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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

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,

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.

CIVIL NO. 20-00433 JAO-RT

MEMORANDUM IN SUPPORT

MEMORANDUM IN SUPPORT

## I. INTRODUCTION

Contrary to what Plaintiffs would have this Court believe, this case does not involve a complaint that anyone's fundamental right to vote has been unconstitutionally denied, diluted, or burdened. There are no voting rights at stake here. Rather, this case involves Plaintiffs' attempt to leverage equal protection principles to secure voting rights not afforded under the Constitution or the challenged federal and state laws. In doing so, Plaintiffs repeatedly treat the federal and state laws as one and the same, as if the laws employ identical classifications and should suffer the same fate. That is not true. Plaintiff's primary equal protection challenge is to federal law, which distinguishes between former state residents living in the Commonwealth of the Northern Mariana Islands from those living in the other territories. By contrast, Plaintiffs' challenge to state law is an afterthought, as Plaintiffs make no serious attempt to challenge its distinction between former state residents living in foreign countries from those living within the United States.

It should therefore come as no surprise that Plaintiffs' challenge of state law fails at the outset. No scrutiny is even warranted because Plaintiffs cannot demonstrate that they are similarly situated in respects relevant to the State's challenged policy. If there is to be scrutiny, Plaintiffs' challenge still fails because

state law only invites and easily survives rational basis review. Further, even if it is determined that a state administrative rule adopted the federal classification and that such classification is unconstitutional, the proper remedy is to eliminate the preferential treatment from the administrative rule. It does not, as the Plaintiffs suggest, allow the Court to reach back to "remedy" a state law definition that even Plaintiffs concede has never provided for preferential treatment for any territory. The State therefore respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment, and grant summary judgment in favor of the State.

## II. BACKGROUND

Under the U.S. Constitution, the right to vote in presidential elections inheres to the fifty states and the District of Columbia. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XXIII, § 1; *see also Att'y Gen. of Territory of Guam v. U.S.*, 738 F.2d 1017, 1019 (9th Cir. 1984) ("The 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."). And the right to vote for voting members of Congress inheres to the people of the fifty states. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII. It is therefore undisputed that, absent a constitutional amendment, the right to vote can only be extended by legislation. *See* Pltfs' Memo in Support of MSJ, ECF #137-1, at 3[1] ("When a U.S. citizen

[1] All page references are to the page numbers at the bottom of the document.

moves outside the fifty states, she loses the right to vote for President and voting representation in Congress unless Congress or her former state of residence legislates otherwise.").

Effective August 28, 1986, the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") extended absentee voting rights in federal elections to uniformed service members, their eligible family members, and overseas U.S. citizens by requiring that states permit such individuals to vote by absentee ballot. Pub. L. No. 99-410, 100 Stat. 924 (1986) (now codified as 52 U.S.C. Ch. 203); *see* 52 U.S.C. 20302(a)(1) ("Each State shall – (1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office[.]").

UOCAVA defines an "overseas voter" in part as, "a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States," or "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." 52 U.S.C. § 20310(5)(b) and (c). The "United States" is defined as "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa." 52 U.S.C. § 20310(8). Thus, former

Hawaii residents living in the United States (including Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa) do not qualify as "overseas voters" and would not be able to vote absentee in Hawaii in federal elections under UOCAVA. *See* 52 U.S.C. § 20310; *see also* Joint Stipulation for the Incorporation of Stipulated Facts Into the Record, ECF #136, ¶8.

Following the enactment of UOCAVA, the Commonwealth of the Northern Mariana Islands ("NMI") was established and its domiciliaries were recognized as citizens of the United States. Proclamation 5564, 51 Fed. Reg. 40399 (Nov. 3, 1986), 1986 WL 796859.[2] Although there were subsequent amendments to UOCAVA, including the Military and Overseas Voter Empowerment Act ("MOVE Act"), Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009), at no time was the definition of the "United States" amended to include the NMI. Former Hawaii residents who move to the NMI may therefore qualify as "overseas voters" under UOCAVA. *See* 52 U.S.C. § 20310.

In 2012, Hawaii enacted its own standalone law, entitled the Uniform Military and Overseas Voter Act ("UMOVA"), which extended absentee voting rights in federal, state, and local elections to uniformed-service and overseas voters. Act 226, 2012 Haw. Sess. Laws 798. Unlike UOCAVA, UMOVA's

[2] Pursuant to Proclamation 5564, Placing Into Full Force and Effect the Covenant With the Commonwealth of the Northern Mariana Islands, and the Compacts of Free Association With the Federated States of Micronesia and the Republic of the Marshall Islands, CNMI became fully established on November 4, 1986.

definition of an "overseas voter" does not include former Hawaii residents who move to the NMI or any U.S. territory. *See* Haw. Rev. Stat. § 15D-2. It is therefore undisputed that, "Hawaii UMOVA does not grant enfranchisement to former state residents who move to *any* Territory." Third Amended Complaint, ECF #105, ¶ 53.

UMOVA and Hawaii Administrative Rules ("HAR") § 3-177-600 nevertheless acknowledge that UOCAVA mandates Hawaii's compliance with federal law. *See* Haw. Rev. Stat. § 15D-4(a) ("The chief election officer shall be the state official responsible for implementing this chapter and the State's responsibilities under the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. section 1973ff et seq."); *see also* HAR § 3-177-600(d)(4) (providing that "[b]allot packages may generally be issued . . . [p]ursuant to a request by a voter covered under . . . the Uniformed and Overseas Citizens Absentee Voting Act of 1986, as amended, or any other applicable federal or state law.").

## III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where "the movant shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. Rule 56(a). Where the moving party will have the burden of proof at trial, the movant "must establish beyond controversy every essential element" of its claim. *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d

885, 888 (9th Cir. 2003) (internal quotation and citation omitted). 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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

## IV. ARGUMENT

The "Equal Protection Clause does not forbid classifications." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id*. Legislatures are therefore "presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Id*. (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

Here, Plaintiffs assert a class-based equal protection claim by alleging that UOCAVA, UMOVA and HAR § 3-177-600 unconstitutionally treat similarly situated classes of people differently. *See* ECF #105, ¶ 63. Specifically, Plaintiffs challenge the distinction between "former [Hawaii] residents who move to any foreign country or the NMI" who qualify to vote absentee in Hawaii in federal elections, and those who "move to 'the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa,'" who do not. *Id*. ¶¶ 1-2, 51.

Plaintiffs seek summary judgment, contending that the challenged laws cannot withstand any level of scrutiny. ECF #137-1, at 8. However, Plaintiffs' equal protection challenge of UMOVA fails at the outset and does not even warrant the application of any level of scrutiny. Even if scrutiny is warranted, Plaintiffs' challenge still fails because UMOVA is only subject to rational-basis review and easily passes constitutional muster. The Court should therefore enter summary judgment in the State's favor as to all claims against it.

A. No Scrutiny of UMOVA is Warranted

No level of scrutiny of state law is warranted because Plaintiffs cannot demonstrate that they are similarly situated in respects relevant to the State's challenged policy. In order to prevail on their class-based equal protection claim, Plaintiffs must "show that a class that is similarly situated has been treated disparately." *Boardman v. Inslee*, 978 F.3d 1092, 1117 (9th Cir. 2020) (alteration adopted) (quoting *Roy v. Barr*, 960 F.3d 1175, 1181 (9th Cir. 2020)). This first requires the identification of the "state's classification of groups" and once identified, a "control group, composed of individuals who are similarly situated to those in the classified group in respects that are relevant to the state's challenged policy." *Id.* (quoting *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018)). "The goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is

the control group." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (quoting *U.S. v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991)). If – and only if – the two groups are similarly situated, then the appropriate level of scrutiny is to be determined and applied. *See Gallinger*, 898 F.3d at 1016.

Plaintiffs make no effort to satisfy the threshold inquiry with respect to UMOVA and HAR § 3-177-600, choosing instead to argue at length as to why the challenged statutes cannot withstand any level of scrutiny. *See* ECF #137-1, at 8-35. Plaintiffs get ahead of themselves. Subjecting the challenged laws to scrutiny is not a given; scrutiny is only applied if Plaintiffs can demonstrate that their proposed comparative group aligns with the State's classification in respects that are relevant to challenged policy. *See Gallinger*, 898 F.3d at 1016. Plaintiffs fail to do so.

1. UMOVA's "Overseas Voter" Definition Should Be Identified as the State's Classification

UMOVA was enacted to "ensure the ability of members of the military and other[ ] eligible voters who are overseas to participate in all elections for federal, state, and local offices[.] S. Stand. Comm. Rep. No. 2450 (2012).[3] In considering whether to enact UMOVA, the Legislature found that:

[3] A copy of Senate Standing Committee Report No. 2450 is attached to the State's Concise Statement of Facts.

> military personnel and overseas civilians face a variety of challenges when voting in United States elections, such as difficulty in registering abroad, frequent address changes, slow mail delivery, ballots or ballot applications that never arrive, difficulty in obtaining information about candidates or the issues, the inability to comply with notarization or verification procedures, or failure to properly comply with non-essential requirements for absentee materials.

*Id*. at 1-2. Believing that UOCAVA and the MOVE Act had "not been wholly effective in overcoming the difficulties overseas voters face[,]" and given that "federal laws do not apply to state or location elections," the Legislature enacted UMOVA in order to "extend[ ] the assistance and protections for military and overseas voters under existing federal law to state elections." *Id*. at 2.

UMOVA extends absentee voting rights in Hawaii in federal, state, and local elections to "covered voters." Haw. Rev. Stat. §§ 15D-3, 15D-6 to -7. The definition of "covered voters" identifies four groups who are eligible to vote under UMOVA:

> (1) A uniformed-service voter or an overseas voter who is registered to vote in this State;
>
> (2) An overseas voter who, before leaving the United States, was last eligible to vote in this State and, except for a state residency requirement, otherwise satisfies this State's voter eligibility requirements;
>
> (3) An overseas voter who, before leaving the United States, would have been last eligible to vote in this State had the voter then been of voting age and, except for a state residency requirement, otherwise satisfies this State's voter eligibility requirements; or

> (4) An overseas voter who was born outside the United States, is not described in paragraph (2) or (3), and except for a state residency requirement, otherwise satisfies this State's voter eligibility requirements, if:
>
> (A) The last place where a parent or legal guardian of the voter was, or under this chapter would have been, eligible to vote before leaving the United States is within this State; and
>
> (B) The voter has not previously registered to vote in any other state;

*See* Haw. Rev. Stat. § 15D-2.

The State's classification of an "overseas voter" is clear and unambiguous. *See id*. UMOVA defines an "overseas voter" as a "United States citizen who is living outside the United States," which, in turn, is defined as including "the several states, the District of Columbia, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States." *Id*. Whether a U.S. citizen qualifies as an "overseas voter" under UMOVA turns on whether the person lives "abroad" (in a foreign country). *See id*.; *see also* S. Stand. Comm. Rep. No. 2450, at 1-2.

Plaintiffs readily concede that, "UMOVA itself does not extend the vote to former state residents who move to any U.S. territory." *See* ECF #137-1, at 5. Plaintiffs nevertheless appear to argue that UOCAVA's classification of "overseas voters" should be imputed to UMOVA because HAR § 3-177-600(d)(4) "enforces

UOCAVA." *See* ECF #138, ¶40; *see also* ECF #137-1, at 5. To the extent Plaintiffs advocate such a position, the Court should decline to adopt it.

The State had an opportunity to adopt UOCAVA's classification, but declined to do so, choosing instead to adopt one which treats all former state residents living in U.S. territories as the same. *See* Haw. Rev. Stat. § 15D-2. As such, HAR § 3-177-600(d)(4) ensures that the State will not run afoul of federal law if federal law enfranchises persons not otherwise eligible to vote under state law. *See* HAR § 3-177-600(d)(4). But at no time does it ratify or adopt as its own UOCAVA's classification of "overseas voters." *See id*. This is evidenced by the fact that HAR § 3-177-600(d)(4) reaffirms that there are two separate classifications: a state classification of eligible voters under UMOVA, and a federal classification of eligible voters under UOCAVA. *See id*. And, should federal law change, no amendment of HAR § 3-177-600(d)(4) is necessary because ballot packages will only issue if the voter is covered by federal law, however prescribed by Congress or "as amended." *See id*.

Moreover, because Plaintiffs ask the Court to sever a portion of UMOVA's definition of "United States" in order to permit Plaintiffs to qualify as "overseas voters," *see* ECF #105, ¶13 and pp. 40-41, UMOVA's classification should be aligned with the very definition Plaintiffs challenge. To hold otherwise would unreasonably hold the State liable for a federal policy over which it had no say in

developing, no say in implementing, and declined to adopt as its own. Thus, for purposes of Plaintiffs' equal protection challenge of UMOVA, UMOVA's statutory definition of "overseas voters" should be identified as the State's classification.

2. Plaintiffs Are Not Similarly Situated Under UMOVA

Having established the State's classification, Plaintiffs must demonstrate that their proposed control group is similarly situated with the State's classified groups before any scrutiny can be applied. *See Gallinger*, 898 F.3d at 1016. Plaintiffs cannot do so. Plaintiffs appear to allege that they are members of a control group consisting of former state residents residing in the U.S. territories of Guam, the U.S. Virgin Islands, American Samoa, and Puerto Rico (hereinafter, "Proposed Control Group"). *See* ECF #105, ¶2, ¶¶15-20; *see also* ECF #138, ¶¶1-32. Plaintiffs also appear to allege that their Proposed Control Group is similarly situated with former state residents living in the NMI, who qualify as "overseas voters" under UOCAVA despite living in a U.S. territory. *See* ECF #105, ¶¶ 33-43.

But at no time do Plaintiffs allege any facts or offer evidence establishing that their Proposed Control Group is similarly situated with any of the State's "overseas voters" classified groups. To the contrary, Plaintiffs stipulate that:

- The Individual Plaintiffs are not "overseas voters" as defined by HRS § 15D-2;

- The Individual Plaintiffs are not "covered voters" as defined by HRS § 15D-2; and

- The Individual Plaintiffs are residents of, and registered to vote in, Guam or the U.S. Virgin Islands.

*See* ECF #136, ¶¶5-6, 9-13. In doing so, Plaintiffs concede that they cannot establish that they are similarly situated with the State's classified groups in respects relevant to UMOVA's challenged policy.

Plaintiffs may attempt to argue that they are similarly situated because they live in a geographically "overseas" U.S. territory. *See* ECF #105, ¶ 63. But living geographically overseas is of no consequence. Hawaii is an island state; anyone who lives outside of Hawaii lives geographically overseas. UMOVA's "overseas voter" policy was fashioned to facilitate voting for U.S. citizens who live "abroad" (in a foreign country) because of the "difficulties overseas voters face." *See* S. Stand. Comm. Rep. No. 2450, at 1-2. That is why qualification as an "overseas voter" turns on whether the person lives *outside* the "United States," as defined by UMOVA. *See* Haw. Rev. Stat. § 15D-2. Given Plaintiffs' stipulation that they live *within* the United States for purposes of UMOVA, *see* ECF #136, ¶¶9-13, Plaintiffs cannot establish that they resemble, in all relevant ways, any of the State's classified groups. *Cf. Roy*, 960 F.3d at 1182-83 (concluding that petitioner who did not meet statute's criteria for citizenship "does not resemble, in all relevant ways, persons who derived citizenship under [challenged statute].").

Because Plaintiffs are not similarly situated, Plaintiffs' challenge of state law fails at the outset and no scrutiny is warranted. *See id*. (declining to apply any level of scrutiny after concluding that "Petitioner's proposed comparative group does not align with the classified group 'in respects that are relevant to the government's challenged policy.'") (alteration adopted).

B. Even If Scrutiny Is Warranted, It Should Be Rational-Basis Review

If the Court determines that UMOVA should be subjected to scrutiny, it should apply rational-basis review. It is well-established that "states retain broad authority to structure and regulate elections." *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018). "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id*. (alteration adopted). As such, "if a law neither burdens a fundamental right nor targets a suspect class, [the court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Plaintiffs argue that UMOVA should be subject to strict scrutiny because it "extend[s] the fundamental right to vote in a discriminatory fashion." ECF #137-1, at 12. Plaintiffs misconstrue the applicable trigger for strict scrutiny. UMOVA's extension of absentee voting rights does not, without more, invite strict scrutiny. *See Green v. City of Tucson*, 340 F.3d 891, 899 (9th Cir. 2003) (quoting *Burdick v.*

*Takushi*, 504 U.S. 428, 433 (1992) ("While 'it is beyond cavil that voting is of the most fundamental significance under our constitutional structure,' courts do not 'subject every voting regulation to strict scrutiny.'") (alteration adopted, internal citation omitted). Strict scrutiny is only applied if the challenged law substantially burdens fundamental rights or if it employs distinctions based on suspect classifications, such as race, alienage, or national origin. *See id.* at 893.

Plaintiffs do not have and do not allege that they have a fundamental right to vote in federal elections. *See Att'y Gen. of Territory of Guam*, 738 F.2d at 1019 ("Since Guam concededly is not a state, it can have no electors, and [American citizens who are residents of Guam] cannot exercise individual votes in a presidential election."); *see also Segovia v. U.S.*, 880 F.3d 384, 390 (7th Cir. 2018) ("[T]he residents of the territories have no fundamental right to vote in federal elections."); ECF #137-1, at 22 (confirming that Plaintiffs do not assert that they have a constitutional right to vote in federal elections). Nor do Plaintiffs allege that UMOVA employs distinctions based on suspect classifications. *See* ECF #105, ¶6 (alleging that UMOVA draws a distinction based on where former state residents live). Thus, no fundamental rights or suspect classifications are even at issue here.

Unable to invoke strict scrutiny through conventional means, Plaintiffs attempt to analogize UMOVA to voting regulations subjected to strict scrutiny.

ECF #137-1, at 17. Strict scrutiny has been applied to two types of voting regulations:

> [f]irst, strict scrutiny applies to 'regulations that unreasonably deprive some residents in a geographically defined governmental unit from voting in a unit wide election.' Examples include laws that condition the right to vote on property ownership or payment of a poll tax. Second, 'regulations that contravene the principle of 'one person, one vote' by diluting the voting power of some qualified voters within the electoral unit' are also subject to strict scrutiny. Examples include laws that weigh votes from rural counties more heavily than votes from urban counties.

*Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008). Neither type of voting regulation is analogous to this case. This is because Plaintiffs must first be a part of the electorate before they can complain of unequal treatment. *See Green*, 340 F.3d at 900 ("Both [types of voting regulations] are concerned with "the equal treatment of voters *within* the governmental unit holding the election, be it a school district, a city or a state.") (emphasis added); *cf. Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627 (1969) (applying strict scrutiny to a statute which granted the right to vote to some residents in the electorate, but denied the franchise to other residents).

Indeed, Plaintiffs brought suit *because* they are not part of the electorate. Plaintiffs therefore do not complain that UMOVA severely burdens their right to vote (they have no such right to complain of), but rather that UMOVA is

unconstitutionally underinclusive. Such a challenge need only survive rational-basis review. *Katzenbach v. Morgan* is instructive on this very point:

> *This is not a complaint that Congress, in enacting [the challenged law], has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected [to others similarly situated]*. . . . [The challenged law] does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. Thus we need not decide whether [the challenged law] discriminates invidiously against those [similarly situated]. *We need only decide whether the challenged limitation on the relief effected . . . was permissible.* In deciding that question, *the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable*; for the distinction challenged . . . is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise.

384 U.S. 641, 657 (1966) (emphasis added).

Alternatively, Plaintiffs argue that UMOVA should be subject to heightened scrutiny because territorial residents constitute a quasi-suspect class against which UMOVA discriminates.[4] ECF #137-1, at 24. This, too, fails. Territorial residents do not constitute a quasi-suspect class. *Cf. Romeu v. Cohen*, 121 F.Supp.2d 264, 282 (S.D.N.Y. 2000) (declining to recognize Puerto Ricans as a suspect class for

[4] UMOVA does not discriminate against territorial residents; UMOVA distinguishes between U.S. citizens who live abroad and those who live within the United States. *See* Haw. Rev. Stat. § 15D-2; *cf. Iguarta De La Rosa v. U.S.*, 32 F.3d 8, 10 (1st Cir. 1994) (UOCAVA distinguishes "between those who reside overseas and those who move anywhere within the United States."). Plaintiffs' proposed "territorial residents" class is therefore too narrow because it does not include the residents of the fifty states and the District of Columbia.

purposes of equal protection challenge of UOCAVA and New York election law brought by former New York resident living in Puerto Rico). Territorial residents cannot vote in federal elections, not because of any historical discrimination, but because the Constitution itself does not provide for such rights. *See Att'y Gen. of Territory of Guam*, 738 F.2d at 1019; *see also Segovia*, 880 F.3d at 390. And unlike gender or illegitimacy, whose characteristics are immutable and/or beyond the individuals' control, *see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985), territorial residents' condition is neither immutable nor beyond their control, s*ee Segovia*, 880 F.3d at 390 (concluding that there was nothing immutable about plaintiffs – former Illinois residents residing in Puerto Rico, Guam, and the U.S. Virgin Islands –because there was nothing preventing them from moving back to Illinois). The Court should therefore decline to recognize "territorial residents" as quasi-suspect class and apply rational-basis review to UMOVA.

C. UMOVA Survives Rational-Basis Review

Under rational-basis review, "[a] statute is presumed constitutional, and 'the burden is on the one attacking the legislative arrangement to negative very conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (alteration adopted, internal citation omitted). "[C]ourts are compelled under rational-basis

review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality." *Id*. at 321. A statute will be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *Id*. at 320.

UMOVA easily survives scrutiny. At the time of UMOVA's enactment, the Legislature determined that military personnel and overseas civilians faced a variety of challenges when voting in United States elections abroad, and that UOCAVA and the MOVE Act had "not been wholly effective in overcoming the difficulties overseas voter face." S. Stand. Comm. Rep. No. 2450, at 1-2. The Legislature further determined that, because UOCAVA did not apply to state and local elections, states were "conducting elections under procedures that vary dramatically from state to state[,]" and 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. For instance, prior to UMOVA, voters covered under UOCAVA were only entitled to have their absentee ballots for federal offices be transmitted forty-five days in advance of an election, but there

was no similar requirement for absentee ballots for state or county offices. *See* 52 U.S.C. § 20302(a)(1), (8).

In an attempt to better engage voters and remove the impediments facing military and overseas voters, the Legislature adopted UMOVA to "extend[ ] the assistance and protections for military and overseas voters under existing federal law to state elections," and to "uniformly appl[y] the military and overseas voting process to all covered elections of which the State has primary administrative responsibility." S. Stand. Comm. Rep. No. 2450, at 2. The Legislature sought to "ensure the ability of members of the military and others eligible voters who are overseas to participate in all elections for federal, state, and local offices[.]" *Id.*, at 1. In other words, UMOVA is a reform measure.

UMOVA's distinction between U.S. citizens who live abroad and those who move anywhere within the United States is therefore rationally related to the Legislature's purpose of ensuring that eligible voters who live *outside* the United States can still participate in elections for all offices. *Cf. Igartua De La Rosa v. U.S.*, 32 F.3d 8, 10-11 (1st Cir. 1994) (concluding that Congress had a rational basis for seeking to protect the absentee voting rights of voters who move overseas because such voters could lose their right to vote in all federal elections, whereas voters who move within the United States to Puerto Rico are eligible to vote in a federal election in their new place of residence).

Plaintiffs contend that UMOVA cannot survive rational-basis review because there is no rational basis for UMOVA's failure to extend absentee voting rights to former Hawaii residents in the territories when UMOVA extends such rights to former Hawaii residents who move to foreign countries. But Plaintiffs' contention ignores the fact that the Legislature fashioned UMOVA redress the challenges voters who live abroad face and:

> in deciding the constitutional propriety of the limitations in such reform measure, [the court is] guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' that a legislature need not 'strike at all evils at the same time[,]' and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'

*Katzenbach*, 384 U.S. at 657 (internal citations omitted). UMOVA therefore passes constitutional muster and Plaintiffs' claims against the State fail as a matter of law.

D. Even If The Court Finds That Plaintiffs' Challenge of HAR § 3-177-600 Has Merit, Any Remedy Should Be Limited to HAR § 3-177-600

If the Court determines that HAR § 3-177-600(d)(4) adopted UOCAVA's classification, the State joins in with the Federal Defendants' arguments that the extension of absentee voting rights in federal elections to former state residents living in the NMI does not implicate any fundamental rights, does not employ any

suspect classifications, and should only be subject to rational-basis review. *See* ECF #140-1, at 13-22.

And similar to UMOVA, HAR § 3-177-600(d)(4) easily passes muster. UOCAVA mandates that Hawaii permit former state residents living in the NMI to vote absentee in Hawaii in federal elections. 52 U.S.C. 20302(a)(1). HAR § 3-177-600(d)(4)'s provision for the issuance of ballot packages to voters covered under UOCAVA is therefore clearly rational because the State is *required* to comply with UOCAVA.

Should the Court determine that HAR § 3-177-600(d)(4)'s provision for compliance with UOCAVA constitutes an unconstitutional preferential treatment for some residents of the NMI, the State joins in with the Federal Defendants' arguments that the proper remedy is to eliminate the preferential treatment rather than expand voting rights.[5] *See* ECF 140-1, at 36-40. But any remedy effected should be limited to HAR § 3-177-600(d)(4), since that is what Plaintiffs allege to be the source of the preferential treatment. *See* ECF #105, ¶53; ECF #137-1, at 5. It does not, as the Plaintiffs suggest, allow the Court to reach back to "remedy" UOCAVA where it is undisputed that UOCAVA has never provided for preferential treatment of any territory. *See* ECF #138, Fact #38 ("UMOVA defines

[5] The State also shares in the concern that, if the Court were to grant the Plaintiffs' requested remedy of extending absentee voting rights to former state residents living in Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa, then it would "facilitate a larger class of 'super citizens' of territories. *See id*., at 25.

the 'United States,' when used in the territorial sense, as the 'several states, the District of Columbia, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States,' which strictly read, *does not grant enfranchisement to former state residents who move to any territory*.") (emphasis added). And Plaintiffs offer no authority for such position. Plaintiffs' challenge of UMOVA therefore fails as a matter of law.

## V. CONCLUSION

The State respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment, and grant summary judgment in favor of the State.

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