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SCOTT NAGO, in his official capacity as
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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 SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S MARCH 5, 2021 ORDER [ECF #94] Judge: Honorable 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,

LLOYD J. AUSTIN III, in his official capacity as Secretary of Defense,[1]

FEDERAL VOTING ASSISTANCE PROGRAM, and

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

Defendant.

DEFENDANT SCOTT NAGO'S SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S MARCH 5, 2021 ORDER [ECF #94]

Defendant Scott Nago, in his official capacity as Chief Election Officer for the Hawaii Office of Elections, through the Attorney General, State of Hawai‘i and her undersigned deputies, hereby submits his supplemental brief pursuant to the Court's March 5, 2021 Order.

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Secretary of Defense Lloyd J. Austin III is automatically substituted as a defendant for former Acting Secretary of Defense Christopher C. Miller.

Under the Constitution, the right to vote in presidential elections inheres to the fifty states[2] and the District of Columbia[3] and the right to vote for voting members of Congress inheres to the people of the fifty states.[4] If Plaintiffs seek to change the status quo under the existing constitutional framework to allow residents of all U.S. territories to vote in federal elections, there must either be a constitutional amendment or legislation expanding the right to vote. Neither option is a function of this court; both options are functions of the democratic process. The Court should therefore dismiss this case.

1. Assuming Plaintiffs' injuries are traceable to UOCAVA, would the declaratory relief requested in paragraph a of the Second Amended Complaint's ("SAC") prayer for relief – declaring definitions unconstitutional – without more, allow Plaintiffs to receive absentee ballots? If yes, describe mechanically how this would occur.

No. There is no law that permits the Plaintiffs to vote absentee in Hawaii in federal elections. Without such a law, additional relief beyond the requested

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[2] *See Att'y Gen. of Territory of Guam v. U.S.*, 738 F.2d 1017, 1019 (9th Cir. 1984) ("The right to vote in presidential elections under Article II inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors.").

[3] *See* U.S. CONST. amend. XXIII, § 1 ("The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state[.]").

[4] *See* U.S. CONST. art. 1, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States[.]"); *see also* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof[.]").

declaratory relief would be required to permit Plaintiffs to vote absentee in Hawaii in federal elections.

This much is not in dispute. Plaintiffs concede that the Court would need to take a "second step" of granting Plaintiffs' requested injunctive relief in order to "guarantee the ability to vote absentee in Hawaii[.]" Plaintiffs' Supp. Brief, ECF #96, pp. 4-5. The necessity of a second step proves that the first step is by itself insufficient.

Plaintiffs' argument that declaratory relief, alone, "***could*** trigger Defendants to allow plaintiffs to vote" is unavailing. *Id*. at p. 5. If the challenged definition in UOCAVA were declared unconstitutional, there is nothing to suggest that Congress and/or Hawaii would take it upon themselves to enact legislation to allow the Plaintiffs to vote absentee in federal elections. To speculate otherwise is insufficient for redressability purposes. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.').

2. Assuming Plaintiffs' injuries are not traceable to UOCAVA, would the declaratory relief, applied only to UMOVA and HAR § 3-177-600, without more, allow Plaintiffs to receive absentee ballots? If yes, describe mechanically how this would occur.

No, for the same reasons discussed above.

3. Does the Court have the power to award the injunctive relief requested in paragraph b of the SAC's prayer for relief? Provide legal authority for an affirmative or negative response.

No. Although the Court has the power to vindicate fundamental rights,[5] no such rights are alleged to be at stake here. Plaintiffs allege that "voting is a fundamental right" and that there is a "fundamental guarantee of equal protection with respect to voting rights," but at no time do Plaintiffs allege that they have a fundamental right to vote absentee in Hawaii in federal elections. SAC, ECF #73, ¶¶ 4, 6. The failure to do so is not an inadvertent oversight. Plaintiffs do not allege a fundamental right to vote in federal elections because it is well-established that no such fundamental right exists. *See Att'y Gen. of Territory of Guam*, 738 F.2d at 1019 ("Since Guam concededly is not a state, it can have no electors, and [American citizens who are residents of Guam] cannot exercise individual votes in a presidential election."); *see also Segovia v. U.S.*, 880 F.3d 384, 390 (7th Cir. 2018) ("[T]he residents of the territories have no fundamental right to vote in federal elections."); *Igartua De La Rosa v. U.S.*, 626 F.3d 592, 596 (1st Cir. 2010) ("The text of Article I is clear that only people *of a state* may choose the members of the House of Representatives from that state. . . . Because Puerto Rico is not a state, it may not have a member of the House of

[5] Whether a right is fundamental depends on whether it is explicitly or implicitly guaranteed by the Constitution. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

Representatives. . . . The text of the Constitution does not permit [U.S. citizen-residents of Puerto Rico] to vote for a member of the U.S. House of Representatives."); *Romeu v. Cohen*, 265 F.3d 118, 123 (2nd Cir. 2001) ("U.S. citizens who are residents of Puerto Rico and the other U.S. territories have not received similar rights to vote for presidential electors because the process set out in Article II for the appointment of electors is limited to 'States' and does not include territories.").

Nor do Plaintiffs have a fundamental right to vote in Hawaii, which may constitutionally require that its voters to be residents, subject to UOCAVA and UMOVA. *See Romeu*, 265 F.3d at 126 (holding that the plaintiff, a former resident of New York who moved to Puerto Rico, has no claim to a constitutional right to vote in New York because New York may constitutionally require that New York voters reside in New York, subject to UOCAVA and the Supremacy Clause).

In short, this is not a case involving a fundamental right to vote absentee in Hawaii in federal elections; Plaintiffs have no such right to begin with. Rather, this case involves Plaintiffs' attempt to avail themselves of the same absentee voting rights that former state residents living in the Commonwealth of the Northern Mariana Islands are afforded under UOCAVA by invoking equal protection principles. In doing so, Plaintiffs contend that UOCAVA and

UMOVA are unconstitutionally underinclusive. There are two problems with Plaintiffs' argument: first, a statute is not invalid under the Constitution because it might have gone farther than it did, *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966), and second, Plaintiffs' reliance on the Equal Protection Clause is misplaced because the Equal Protection Clause creates no substantive rights, *Vacco v. Quill*, 521 U.S. 703, 799 (1997); *see also San Antonio*, 411 U.S. at 59 ("Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties.") (Stewart, J., concurring). Moreover, even if there were an equal protection violation here, the Court would not have the power to grant the requested injunctive relief. It is simply "not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio*, 411 U.S. at 33.

Inasmuch as Plaintiffs cannot and have not alleged a fundamental right to vote in federal elections, Plaintiffs' recourse is through the democratic system, not this Court. *See M.S. v. Brown*, 902 F. 3d 1076, 1088 (9th Cir. 2018) (Democracy is the appropriate process for effectuating change where plaintiff fails to allege a fundamental right); *see also Obergefell v. Hodges*, 576 U.S. 644, 676 (2015) ("[T]he Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental

rights."); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) ("[T]he Constitution does not provide judicial remedies for every social and economic ill. . . . Absent constitutional mandate, the assurance of [appellants' asserted interests] are legislative, not judicial, functions.").

4. Does this case fall under the narrow set of circumstances in which the Court has the authority to order government officials to implement or enact legislation or take other action? See *M.S.*, 902 F.3d at 1088 n.14.

No. The narrow set of circumstances referred to in footnote 14 involves the vindication of a right that has vested such that it is beyond the control of the democratic process – to wit, when a right has been vested by a judgment. This case does not involve such circumstances because Plaintiffs do not have a vested right to vote in federal elections, let alone a vested right to vote absentee in Hawaii in federal elections. Nor has there been any judgment vesting in Plaintiffs the right to vote absentee in Hawaii in federal elections.

5. Assuming Plaintiffs lack standing, could amendment of the SAC – which the Court is authorized to permit – overcome the asserted defects?

No. Plaintiffs' offer to amend their complaint to clarify that the remedy sought does not necessitate an order to enact legislation is unavailing. No amendment could overcome the fact that the Court lacks the power to grant Plaintiffs the relief they seek in this case: the ability to vote absentee in Hawaii in federal elections. Inasmuch as the Court lacks the power to grant the ultimate

relief sought, Plaintiffs cannot establish redressability and thus, standing. *M.S.*, 902 F.3d at 1082.

DATED: Honolulu, Hawai‘i, April 1, 2021.

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