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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*.[1]	CIVIL NO. 20-00433 JAO-RT FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEF ON STANDING Hearing Date: March 5, 2021 Time: 9:00 a.m. Judge: Hon. Jill A. Otake

FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEF ON STANDING

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

INTRODUCTION

As explained in prior briefs and at oral argument, Plaintiffs lack Article III standing to challenge UOCAVA for at least two separate and independent reasons. First, Plaintiffs' injuries are not fairly traceable to UOCAVA (or to any of the Federal Defendants), as their injuries—that is, their inability to vote absentee in federal elections in Hawaii—are fairly traceable to Hawaii law, not federal law. *See Segovia v. United States*, 880 F.3d 384 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 320 (2018). Second, Plaintiffs' injuries are not redressable by a favorable decision, because even if there were a constitutional violation, the only appropriate remedy here would be to eliminate any inappropriate preferential treatment for former Hawaii residents living in the Northern Mariana Islands, by treating them as UOCAVA already treats former Hawaii residents living in any other inhabited U.S. territory. *See Sessions v. Morales-Santana*, 137 S. Ct. 1679 (2017). But that would not redress Plaintiffs' injuries; they would remain unable to vote absentee in Hawaii. For either or both of these reasons, Plaintiffs lack Article III standing.

The Court's order for supplemental briefing asked five questions of the parties. *See* March 5, 2021 Minute Order. As explained below, the answer to each question is "No." Accordingly, all of Plaintiffs' claims against the Federal Defendants, and all of Plaintiffs' claims challenging UOCAVA, should be dismissed for lack of subject-matter jurisdiction.

RESPONSES TO THE COURT'S QUESTIONS

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. Declaratory relief "without more" would not "allow Plaintiffs to receive absentee ballots." March 5, 2021 Minute Order. Generally, a declaratory judgment standing alone (in the absence of an injunction) does not require any immediate change in a defendant's behavior. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 155 (1963) ("There was no interdiction of the operation at large of the statute. It was declared unconstitutional, but without even an injunctive sanction against the application of the statute by the Government to Mendoza-Martinez. Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute."); *see also Steffel v. Thompson*, 415 U.S. 452, 470-71 (1974) (quoting *Perez v. Ledesma*, 401 U.S. 82, 125-26 (1971) (Brennan, J., concurring in part and dissenting in part) ("[E]ven though a declaratory judgment has the force and effect of a final judgment, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.") (citation omitted)).[2]

[2] Plaintiffs offer a partial quotation from *Los Angeles County Bar Association v. Eu* to suggest the opposite, but that case confirms that a declaratory judgment alone (unlike an injunction) has no coercive effect—although a defendant may

In addition, even setting aside the differences between the declaratory relief requested in Paragraph (a) of Plaintiffs' Prayer for Relief and the injunctive relief requested in Paragraph (b), and setting aside the question of traceability (as this question does), Plaintiffs still lack standing, because they cannot show redressability. That is because, on the merits, Plaintiffs' 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. But because that result would have no effect on Plaintiffs' inability to vote absentee as a matter of Hawaii law, it is not "'likely, as opposed to merely speculative, that the[ir] injury will be redressed by a favorable decision.'" *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1997)); *see also* Federal Defs.' Mot. to Dismiss, ECF No. 75, at 20-24; Federal Defs.' Reply, ECF No. 88, at 10-15.

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voluntarily conform its behavior to comply with an adverse declaration. *See* 979 F.2d 697, 701 (9th Cir. 1992) ("Were this court to issue the requested declaration, we must assume that it is substantially likely that the California legislature, although its members are not all parties to this action, would abide by our authoritative determination.").

To that end, Plaintiffs conceded at oral argument that even assuming there were a constitutional violation here, the Court "must adopt the remedial course Congress likely would have chosen had it been apprised of the constitutional infirmity." *Sessions v. Morales-Santana*, 137 S. Ct. 1679, 1701 (2017); *accord* Hr'g Tr. (March 5, 2021), at 29:7-10 ("THE COURT: Doesn't the *Morales-Santana* case really urge me to look at what Congress would have done if it had been aware of the disparate -- of the disparity? MR. HANSON: Certainly."). Here, that inquiry is straightforward, as the text, structure, and history of UOCAVA all point in the same direction. Congress would have wanted to address any (hypothetical) constitutional violation by treating the Northern Mariana Islands the same way that UOCAVA defines every other inhabited territory (and every inhabited territory at the time the statute was enacted): as part of the "United States." 52 U.S.C. § 20310(8). But that would have no effect on Plaintiffs' inability to vote absentee in federal elections in Hawaii. Accordingly, even "[a]ssuming Plaintiffs' injuries are traceable to UOCAVA," March 5, 2021 Minute Order, Plaintiffs still lack Article III standing, and are therefore entitled to no relief at all, including declaratory relief alone.

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. Assuming (as this question does) that "Plaintiffs' injuries are not traceable to UOCAVA," March 5, 2021 Minute Order, then all of the Federal

Defendants, and all of Plaintiffs' claims challenging UOCAVA, must be dismissed from the litigation for lack of subject-matter jurisdiction. *See* Federal Defs.' Mot. to Dismiss, ECF No. 75, at 14-20; Federal Defs.' Reply, ECF No. 88, at 2-9.

The assumption embedded in the Court's question is correct: "Plaintiffs' injuries are not traceable to UOCAVA." March 5, 2021 Minute Order. As oral argument made even clearer than the briefing, none of the parties disputes the core premises of Federal Defendants' traceability argument: if UOCAVA were repealed, Plaintiffs would remain ineligible to vote absentee in Hawaii—because of Hawaii law. Likewise, no party disputes that "State law could provide the plaintiffs the ballots they seek; it simply doesn't." *Segovia v. United States*, 880 F.3d 384, 388 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 320 (2018).

In particular, at oral argument, counsel for the State of Hawaii all but conceded that Plaintiffs' inability to vote absentee in federal elections in Hawaii is traceable to legislative judgments made by the State of Hawaii—not to the Federal Defendants, and not to UOCAVA. *See, e.g.*, Hr'g Tr. (March 5, 2021), at 19:8-10 ("MS. TANIGAWA: The state could, if it chose to do so, expand those absentee voting rights. But the state has not chosen to do so."); *id.* at 21:4-8 ("THE COURT: . . . You could still comply with [UOCAVA] by giving these plaintiffs the right to vote, right? . . . MS. TANIGAWA: Yes, we could. But Hawaii has chosen not to do so."). Because Plaintiffs' injuries are therefore traceable to Hawaii law, not federal

law, Plaintiffs lack Article III standing with respect to the Federal Defendants, and all of their claims challenging UOCAVA.

As for an answer to Question 2 with respect to any remaining claims challenging Hawaii law, Federal Defendants defer to the State and County Defendants.

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. The Court does not have the power to award any relief to Plaintiffs who lack Article III standing, which is a jurisdictional requirement that "is rooted in the 'Cases or Controversies' clause of Article III of the Constitution." *M.S. v. Brown*, 902 F.3d 1076, 1082 (9th Cir. 2018) (quoting *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016)).

In addition, on its face, and as Federal Defendants argued in their motion to dismiss, the injunctive relief requested in Paragraph (b) of the Prayer for Relief cannot logically apply to the Federal Defendants, who do not administer federal elections in Hawaii. *See* Federal Defs.' Mot. to Dismiss, ECF No. 75, at 19 n.5 ("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., ECF No. 73,

Prayer for Relief ¶ (b) (requesting an 'order enjoining Defendants . . . to accept applications to vote absentee in future federal elections in Hawaii from Individual Plaintiffs')).

This further underscores Plaintiffs' traceability problem: to the extent Hawaii's rules for absentee voting are unconstitutional, the only appropriate defendants (if any) would be the state and local officials who actually determine those rules and administer those elections.

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. For the reasons discussed above and in the Federal Defendants' prior briefs, Plaintiffs lack Article III standing, so the Court lacks subject-matter jurisdiction and therefore does not have the authority to provide any relief. And to the extent that the Ninth Circuit's decision in *M.S. v. Brown* applies here, this case also does not implicate "fundamental rights," nor any "right that has vested such that it is beyond the control of the democratic process." 902 F.3d at 1088 n.14. There is no constitutional right to vote in federal elections in the territories at all—let alone a right that is "fundamental" or "vested" in the relevant sense. *Id.*; *see also Attorney Gen. of Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) ("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."); *Igartua v. United States*, 626 F.3d 592, 596 (1st Cir. 2010) (same result with respect to congressional elections).

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

No. Plaintiffs—represented by experienced counsel who litigated these same issues in *Segovia*—have already amended their complaint twice. *See* ECF No. 1 (Complaint); ECF No. 39 (First Amended Complaint); ECF No. 73 (Second Amended Complaint). In addition, Pursuant to Local Rule 7.8 and Section II of this Court's General Civil Case Procedures, Plaintiffs have already had ample opportunity to bring any proposed amendments to the Defendants' and the Court's attention, if Plaintiffs believed that any further amendment would cure the asserted defects. *See* ECF No. 74 (meet-and-confer statement describing lengthy discussions between the parties that ultimately resulted in the filing of the Second Amended Complaint). Plaintiffs did not do so. Nor did Plaintiffs suggest in their opposition to the motion to dismiss or at oral argument that any of the legal issues at stake would be materially altered if they had the opportunity to file a third amended complaint.

Plaintiffs' supplemental filing does make brief reference to the possibility of "further clarif[ication] that the remedy sought does not necessitate an order to enact legislation within the meaning of *M.S.*," ECF No. 96, at 10. But the permissibility of an appropriate remedy under the Ninth Circuit's Article III standing precedent is

a legal question for this Court to resolve—not a factual issue to be clarified by more detailed pleadings.

Most importantly, any such amendment would do nothing to address the purely legal traceability and redressability defects that are at the core of Federal Defendants' motion to dismiss. No amendment can change that Plaintiffs' injuries are traceable to Hawaii law, not federal law. And no amendment can change that any judgment in favor of Plaintiffs, on the merits, could (at most) result in the disenfranchisement of others who are not before the Court, rather than redress these Plaintiffs' inability to vote absentee in federal elections in Hawaii. Under these circumstances, any request for leave to amend should be denied as futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

CONCLUSION

For these reasons, and for the reasons set forth in the Federal Defendants' prior briefs and at oral argument, all of Plaintiffs' claims challenging UOCAVA, and all of Plaintiffs' claims against the Federal Defendants, should be dismissed for lack of subject-matter jurisdiction.

Dated: April 2, 2021

Respectfully submitted,

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