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EQUALLY AMERICAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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,	No. CV 20-00433 JAO-RT Honorable Judge Jill A. Otake Honorable Magistrate Judge Rom Trader **PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

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

UNITED STATES OF AMERICA,

LLOYD J. AUSTIN III,
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.

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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The central premise of defendants' opposition briefs is entirely erroneous—the notion that voting rights are only fundamental when defined in the Constitution itself. But almost no voting rights are defined in the Constitution—not even the right to vote for President, which the Constitution commits to the states, not the people. Once the right to vote is extended, however, it is fundamental, and legislative line-drawing must be closely scrutinized. The Supreme Court has applied that principle to a broad range of voting rights, from President to school board. There is no reason in logic or precedent to apply a different principle when legislatures grant the right to vote to citizens who move outside the states.

Defendants' remaining arguments are no more persuasive. They disagree that plaintiffs are members of a quasi-suspect class, arguing that their political powerlessness is compelled by the Constitution and that they need only move to access the right to vote. But the Constitution does not require Congress or state legislatures to subject territorial residents to disfavored treatment, and the ability of (some) territorial residents to uproot their lives and move their homes solely to obtain voting rights does not justify their relegation to second-class status.

Defendants make no effort to defend UOCAVA or UMOVA under any degree of heightened scrutiny—arguing only that they are rational—but their speculative musings about the legislative purposes for extending the vote to state residents who move to foreign countries or the Northern Mariana Islands ("NMI")

but not those who move to four disfavored territories fail to identify a legitimate government interest that is rationally advanced by this disparate treatment. The thrust of their contention is that the NMI is "more akin to a foreign country," but they do not explain how that characteristic (even if true) should be decisive on the question of voting for President, Vice President and Congress. If anything, since territorial residents are more directly affected by federal legislation, defendants' argument serves only to highlight the irrationality of the law.

Finally, defendants' argument that the proper remedy would be to enjoin the laws in a fashion that would restrict rather than expand voting rights also lacks merit. Their argument proceeds as though the purpose of UOCAVA were focused solely on differentiating among the territories, when in reality its overarching purpose as revealed both through the text of the statute and the legislative history was to remedy perceived equal-protection problems by massively expanding the right to vote overseas. *Contracting* voting rights to resolve residual equal-protection problems would be anathema to Congress's plain purpose.

ARGUMENT

I. UOCAVA and UMOVA violate equal protection by denying former state residents living in disfavored territories the same right to vote that they give to U.S. citizens living nearly anywhere else on Earth.

As plaintiffs explained in their opening brief, both UOCAVA and UMOVA violate the principles of equal protection guaranteed by the Fifth and Fourteenth

Amendments by extending the right to vote to former state residents who move nearly anywhere on earth—including to foreign countries or to the NMI—while denying it to those who move to four disfavored U.S. territories. That regime is subject to strict scrutiny because it strikes at the right to vote—a right that is fundamental even though it is not directly guaranteed by the Constitution. At bare minimum the regime is subject to heightened scrutiny because citizens who move to the territories are a quasi-suspect class—politically powerless and the subject of substantial historical discrimination. But regardless of the level of scrutiny to be applied, both statutes must fail, because they are not even rational. The distinctions that defendants highlight did not provide any rational basis to discriminate against the disfavored territories when the statutes were enacted, and they certainly do not do so today.

A. Because they discriminatorily deny the vote, UOCAVA and UMOVA are subject to strict scrutiny, which they cannot satisfy.

Both UOCAVA and UMOVA are subject to strict scrutiny because, as explained in the opening brief, they selectively expand the right to vote in federal elections in Hawaii, discriminating between similarly situated individuals based on whether they move to the NMI or a foreign country on the one hand or to one of four disfavored territories on the other. Defendants' contrary arguments erroneously presume that only voting rights expressly granted in the Constitution are fundamental and that only narrow categories of voting restrictions are subject

to scrutiny. Not so. The lines drawn by UOCAVA and UMOVA are subject to strict scrutiny, which no defendant has argued could possibly be satisfied.

1. Defendants' arguments that strict scrutiny does not apply to the kind of right or restrictions at issue misapprehend the law.

As detailed in the opening brief, voting rights are fundamental because they provide the means by which the people shape the laws by which they are to be governed—regardless whether such rights are expressly established under the Constitution or later created by statute. (Mem. at 13-17.) Defendants largely ignore these principles, arguing that territorial residents have no express voting rights under the Constitution and that legislatures have a free hand in extending voting rights beyond what the Constitution requires. These arguments lack merit.

a. The federal defendants' primary argument is that neither territorial residents nor former state residents, as such, have a freestanding right to vote, and that there is no independent "constitutionally protected right to vote in a [s]tate in which [one] do[es] not reside." (Fed. Br. at 14.) And "absent a constitutional right to vote [extraterritorially] in the first place," they claim, "UOCAVA cannot burden a fundamental right triggering strict scrutiny." (*Id.*)

But strict scrutiny is not reserved for voting rights expressly ordained in the Constitution. Indeed, "the Constitution 'does not confer the right of suffrage upon any one.'" *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (citation

omitted). Nevertheless, "once the franchise is granted to the electorate, lines may not be drawn" unless they can satisfy "exacting judicial scrutiny." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628-29 (1969) (citation omitted). That is why both the Supreme Court and the Ninth Circuit have repeatedly applied strict scrutiny to all manner of elections that citizens have no freestanding constitutional right to participate in—from ballot initiatives, *see Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 n.7 (9th Cir. 2003) to school board, *see Kramer*, 395 U.S. at 628-29, to President, *see Moore v. Ogilvie*, 394 U.S. 814, 818-19 (1969).

Just as the Constitution does not require a state to hold popular elections for school board, or ballot initiative, or even presidential electors, it may well not require extraterritorial, overseas, or absentee voting of any kind. But once the government has decided to give that right to some people, it cannot withhold it from others who are similarly situated without triggering the highest level of constitutional review. There is simply no basis to exempt extraterritorial extensions of the right to vote from this rule.

Indeed, that is the premise of UOCAVA itself. As plaintiffs explained in their opening brief, prior to the passage of UOCAVA's predecessor statute, the Overseas Citizens' Voting Rights Act, states frequently extended voting rights to military and government employees stationed abroad, but not to private citizens

who voluntarily moved abroad. Even if, as Honolulu contends, "[t]here is a rational basis for such a distinction" since the former group is stationed abroad "to serve national interests" while the latter group moved there "voluntarily" (Honolulu Br. at 1-2), Congress found the distinction to be "highly discriminatory" and "suspect under the equal protection clause," H.R. Rep. No. 94-649, pt. 1, at 3 (1975). In other words, Congress itself thought extraterritorial voting rights to be subject to the very heightened scrutiny that defendants now disclaim.

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) (cited in Fed. Br. at 16), is not to the contrary. That case does not stand for the proposition that voting rights are necessarily defined by "geographic boundaries," 439 U.S. at 68 (quoted in Fed. Br. at 16), as the federal defendants contend. It held that a jurisdiction "may legitimately restrict the right to participate in its political processes to those who reside *within* its borders," *id.* at 68-69 (emphasis added), but it said nothing about whether, once a jurisdiction chose to expand voting rights *beyond* its borders, it could do so in a discriminatory fashion.

The federal defendants also ignore the fact that, unlike in *Holt Civic Club*, the voting rights at issue here concern offices that are responsible for enacting laws that directly touch on the residents of the four disfavored territories. The law in *Holt Civic Club* only limited the right to vote in municipal elections in a neighboring city that exercised some limited powers over its suburbs. The Court

was clear to distinguish the case from "the far-reaching consequences" of denying the right "to vote in national [and] state" elections, 439 U.S. at 71 n.7, or a scenario in which the neighboring municipality exercised extensive authority over the disenfranchised, *see id.* at 72 n.8; *see also id.* at 77-78 (Stevens, J., concurring) (noting plaintiffs "vote[d] for . . . county, state, and federal officials" and that statutory scheme did not "deny the [local] franchise to individuals who share[d] the interests of their voting neighbors").

Here, by contrast, plaintiffs are directly governed by federal law, yet are excluded from voting for the officials who shape it. As explained in plaintiffs' opening brief, the Supreme Court has emphasized the importance of extending voting rights with an even hand when it comes to having a voice in the laws that are to govern the potential voter. *Evans v. Cornman*, 398 U.S. 419, 421-24 (1970). *Evans* is mentioned just once among defendants' three briefs, in a fleeting assertion that it is distinguishable because it involved residents of a federal enclave who were "treated . . . as state residents for most purposes." (Fed. Br. at 16.) But that ignores the emphasis *Evans* placed on having a voice in the governing law, and it is any event not a meaningful distinction, since plaintiffs too are "treated . . . as [U.S.] residents for most purposes" when it comes to the application of federal law.

b. Defendants next argue that, even if the voting rights at issue here are fundamental in nature, not every election law is subject to strict scrutiny. (State

Br. at 15-16; *see also* Fed. Br. at 17-18 (similar).) But their principal authority—*Lemons v. Bradbury*, 538 F.3d 1098, 1103 (9th Cir. 2008) (cited in State Br. at 16)—expressly concerns "burdens" placed on already established voting rights, *not* the question of who is eligible to vote in the first place.

In any event, *Lemons* acknowledges that "strict scrutiny applies . . . when the right to vote is 'subjected to severe restrictions.'" 538 F.3d at 1103 (citation omitted). That is clearly the case here: those who move from Hawaii to a disfavored territory are *wholly excluded* from voting for electors for President and Vice President or for voting members of Congress. That is simply nothing like the regulatory measure concerning the specifics of a signature verification process challenged in *Lemons*.

Lemons also recognizes that the Supreme Court has subjected laws to strict scrutiny when they "unreasonably deprive some residents in a geographically defined governmental unit from voting." 538 F.3d at 1104 (citation omitted) (quoted in State Br. at 16). Both UOCAVA and UMOVA fit well within the logic of these precedents. By expanding the franchise to former residents who move anywhere but the disfavored territories, the statutes define the relevant "unit" of analysis as former state residents who do not obtain the right to vote in their new homes. And they "unreasonably deprive" some citizens within that "unit" of the franchise.

c. Defendants also contend that Congress may treat territories differently from the states. (*E.g.*, Fed. Br. at 14.) But Congress's power over the territories is not so broad as to permit it to "switch the Constitution on or off at will" within their boundaries. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). The Constitution prevents Congress from abrogating the Fifth or Fourteenth Amendments, even in the territories. *See Rodriguez*, 457 U.S. at 7 ("It is not disputed that the fundamental protections of the United States Constitution extend to the inhabitants of" the territories). The United States acknowledged as much at a recent argument before the Supreme Court. *See* Tr. of Oral Arg. 10:3-11, *United States v. Vaello-Madero*, No. 20-303 (U.S. Nov. 9, 2021) (Justice Gorsuch and Curtis Gannon) ("equal protection" "applies fully" in the territories). Thus "it is clear that the voting rights of [territorial] citizens are constitutionally protected to the same extent as those of all other citizens of the United States." *Rodriguez*, 457 U.S. at 8; *see Charfauros v. Bd. of Elections*, 249 F.3d 941, 949 (9th Cir. 2001) (discussing "fundamental" nature of right to vote for school board in a territory).

d. Defendants finally assert that UOCAVA and UMOVA can be shielded from strict scrutiny as an incremental expansion of the franchise of the type approved in *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Fed. Br. at 18-19; State Br. at 17), but this too is wrong. As plaintiffs explained in the opening brief, *Katzenbach* did not concern discrimination as to the right to vote at all, and instead

concerned only a provision of the Voting Rights Act that required states to offer an exception to English literacy tests. The exception was also exceedingly narrow and thus truly incremental. By contrast, the statutes at issue here expanded voting rights to everyone living outside the states but the residents of four territories. Defendants' reading of *Katzenbach* as creating a broad rule that no statute that "seeks to expand the franchise" can be subject to strict scrutiny (Fed. Br. at 18) is simply not tenable. If that were the case, UOCAVA could have required states to allow Democratic voters residing overseas but not Republican ones to vote absentee, or brunette voters but not blond ones, or straight voters but not gay ones, without triggering strict scrutiny. That is not the law.

2. The statutes cannot survive strict scrutiny.

As plaintiffs explained in their opening brief, both UOCAVA and UMOVA fail under strict scrutiny, which requires that any statute be "necessar[ily] and narrowly tailored to serve [a] compelling interest." *Charfauros*, 249 F.3d at 952. No defendant argues to the contrary, and they thus concede the point.

B. Alternatively, UOCAVA and UMOVA are subject to heightened scrutiny, which they fail, because they discriminate against a suspect class that is politically powerless.

At minimum, UOCAVA and UMOVA are subject to heightened scrutiny because they discriminate against a quasi-suspect class for the reasons set forth in the opening brief: plaintiffs are members of a class that has been historically

subjected to discrimination; that discrimination is not based on any quality that renders plaintiffs less able to perform or contribute to society; the class has distinguishing and discrete characteristics; and that class is politically powerless. (Mem. at 24-28.) Defendants argue that plaintiffs' political powerlessness results from the Constitution, not discrimination; that their status as territorial residents is not sufficiently immutable to qualify as a quasi-suspect class; and that Supreme Court precedent applying rational-basis review to territorial legislation precludes the application of heightened scrutiny here. None of these arguments has merit.

1. First, while defendants essentially concede that plaintiffs and other territorial residents are politically powerless, they argue that this fact does not warrant heightened scrutiny because their powerlessness is compelled by the Constitution. (Fed. Br. at 21; State Br. at 18.) But the Constitution contains no such command. Indeed, the Supreme Court has squarely rejected the notion—implicit in defendants' argument—that the Territories Clause somehow strips territorial residents of their constitutional rights. *Boumediene*, 553 U.S. at 765 ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply").

What the Constitution does require is that federal and state governments afford equal protection of the laws to everyone—including territorial residents. *See* Tr. of Oral Arg. 10:3-11, *Vaello-Madero*, No. 20-303 (U.S. Nov. 9, 2021)

(Justice Gorsuch and Curtis Gannon) ("equal protection" "applies fully" in the territories). Guaranteeing equal protection of the laws entails some obligation to take account of the fact that certain classes of individuals subject to those laws are powerless to influence them. As noted above, that is precisely what Congress did in enacting UOCAVA and its predecessor law—observing that the existing array of overseas voting laws shut out of the political process some would-be voters who were still subject to federal law on a range of issues. This case is no different.

2. Defendants also contend that plaintiffs' status as territorial residents is not immutable—in essence, that the history of racism toward the territories is not directed at them (as former state residents), and that they could simply move back to Hawaii if they wish to vote in federal elections. (Fed. Br. at 20; State Br. at 18; Honolulu Br. at 3.) But absolute immutability is not a prerequisite to heighted scrutiny. As illustrated by equal-protection cases relating to religion, citizenship status, and gender, the correct test is whether the characteristic is so fundamental that an individual should not have to change it. *See Golinski v. U.S. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 n.6 (N.D. Cal. 2012) (collecting examples). In any event, the notion that newcomers are somehow exempt from the lasting legacy of racism toward the territories is fanciful at best. What matters is that the territories and their residents continue to suffer from legislative neglect that has

roots in the racist and colonial doctrines of the *Insular Cases*—a disadvantage that inescapably affects anyone who takes up residence there.

3. Finally, the federal defendants claim that the Supreme Court's resort to rational-basis review in other territorial cases precludes application of heightened scrutiny here. (Fed. Br. at 21-22.) But the cases they cite do not support so broad a proposition. All of them involve the provision of monetary benefits, which was clearly important to the application of rational-basis review and the "strong presumption of constitutionality" in those cases. *Califano v. Gautier Torres*, 435 U.S. 1, 5 (1978) (per curiam) (citation omitted). As explained in *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1159 (D.C. Cir. 1991), this context is important because there may be economic rationales for differential treatment that only incidentally "coincid[e] with race or national origin." 928 F.2d at 1160-62. Here, by contrast, territorial status is not incidental to the denial of voting rights—it is the very reason for the denial. Accordingly, the federal defendants' authority is inapposite. And because defendants do not contend otherwise, they effectively concede that the laws cannot survive heightened scrutiny.

C. The claim that UOCAVA and UMOVA are subject to no scrutiny is nonsensical and unsupported by case law.

The state goes beyond the other defendants' arguments regarding the standard of view and contends that UMOVA is not subject to *any form* of scrutiny at all—not even rational-basis review—because plaintiffs are not similarly situated

to those who are enfranchised. (State Br. at 7-14.) This assertion is meritless. It is predicated on the notion that plaintiffs are not similarly situated to a comparator group because they are not defined as "overseas voters" under UMOVA and its implementing regulations. (*Id.* at 12-13.) This argument is entirely circular. If accepted, it would mean that Hawaii could use any definition it desired for "overseas voters"—say, only those former Hawaii residents who voted Democratic or who live in France—but the law would be immune from attack by Republican voters or those who move to any other country because, under the state's logic, they would not be "similarly situated" to those who are defined as overseas voters. If that were the standard, there could *never* be an equal-protection case, which is necessarily only brought when a group is denied certain benefits that a comparator group receives. *See Roy v. Barr*, 960 F.3d 1175, 1181 (9th Cir. 2020) (finding that all successful equal-protection claims have a "a class that is similarly situated [and] has been treated disparately") (citation omitted), *cert. denied*, 141 S. Ct. 1517 (2021). The Court should reject this contention out of hand.

D. UOCAVA and UMOVA's treatment of individuals who move to disfavored territories is unconstitutional under any standard of review, including rational basis.

Ultimately, the Court need not even decide whether UOCAVA and UMOVA are subject to strict or heightened scrutiny because the lines they draw are (and always have been) irrational. Defendants argue that UOCAVA was

rational when it was enacted because NMI was not a territory at that time and thus it treated individuals who moved from a state to a territory the same as individuals who moved from one state to another; that UOCAVA remains rational today because Congress is free to treat each territory differently and the NMI's ostensible status as "more akin to a foreign country" justifies treating it differently with respect to overseas voting rights; and that it is rational to treat former state residents who move to foreign countries or uninhabited territories differently with respect to overseas voting rights from those who move to the four disfavored territories. These arguments all lack merit.

1. The federal defendants' lead argument is that UOCAVA was rational "at the time it was enacted." (Fed. Br. at 24 (cleaned up).) That contention, even if correct, is irrelevant. As plaintiffs argued in their opening brief—and the federal defendants nowhere dispute—a "statute must advance some legitimate governmental purpose *today*." (Mem. at 30.) *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."). Thus, even if there were a justification to discriminate among otherwise unrepresented American citizens residing abroad or in the territories with respect to voting rights in 1986, that justification no longer exists, and that is what matters for rational-basis review.

The federal defendants' argument is also wrong on its own terms. They contend that UOCAVA prevented the creation of "super citizens" in territories—i.e., a class of former state residents who could vote for federal office and thus enjoy broader rights than residents of the territories who had never been citizens of a state. (Fed. Br. at 25.) In fact, Congress enacted just such a class of "super citizens" in the NMI by adopting UOCAVA as written. The federal defendants' attempted deflection from this reality by insisting that the NMI was "not yet even a territory" at that time (*id.*) is formalism in the extreme. The Covenant establishing the political union of the NMI and the United States was already ten years old when UOCAVA was enacted, and the residents of the NMI had already been birthright U.S. citizens for *eight years*. *Sabangan v. Powell*, 375 F.3d 818, 819 (9th Cir. 2004). And the federal defendants conspicuously do not fault UOCAVA for sustaining the "super citizen" phenomenon in the NMI to the present day.

Even if UOCAVA did not already create this problem in the NMI, the super-citizen argument fails to identify a *legitimate* government interest. As two territories themselves have expressly argued, the "super citizen" pejorative masks the reality that all plaintiffs 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. *See* Br. of Commonwealth of Puerto Rico as Amicus Curiae at 3, 8, *Segovia v. United States*, No. 17-1463 (U.S. May 23, 2018)

(Ex. 1) (emphasis added); Br. of Amicus Curiae U.S. Virgin Islands at 4, *Segovia*, No. 17-1463 (U.S. June 28, 2018) (Ex. 2) (similar). The fact that their enfranchisement would draw attention to the reality that their fellow territorial residents lack the right to vote is a reason to *expand* the vote. The policymaker's impulse to deny that vote altogether so that Congress can avoid uncomfortable questions about voting rights in the territories does not further a legitimate government interest.

2. Defendants next contend that it is rational to treat the NMI differently because each territory is unique, and there is no requirement that Congress put the territories on "equal footing" with one another. (Fed. Br. at 26-31.) But to say one territory is different from another is a truism that obviously cannot justify any and all differential treatment Congress can imagine. Even under rational-basis review, distinctions cannot be arbitrary; they must still be rooted in a legitimate government interest, and the distinctions must rationally advance that interest. (*See* Mem. at 30-31.)

The federal defendants offer no explanation that satisfies this requirement. Instead, they offer a list of purportedly distinctive features of the NMI that have no rational bearing on whether former state residents now living there should enjoy the right to vote—specifically, the NMI's relatively "recent addition" as a territory; its historical control over immigration (which ended 13 years ago, in 2009); its

lack of a congressional delegate (until 14 years ago, in 2008); and the ostensible uniqueness of the NMI's voluntary union with the United States. (Fed. Br. at 27-29.)

But the federal defendants fail to explain how any of these things individually relates to overseas voting rights. As a threshold matter, it is not true that the NMI is the only territory to enter a voluntary union with the United States. American Samoa did so in 1900. *See Deeds of Cession of Tutuila* (Apr. 17, 1900). Setting aside the factual error, the voluntariness of the union has no obvious relationship to whether former state residents who move to the NMI should be able to vote absentee there. Nor does the NMI's control over immigration, or its lack of a delegate to Congress (who cannot vote in the full House). In any event, neither of these characteristics could justify UOCAVA today since neither has been true for *over a decade*, and rational-basis review requires justification grounded in *current* circumstances. Finally, there is nothing about the recency of the NMI's union with the United States that has any obvious relationship to voting rights. In any event, that union is not that recent – it is over 35 years old.

The federal defendants also contend that Congress could have rationally decided not to impose the logistical burdens of UOCAVA's requirements on the NMI. (Fed. Br. at 30.) But there is no evidence that any such burden is material,

and this argument does not justify the NMI's differential treatment from other territories, for which UOCAVA is presumably just as burdensome.

The federal and state defendants finally assert that the distinct treatment of the NMI remains rational because legislatures may expand voting rights incrementally without violating equal protection, citing *Katzenbach*, 384 U.S. 641. (Fed. Br. at 30-31; State Br. at 21.) But defendants ignore the reality—explained in plaintiffs' opening brief—that the incrementalism principle applied in *Katzenbach* is worlds apart from the "broad expansion [of voting rights to overseas voters] that singles out particular groups for exclusion" under the laws at issue here. (Mem. at 23.) When a legislature singles out groups for exclusion, it violates equal-protection principles, even under rational-basis review. *See Romer v. Evans*, 517 U.S. 620, 633-34 (1996) (explaining that "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare" and inherently raise equal-protection concerns). That is what UOCAVA does: it extends 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. It cannot be defended on the ground that it is an incremental reform.

3. The federal defendants also contend that UOCAVA's differential treatment of individuals who move to territories and those who move to foreign countries or uninhabited territories is rational, arguing that binding Ninth Circuit

precedent controls this issue, and in any event that, by virtue of its definition of the "United States," UOCAVA preserves the right to vote absentee for federal delegates for territorial residents who move overseas. (Fed. Br. at 31-36.) These contentions also lack merit.

First, the Ninth Circuit's ruling in *Attorney General of Territory of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) has no relevance to the analysis. Indeed, the federal defendants begin their exposition of the case by acknowledging that "it is not clear" that "the plaintiffs in that case made all of the arguments that these Plaintiffs raise here." (Fed. Br. at 32.) That understates things significantly. The Ninth Circuit made clear that the "[p]laintiffs' claim in th[at] case [wa]s asserted on behalf of all voters . . . in Guam"; it expressly did not involve "a claim on behalf of those who ha[d] previously qualified to vote in a state election." 738 F.2d at 1020. Nor is it true, as the federal defendants contend, that the Ninth Circuit held that there is "'no constitutional violation' when absentee-voting rights are provided to former state residents who live in foreign countries, but not to *former state residents who live in Guam*." (Fed. Br. at 32 (emphasis added) (citation omitted).) The Ninth Circuit did not address that comparison at all; instead, it held there was "no constitutional violation" in denying the right to vote for President to Guamanians *generally* because "Guam concededly is not a state."

738 F.2d at 1019. In short, the federal defendants have misread *Attorney General of Guam*; it simply does not address or otherwise bear on the question presented.

The federal defendants' alternative argument that UOCAVA's differential treatment of the territories is rational because it preserves the right of territorial residents who move overseas to vote absentee for their federal delegates also lacks force. The right to vote for such delegates, while no doubt of symbolic significance, does not afford territorial residents meaningful representation in Congress, as the federal defendants all but concede. (*See* Fed. Br. at 34.) The preservation of rights with no practical value at the expense of real voting rights for President, Vice President and voting Members of Congress furthers no legitimate government interest. In any event, nothing required Congress to link the two in drafting UOCAVA. If absentee voting rights for territorial delegates were of critical importance, it could have extended absentee voting rights for state residents who move to territories *and* established absentee voting rights for territorial residents who moved overseas. The trade-off identified by the federal defendants is not inherent in plaintiffs' request to be treated equally; it is instead a function of statutory drafting choices. Plaintiffs' claim to the right to vote should not be prejudiced by this fact.

Finally, defendants nowhere contend with the fact that the right to vote for President, Vice President and congressional representation is especially important

in the territories. (*See* Mem. at 17, 32.) A significant justification for the enactment of UOCAVA and its predecessor statute was that former state residents living abroad remain subject to a range of federal law, *e.g.*, S. Rep. No. 93-1016, at 2 (1974) (explaining that "the citizen outside the United States also has his congressional interests," such as "the exchange rate of the dollar, social security benefits, or the energy situation")—echoing the same concerns the Supreme Court expressed in *Evans v. Cornman*. It is patently irrational to argue for the protection of voting rights for such individuals on the one hand while on the other arguing against such rights for former state residents living in the territories—where they 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* 398 U.S. at 424. For this reason, too, UOCAVA's differential treatment is irrational and violates equal protection.

In short, none of the grounds identified by defendants establishes a legitimate government interest that is rationally related to the discriminatory lines drawn by the laws at issue. Accordingly, even if rational-basis review applies, these laws violate plaintiffs' equal-protection rights.

II. The proper remedy is to sever UOCAVA and UMOVA so that they extend federal absentee voting rights to all former state residents living in foreign countries or U.S. territories, rather than taking the unprecedented approach espoused by defendants.

Turning to remedy, defendants argue that even if UOCAVA violates plaintiffs' equal-protection rights, plaintiffs must be condemned to a "Pyrrhic" victory because the "only appropriate remedy would be to treat CNMI as UOCAVA already treats all of the other territories listed in the statute." (Fed. Br. at 37; *accord* State Br. at 22; Honolulu Br. at 3.) This argument is premised entirely on the federal defendants' contention that the "general rule" reflected in UOCAVA is one that denies voting rights to former state residents living in the territories, from which the NMI is the only exception. (*See* Fed. Br. at 38-39.)

This argument ignores the broader context. It is not disputed that Congress's overarching goal in enacting UOCAVA was to "make absentee voting for President and voting members of Congress widely available for former state residents living overseas." (Mem. at 37.) The entire thrust of the law is one of massive expansion. For example, Congress noted the varying approaches of the states, with some extending the vote to those in the military service, some extending it to those who indicated an intent to return, and others to those in federal service. Congress did not pick among these groups but rather extended the right as broadly as possible. *See, e.g.*, H.R. Rep. No. 94-649, pt. 1, at 1-3. The question of line-drawing among the territories, by contrast, receives no attention in

the legislative history and serves no purpose apparent from the statutory language (as canvassed above), and thus cannot be read to reflect a "general rule" specific to the territories at all. The relevant general rule is expansion.

The reason for the expansive nature of the legislation is just as important to this analysis. As noted above, Congress expanded overseas voting rights almost universally because of the perceived unfairness and equal-protection issues associated with depriving overseas voters who remained subject to and interested in federal laws of the right to have a say in the formation of those laws, finding it "highly discriminatory" and "suspect under the equal protection clause" that these individuals "continue to be excluded from the democratic process of their own country." S. Rep. No. 93-1016, at 4, 5. It would fundamentally contradict that policy concern to adopt a remedy that would further withdraw the right to vote from those former state residents most directly affected by federal law.

Accordingly, the ordinary and preferred approach of extension, *see Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), should be followed in this case and the appropriate remedy is to sever the offending language from the statutes and expand the ability to vote absentee to plaintiffs.

CONCLUSION

The Court should grant plaintiffs' motion for summary judgment and deny defendants' cross-motions for summary judgment.

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Respectfully submitted,

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