" in the other Territories.

Relatedly, Plaintiffs' conclusory statement (accompanied by no citation) that it "does not further a legitimate government interest" for Congress to "avoid uncomfortable questions about voting rights in the territories," Pls.' Opp'n & Reply at 17, misunderstands UOCAVA. Congress's definition of the "United States" in UOCAVA does not "avoid" anything—it reflects an overt legislative choice to treat Plaintiffs' home territories identically to the fifty States and D.C. And the "uncomfortable question" that Plaintiffs make oblique reference to—that is, the question of voting rights for *all* territorial residents—is not addressed by UOCAVA

at all, and has already been resolved by the Ninth Circuit. *See Guam*, 738 F.2d at 1019; *accord Romeu*, 265 F.3d at 123 (collecting cases).

B. UOCAVA's treatment of the CNMI does not make UOCAVA's treatment of Plaintiffs' home territories irrational.

Congress often treats different territories differently.[2] Although the Supreme Court has emphasized the constitutional equality of the States, it has never adopted anything like an equal-footing doctrine for the Territories. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1822 n.4 (2016). To the contrary, Congress may "develop innovative approaches" to address each Territory's unique needs. *Id.* at 1876. The Supreme Court and the Ninth Circuit have each passed upon such arrangements without identifying a constitutional violation. *See, e.g.*, *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv.*, 140 S. Ct. 1649 (2020) (rejecting Appointments Clause challenge to Puerto Rico-specific bankruptcy law); *Rabang v. INS*, 35 F.3d 1449, 1454 (9th Cir. 1994) (individuals born in the Philippines while it was a U.S. territory are not entitled to birthright citizenship under the Constitution, even though Congress provided for birthright citizenship in most other territories).

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[2] *See, e.g.*, 48 U.S.C. § 734 (extending most federal laws to Puerto Rico, but not to other territories); 42 U.S.C. §§ 602, 619 (extending Temporary Assistance for Needy Families program to "States," defined to include Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, but not CNMI); 7 U.S.C. § 2014 (food stamps for Guam and the U.S. Virgin Islands, but no other Territories); 8 U.S.C. § 1408 (individuals born in American Samoa are "nationals . . . of the United States," even though individuals born in all other U.S. territories are U.S. citizens).

Here, "[t]he cultural, political, and legal history of the Northern Mariana Islands provides ample basis for Congress to have treated it as more akin to a foreign country than the other Territories for purposes of UOCAVA." Fed. Defs.' MSJ at 27. Indeed, Plaintiffs do not dispute that "[t]he CNMI is (by far) the most recent addition to the United States' Territories," nor that "its relationship with the United States is unique in American law." *Id.* Plaintiffs do not dispute that CNMI's unique "'status as a former Trust Territory informed its relationship with the United States,' because that relationship did not begin as one of sovereignty; rather, the United States served as a trustee." *Id.* at 28 (quoting *Segovia v. Bd. of Election Comm'rs for City of Chi.*, 201 F. Supp. 3d 924, 948 (N.D. Ill. 2016), *aff'd*, 880 F.3d 384 (7th Cir. 2018)). And Plaintiffs do not dispute that "[c]onsistent with CNMI's unique history and status, Congress has historically treated CNMI as more akin to a sovereign country," including by not extending "specified provisions of United States statutory and constitutional law," *id.* at 28—which is why, for example, "full implementation of federal immigration law in CNMI will not be complete until December 31, 2029." *Id.* at 28-29.

Plaintiffs do protest that "the federal defendants fail to explain how any of these things individually relates to overseas voting rights." Pls.' Opp'n & Reply at 18. But rational-basis review does not require the government to identify an "obvious relationship," *id.*, between the legislation enacted and the problem

addressed—to the contrary, the challenged statute enjoys "a strong presumption of validity," and *Plaintiffs* bear "the burden 'to negative every conceivable basis which might support it'" without regard to "whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993). And here, it is at least "conceivable" that Congress could have wanted to respect CNMI's autonomy, unique political history, and comparatively young arm's-length relationship with the U.S. by treating it more like a foreign country (and less like a State) for this purpose. That is enough. *See Segovia*, 201 F. Supp. 3d at 948.[3]

Even setting aside Congress's "broad" powers with respect to the Territories, *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 586 n.16 (1976), more generally, it is a key feature of rational-basis review that Congress "need not strike at all evils at the same time or in the same way." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). That is especially true where, as here, Congress "must necessarily engage in a process of

[3] Also, "[b]y declining to include CNMI within UOCAVA's definition of a State," "Congress avoided imposing requirements on CNMI's electoral process that it imposed on the other Territories," and thereby "respected its unique relationship to the United States." Fed. Defs.' MSJ at 29-30. Plaintiffs' response—that "there is no evidence that any such burden is material," Pls.' Opp'n & Reply at 18-19—is irrelevant on rational-basis review, in which "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach*, 508 U.S. at 315.

line-drawing," because "[d]efining the class of persons subject to a regulatory requirement . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Beach*, 508 U.S. at 315-16 (citations omitted). In those circumstances, "the precise coordinates of the resulting legislative judgment" are "virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Id.* at 316. So even if (as Plaintiffs' argument implies) Congress could have improved UOCAVA by adding the CNMI to the definition of the "United States" once it became a territory, declining to do so was not irrational, and casts no constitutional doubt on the statute's application to Plaintiffs' home territories.[4]

C. It is not irrational for UOCAVA to treat those who move to U.S. territories differently than those who move to foreign countries.

Without UOCAVA, former State (or territorial) residents who move to foreign countries would no longer have any opportunity to vote in U.S. elections. Those who move to the Territories, by contrast, may vote there—including for non-voting representatives in the U.S. Congress. Congress could rationally have concluded that (1) it was important to ensure that Americans living in foreign countries retained

[4] That is also why Plaintiffs err in suggesting that it is "irrelevant" whether "UOCAVA was rational 'at the time it was enacted,'" or that Federal Defendants have conceded as much. Pls.' Opp'n & Reply at 15. In any event, the central point is not one of timing *per se*, but rather that (1) UOCAVA's treatment of Plaintiffs' home territories was (and is) rational, and (2) the intervening addition of the CNMI as a U.S. territory did not (and does not) change that conclusion.

some opportunity to remain connected to their government; and (2) that those who moved to the Territories had a lesser need, given the new voting rights they gained in the Territories. *See Romeu*, 265 F.3d at 124-25; *Igartua de la Rosa*, 32 F.3d at 11 n.3.

As predicted, Plaintiffs respond that "[t]he right to vote for such delegates, while no doubt of symbolic significance, does not afford territorial residents meaningful representation in Congress[.]" Pls.' Opp'n & Reply 21. But Plaintiffs' preference for voting (rather than non-voting) representation in Congress for territorial residents is not solvable by UOCAVA, nor by *any* statute—the Constitution itself draws that line. Likewise, "[t]he right to vote in presidential elections under Article II inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors." *See Guam*, 738 F.2d at 1019. That is why, "[u]ntil the passage of the twenty-third amendment to the Constitution, American citizens who lived in the District of Columbia could not participate in presidential elections," *id.*, and why (to this day) D.C. residents have only non-voting congressional representation. If Plaintiffs want representation in Congress or the Electoral College, UOCAVA is not to blame, and "the judiciary is not the institution of our government that can provide the relief they seek." *Id.* at 1020.[5]

[5] As for UOCAVA's application to uninhabited territories, Plaintiffs did not respond to Federal Defendants' arguments on this issue, *see* Fed. Defs.' MSJ at 35-36, and thus have conceded the point.

III. Even if Plaintiffs' claims had merit, the appropriate remedy would be to add the CNMI to UOCAVA's definition of "the United States"—not to remove all of the other inhabited territories from that definition.

The Court should not issue any relief, because Plaintiffs' claims lack merit. In the alternative, however, all seem to agree that the proper remedial framework comes from *Sessions v. Morales-Santana*, under which the Court "must adopt the remedial course Congress likely would have chosen had it been apprised of the constitutional infirmity." 137 S. Ct. 1679, 1701 (2017); *accord* Hr'g Tr. (March 5, 2021), at 29:7-10; Pls.' Opp'n & Reply at 24. Here, that inquiry is straightforward: the Court "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." *Segovia*, 880 F.3d at 389 n.1. That result, albeit one that no party has actually requested, would respect congressional intent by doing the least amount of damage to the statutory scheme that Congress actually enacted—by leaving the existing rules in place for the four largest and oldest territories, and by changing the rules only in the smallest and youngest territory, to match the rest.

CONCLUSION

The Court should enter summary judgment for Federal Defendants.

Dated: February 11, 2022

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