JENNIFER B. DICKEY
Acting Assistant Attorney General

KENJI M. PRICE #10523
United States Attorney, District of Hawaii

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

STEPHEN M. PEZZI
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Phone: (202) 305-8576
Fax: (202) 616-8470
Email: stephen.pezzi@usdoj.gov

DANA A. BARBATA #9112
Assistant U.S. Attorney
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
Phone: (808) 541-2850
Fax: (808) 541-3752
Email: Dana.Barbata@usdoj.gov

Attorneys for Federal Defendants UNITED STATES OF AMERICA; CHRISTOPHER C. MILLER, in his official capacity as the Acting Secretary of Defense; FEDERAL VOTING ASSISTANCE PROGRAM; and DAVID BEIRNE, in his official capacity as Director of the Federal Voting Assistance Program

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RANDALL JAY REEVES, *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' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

The Constitution

Regulations

Legislative Materials

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 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 Attorney Gen. of Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984). Instead, Plaintiffs argue 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 *Plaintiffs* to be deprived of that same opportunity. To the extent the Court reaches the merits, that argument fails—as every federal judge to consider the question has concluded.

But before this Court even considers the merits, it must first assure itself that has subject-matter jurisdiction over each of Plaintiffs' claims. And here, Plaintiffs have sued not only the state and local entities who actually administer federal elections in Hawaii—including by determining eligibility for absentee ballots under Hawaii law—but also the United States of America, the Acting Secretary of Defense, the Federal Voting Assistance Program, and the Director of the Federal Voting Assistance Program ("the Federal Defendants"). As for the Federal Defendants, Plaintiffs argue that the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") is somehow the cause of their injuries, and that declaring it unconstitutional would redress their harms.

Not so. Plaintiffs lack Article III standing to challenge UOCAVA, for two separate and independent reasons. First, Plaintiffs' alleged injuries are not fairly traceable to UOCAVA, or to any of the Federal Defendants. As a unanimous Seventh Circuit panel recently held in a materially identical lawsuit filed by former Illinois residents who reside in the same territories at issue here, "UOCAVA does not prevent [the State] from providing the plaintiffs absentee ballots, and so it does not cause their injury." *Segovia v. United States*, 880 F.3d 384, 387 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 320 (2018). Instead, "[t]o the extent the plaintiffs are injured, it is because they are not entitled to ballots *under state law*." *Id.* (emphasis added). In other words, UOCAVA sets a federal law floor, by requiring certain minimum absentee voting rights for some military and overseas voters. But it sets no ceiling, and instead leaves to each State to determine how broadly to permit absentee voting by current or former residents—consistent with the Constitution's general grant of authority to each State to set "[t]he Times, Places and Manner" of elections for federal office. U.S. Const. art. II, § 1, cl. 2; *see also* U.S. Const., art. I, § 4, cl. 1. If UOCAVA were repealed tomorrow, Plaintiffs would remain ineligible to vote absentee in Hawaii elections, because of Hawaii law. Given that reality, it cannot be UOCAVA that is the cause of their alleged injuries.

In addition, Plaintiffs' alleged injuries are not likely to be redressed by a favorable decision. That is because, on the merits, their claims turn on the assertion that UOCAVA and Hawaii law grant inappropriate preferential treatment to former state residents who reside in one territory: the Commonwealth of the Northern Mariana Islands. But even if that were so, the appropriate remedy would be to

eliminate any preferential treatment, and treat former Hawaii residents who live in the Northern Mariana Islands the same as former Hawaii residents who live in Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands. And that result would have no effect on Plaintiffs' inability to vote absentee as a matter of Hawaii law.

For these reasons, all of Plaintiffs' claims challenging UOCAVA, and all of Plaintiffs' claims against the Federal Defendants, should be dismissed for lack of subject-matter jurisdiction.

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. This 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." *Attorney Gen. of Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984). 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 Attorney Gen. of Territory of 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.*, *Igartua v. United States*, 626 F.3d 592, 596 (1st Cir. 2010).

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 pursuant to 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://www.gao.gov/archive/1998/og98005.pdf ("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 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

[1] *See* Office of Insular Affairs, U.S. Dep't of the Interior, *Definitions of Insular Area Political Organizations*, https://www.doi.gov/oia/islands/politicatypes (describing various insular areas).

"transition to constitutional self-government" and govern "future political relationships." *Segovia v. Bd. of Election Commissioners for City of Chicago*, 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. § 1681 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 largest 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 larger 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 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 U.S.C. § 1756 (providing that provisions allowing Resident Representative to serve as non-voting delegate do not affect the Covenant)).

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

Congress enacted UOCAVA in August of 1986, approximately three months before the Covenant with the CNMI went into full effect. Pub. L. 99-410, 100 Stat.

[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.

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 territorial 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 one of the listed territories).

The statute does not mention the Northern Mariana Islands—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 (largely uninhabited) 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 in the CNMI or other territories to vote absentee in federal elections.[3]

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

As a general matter, to register to vote in the State of Hawaii, one must be a U.S. citizen, a resident of Hawaii, and at least eighteen years of age. *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

[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 uninhabited); *id.* at 54 (noting former military use of Baker Island and noting that current use is restricted to scientists and educators).

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 with respect to U.S. territories, 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) (allowing an absentee "ballot package" to "generally be issued" in several circumstances, one of which is "[p]ursuant to a request by a voter covered under chapter 15D, HRS, or the Uniformed and Overseas Citizens Absentee Voting Act of 1986, as amended, or any other applicable federal or state law").[4]

[4] Until recently, Hawaii law accomplished this same result through a more straightforward manner, but "[t]he prior regulation addressing the same issue . . . has now been repealed." Second Am. Compl. ¶ 1 n.2, ECF No. 73; *see also* H.A.R. § 3-174-22(c) ("Citizens shall be regarded as residing overseas if they reside anywhere except the several statues of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa.") (repealed July 26, 2020).

In some respects, however, 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." Second Am. Compl., ECF No. 73, ¶ 10 (citing H.R.S. § 15D-2; H.A.R. § 3-177-600). And with respect to presidential elections, former Hawaii residents who now live in other U.S. states also receive additional absentee-voting rights: "[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. Neither of those provisions find any parallel in 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* Second Am. Compl. ¶¶ 14-20. Plaintiffs filed suit against various federal, state, and local entities and officials alleging that "UOCAVA and Hawaii UMOVA as applied to them violate the Fifth Amendment and the Fourteenth Amendment, respectively." *Id.* ¶ 13. "Plaintiffs also seek an injunction directing Defendants to accept Individual Plaintiffs' applications to vote absentee in federal elections in Hawaii." *Id.* Plaintiffs base their equal protection argument on the ground that Hawaii authorizes absentee voting by citizens who move from Hawaii

to the Northern Mariana Islands, but not by citizens who move to Puerto Rico, Guam, American Samoa, or the U.S. Virgin Islands. *See id.* ¶¶ 1-13.

On November 24, 2020, the Court issued an order denying the parties' joint motion for a stipulated briefing schedule. The Court noted that "[t]he parties dispute Plaintiffs' standing, a threshold issue concerning subject matter jurisdiction." Nov. 24, 2020 Order, ECF No. 67. "Given the issues to be litigated, the Court [found] that judicial economy will be served by a multistep process," in which standing is "addressed as a preliminary matter." *Id.* The Court further ordered that "[o]nly after standing is resolved should the parties file their anticipated motions for summary judgment." *Id.*

LEGAL STANDARD

"Standing is 'an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 975 F.3d 831, 837 (9th Cir. 2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff who seeks to establish standing "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *accord Carney v. Adams*, 141 S. Ct. 493, 498 (2020). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

"[S]tanding is not dispensed in gross." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Instead, "a plaintiff must demonstrate

standing for each claim he seeks to press and for each form of relief that is sought." *Id.*

ARGUMENT

Plaintiffs allege that they have suffered an Article III injury: they wish to vote absentee in federal elections in Hawaii, but are currently prohibited from doing so. But it is Hawaii law—and only Hawaii law—that prohibits Plaintiffs from voting absentee in federal elections in Hawaii. In other words, were Hawaii to choose to provide absentee ballots to all former residents who reside in the territories, neither UOCAVA nor any other provision of federal law would be an obstacle. Likewise, if Congress repealed UOCAVA tomorrow, that would not affect Plaintiffs' inability to vote absentee in federal elections in Hawaii, which would persist—again, because of Hawaii law. *See* H.R.S. § 15D-2 (definition of "United States"); H.A.R. § 3-177-600. Accordingly, Plaintiffs' injury is neither fairly traceable to UOCAVA, nor to any of the Federal Defendants, which means that Plaintiffs lack Article III standing with respect to all of those claims.

Even if Plaintiffs could overcome their traceability problem, they lack Article III standing for an additional, independent reason: their injury is not likely to be redressed by a favorable decision in this case. That is because, on the merits, Plaintiffs' equal protection argument turns on what they consider inappropriate preferential treatment in UOCAVA for one U.S. territory: the Commonwealth of the Northern Mariana Islands. But even if Plaintiffs were to prevail on that argument, the only appropriate remedy would be to *eliminate* any preferential treatment—that is, to eliminate UOCAVA protections for former state residents who now reside in

the Northern Mariana Islands. But that would not redress these Plaintiffs' injuries; they would remain unable to vote absentee in Hawaii.

For these reasons, Plaintiffs' claims challenging UOCAVA, and Plaintiffs' claims against the Federal Defendants, should all be dismissed for lack of Article III standing.

I. Plaintiffs' injuries are not traceable to UOCAVA or the Federal Defendants.

To satisfy the causation or "traceability" requirement of Article III standing, a plaintiff need not establish that "the defendant's actions [we]re the very last step in the chain of causation"; it may suffice that the defendant exerted "determinative or coercive effect upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997). But the plaintiff must seek to "redress [an] injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). With respect to UOCAVA and the federal defendants, Plaintiffs cannot satisfy this jurisdictional requirement: any injury from being unable to vote absentee in federal elections in Hawaii results from Hawaii, and Hawaii law.

a. Plaintiffs' alleged injury is that they cannot vote absentee in Hawaii. But nothing about UOCAVA prevents them from doing so, or prevents Hawaii from accepting their absentee ballots. Instead, UOCAVA creates a statutory floor for absentee voting, requiring States to accept absentee ballots from service members and certain other residents who move overseas. But each State remains free to choose to accept absentee ballots from individuals, like plaintiffs, who move from

States to other places within the United States (as defined by the statute). *See, e.g.*, H.R. Rep. No. 99-765, at 19 (1986), *reprinted in* 1986 U.S.C.C.A.N 2009, 2023 (noting that nothing in UOCAVA "prevent[s] any State from adopting any voting practice which is less restrictive than the practices prescribed by this Act.").

Consistent with UOCAVA, Hawaii could have chosen to accept absentee ballots from former Hawaii residents, like plaintiffs, who now reside in Puerto Rico, Guam, American Samoa, or the Virgin Islands. Hawaii has chosen not to do so, but that was the State's choice. The differential treatment of which plaintiffs complain thus flows not from UOCAVA, but from a legislative judgment made by their former State of residence.

In fact, at least some other states *have* made different judgments: some *do* permit former residents who move to other territories to vote absentee. For example, former residents of Illinois who move to the CNMI *or to American Samoa* may vote absentee in federal elections in Illinois. *See Segovia v. United States*, 880 F.3d 384, 387 (7th Cir. 2018) ("Had they moved instead to American Samoa or the Northern Mariana Islands, Illinois law would consider them to be overseas residents entitled to ballots.") (citing 10 Ill. Comp. Stat. Ann. 5/20-1(1)). Accordingly, were a hypothetical former Hawaii resident, instead, a former *Illinois* resident, he or she would be permitted to vote absentee after moving to American Samoa—for reasons having nothing to with UOCAVA, and everything to do with differences between Hawaii and Illinois election law.

In addition, as Plaintiffs concede, there are other ways in which even *Hawaii* law departs from the floor set by UOCAVA, by providing voting rights to some (but

not all) additional overseas citizens. In particular, "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." Second Am. Compl. ¶ 10 (citing H.R.S. § 15D-2; H.A.R. § 3-177-600). And with respect to presidential elections, former Hawaii residents who now live in other U.S. states also receive additional absentee-voting rights: "[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. Those choices by Hawaii unquestionably had nothing to do with UOCAVA, which contains no parallel provisions. And they further illustrate how it is *Hawaii* that has the ultimate authority over the full scope of who may vote absentee in Hawaii—not the federal government.

Plaintiffs' claimed injury is thus traceable to state, not federal, law. *See, e.g.*, *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) (holding that plaintiffs lacked standing to sue for injuries traceable to independent action of third party). As confirmation of that reality, consider the consequences if Congress were to repeal UOCAVA tomorrow: Plaintiffs would remain ineligible to vote absentee in Hawaii, for the same reason they are ineligible now—that is, Hawaii law.

In sum, nothing in federal law prohibits Hawaii from allowing Plaintiffs to vote absentee in Hawaii. That Hawaii chooses not to do so is not a constitutional defect in UOCAVA, and Plaintiffs injuries are therefore not fairly traceable to federal law or the federal government.

b. Recently, in a nearly identical case brought by the same counsel, a unanimous Seventh Circuit panel came to this same conclusion. In *Segovia v. United States*, "former residents of Illinois now residing in the United States territories of Puerto Rico, Guam, and the Virgin Islands challenge[d] federal and state statutes that do not allow them to obtain absentee ballots for federal elections in Illinois." 880 F.3d 384, 386 (7th Cir.), *cert. denied*, 139 S. Ct. 320 (2018). The *Segovia* plaintiffs brought equal protection and due process claims premised on the fact that "former Illinois residents who move to some territories can still vote in federal elections in Illinois, but the plaintiffs cannot." *Id.* "The district court rejected their claims" on the merits, "holding that there was a rational basis for the inclusion of some territories but not others in the definition of the United States." *Id.* at 386-387.

Although the Seventh Circuit affirmed on the merits "[w]ith respect to the challenge to the Illinois statute," it handled Plaintiffs' claims against the federal government differently. The Seventh Circuit held "that plaintiffs lack standing to challenge" UOCAVA, because "UOCAVA does not prevent Illinois from providing the plaintiffs absentee ballots, and so it does not cause their injury." *Id.* Instead, "[t]o the extent the plaintiffs are injured, it is because they are not entitled to ballots under state law." *Id.* Accordingly, as to the federal defendants, the court "VACATE[D] the portion of the district court's judgment in favor of the federal defendants and REMAND[ED] the case with instructions to dismiss the claims against the federal defendants for want of jurisdiction." *Id.* at 392.

In reaching this conclusion, the Seventh Circuit distinguished between the floor provided by UOCAVA, and the ceiling set by Illinois law, noting correctly that

"[f]ederal law *requires* Illinois to provide absentee ballots for its former residents living in the Northern Mariana Islands, but it does not *prohibit* Illinois from providing such ballots to former residents in Guam, Puerto Rico, and the Virgin Islands." *Id.* at 388. In short, "State law could provide the plaintiffs the ballots they seek; it simply doesn't." *Id.*

The Seventh Circuit also acknowledged that "federal law *could have* required Illinois to provide the plaintiffs absentee ballots." *Id.* at 388. But as the Seventh Circuit correctly explained, "that does not render federal law the cause of the plaintiffs' injuries." *Id.* (citing *Simon*, 426 U.S. at 26). That is because Illinois was an independent actor, which retained "discretion to determine eligibility for overseas absentee ballots under its election laws." *Id.* at 389. As the *Segovia* court explained:

> [T]here is nothing other than Illinois law preventing the plaintiffs from receiving ballots. Federal law doesn't encourage Illinois not to offer the plaintiffs ballots. And the federal government doesn't run the elections in Illinois, so, UOCAVA or not, whether the plaintiffs can obtain absentee ballots is entirely up to Illinois. Given that type of unfettered discretion with respect to the plaintiffs, the federal government cannot be the cause of their injuries. Illinois has caused their injuries by failing to provide them ballots. Simply put, the plaintiffs cannot sue the federal government for failing to enact a law requiring Illinois to remedy their injury.

Id. So too here. In all material respects, the relationship between UOCAVA and Illinois law (at issue in *Segovia*) is identical to the relationship between UOCAVA and Hawaii law (at issue here). "In short, the reason the plaintiffs cannot vote in

federal elections in [Hawaii] is not the UOCAVA, but [Hawaii's] own election law." *Id.* at 388.[5]

c. The only Article-III injury that Plaintiffs clearly allege in the Second Amended Complaint is that they are not permitted to vote by absentee ballot in federal elections in Hawaii. *See, e.g.*, Second Am. Compl. ¶ 14(a) ("Defendants will not permit Mr. Reeves to vote for President or for voting members of Congress by virtue of his residence in Guam."); *see also id.* ¶¶ 15(a), 16(a), 17(a), 18(a), 19(a), 20(a). But even assuming that Plaintiffs' injuries could be divorced from their actual eligibility to vote absentee in Hawaii, and instead be characterized as some abstract or psychological harm from the "preferential treatment" afforded to citizens in the Northern Mariana Islands, that alleged harm would still not be attributable to UOCAVA. Federal law does not require such differential treatment; Hawaii law does. As the Seventh Circuit correctly concluded in *Segovia* with respect to Illinois, nothing in federal law prevents Hawaii from affording absentee voting rights "to former residents in Guam, Puerto Rico, [American Samoa,] and the Virgin Islands. . . . [I]t simply doesn't." 880 F.3d at 388.

* * *

[5] For similar reasons, Plaintiffs' request for injunctive relief allowing their absentee ballots to be accepted—tellingly, addressed to "Defendants," but without specifying *which* Defendants—cannot sensibly apply to the Federal Defendants, who are not responsible for managing Hawaii's elections. *See* Second Am. Compl., Prayer for Relief ¶ (b) (requesting an "order enjoining Defendants . . . to accept applications to vote absentee in future federal elections in Hawaii from Individual Plaintiffs").

Because Plaintiffs' alleged injuries are not "fairly traceable to" UOCAVA or the Federal Defendants, *Spokeo*, 136 S. Ct. at 1547, all of Plaintiffs' claims challenging UOCACA, and all of Plaintiffs' claims brought against the Federal Defendants, should be dismissed for lack of Article III standing.

II. Plaintiffs' claims are not redressable by a favorable decision with respect to UOCAVA or the Federal Defendants.

To satisfy the requirement of redressability, it is insufficient that "a favorable judgment will make [the plaintiff] happier," or will see "that the Nation's laws are faithfully enforced"—that sort of "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). In other words, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id.*

Plaintiffs' claims against the Federal Defendants are not redressable by this Court. That is because, on the merits, all of Plaintiffs' claims turn on the assertion that former residents of Hawaii who now live in the CNMI receive preferential treatment under UOCAVA, which violates the equal protection guarantees of the U.S. Constitution. 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: for the reasons set forth below, 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 certain voting-related benefits for some residents of the CNMI, but would not alter Plaintiffs' inability to vote absentee in Hawaii. Plaintiffs therefore also lack standing for this additional reason.

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."). 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; *see also id.* at 1700 ("Put to the choice, Congress, we believe, would have abrogated § 1409(c)'s exception, preferring preservation of the general rule.").

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 because the statute does not also mention the Northern Mariana Islands, which became a Territory after the statute was enacted. Under the logic of *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 correctly 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. That means a holding that the UOCAVA violates equal protection would not remedy the plaintiffs' injuries.

Segovia, 880 F.3d at 389 n.1.[6] So too here.[7]

The timing of UOCAVA's passage confirms this conclusion. UOCAVA was signed into law in August of 1986—a few months *before* CNMI had completed the process of becoming a U.S. territory. It is reasonable to assume that had CNMI been a U.S. territory at the time UOCAVA was enacted, it would have been listed alongside Guam, Puerto Rico, American Samoa, and the U.S. Virgin Islands, and therefore defined to be within the "United States" for purposes of UOCAVA—and Plaintiffs would remain uncovered by the statute. Given that likely practical reality, and the focus on hypothetical congressional intent required by *Morales-Santana*, it is not the case that these Plaintiffs' alleged injuries—that is, their inability to vote absentee in Hawaii—are "likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. Instead, the most that would result from Plaintiffs' prevailing in this lawsuit is a contraction of voting rights for certain residents of the

[6] Both *Segovia* and *Morales-Santana* predated the Supreme Court's decision in *Barr v. American Association of Political Consultants*, 140 S. Ct. 2335 (2020), which addressed arguably analogous issues primarily through the frame of severability, rather than Article III standing, in the context of a First Amendment commercial-speech claim. But no opinion in *AAPC* garnered a majority of votes, and most of the four opinions for the Court did not address this nuance in any detail. Accordingly, *Morales-Santana* remains the most recent and the most applicable Supreme Court precedent on this subject.

[7] To the extent the Court finds that Plaintiffs have standing, Defendants reserve their right, at the appropriate time, to re-assert the argument that the only appropriate remedy for any constitutional violation would be to eliminate any preferential treatment for the CNMI, rather than to expand UOCAVA rights to all other territories in a manner inconsistent with congressional intent.

CNMI. Accordingly, Plaintiffs lack Article III standing for that additional, independent reason.

CONCLUSION

For these reasons, Plaintiffs' claims challenging UOCAVA, and all of Plaintiffs' claims against the Federal Defendants, should be dismissed for lack of subject-matter jurisdiction.

Dated: January 14, 2021

Respectfully submitted,

JENNIFER B. DICKEY
Acting Assistant Attorney General

KENJI M. PRICE #10523
United States Attorney
District of Hawaii

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

/s/ *Stephen M. Pezzi*
STEPHEN M. PEZZI
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Phone: (202) 305-8576
Fax: (202) 616-8470
Email: stephen.pezzi@usdoj.gov

DANA A. BARBATA #9112
Assistant U.S. Attorney
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
Phone: (808) 541-2850
Fax: (808) 541-3752
Email: Dana.Barbata@usdoj.gov

Attorneys for the Federal Defendants