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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

RANDALL JAY REEVES, VINCENTE TOPASNA BORJA, EDMUND FREDERICK SCHROEDER, JR., RAVINDER SINGH NAGI, PATRICIA ARROYO RODRIGUEZ, LAURA CASTILLO NAGI, and EQUALLY AMERICAN, Plaintiffs, vs. SCOTT NAGO, in his official capacity as Chief Election Officer for the Hawaii Office of Elections,	CIVIL NO. 20-00433 JAO-RT DEFENDANT SCOTT NAGO'S MEMORANDUM IN PARTIAL OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION [ECF #74] AND MEMORANDUM IN SUPPORT [ECF #75] Hearing Date: March 5, 2021 Time: 9:00 a.m. Judge: Hon. Jill A. Otake

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

KATHY KAOHU, in her official capacity as Clerk of the County of Maui,

UNITED STATES OF AMERICA,

CHRISTOPHER C. MILLER, in his official capacity as Acting Secretary of Defense,

FEDERAL VOTING ASSISTANCE PROGRAM, and

DAVID BEIRNE, in his official capacity as Director of the Federal Voting Assistance Program ,

Defendant.

DEFENDANT SCOTT NAGO'S MEMORANDUM IN PARTIAL OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION [ECF #74] AND MEMORANDUM IN SUPPORT [ECF #75]

I. INTRODUCTION

On its face and as-applied, Hawaii's UMOVA does not treat former state residents differently based on which U.S. territory they reside in. The same thing cannot be said of UOCAVA. To be clear, this is not to suggest that UOCAVA is unconstitutional. UOCAVA is constitutional, as is UMOVA. But rather than

proceed to a judgment on the merits, the Federal Defendants seek dismissal based on standing, arguing in large part that it is Hawaii law, Hawaii's choices, and/or Hawaii's inaction that caused Plaintiffs' alleged injuries. It is this argument that the Chief Election Officer takes issue with and opposes.

The Federal Defendants liken UOCAVA to merely having set the floor, arguing that nothing prevents Hawaii from allowing Plaintiffs to vote absentee. But it is the floor about which the Plaintiffs complain. It is the floor that treats former state residents living in the Commonwealth of the Northern Mariana Islands differently from former state residents living in the other U.S. territories. And it is the floor which gives rise to Plaintiffs' equal protection claim. The federal government created the floor and should not be allowed to avoid claims of flaws therein to the extent such claims are redressable. If the Court determines that Plaintiffs' alleged injuries are redressable, the Federal Defendants' Motion to Dismiss should be denied.

II. BACKGROUND

Effective August 28, 1986, the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") extended absentee voting rights in federal elections to uniformed service members, their eligible family members, and overseas U.S. citizens by requiring that states permit such individuals to vote by absentee ballot. Pub. L. No. 99-410, 100 Stat. 924 (1986). UOCAVA defines an "overseas voter"

in part as, "a person who *resides outside the United States* and is qualified to vote in the last place in which the person was domiciled before leaving the United States," or "a person who resides *outside the United States* and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." 52 U.S.C. § 20310(5)(b) and (c) (emphases added). The "United States" is defined as "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and America Samoa." 52 U.S.C. § 20310(8). Thus, former Hawaii residents living in the "United States" (including Puerto Rico, the U.S. Virgin Islands, and Guam) do not qualify as "overseas voters" and would not be entitled to vote absentee under UOCAVA.

Following the enactment of UOCAVA, the Commonwealth of the Northern Mariana Islands ("CNMI") was established and its domiciliaries were recognized as citizens of the United States. Proclamation 5564,[1] 51 Fed. Reg. 40399 (Nov. 3, 1986), 1986 WL 796859. Although there were subsequent amendments to UOCAVA, including the Military and Overseas Voter Empowerment Act ("MOVE Act"), Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190,

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

2318-2335 (2009), at no time was the definition of the "United States" amended to include CNMI.

In 2012, Hawaii enacted its own law, entitled the Uniform Military and Overseas Voter Act ("UMOVA"), which extended absentee voting rights in federal and state elections to uniformed-service and overseas voters. Act 226, 2012 Haw. Sess. Laws 798. UMOVA defines an "overseas voter" as a "United States citizen who is living outside the United States," which, in turn, is defined 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." Haw. Rev. Stat. § 15D-2. As such, former state residents living in CNMI, Puerto Rico, the U.S. Virgin Islands, and Guam do not qualify as "overseas voters" and would not be entitled to vote absentee in Hawaii under UMOVA.

III. STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 12(b)(1), a complaint may be dismissed for lack of subject matter jurisdiction. An attack on subject matter jurisdiction "may be facial or factual." *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir. 2004). Although the allegations of fact in the complaint are to be accepted as true and construed in the light most favorable to the plaintiff, courts do not need to assume the "truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc*., 328 F.3d 1136, 1139

(9th Cir. 2003). In resolving a factual attack on jurisdiction, the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone,* 373 F.3d at 1039.

IV. PLAINTIFFS' ALLEGED INJURY IS TRACEABLE TO UOCAVA

The Federal Defendants challenge Plaintiffs' standing action based on causation and redressability. The Chief Election Officer joined in the Federal Defendants' redressability arguments (ECF #78), but if the Court determines that Plaintiffs' alleged injuries are redressable, the Court should also determine that Plaintiffs' alleged injuries are fairly traceable to UOCAVA.

A plaintiff invoking federal jurisdiction bears the burden of establishing the "irreducible constitutional minimum" of standing consisting of three elements: (1) the plaintiff must have suffered a concrete and particularized injury that is actual or imminent; (2) there must be a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff need not show that a defendant's actions are the very last step in the chain of causation, but need only show that there are no independent actions of third parties that break the causal link. *Assoc. of Public Agency Customers v. Bonneville Power Admin.*, 733 F.3d

939, 953 (9th Cir. 2013). If there are no independent actions, the defendant's challenged action is understood to have had a determinative effect upon the action of the third party. *Id*.

A. Plaintiffs Allege The Denial Of Equal Treatment

In challenging causation, the Federal Defendants contend that Plaintiffs' alleged injury of being unable to vote absentee in Hawaii in federal elections is caused, not by UOCAVA, but by Hawaii law. But the inability to vote is not the only injury alleged by Plaintiffs. Plaintiffs allege that they have been "injured by virtue of the Defendants' disparate treatment of former state residents residing in the Territories and overseas[.]" Second Amended Complaint ("SAC"), ECF #73, ¶ 12. In particular, Plaintiffs allege that,

> Under UOCAVA, States are required to allow former state citizens residing outside the United States or in the NMI to vote on an absentee basis in federal elections. But under the same law, States are free to deny that right to similarly situated persons residing in the other U.S. Territories overseas.

SAC, ¶ 6. Thus, to the extent Plaintiffs are alleging that the named Defendants erected a barrier that makes it more difficult for former state residents living in Guam and the U.S. Virgin Islands to vote absentee in Hawaii in federal elections than it is for former state residents living in CNMI, Plaintiffs' injury in fact is the denial of equal treatment, not the inability to vote. In such case, Plaintiffs need only allege that they have been denied equal treatment for standing purposes. *See*

Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing."). Any causation analysis should therefore be based on Plaintiffs' alleged denial of equal treatment injury.

B. Plaintiffs' Alleged Injury Is Traceable To UOCAVA

It is undisputed that, under UOCAVA, Hawaii is required to allow former state residents living in CNMI to vote absentee in federal elections, but not former state residents living in the other U.S. territories. *See* Memo in Support, pp. 8-9 (emphases in original). Notwithstanding UOCAVA's clear mandate, the Federal Defendants attempt to sever the causal link by arguing that Hawaii has the "ultimate authority over the full scope of who may vote absentee in Hawaii – not the federal government." *Id*. at p. 16. But Hawaii made the decision *not* to extend absentee voting rights to former residents living in *any* U.S. territory when it enacted UMOVA. *See* Haw. Rev. Stat. § 15D-2; *see also* Memo in Support, p. 10 ("On its face, the text of [UMOVA] would appear to define residents of *any* U.S. territory as still residing within the 'United States,' and thus ineligible for absentee

ballots.")[2] (emphasis in original); *see also* SAC, ¶ 53 ("[S]trictly read, Hawaii UMOVA does not grant enfranchisement to former state residents who move to *any* Territory.") (emphasis in original). If, as the Federal Defendants contend, Hawaii had the "ultimate authority," Hawaii would be able to fully implement UOCAVA by not allowing former residents living in CNMI to vote absentee.

But Hawaii does not have such authority; Congress does. *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) ("[T]he Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them."). UOCAVA therefore preempts UMOVA. *Cf. Attorney Gen. of Territory of Guam v. US.*, 738 F.2d 1017, 1020 (9th Cir. 1984) (acknowledging that the Overseas Citizens Voting Rights Act, the precursor to UOCAVA, preempted state residency voting requirements). Thus, while Hawaii decided not to extend absentee voting rights to former residents living in any U.S. territory, UOCAVA compels it to do so for

[2] To the extent the Federal Defendants also suggest that Hawaii Administrative Rules ("HAR") § 3-177-600(d) mirrors UOCAVA and breaks the causal link, such suggestion is misplaced. HAR § 3-177-600(d) states in relevant part that, "[b]allot packages may generally be issued . . . (4) Pursuant to a request by a voter covered under [UMOVA] or the Uniformed and Overseas Citizens Absentee Voting Act of 1986, as amended[.]" This simply provides a mechanism for compliance with federal law. It does not adopt UOCAVA's provisions in contravention of UMOVA. Nor can it. *See Agsalud v. Blalack*, 67 Haw. 588, 591, 699 P.2d 17, 19 (1985) ("It is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement.").

former residents living in CNMI. It is this compulsion that establishes a direct causal link between UOCAVA and Plaintiffs' injury in fact.

C. The Court Should Decline To Follow Segovia

The Federal Defendants ask the Court to adopt the Seventh Circuit's holding in *Segovia v. U.S.*, 880 F.3d 384 (7th Cir. 2018) that plaintiffs do not have standing to sue the federal government. The Court should decline to do so.[3] UOCAVA may be a floor, but it became uneven when CNMI became a U.S. territory. It is the unevenness of the floor that Plaintiffs allege to have been injured by, not just the inability to vote. Absent the floor, Plaintiffs would have no basis to bring suit against Hawaii because UMOVA does not treat former state residents differently based on which U.S. territory they reside in. The floor, however, mandates compliance. The fact that Hawaii may be in a position to level the floor should not insulate the Federal Defendants from lawsuits arising from it. The Court should therefore decline to follow *Segovia* and find that Plaintiffs' alleged denial of equal treatment is traceable to UOCAVA.

[3] *Segovia* is not binding on this Court. *See In re Amy*, 710 F.3d 985, 987 (9th Cir. 2013) (a decision from a sister circuit is not binding).

V. CONCLUSION

If the Court determines that Plaintiffs' alleged injuries are redressable, the Chief Election Officer respectfully requests that the Court deny the Federal Defendants' Motion to Dismiss.

DATED: Honolulu, Hawai'i, February 5, 2020.

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