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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' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT Judge: Hon. Jill A. Otake

FEDERAL DEFENDANTS' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

U.S. Constitution

Regulations

Other Authorities

INTRODUCTION

This lawsuit is brought by residents of Puerto Rico, the U.S. Virgin Islands, and Guam—none of whom live in Hawaii, and some of whom only ever lived in Hawaii briefly, decades ago—who nonetheless wish to vote in federal elections in Hawaii via absentee ballot. Plaintiffs are not arguing that residents of U.S. territories, as a general matter, have a constitutional right to vote in federal elections. For good reason: that argument is foreclosed by binding precedent. *See Att'y Gen. of the Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984). Instead, Plaintiffs seek a partial workaround, arguing that because Hawaii allows some other former Hawaii residents to vote absentee in federal elections in Hawaii, it violates the equal protection guarantees of the U.S. Constitution for these particular Plaintiffs to be deprived of that same opportunity.

As every court to consider this question has concluded, Plaintiffs' equal-protection theory is meritless. Primarily, Plaintiffs argue that UOCAVA violates equal-protection principles because its definition of the territorial United States includes the Territories in which they reside, but does not include the Commonwealth of the Northern Mariana Islands (CNMI). But CNMI was not yet a Territory when Congress passed UOCAVA. And in addition to being the newest Territory, CNMI is the only Territory that joined the United States voluntarily, on terms set forth in a Covenant entered into while it was a United Nations Trust

Territory. CNMI's unique and comparatively young relationship with the United States provides ample justification for Congress's decision to treat the CNMI as more akin to a foreign country for purposes of UOCAVA. And, regardless of the CNMI, it was not irrational for Congress to conclude that former State residents who move to any of the four oldest Territories should be treated the same for purposes of UOCAVA as former State residents who move to the fifty States or the District of Columbia—but differently than those who move to foreign countries. In all events, UOCAVA's permissive structure still allows States to provide for greater absentee voting opportunities for their own former residents, if a State wishes to do so.

Moreover, Congress's definition of the territorial United States for purposes of UOCAVA does not implicate any fundamental right that would trigger strict scrutiny. The Constitution does not create a fundamental right for a resident of a Territory to vote in a State in which they do not live. In any event, heightened scrutiny does not apply to a statute like UOCAVA that functions only to expand access to the ballot and imposes no restrictions whatsoever on anyone's right to vote.

Nor does UOCAVA draw distinctions based on any suspect class. Former State residents who move to the Territories have faced no particular history of discrimination, regardless of the history of the Territories in general. And UOCAVA treats individuals who move anywhere within the United States—including the fifty States, the District of Columbia, and the four listed Territories—identically.

BACKGROUND

I. Constitutional Provisions Regarding Federal Elections

Generally, U.S. citizens who reside in the Territories do not have a constitutional right to participate in federal elections. That is because the Constitution provides that the President, Vice President, Members of the House of Representatives, and Senators are selected by the States or the people of the States.

With respect to elections for President and Vice President, Article II, Section 1 of the Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2. Therefore, "[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." *Guam*, 738 F.2d at 1019. Accordingly, "those Courts of Appeals that have decided the issue"—including the Ninth Circuit—"have all held that the absence of presidential and vice-presidential voting rights for U.S. citizens living in U.S. territories does not violate the Constitution." *Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) (per curiam) (collecting cases); *accord Guam*, 738 F.2d at 1019 ("Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation.").

As for elections for the U.S. Congress, Article I, Section 2 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Seventeenth Amendment specifies that the Senate "shall be composed of two Senators from each State, elected by the people thereof." U.S. Const. amend. XVII. Each State's legislature prescribes "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," but "the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators." U.S. Const., art. I, § 4, cl. 1. As with the election of the President and Vice President, residents of the Territories do not possess the right to vote for members of the House of Representatives and the Senate. *See, e.g.*, *Igartúa v. United States*, 626 F.3d 592, 597-98 (1st Cir. 2010) ("There has been no amendment that would permit the residents of Puerto Rico to vote for Representatives to the U.S. House of Representatives. . . . Voting rights for the House of Representatives are limited to the citizens of the states absent constitutional amendment to the contrary.").

II. U.S. Territories and the Commonwealth of the Northern Mariana Islands

The Territorial Clause of the Constitution gives Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. 4, § 3, cl. 2. There are at least fourteen territories that Congress governs, directly or indirectly, pursuant to this

Clause, although only five of them have any permanent residents: Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.[1]

The United States initially acquired most of these territories by purchasing them, by annexing them as unoccupied territories, or by treaties with other nations. For instance, Puerto Rico and Guam were ceded to the United States by Spain as part of the Treaty of Paris after the Spanish-American War, and the United States purchased the U.S. Virgin Islands in 1917. *See U.S. Insular Areas: Application of the U.S. Constitution* 7-8, U.S. General Accounting Office (Nov. 1997), https://perma.cc/4MBV-EV6J ("GAO Report"). American Samoa became a territory in 1900, after the withdrawal of competing claims by Great Britain and Germany. *See* Tripartite Convention of 1899, art. II, 31 Stat. 1878, 1879 (1899). A number of smaller unoccupied islands were annexed pursuant to the Guano Islands Act, 48 U.S.C. §§ 1411-1419. *Id.* at 9.

By contrast, the newest territory, the Commonwealth of the Northern Mariana Islands (CNMI), entered into a political union with the United States voluntarily. The Northern Mariana Islands (along with Micronesia, Palau, and the Marshall Islands) were initially part of the United Nations "Trust Territory of the Pacific Islands" that the United States administered in the aftermath of World War II. *See*

[1] *See* Office of Insular Affairs, U.S. Dep't of the Interior, *Definitions of Insular Area Political Organizations*, https://perma.cc/38HQ-9L4S (describing various insular areas).

Mtoched v. Lynch, 786 F.3d 1210, 1213 (9th Cir. 2015). In 1969, the United States began negotiations to allow the political subdivisions of the trust territories to "transition to constitutional self-government" and govern "future political relationships." *Segovia v. Bd. of Election Comm'rs for City of Chi.*, 201 F. Supp. 3d 924, 945 (N.D. Ill. 2016), *aff'd in part, vacated in part sub nom. Segovia v. United States*, 880 F.3d 384 (7th Cir. 2018). As a result of those negotiations, Micronesia, Palau, and the Marshall Islands chose to become independent states and entered into "compacts of free association" with the United States. *See 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*, Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 3, 1986) ("Presidential Proclamation 5564").

The people of the Northern Mariana Islands, however, chose to become a "commonwealth" of the United States. After "extensive" negotiations, in 1975 CNMI and the United States executed the "Covenant to Establish a Commonwealth in Political Union with the United States of America," *reprinted as amended in* 48 U.S.C. § 1801 note (1988) ("the Covenant"), which set forth the parameters for its new relationship with the United States. *See* Presidential Proclamation 5564. Congress approved the Covenant in 1976, and it became fully effective on

November 4, 1986, upon a Proclamation by President Reagan. *See id.* The CNMI thereby became a territory of the United States.

Congress allows the CNMI and the other four inhabited territories—Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa—to operate with varying degrees of independence and forms of self-government.[2] While none of the territories participates in federal elections for Senators, Members of the House of Representatives, President, or Vice President, Congress has provided these territories with various forms of non-voting representation in Congress. *See* GAO Report at 27. Puerto Rico has been represented by a Resident Commissioner since 1904. Guam, the U.S. Virgin Islands, and American Samoa have been represented by delegates to the House of Representatives since the 1970s. *See id.* Before 2008, CNMI was represented by a Resident Representative, who had "no official status" in the Congress. *See* Northern Mariana Islands Delegate Act, H.R. Rep. No. 108 761, at 6 (2004). In 2008, Congress authorized the CNMI's Resident Representative to act as a non-voting delegate to the House of Representatives. Pub. L. No. 110-229, § 711, 122 Stat. 754 (*codified at* 48 U.S.C. § 1751 (2008)); *see also* 48

[2] Puerto Rico has a constitution that has been approved by the U.S. Congress. *See* Pub. L. 82-447, 66 Stat. 327 (July 3, 1952). The constitution of American Samoa was enacted pursuant to an Executive Order issued by President Truman that delegated approval authority to the Secretary of the Interior. *See United States v. Lee*, 472 F.3d 638 (9th Cir. 2006). The U.S. Virgin Islands and Guam "have not adopted local constitutions and remain under organic acts approved by the Congress." GAO Report at 8.

U.S.C. § 1756 (providing that provisions allowing the Resident Representative to serve as a non-voting delegate do not affect the Covenant)).

III. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)

Congress enacted UOCAVA in August 1986, about three months before the Covenant with the CNMI went into full effect. Pub. L. 99-410, 100 Stat. 924 (Aug. 28, 1986). UOCAVA directs that "[e]ach State shall . . . 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." 52 U.S.C. § 20302(a)(1). The statute defines "overseas voter" as:

> (A) an absent uniformed services voter who, by reason of active duty or service is absent from the United States on the date of the election involved;
>
> (B) 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
>
> (C) 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.

Id. § 20310(5). "Federal office" is defined as "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." *Id.* § 20310(3). The statute further defines "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa," *id.* § 20310(6), and it defines

"'United States,' where used in the territorial sense," to mean "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa," *id.* § 20310(8).

Accordingly, under UOCAVA, "States" (including Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa) must allow former residents to vote absentee if they reside outside of the United States (which is also defined to include Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa). UOCAVA does not require States to extend absentee voting rights to civilians who have moved within the United States (including those who move from a State to a listed territory).

UOCAVA does not mention the CNMI—after all, the Covenant had not yet gone into full effect at the time of UOCAVA's enactment—nor does it mention any of the other (generally uninhabited[3]) territories, and thereby treats those territories as outside the United States. Accordingly, States (defined to include Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa) must allow active-service members and other former residents who are stationed or live outside the United States, including in the CNMI, to vote absentee in federal elections.

[3] Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the CNMI are the only territories with permanent residents. Scientific and military personnel may be stationed in some of the smaller territories. *See, e.g.*, GAO Report at 6 (noting that most of the smaller insular areas are uninhabited); *id.* at 54 (noting former military use of Baker Island and noting that current use is restricted to scientists and educators).

IV. The Hawaii Uniform Military and Overseas Voters Act (UMOVA)

Generally, to vote in Hawaii, one must be a U.S. citizen, a resident of Hawaii, and at least eighteen years old. *See* H.R.S. §§ 11-11, 11-12, 11-13, 11-15 (2019). Pursuant to the Hawaii Uniform Military and Overseas Voters Act ("Hawaii UMOVA"), and as required by UOCAVA, however, certain "overseas voters" or "uniformed-service voters" may vote in federal elections in Hawaii, by absentee ballot, even without current Hawaii residence. *See* H.R.S. § 15D (2019). As relevant here, Hawaii law defines an "overseas voter" as "a United States citizen who is living outside the United States." *Id.* § 15D-2 (2019). And Hawaii statutes define "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." *Id.*

On its face, the text of this Hawaii statute would appear to define residents of any U.S. territory as still residing within the "United States," and thus ineligible for absentee ballots. Hawaii Administrative Rules implementing Hawaii UMOVA make clear, however, that Hawaii will accept absentee ballots from former Hawaii residents living in U.S. territories except those territories specifically listed in UOCAVA and defined to be part of the "United States"—that is, Guam, Puerto Rico, American Samoa, and the U.S. Virgin Islands. *See* H.A.R. § 3-177-600(d).

In some respects, Hawaii law goes farther than UOCAVA in allowing absentee voting by former residents living overseas. For example, "Hawaii's laws permit U.S. citizens who have *never* resided in Hawaii to vote absentee under Hawaii UMOVA if a parent or guardian was last domiciled in the state of Hawaii[.]" Third Am. Compl., ECF No. 105, ¶ 10 (citing H.R.S. § 15D-2; H.A.R. § 3-177-600). And with respect to presidential elections, "[i]f ineligible to qualify as a voter in the state to which the voter has moved, any former registered voter of Hawaii may vote an absentee ballot in any presidential election occurring within twenty-four months after leaving Hawaii." H.R.S. § 15-3. None of these provisions find any parallel in UOCAVA—which always permits States to provide greater absentee voting rights for its residents (or former residents) than the minimum required by UOCAVA.

V. Procedural Background

Plaintiffs are residents of Puerto Rico, Guam, and the U.S. Virgin Islands who formerly resided in Hawaii, along with an organization whose members include residents of those same territories (as well as American Samoa) who formerly resided in Hawaii. *See* Third Am. Compl. ¶¶ 15-20, ECF No. 105. Plaintiffs bring suit against various Federal, State, and Local officials and agencies who are connected with federal election administration in Hawaii and who implement the requirements of UOCAVA and Hawaii UMOVA. Plaintiffs filed this suit on October 8, 2020, ECF No. 1, and amended their complaint as of right on October 29,

2020, ECF No. 39. With consent of all parties and leave of the Court, ECF No. 72, Plaintiffs filed their second amended complaint on December 18, 2020, ECF No. 73.

At the Court's direction, *see* ECF No. 67, the parties first briefed the threshold, jurisdictional question of Article III standing. Federal Defendants moved to dismiss on that basis on January 14, 2020, ECF No. 74, and the State and Local Defendants joined in that motion in substantial part, ECF Nos. 78-80. In an April 23, 2021 opinion and order, the Court granted the motion, and dismissed the second amended complaint, without prejudice, for lack of Article III standing. *Reeves v. Nago*, --- F. Supp. 3d ----, 2021 WL 1602397 (D. Haw. Apr. 23, 2021).

Plaintiffs filed their third amended complaint—now the operative pleading—on May 14, 2021. ECF No. 105. Federal Defendants again moved to dismiss for lack of Article III standing, ECF No. 107, and the State and Local Defendants again joined the motion in substantial part, ECF Nos. 109-10. The Court denied the second motion to dismiss on September 2, 2021, concluding that Plaintiffs had alleged sufficient facts to support Article III standing. *Borja v. Nago*, No 1:20-cv-00433-JAO-RT, 2021 WL 4005990 (D. Haw. Sept. 2, 2021).

Plaintiffs moved for summary judgment on November 22, 2021. ECF No. 137. Federal Defendants now oppose and cross-move for summary judgment on all claims.

ARGUMENT

Plaintiffs "seek the right to continue to vote in federal elections in [Hawaii] even though they are now residents of United States territories." *Segovia v. United States*, 880 F.3d 384, 392 (7th Cir. 2018). "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." *Id.* 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 Court should "not be the first." *Id.* Instead, as every court to confront these questions has concluded: (1) all of Plaintiffs' claims are subject to rational-basis review, and (2) UOCAVA is not irrational. Accordingly, summary-judgment should be entered for Federal Defendants on all claims.

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

Under the equal-protection guarantees of the U.S. Constitution, "[i]f 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)). Congress's legislative discretion, moreover, is especially broad when it legislates pursuant to the Territorial Clause. *See, e.g.*, *Examining Bd. of Eng'rs, Architects &*

Surveyors v. Flores de Otero, 426 U.S. 572, 586 n.16 (1976) ("The powers vested in Congress by Const., Art. IV, s 3, cl. 2, to govern Territories are broad."). Congress may ordinarily treat a Territory differently from States so long as there is some rational basis for that distinction. *See, e.g.*, *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam) (applying rational-basis standard and rejecting equal-protection challenge by territorial residents); *Califano v. Gautier Torres*, 435 U.S. 1, 4 (1978) (applying rational-basis standard 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"). Accordingly, as every court to consider the question has concluded, Plaintiffs' equal-protection claims challenging UOCAVA are subject only to rational-basis review.

A. UOCAVA does not burden a fundamental right.

Contrary to plaintiffs' arguments, this case does not implicate a restriction on a fundamental right triggering strict scrutiny. Citizens do not have a constitutionally protected right to vote in a State in which they do not reside. And absent a constitutional right to vote in the first place, UOCAVA cannot burden a fundamental right triggering strict scrutiny. In short, "residents of the territories have no fundamental right to vote in federal elections," and "plaintiffs have no special right simply because they *used* to live in a State." *Segovia*, 880 F.3d at 390.

As a general matter, "[t]he Supreme Court has often emphasized the importance of the right to vote." *Igartúa*, 626 F.3d at 602 n.9. But "in each of these cases the Court has addressed the voting rights of citizens 'of the several States.' In other words, the Court's recognition of the right to vote has been consistently cabined by the geographical limits set out in the Constitution." *Id.* (citations omitted).

The right of citizens residing in a State to vote in their State's federal elections flows from the role of the States under the Constitution. *See Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001). But Territories "are not States, and therefore those Courts of Appeals that have decided the issue have all held that the absence of presidential and vice-presidential voting rights for U.S. citizens living in U.S. territories does not violate the Constitution." *Id.* (collecting cases). That includes the Ninth Circuit, which has explained that "[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." *Guam*, 738 F.2d at 1019; *see also id.* ("Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation."). Similarly, because the Constitution provides that Members of Congress represent and are selected by the States, residents of Territories lack a constitutionally protected right to vote for them. *See, e.g.*, *Igartúa*, 626 F.3d at 596.

By statute, Congress has accorded residents of the Territories some level of representation through non-voting delegates, and it is undisputed that Plaintiffs may vote in federal elections for their respective Territories' delegates to Congress in the same manner as every other eligible U.S. citizen residing in those Territories. What Plaintiffs seek here is something else entirely: the right to participate in federal elections in a State where they *formerly* lived, even though they now reside in a different part of the territorial United States.

But the Supreme Court has expressly recognized that the core of the right to vote is applicable only "to individuals who were physically resident within the geographic boundaries of the governmental entity concerned." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68 (1978); *see also id.* ("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."). Even the cases on which plaintiffs rely make this limitation clear. In *Dunn v. Blumstein*, for instance, the Supreme Court explained that citizens have a "constitutionally protected right to participate in elections on an equal basis with other citizens *in the jurisdiction*." 405 U.S. 330, 336 (1972) (emphasis added). In *Evans v. Cornman*, 398 U.S. 419 (1970), the Court held that Maryland could not exclude Maryland residents who lived on federal land *in Maryland* from voting because the State treated them as state residents for most purposes. And in *Kramer v. Union Free School District No. 15*,

the only question was whether "some district residents" could be excluded from a local school board election—the Court repeatedly emphasized that it was talking about "bona fide residents of the school district" in question. 395 U.S. 621, 625-627 (1969). The fundamental right to vote does not include a right for residents of one jurisdiction to vote absentee in another jurisdiction in which they *used to* reside.

This conclusion does not require an extension—or even any application—of the so-called *Insular Cases*, which distinguish between "incorporated" and "unincorporated" territories and hold that certain parts of the Constitution do not apply in unincorporated territories. Rather, it flows from the structure of the Constitution itself, which provides that the right to elect the President, Vice President, and Members of Congress inheres in States and their residents, and not in Territories. *See, e.g.*, *Guam*, 738 F.2d at 1019. And the right to vote absentee in Hawaii is no more a fundamental right for someone who moves from Hawaii to Puerto Rico than for someone who moves from Hawaii to California—both lose their right to vote in Hawaii, because they no longer live in Hawaii. And of course, those hypothetical individuals gain new rights to vote, in their new residence of Puerto Rico or in California.

Even with respect to the constitutional right of *current* state residents to vote in their own State's elections, "legislatures may without transgressing the Constitution impose extensive restrictions on voting," and "[a]ny such restriction is

going to exclude, either de jure or de facto, some people from voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (Posner, J.) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997); *Burdick v. Takushi*, 504 U.S. 428, 438-42 (1992)). To require States to extend absentee voting rights to overseas civilians, Congress had no choice but to define what counts as "overseas." This type of line-drawing exercise is not the type of direct burden on the franchise that triggers heightened scrutiny—particularly in the context of a statute like UOCAVA, which *expands* voting rights, and imposes no burden on anyone's access to the franchise.

As the Supreme Court has explained, 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). That is why, in *Katzenbach*, the Supreme Court declined to apply heightened scrutiny to a statute that barred States from applying English literacy requirements to voters educated in Puerto Rican schools in which English was not the predominant classroom language, but did not enact a similar prohibition for voters educated in other schools. The Court stressed that a statute does not violate equal protection simply because "it might have gone farther than it did." *Id.* For the same reason, a statute like UOCAVA that functions solely to expand access to the franchise is not subject to strict scrutiny.

Plaintiffs attempt to distinguish *Katzenbach* on the mistaken theory that UOCAVA and Hawaii UMOVA "single[] out particular groups for exclusion" of the right to vote, as opposed to the "incremental expansion" at issue in *Katzenbach*. Pls.' Mot. for Summ. J. at 22-23, ECF No. 137 ("Pls.' MSJ"). The text of UOCAVA contradicts that characterization. The statute operates solely to expand voting rights by requiring that, at a minimum, States accept absentee ballots from former residents who are overseas. And it treats all individuals who move within the United States—including between and among States, the listed Territories, and D.C.—identically.[4]

Because UOCAVA expands the franchise and does not impair any constitutionally protected right to vote, it does not burden any fundamental right triggering strict scrutiny.

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[4] Plaintiffs rely heavily on dictum in a single footnote of *Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 & n.7 (9th Cir. 2003) (cited in Pls.' MSJ at 13-16). But nobody disputes that UOCAVA is "subject[] . . . to the requirements of the Equal Protection Clause." *Id.* And UOCAVA plainly does not "weigh the votes (or signatures) of some voters more heavily than those of others," *id.* at 1079—the problem at issue in *Idaho Coalition*. Indeed, a quotation from the case that appears in Plaintiffs' brief (at 16) cuts off mid-sentence to omit language that is inconsistent with Plaintiffs' theory. *See Idaho Coalition*, 342 F.3d at 1077 n.7 ("Indeed, the very right at issue in *Moore*, the right to vote for electors for President and Vice President, is granted by the state, not by the federal Constitution.").

Plaintiffs also cite *Bush v. Gore*, 531 U.S. 98 (2000). But again, the actual language of the opinion is no help to their arguments here. *See id.* at 104-05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."). Plaintiffs' reliance on *Bush v. Gore* is further undermined by the Court's explicit caveat that that opinion was "limited to the present circumstances[.]" *Id.* at 109.

B. UOCAVA does not discriminate against a protected class.

UOCAVA defines the territorial United States to include the States, the District of Columbia, and four Territories. The statute thus treats citizens who move from a State to Puerto Rico, Guam, or the U.S. Virgin Islands no differently from citizens who move from one State to another State or to the District of Columbia. Plaintiffs' claim is not based on their status as territorial residents, but rather on their status as former Hawaii residents who moved to particular Territories. What plaintiffs seek is an advantage—the right to vote absentee in federal elections—that their neighbors who have never resided in a State would not have.

Regardless 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. Plaintiffs provide no reason to think that alleged racism towards or historical mistreatment of the inhabitants of the Territories have any application to a group composed entirely of persons who resided in a State and then chose to move to one of three Territories. *See Segovia*, 880 F.3d at 390 ("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."). And to the extent plaintiffs claim they are a suspect class

because they have fewer rights to participate in federal elections, that stems from the constitutional status of the Territories—not their membership in any suspect class. *Cf. Kahawaiolaa*, 386 F.3d at 1279 (applying rational-basis review to Department of Interior regulations excluding native Hawaiians from tribal recognition process, because "[r]ecognition of political entities, unlike classifications made on the basis of race or national origin are not subject to heightened scrutiny").

More generally, plaintiffs' suggestion that Territorial residents constitute a protected class is at odds with the Supreme Court's repeated application of rational-basis review to legislation bearing only on the Territories. *See, e.g.*, *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam) (applying rational-basis standard and rejecting equal-protection challenge by territorial residents); *Califano v. Gautier Torres*, 435 U.S. 1, 4 (1978) (applying rational-basis standard 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"). A conclusion that strict scrutiny applies whenever Congress enacts legislation specific to a Territory would be sharply at odds with that binding precedent, as well as Congress's plenary powers under the Territorial Clause and Congress's long history of independently managing its varied relationships with each Territory.

As then-Judge Ginsburg put it in applying rational-basis review to a limitation on veteran's benefits to World War II veterans from the Philippines (a former U.S. territory), "[b]y definition . . . residents of territories lack equal access to channels of political power. To require the government, on that account, to meet the most exacting standard of review . . . would be inconsistent with Congress's large powers to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.'" *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1156 (D.C. Cir. 1991) (quoting U.S. Const., Art. IV, § 3, cl. 2) (other citations omitted).

* * *

For these reasons, rational-basis review applies to all of Plaintiffs' claims—as every court to consider the question has concluded. *See Segovia*, 880 F.3d at 390 ("Because the Illinois law does not affect a fundamental right or a suspect class, it need only satisfy rational-basis review."); *Romeu*, 265 F.3d at 124 ("Given the deference owed to Congress in making 'all needful Rules and Regulations respecting the Territory' of the United States, U.S. Const. art. IV § 3, we conclude that the UOCAVA's distinction between former residents of States now living outside the United States and former residents of States now living in the U.S. territories is not subject to strict scrutiny."); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994) ("Given that [UOCAVA] neither affects a suspect class nor infringes a fundamental right, it need only have a rational basis to pass constitutional muster.").

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

Rational-basis review "is a paradigm of judicial restraint," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-314 (1993); it is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). When considered under this standard, the challenged statute enjoys "a strong presumption of validity," and the challenger bears "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." *Beach*, 508 U.S. at 314-315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). In particular, in formulating definitions or establishing categories of beneficiaries, "Congress had to draw the line somewhere," *id.* at 316, which "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). In these cases, Congress's decision where to draw the line, as a practical matter, is "virtually unreviewable." *Beach*, 508 U.S. at 316.

In defining the boundaries of the United States for purposes of UOCAVA, Congress included the four major Territories then existing as part of the United States, and treated the remaining outlying territories and the Pacific Trust territories (including CNMI) as "overseas." That legislative judgment readily withstands

rational-basis review—whether with respect to UOCAVA's treatment of the CNMI when the statute was enacted in 1986, UOCAVAs treatment of the CNMI today, or UOCAVA's applicability to foreign countries or uninhabited territories.

A. At the time it was enacted, UOCAVA's treatment of the territories was at least rational.

In UOCAVA, Congress specified its intended treatment for the four then-existing inhabited Territories by defining "'United States,' where used in the territorial sense," to mean "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). The statute thus treats individuals who move from Hawaii to one of those Territories just like individuals who move from Hawaii to another State or the District of Columbia.[5]

Congress's decision to include these four Territories within its definition of "United States" serves an obvious purpose: it generally places individuals who move from a State to a Territory on equal footing with the other residents of that Territory for purposes of participation in federal elections. This makes sense: if the territories were *not* included in the definition of the United States, whether citizens who reside

[5] Plaintiffs are thus incorrect to say that UOCAVA "den[ies] former state residents living in disfavored territories the same right to vote that they give to U.S. citizens living anywhere else on Earth." Pls.' MSJ at 9. In fact, someone who moves from Hawaii to one of Plaintiffs' home Territories is treated identically by UOCAVA as someone who moves from Hawaii to any of the fifty States or the District of Columbia.

in a Territory could vote for President would turn on whether they had previously lived in a State—a state of affairs that would be "arguably 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 (rejecting equal-protection challenge to Puerto Rico's inclusion in UOCAVA's definition of the United States). 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.* In other words, 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. Congress's decision to avoid creating this distinction in its four oldest and largest inhabited Territories directly serves an important governmental interest in avoiding that bizarre and inequitable outcome.

Plaintiffs appear not to contest that avoiding this sort of distinction is a legitimate congressional purpose. Instead, they suggest that Congress could not have been seeking to serve that legitimate interest in Puerto Rico, Guam, American Samoa, or the U.S. Virgin Islands—which are expressly addressed in the statute—because it did not provide identical treatment for CNMI. But the fact that Congress did not mention CNMI, which was not yet even a Territory when UOCAVA was enacted, does not suggest that Congress had no rational purpose when it specified its

intended treatment of the four largest, most heavily populated Territories—the only inhabited territories possessed by the United States at the time.

B. To this day, UOCAVA's treatment of the territories is rational.

In any event, plaintiffs' equal-protection argument is meritless even without regard to the timing of UOCAVA's enactment, and the finalization of the Covenant with the CNMI. The crux of plaintiffs' equal-protection argument is that Congress was required to exclude all of the Territories from UOCAVA's definition of "United States" because it failed to include CNMI in that definition. That argument ignores the *sui generis* nature of the relationship between the United States and each Territory, and flies in the face of Congress's long history of managing its relationship with each Territory independently.

Federal law has long distinguished between and among Territories in myriad ways, in matters small and large. For instance, Congress has enacted legislation ensuring that Puerto Rico is treated like a state for most statutory purposes, *see* 48 U.S.C. § 734, but has not passed analogous legislation for other territories. Federal benefits programs routinely distinguish among territories. *See, e.g.*, 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 (Guam and the U.S. Virgin Islands, but no other Territories, treated akin to States for purposes of the federal Supplemental

Nutrition Assistance Program (*i.e.*, food stamps)). And Congress has extended birthright citizenship to individuals born in Guam, Puerto Rico, the U.S. Virgin Islands, and the CNMI, but not American Samoa. *See* 8 U.S.C. § 1408 (individuals born in American Samoa are "nationals . . . of the United States"); *see generally Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (holding that the Constitution does not require that American Samoans be granted birthright citizenship); *Rabang v. INS*, 35 F.3d 1449, 1454 (9th Cir. 1994) (holding that 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 several other territories by statute). Plaintiffs do not identify any case suggesting that Congress is constrained to extend federal legislation to the Territories uniformly.

The 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. The CNMI is (by far) the most recent addition to the United States' Territories, and its relationship with the United States is unique in American law. *See Segovia*, 201 F. Supp. 3d at 949 ("Courts have concluded that the position that the NMI has a political status distinct from that of unincorporated territories such as Puerto Rico is credible.") (citation omitted) (collecting cases), *aff'd* 880 F.3d at 384.

When Congress passed UOCAVA in 1985, CNMI was still a U.N. Trust Territory. The NMI's "status as a former Trust Territory informed its relationship with the United States," *id.* at 948, because that relationship did not begin as one of sovereignty; rather, the United States served as a trustee. Unlike every other Territory, CNMI entered the United States voluntarily, on terms negotiated and set forth in the Covenant. *See generally Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990); *United States v. Lebron-Caceres*, No. 15-cr-279, 2016 WL 204447, at *14 (D.P.R. Jan. 15, 2016) (describing unique nature of CNMI Covenant). Among other things, the Covenant specified provisions of United States statutory and constitutional law that would, and would not, apply to CNMI. *See generally* Covenant, art. V. With respect to federal laws not expressly addressed, the Covenant required the United States to establish a Commission to make recommendations about which laws should be extended to CNMI. *See* Covenant § 504. That Commission remained active when Congress enacted UOCAVA. *See id.* (requiring final report of Commission within one year after termination of Trusteeship Agreement).[6]

[6] The Commission's final report emphasized that CNMI is "the first truly consensual political union involving the United States since the Republic of Texas joined the United States as a state," and stressed that Congress should be especially careful not to extend laws to CNMI that would infringe on CNMI's right to self-government. Northern Mariana Islands Commission on Federal Laws, Final Report, at 54 (undated); *see also id.*, introductory letter (indicating that Report was submitted within one year of November 3, 1986 Presidential Proclamation).

Consistent with CNMI's unique history and status, Congress has historically treated CNMI as more akin to a sovereign country. For instance, CNMI maintained virtually full control over its own immigration laws until 2008, when Congress extended federal immigration laws to CNMI in part because population changes had undermined Congress's intent to ensure that the indigenous populations maintained local control. *See Eche v. Holder*, 694 F.3d 1026 (9th Cir. 2012) (explaining that Consolidated Natural Resources Act of 2008 made federal immigration law applicable to the CNMI beginning in 2009); S. Rep. No. 110-324 (2008) (explaining that Congress's intent to protect indigenous populations was not being served). But the full implementation of federal immigration law in CNMI will not be complete until December 31, 2029. *See* 48 U.S.C. § 1806(a)(2). And while Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa have all had non-voting delegates to Congress with the right to participate in certain legislative activities since at least the 1970s, CNMI was not afforded a delegate with analogous rights until 2008. *See* Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 711, 122 Stat. 754, 868 (*codified at* 48 U.S.C. § 1751).

Against this background, it was rational for Congress to determine that moving from a State to CNMI is more akin to moving "overseas" for purposes of UOCAVA, and that requiring States to accept absentee ballots from former residents who move to CNMI furthers UOCAVA's general purpose of expanding overseas

access to federal elections. By declining to include CNMI within UOCAVA's definition of a State, moreover, Congress avoided imposing requirements on CNMI's electoral process that it imposed on the other Territories.[7] Congress's decision to take a more hands-off approach concerning CNMI respected its unique relationship to the United States. *See Segovia*, 201 F. Supp. 3d at 948 ("Congress could have reasonably concluded that because the NMI is the only United States Territory that used to be a Pacific Trust Territory and, as of the date of the UOCAVA's enactment, was not yet a United States Territory, it was more analogous to a foreign country, as opposed to the United States Territories of Puerto Rico, Guam, and the U.S. Virgin Islands.").

In all events, under the rational-basis test, Congress need not completely solve a particular societal problem in one fell swoop. Instead, Congress "may take one step at a time"; it may "select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). Congress's decision to define "the United States" for purposes of

[7] For instance, UOCAVA requires Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa—like the fifty States and the District of Columbia—to accept absentee ballots from their former residents who move overseas, and requires them to establish detailed procedures related to absentee voting. It imposes no similar requirements on CNMI. *See generally* 52 U.S.C. § 20302; *id.* § 20310(6) (defining "State" to include the listed Territories). Thus, if Plaintiffs moved from the Territories in which they live to a foreign country, UOCAVA would require those Territories to accept absentee ballots for them in federal elections, whereas it does not impose a similar requirement on CNMI.

UOCAVA in a manner that excludes the CNMI thus does not require it to extend that definition to other Territories. That is particularly true in the context of a statute like UOCAVA that *expands* access to voting rights, while placing no restriction on anyone's ability to vote. *See Katzenbach*, 384 U.S. at 657.

The nature of the United States' relationship with the Territories reinforces these arguments. Although the Supreme Court has often emphasized the constitutional equality of the States, *see, e.g.*, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1822 n.4 (2016); *Coyle v. Smith*, 221 U.S. 559, 556 (1911), it has never adopted anything like an equal-footing doctrine for the Territories. To the contrary, the Supreme Court has recognized that Congress may "develop innovative approaches" to address each Territory's distinctive needs. *Sanchez Valle*, 136 S. Ct. at 1876; *see also id.* at 1868, 1876 (observing that Puerto Rico's relationship to the United States is "unique" and "has no parallel in our history") (citation omitted). Against that backdrop, it is not irrational for Congress to provide for different minimum absentee-voting rights for former State residents residing in different Territories—particularly given the ability of individual states to provide their former residents with more than the federally required minimum, if they so choose.

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

Plaintiffs also suggest that it violates the Constitution for Congress to provide for absentee-voting rights for former state residents who move to foreign countries,

while not guaranteeing those rights for those who move to U.S. territories. This theory is inconsistent with binding precedent. The Ninth Circuit, considering a statutory predecessor to UOCAVA, has already rejected the argument that residents of Guam should be permitted to vote in Presidential elections just because Congress separately provided that "citizens who live outside this country may vote by absentee ballot in their last state of residency[.]" *Guam*, 738 F.2d at 1020.

To be sure, it is not clear from the Ninth Circuit's opinion in *Guam* whether the plaintiffs in that case made all of the arguments that these Plaintiffs raise here. But the central holding remains fatal to Plaintiffs' argument about UOCAVA's distinction between the Territories and foreign countries: according to the Ninth Circuit, "[t]here is no constitutional violation," *id.* at 1019, 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. The First and Second Circuits have come to that same conclusion even more explicitly. *See Romeu*, 265 F.3d at 125 ("[W]e hold that Congress acted in accordance with the requirements of the Equal Protection Clause in requiring States and territories to extend voting rights in federal elections to former resident citizens residing outside the United States, but not to former resident citizens residing in either a State or a territory of the United States."); *Igartua De La Rosa*, 32 F.3d at 9-11 (same).

Even if this Court were writing on a clean slate, it is at least rational to treat former state residents who move to U.S. territories differently than former state residents who move to foreign countries. Generally, absent UOCAVA, former state residents who live in foreign countries would no longer have any opportunity to vote in any United States elections. Those who live in U.S. territories, by contrast, may vote in the elections in those territories—including for various forms of non-voting representatives in the United States Congress. "For example, a citizen who moves to Puerto Rico would be eligible to vote in the federal election for the Resident Commissioner." *Igartua de la Rosa*, 32 F.3d at 11 n.3. Congress could rationally have concluded that it was important to ensure that Americans living in foreign countries retained *some* opportunity to remain connected to the government of the United States. And Congress could rationally have concluded that those who moved to the Territories had a lesser need, given the new voting rights that they gained upon arriving in the Territories. *See Romeu*, 265 F.3d at 124-25 ("[C]itizens who move outside the United States . . . might be completely excluded from participating in the election of governmental officials in the United States but for the UOCAVA. In contrast, citizens of a State who move to Puerto Rico may vote in local elections for officials of Puerto Rico's government (as well as for the federal post of Resident Commissioner).").

Plaintiffs may protest that those who move to the States gain the right to vote in all federal elections in their new jurisdiction, while those who move the to the Territories only gain the right to vote for various forms of non-voting congressional representation. But again, that is a well-settled feature of our basic constitutional structure, in which, as a general matter, those who live in the territories do not have the right to vote in presidential or congressional elections. *See generally Guam*, 738 F.2d at 1017; *see also Igartua de la Rosa*, 32 F.3d at 11 ("While the Act does not guarantee that a citizen moving to Puerto Rico will be eligible to vote in a presidential election, this limitation is not a consequence of the Act but of the constitutional requirements discussed above."). After all, for residents of the District of Columbia, the same was true with respect to presidential elections until ratification of the twenty-third amendment in 1961. And it remains true today, with respect to congressional elections—D.C. residents have only a non-voting representative in the House of Representatives, and no representation at all in the U.S. Senate. Plaintiffs (like many residents of the District of Columbia) may desire another arrangement, but "the judiciary is not the institution of our government that can provide the relief they seek." *Guam*, 738 F.2d at 1020.

Finally, Plaintiffs' arguments about foreign countries are also inherently self-contradictory. At bottom, these arguments amount to a complaint that former State residents who move to Plaintiffs' home territories are treated *identically* to

those who move to the fifty States or to the District of Columbia—that is, they lose the ability to vote in the State that they left behind. That result is neither surprising, nor constitutionally problematic—and it is consistent with Plaintiffs' general desire that territorial residents *should* be treated more similarly to residents of States. Put differently, it is hard to see how UOCAVA could represent unconstitutional discrimination against the Territories simply because it defines them as *part of* the "United States" for purposes of UOCAVA, 52 U.S.C. § 20310(8)—on equal footing with the fifty States and the District of Columbia.

D. It is not irrational for UOCAVA to treat those who move to uninhabited territories differently than those who move to inhabited territories or to the States.

Finally, at times, Plaintiffs suggest that Congress has drawn a distinction between "favored U.S. territories" and "disfavored territories." Pls.' MSJ at 1. To the extent this is primarily a reference to the CNMI (as contrasted with Plaintiffs' home territories and American Samoa), that distinction has already been addressed at length, above. *See supra* at 24-31. But to the extent Plaintiffs intend to suggest that UOCAVA treats various *other* U.S. territories, outlying possessions, or insular areas as "favored territories"—such as Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, Palmyra Atoll, Wake Island, and Navassa Island—there is an obvious rational basis for treating those territories differently than Guam, Puerto Rico, American Samoa, and the U.S. Virgin Islands:

they generally have no permanent residents. *See* GAO Report at 6 n.3, 54-63. Plaintiffs acknowledge this. *See* ECF No. 84 at 1 (Plaintiffs defining "favored Territories" as "the NMI and ten other Territories without permanent settlements"). Even accepting that UOCAVA applies to those locations as a formal matter, UOCAVA has no meaningful, real-world application to uninhabited locations that have no voters. In any event, much like former State residents living in foreign countries, temporary inhabitants of those locations do not otherwise have any representation (voting or non-voting) in the United States Congress, and it is thus not irrational to treat them differently than residents of Plaintiffs' home territories.

* * *

For all these reasons, "Congress may distinguish between those U.S. citizens formerly residing in a State who live outside the U.S., and those who live in the U.S. territories" in which Plaintiffs reside. *Romeu*, 265 F.3d at 124.

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.

Plaintiffs' claims primarily rest on the assertion that former residents of Hawaii who now live in the CNMI receive preferential treatment under UOCAVA. But even if Plaintiffs were right about that, the Court would still be presented with an additional remedial question: should any unconstitutional disparate treatment be remedied by (1) eliminating preferential treatment for the CNMI, or (2) granting new

absentee-voting rights to all former Hawaii residents who reside in Guam, Puerto Rico, the U.S. Virgin Islands, or American Samoa? The answer is the former: the only appropriate remedy would be to treat CNMI as UOCAVA already treats all of the other territories listed in the statute. That means any "victory" for Plaintiffs here would be Pyrrhic: it would result in the withdrawal of voting rights for some residents of the CNMI, but would not alter Plaintiffs' inability to vote in Hawaii.

The Supreme Court's decision in *Sessions v. Morales-Santana*, 137 S. Ct. 1679 (2017), is instructive. In *Morales-Santana*, the Supreme Court held that a provision of the Immigration and Nationality Act (INA) extending citizenship to certain children with one U.S. citizen parent violated equal protection principles because it provided more lenient rules for unwed U.S. citizen mothers than for unwed U.S. citizen fathers. *Id.* at 1699. The *Morales-Santana* Court unanimously held that the proper remedy for this equal protection violation was to eliminate the favorable treatment of mothers, rather than expanding the rights of fathers. *Id.* at 1700. The Court stressed that "the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* at 1698 (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)). Which of these approaches to take "is governed by the legislature's intent, as revealed by the statute at hand." *Id.* at 1699; *see also id.* at 1701 (the Court "must adopt the remedial course Congress

likely would have chosen 'had it been apprised of the constitutional infirmity.'") (citation omitted). Looking to the text and structure of the INA, the Court concluded that Congress would have preferred to eliminate the "discriminatory exception" favoring mothers. *Id.* at 1699; *accord Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2355 (2020) ("[T]he correct result in this case is to sever the 2015 government-debt exception and leave in place the longstanding robocall restriction.").

The text, structure, and history of UOCAVA all point to a similar conclusion here. Here, Plaintiffs contend that a statute expressly defining "the United States" to include Puerto Rico, American Samoa, the U.S. Virgin Islands, and Guam as part of the United States violates equal protection in part because the statute does not also mention the CNMI, which became a Territory after UOCAVA was enacted. Under *Morales-Santana*, if that were an equal protection violation, the proper remedy would be to treat CNMI like the four major territories that Congress already expressly addressed in the statute. The Seventh Circuit recognized as much in *Segovia*:

> Under *Morales-Santana*, we should presume that Congress would have wanted the general rule—that U.S. territories are part of the United States—to control over the exception for the Northern Marianas. Therefore, instead of extending voting rights to all the territories, the proper remedy would be to extend them to none of the territories.

Segovia, 880 F.3d at 389 n.1. So too here.

The timing of UOCAVA's passage confirms this conclusion. As discussed above, UOCAVA was signed into law in August of 1986, before CNMI had completed the process of becoming a U.S. territory. Applying *Morales-Santana* in these circumstances, if there were a constitutional violation here—and had CNMI been a U.S. territory at the time UOCAVA was enacted—it is more likely that Congress would have resolved any constitutional problem by treating the CNMI like all of the other inhabited U.S. territories, and thus defining it to be within the "United States" for purposes of UOCAVA. In that circumstance, Plaintiffs would remain uncovered by the statute. Given that likely practical reality, and the focus on hypothetical congressional intent required by *Morales-Santana*, the most that could properly result from Plaintiffs' prevailing in this lawsuit would be a contraction of voting rights for certain residents of the CNMI.[8]

That counterproductive bottom-line result—which no party has actually requested—further underscores why the Court should decline Plaintiffs' invitation to distort equal-protection doctrine in order to concoct new rights for a small subset of Territorial residents in a way that neither the Constitution nor the Congress has

[8] This remedial argument would not apply if the Court concluded that it was irrational to treat Plaintiffs differently from those who move from a State to a foreign country, *but see supra* at 31-35—it would apply only if the Court concluded that treating the CNMI differently from other territories was irrational and unconstitutional.

contemplated. Nevertheless, should the Court accept Plaintiffs' argument that UOCAVA's treatment of the CNMI renders the definition of the "the United States" in UOCAVA unconstitutional, the only appropriate result consistent with congressional intent and Supreme Court precedent would be to hold that UOCAVA rights may not extend to former state residents who reside in the CNMI.

CONCLUSION

For these reasons, the Court should enter summary judgment for Federal Defendants on all claims.[9]

[9] Last month, the Supreme Court heard oral argument in *United States v. Vaello-Madero*, No. 20-303 (U.S., argued Nov. 9, 2021). That case presents the following question: "Whether Congress violated the equal-protection component of the Due Process Clause of the Fifth Amendment by establishing Supplemental Security Income—a program that provides benefits to needy aged, blind, and disabled individuals—in the 50 States and the District of Columbia, and in the Northern Mariana Islands pursuant to a negotiated covenant, but not extending it to Puerto Rico." U.S. Pet'n for a Writ of Certiorari (Sept. 4, 2020), https://perma.cc/78S5-PP3S. In this case, for all the reasons above, Federal Defendants respectfully submit that summary judgment is appropriate now, on all claims, because rational-basis review applies, and because UOCAVA has a rational basis. Nevertheless, it is possible that *Vaello-Madero* will provide additional clarity on some of the issues at stake in this case, particularly with respect to the appropriate standard of review.

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