

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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RANDALL JAY REEVES, et al.,)	CIVIL NO. 20-00433 JAO-RT
)	
Plaintiffs,)	Honolulu, Hawaii
)	March 5, 2021
vs.)	
)	VIA VIDEO TELECONFERENCE:
SCOTT NAGO, in his official)	[74] FEDERAL DEFENDANTS'
capacity as Chief Elections)	MOTION TO DISMISS FOR LACK
Officer for the Hawaii)	OF SUBJECT MATTER
Office of Elections, et al.,)	JURISDICTION AND VARIOUS
)	JOINDERS [78], [79] AND [80]
Defendants.)	
)	
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JILL A. OTAKE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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25 Proceedings recorded by machine shorthand, transcript produced
 with computer-aided transcription (CAT).

1 FRIDAY, MARCH 5, 2021

9:03 O'CLOCK A.M.

2 COURTROOM MANAGER: The United States District Court
3 for the District of Hawaii, with the Honorable Jill Otake
4 presiding, is now in session.

5 Civil Number 20-00433 JAO-RT, Randall Jay Reeves, et
6 al. versus Scott Nago, et al.

7 This case has been called for a hearing on federal
8 defendants' motion to dismiss for lack of subject matter
9 jurisdiction and joinders.

10 This hearing is being conducted by video
11 teleconference.

12 Counsel, please make your appearances for the record.

13 MR. QUAN: Good morning, Your Honor. Anthony Quan,
14 Geoffrey Wyatt, Andrew Hanson, and Neil weare appearing as
15 plaintiffs' pro bono counsel. I will also note the presence by
16 phone of plaintiffs' counsel Andrew -- I'm sorry -- Zachary
17 Martin and Nicole Clemenshaw, in addition to plaintiffs' local
18 Virgin Island counsel, Ms. Pam -- thank you.

19 THE COURT: Thank you, Mr. Quan. Could you tell us
20 that last person's name?

21 MR. QUAN: Her name is Ms. Pamela Colon. She is
22 plaintiffs' local Virgin Island counsel.

23 THE COURT: All right. Thank you.

24 MR. QUAN: You're welcome. Thank you, Your Honor.

25 THE COURT: Ms. Tanigawa, I see you moving your

1 mouth, but I can't hear you.

2 MS. TANIGAWA: (Inaudible.) Your Honor, is this --

3 THE COURT: Now you're going in and out. I
4 apologize.

5 MS. TANIGAWA: Can you hear me okay, or is it still
6 cutting in and out?

7 THE COURT: I can hear you better now. Thank you.
8 But if you could speak a little louder, that would be helpful.

9 MS. TANIGAWA: Sure. Lori Tanigawa, counsel for
10 defendant Scott Nago, chief election officer for the State of
11 Hawaii.

12 THE COURT: Thank you.

13 MR. KOHN: Good morning, Your Honor. Robert Kohn for
14 Glen Takahashi, the clerk of the City and County of Honolulu.

15 THE COURT: Good morning.

16 MR. ROWE: Good morning, Your Honor. Deputy
17 Corporation Counsel Caleb Rowe on behalf of Kathy Kaohu, the
18 county clerk of the County of Maui.

19 THE COURT: Good morning.

20 MR. PEZZI: Good morning, Your Honor. Stephen Pezzi
21 from the Department of Justice on behalf of the United States
22 and the other federal government defendants.

23 THE COURT: Good morning.

24 Thank you, everyone, for making yourselves available
25 this morning.

1 Let me just reiterate a few of the rules. If you're
2 not the person speaking, please continue to mute yourself. I
3 think we've all been living in this Zoom wonderland for a while
4 now. And I can tell you that of course there are occasions
5 where I can't hear you or there are glitches and you freeze.

6 I have in front of me a live stream of our court
7 reporter's transcript, so if I'm looking down at it, it means
8 that I might be having a hard time hearing you, but I'm
9 checking to make sure we still have the record.

10 We are, of course, going to interrupt you and let you
11 know if we can't hear you or if we can't understand something,
12 and the court reporter has been given permission to do so.

13 We have already let you know, but as a reminder, we
14 have broken out the time limitations for this morning's
15 hearing. Twenty minutes for the federal defendants and the --
16 Mr. Pezzi, you are able to reserve some time for rebuttal. Do
17 you have some time that you wish to reserve for rebuttal that
18 you would like to tell us about?

19 MR. PEZZI: Yes, Your Honor. I'd like to reserve
20 three minutes for rebuttal.

21 THE COURT: Okay. So that will give you 17 minutes
22 in the first session. And Ms. Mizukami will hold up a
23 two-minute warning for each of you.

24 COURTROOM MANAGER: (Indicates.)

25 THE COURT: So Mr. Pezzi, that means that at 13

1 minutes you will get a two-minute warning.

2 And Ms. Tanigawa, Mr. Kohn, and Mr. -- excuse me --
3 Mr. Kohn and Mr. Rowe, who will be arguing this morning on
4 behalf of the state defendants?

5 MS. TANIGAWA: I will be, Your Honor.

6 THE COURT: Okay. Thank you. And we've allotted 15
7 minutes for you.

8 And who will be arguing for the plaintiffs this
9 morning?

10 MR. HANSON: I will be, Your Honor.

11 THE COURT: Thank you. And we've allotted 25 minutes
12 for you, Mr. Hanson. So thank you.

13 And with that, we are ready to begin. Let me assure
14 all of you that I think your briefs were very well written, so
15 I appreciate the thoughtful arguments and the writing style.
16 Frankly, it was a pleasure to read all of your briefs. And
17 let's start then with you, Mr. Pezzi.

18 MR. PEZZI: Thank you, Your Honor.

19 Stephen Pezzi from the Department of Justice on
20 behalf of the federal government defendants.

21 Article III standing requires the plaintiffs to show
22 injury in fact, causation, and redressability. Now, there's no
23 dispute here that plaintiffs have suffered an injury in fact,
24 although there is some disagreement over the precise nature of
25 that injury. But at least with respect to the federal

1 defendants, plaintiffs' claims fail both the causation and the
2 redressability requirements of Article III standing.

3 I'd like to start with causation or traceability.
4 Everyone agrees that if UOCAVA were repealed tomorrow, that
5 would have no effect whatsoever on plaintiffs' inability to
6 vote absentee in federal elections in Hawaii. Everyone also
7 agrees that if Hawaii wanted to provide absentee voting rights
8 to these plaintiffs or those similarly situated to these
9 plaintiffs, neither UOCAVA nor any other provision of federal
10 law would be any obstacle. And that is not just a
11 hypothetical --

12 THE COURT: Does it matter, Mr. Pezzi, that the
13 Hawaii Administrative Rules are -- rules are at least founded
14 upon or comport with UOCAVA and refer to it?

15 MR. PEZZI: I don't think it ultimately matters, Your
16 Honor, no. Ultimately, what matters is that it would not
17 conflict with federal law in any way for Hawaii to make a
18 different legislative judgment than the one it has currently
19 made to provide absentee ballot voting rights to this group of
20 plaintiffs.

21 And some states have made different choices, and we
22 cited in our brief the example of Illinois, for example, where
23 if a former resident of Illinois moves to, say, American Samoa,
24 he or she can vote absentee in federal elections in Illinois.
25 But if a former Hawaii resident moves to American Samoa, that

1 former Hawaii resident cannot vote absentee in federal
2 elections in Hawaii.

3 Now, obviously UOCAVA and federal law apply
4 identically to both Illinois and to Hawaii, and so that
5 differential treatment can only be explained by different
6 legislative judgments having been made by the State of Hawaii
7 and by the State of Illinois. And there's nothing surprising
8 or unusual about that. I mean, the general constitutional
9 structure here leaves most of the authority with respect to
10 administering even federal elections with each of the 50
11 states, and election laws vary widely from state to state on a
12 whole host of issues, most of which we haven't touched at all
13 on in our briefs, of course. But that just shows that it is
14 ultimately Hawaii that has the authority if it wished to do so
15 to provide these plaintiffs the rights that they are seeking to
16 vote absentee in federal elections in Hawaii.

17 Even Hawaii law departs in some respects from the
18 floor set by UOCAVA. And again, I think there's also no
19 dispute about this, with respect to children born to former
20 Hawaii residents who have never lived in Hawaii at all. Hawaii
21 law provides them absentee balloting voting rights. That again
22 has no connection at all to UOCAVA. There's no provision in
23 UOCAVA that requires it or says anything about it. And that's
24 another example of how Hawaii has made a series of legislative
25 judgments marking the outer bounds of who it does and does not

1 permit to vote absentee in its elections, in federal elections
2 in Hawaii.

3 There's also a provision in Hawaii law that we cite
4 in our brief about if you leave Hawaii and move to another
5 state and for whatever reason can't qualify to vote in a
6 presidential election in that state, at least for a period of
7 24 months you can continue to vote absentee in presidential
8 elections in Hawaii. Again, UOCAVA had nothing to do with that
9 legislative judgment.

10 And so ultimately, the fact that it is Hawaii law
11 that is the only obstacle standing in the way of these
12 plaintiffs attaining the relief that they seek, that is, the
13 desire to vote absentee in federal elections in Hawaii, means
14 that any injury they have suffered to that effect is caused not
15 by federal law but by Hawaii law. That's the conclusion that
16 was reached by a unanimous Seventh Circuit panel in a case
17 raising nearly identical issues, and the federal government
18 believes that conclusion to be correct.

19 On the subject of traceability, I do think it is
20 worth noting that although, as I had mentioned at the outset,
21 the federal defendants do not dispute that plaintiffs have
22 suffered an injury in fact here, there does seem to be some
23 disagreement in the briefs about the precise nature of that
24 injury in fact. And so plaintiffs suggest that their injury is
25 somehow not just their inability to vote but a more generic or

1 abstract concept of unequal treatment. And so then they point
2 to UOCAVA as the source of the alleged unequal treatment. I
3 don't think that's right for several reasons.

4 So first of all, again, UOCAVA does not require any
5 unequal treatment. It is only Hawaii law that actually
6 requires treating these plaintiffs differently from former
7 Hawaii residents that move to other territories, and in
8 particular the Northern Mariana Islands. If Hawaii did not
9 wish to do so, again, federal law would be no obstacle. So
10 that's another version of the same argument I made before, but
11 I think it's important to recognize that even in the context of
12 the way plaintiffs frame their injury.

13 More fundamentally, I just don't think conceptually
14 it's appropriate to divorce from their injury their inability
15 to vote absentee. We didn't dispute in our brief, of course,
16 that they have suffered injury. In fact, they want to vote in
17 federal elections in Hawaii. The law prevents them from doing
18 so. That's an Article III injury and a relatively common way
19 to assert an Article III injury. It is not a common way to
20 assert an Article III injury to just simply say, "I have been
21 subjected to unequal treatment" in the abstract, divorced from
22 their actual inability to vote or from any other type of harm.

23 There's always a requirement that a plaintiff show
24 some actual real-world impact on some law or some government
25 action on their life to show why they have suffered an Article

1 III injury in fact. And so, well, that can take many forms,
2 and in many equal protection cases over the years it has taken
3 many forms. So, you know, unequal treatment in the provision
4 of Social Security benefits, or unequal treatment in public
5 schooling or, in this case, unequal treatment in the right to
6 vote, it has to be unequal treatment in something, and that
7 something is what gives plaintiffs an Article III injury.

8 And so I don't think plaintiffs can avoid the
9 traceability problem solely by saying UOCAVA lists some
10 territories but not all territories in the definition of the
11 United States, and therefore that standing alone has caused
12 some sort of injury.

13 Again, to illustrate that, one possible outcome here
14 is Hawaii could decide -- let's say Hawaii decides tomorrow to
15 provide these plaintiffs exactly what they want. Hawaii
16 changes the law to say that these plaintiffs now can vote
17 absentee in federal elections in Hawaii as former Hawaii
18 residents of the territories. If they did that, I think
19 everyone on this call, I assume, would agree that the case is
20 now moot. Plaintiffs would be able to do the thing that they
21 filed the lawsuit seeking to do, which is vote in federal
22 elections absentee in Hawaii. At that point there would be no
23 Article III injury, and the Court would claim they lack subject
24 matter jurisdiction over the case. But UOCAVA would remain
25 unchanged in that hypothetical, but I don't think plaintiffs

1 could come into court and say, sure, now we're allowed to vote
2 in Hawaii, but we're still subject to some sort of unequal
3 treatment in one sentence in the U.S. Code that doesn't
4 actually affect us. That's not the sort of (inaudible) that
5 gives rise to an Article III injury in fact.

6 And so for that reason, I think plaintiffs' attempt
7 to recast their injury in fact is something other than the
8 denial of the right to vote in absentee -- the denial of the
9 right to vote in Hawaii via absentee ballot. I don't think it
10 saves them from the traceability or causation problem that the
11 federal defendants raised in their motion to dismiss.

12 Unless Your Honor has any other questions about
13 causation or traceability, I'll move on to the redressability
14 argument.

15 THE COURT: I --

16 MR. PEZZI: The redressability argument, it turns on
17 the fact that ultimately plaintiffs' claim here is that the
18 residents of one particular territory, the Commonwealth of the
19 Northern Mariana Islands, have received inappropriate
20 preferential treatment under the law. But recent Supreme Court
21 precedent makes clear that the remedy for that sort of unequal
22 treatment, even if there were a constitutional violation --
23 and, of course, we don't think there has been a constitutional
24 violation. But if there were, the remedy would be to eliminate
25 that unequal treatment by treating former Hawaii residents who

1 live in the Northern Mariana Islands the same as the law treats
2 former Hawaii residents who live in any other U.S. territory,
3 Guam, American Samoa, Puerto Rico, or the Virgin Islands.

4 And there's ample reason to think that if Congress
5 had been aware of some constitutional infirmity, which is again
6 the analysis required by the Supreme Court, primarily in the
7 Morales-Santana case, the Congress would have wanted to treat
8 residents of all of their territories equally by including them
9 within the definition of the United States, as UOCAVA already
10 includes every other inhabited territory.

11 THE COURT: Mr. Pezzi, let me ask you a question
12 about my own powers here, and that relates to whether or not I
13 could or I do have the authority to expand UOCAVA so that there
14 is no differentiation between the territories or between the --
15 those voters who are in United States territories as opposed to
16 those voters who are in foreign countries.

17 MR. PEZZI: And so, I mean, is the question is
18 whether the Court has the authority to do so?

19 THE COURT: Right.

20 MR. PEZZI: I mean, I think our first line answer is
21 the Court does not have the authority to do so because the
22 Court lacks subject matter jurisdiction over the federal
23 defendants and subject matter jurisdiction over all of
24 plaintiffs' claims challenging UOCAVA. And so because no
25 plaintiff here has standing to challenge UOCAVA, the Court

1 therefore lacks the authority to issue a judgment with respect
2 to UOCAVA.

3 Now, the redressability argument, it's -- it
4 requires, you know, as is unfortunately not unheard of with the
5 Supreme Court's current standing jurisprudence, it does require
6 a brush with the merits in the sense that it hypothesizes if
7 there is a constitutional violation, what, if anything, can the
8 court do about it. And I think all parties agree that in that
9 hypothetical the analysis that -- requires consideration of
10 what Congress would have done had it been apprised of the
11 constitutional infirmity to the Supreme Court's language.

12 And again there, I mean, I think the timing is quite
13 instructive. And so at the time UOCAVA was enacted, it listed
14 every single inhabited U.S. territory as part of the definition
15 of the United States, reflecting Congress's judgment that it
16 wished to define the territories as part of the United States,
17 and it wished to treat that differently than foreign countries,
18 for example.

19 And so, you know, if we hypothesize that there has
20 been a constitutional violation, it's reasonable to assume that
21 Congress would have wanted to remedy that constitutional
22 violation by treating residents of the Northern Marianas the
23 same as it treated residents of all of the other inhabited
24 territories.

25 So that's the basis of our redressability argument.

1 Ultimately, I mean, I think both the traceability argument and
2 the redressability argument boil down to, you know, an odd
3 feature of this lawsuit. I mean, the Seventh Circuit in
4 Segovia ended its concluding paragraph in the opinion by
5 saying, "This is a strange case." And I think there's some
6 truth to that in that at times plaintiffs' briefing on standing
7 suggests that they're indifferent between an outcome in which
8 they are granted the right to vote on one hand, or on the other
9 hand, whether they still cannot vote, but the residents of the
10 Commonwealth of the Northern Marianas Islands who are former
11 state residents lose their right to vote.

12 It's perhaps a question better directed to
13 plaintiffs, but I assume that there's nobody here that actually
14 wants any former Hawaii residents who move to the Northern
15 Mariana Islands to lose their right to vote. But if that's
16 true, I think there's a concern that this lawsuit starts to
17 look more like an effort to vindicate a belief that UOCAVA is
18 unconstitutional rather than a discrete case or controversy in
19 which the goal is for the Court to order relief that actually
20 changes the legal rights of these particular plaintiffs. And
21 Article III requires for the Court to have power over a case in
22 federal court that it is adjudicating an actual case or
23 controversy between parties and affecting their legal rights.

24 And so, I mean, ultimately I think all of our
25 arguments boil down to that concern, that the relief plaintiffs

1 have requested and the nature of their claims do not actually
2 address the fact that it is, first of all, Hawaii law rather
3 than federal law that is the cause of their injury, and that
4 even if they prevailed, their right to vote would not be
5 changed.

6 And so unless the Court has any questions, for those
7 reasons, the federal defendants ask that the Court grant the
8 motion to dismiss, and I reserve my remaining time for
9 rebuttal.

10 THE COURT: All right. Thank you, counsel.

11 I'm going to step off for just a moment, and I have
12 an IT question for Ms. Mizukami for just a moment.

13 So Ms. Mizukami, if you could call me on my desk
14 line, and I'm going to step off for just a moment before we
15 start with Ms. Tanigawa. Thank you.

16 (Break was taken.)

17 THE COURT: All right. We are back on.

18 I'm having one slight IT issue, folks. If it arises
19 further, I'm going to have to take another recess. But we're
20 going to push through. I was able to at least read the
21 transcript of what Mr. Pezzi was saying. And I heard the vast,
22 vast majority of what he argued. There were just a couple of
23 occasions where he was frozen on my screen. But again, I was
24 able to read the live transcript. And the live transcript
25 seemed to make sense. It wasn't anything nonsensical.

1 So, all right, with that, Ms. Tanigawa, if you could
2 go ahead.

3 MS. TANIGAWA: Thank you, Your Honor. The counties
4 (inaudible) --

5 (The court reporter requested clarification.)

6 MS. TANIGAWA: I'm going to --

7 (Off the record.)

8 THE COURT: Okay. Ms. Tanigawa, if you could keep
9 your voice up, it did seem to get a little bit louder once you
10 took your earphones out. But if you could keep your voice up,
11 that would be really helpful.

12 MS. TANIGAWA: Sure. Apologies, Your Honor. I will
13 do my best.

14 There are just three points I'd like to briefly
15 highlight, after which I would welcome the Court's questions.

16 The first is that this case is not just about
17 plaintiffs' inability to vote. The crux of this case is equal
18 protection. The plaintiffs are challenging the disparate
19 treatment of two groups of former state residents, you know,
20 those who are living in the CNMI, who are allowed to vote
21 absentee, and those who are living in the other territories,
22 who are not allowed to vote absentee.

23 There's no dispute that the differential treatment
24 originates from UOCAVA. And plaintiffs have alleged that
25 they've been relegated to a second class citizen status. They

1 are politically powerless and are otherwise injured as a result
2 of that disparate treatment. So for purposes of traceability
3 and redressability, the plaintiffs alleged disparate treatment
4 injury can't be ignored.

5 The second is that if the Court were to find an equal
6 protection violation, the remedy necessarily involves UOCAVA.
7 Hawaii's UMOVA does not treat state residents, former state
8 residents differently based on where they live. Hawaii's UMOVA
9 does not require any remedy. If there's a remedy to be had,
10 it's going to be equal treatment in the form of either
11 expansion or contraction of those CNMI residents' voting rights
12 under UOCAVA, because --

13 THE COURT: Let me ask you a question related to that
14 then, Ms. Tanigawa. Do you agree with the DOJ's argument that
15 if the state changed the administrative rule tomorrow to expand
16 the voting ballots to the people in the -- in Puerto Rico,
17 Virgin Islands, American Samoa, et al., that we would not be
18 here, that we would not have a live action anymore?

19 MS. TANIGAWA: Yes. I mean, if -- if -- they
20 wouldn't be injured anymore. But it -- it wouldn't -- it
21 wouldn't eliminate the disparate treatment that still emanates
22 from UOCAVA. So, yes, if the specific plaintiffs were allowed
23 to vote absentee and Hawaii were to do that, then they would
24 not have an injury. And, you know --

25 THE COURT: And UOCAVA doesn't prevent the state from

1 doing that, right?

2 MS. TANIGAWA: No, UOCAVA does not.

3 THE COURT: Okay. So you would not violate -- the
4 state would not violate UOCAVA by doing so then?

5 MS. TANIGAWA: That's correct. The state could, if
6 it --

7 THE COURT: And -- go ahead.

8 MS. TANIGAWA: The state could, if it chose to do so,
9 expand those absentee voting rights. But the state has not
10 chosen to do so.

11 THE COURT: Okay. So tell me then how you have a
12 legitimate traceability argument.

13 MS. TANIGAWA: well, with respect to the -- right
14 now, because the state has not expanded those voting rights,
15 right now we have UOCAVA saying, well, even though you, Hawaii,
16 do not want to allow residents of territories to vote absentee,
17 you still need to do so only for the residents of CNMI.

18 It's that disparate treatment which gives rise to
19 plaintiffs' equal protection claim. So if there's going to be
20 a violation found and there's going to be a remedy ordered,
21 it's going to be with respect to UOCAVA. There's no remedy as
22 to Hawaii law.

23 THE COURT: why couldn't the remedy be -- you know,
24 and let's assume for the sake of our argument I have this
25 power. But why couldn't the remedy be that Hawaii needs to

1 amend its administrative rules to expand the voting, those
2 eligible to vote, to include the people in the other -- in the
3 non-NMI territories?

4 MS. TANIGAWA: Well, you know, Your Honor, I think
5 the reason why the Seventh Circuit -- you know, we disagree, of
6 course, with that decision, but the reason why it reached that
7 holding is because they felt that states have this unfettered
8 discretion, this wide authority to do as it sees fit with
9 respect to the elections that it conducts.

10 So if the order were to require Hawaii to enact a law
11 for purposes of remediating disparate treatment created by
12 federal law, I don't believe that that is -- is an appropriate
13 remedy, quite frankly, because states have freedom to dictate
14 how they hold elections unless as directed by Congress.

15 THE COURT: So -- but what it sounds to me like -- it
16 sounds to me what you're saying is -- and correct me if I'm
17 wrong -- is, is that there isn't -- there is a traceability
18 problem with regard to UOCAVA, or at least the fed -- the fed
19 defendants should be in this case, and with regard to
20 traceability, because the current state of the law is such that
21 the Hawaii Administrative Rule refers to UOCAVA. And because
22 that's the current state of the law, UOCAVA is the -- is
23 basically where the buck stops. Is that what you -- is that
24 what you're arguing?

25 MS. TANIGAWA: It -- there's -- to me, the reference

1 to UOCAVA, the acknowledgment to UOCAVA doesn't make any
2 difference. You know, UOCAVA is something that we need to
3 comply with. And --

4 THE COURT: Right. You could still comply with it by
5 giving these plaintiffs the right to vote, right? Or, I mean,
6 sending them the ballots, right?

7 MS. TANIGAWA: Yes, we could. But Hawaii has chosen
8 not to do so.

9 THE COURT: Right. So I guess what I'm not
10 understanding is: How does your compliance with UOCAVA mandate
11 that you don't give these plaintiffs the opportunity to vote?

12 MS. TANIGAWA: This -- we're not suggesting that
13 UOCAVA is preventing Hawaii from giving the plaintiffs the
14 right to vote. We agree that if Hawaii wanted to give the
15 plaintiffs the right to vote, it could -- it could. It's
16 decided not to.

17 THE COURT: Okay.

18 MS. TANIGAWA: So I'll just continue.

19 In addressing the proper remedy, we agree, and which
20 is why we joined in with the federal defendants, that the
21 proper remedy, if there were to be an equal protection
22 violation, would be the contraction of voting rights. And that
23 is the exact opposite of what plaintiffs have asked for in the
24 second amended complaint. That would not be a favorable
25 decision. And if the Court agrees, then that's the end of the

1 inquiry.

2 The last point I wanted to just raise is that if the
3 Court determines that the plaintiffs' injury is redressable,
4 then the Court should find that the plaintiffs' injury is
5 traceable to the federal defendants.

6 Absent UOCAVA, Hawaii would not be providing absentee
7 ballots to any resident of any territory. But UOCAVA compels
8 it do so for the residents living in CNMI. So the question is
9 not whether the federal defendants are part of the chain. They
10 are very much a link. So the -- the question is really whether
11 there's an independent act that severs that traceability to the
12 federal defendants, and the answer is no.

13 You know, Hawaii has at no time adopted as its own
14 the provisions of UOCAVA which create that disparate treatment.

15 The fact that Hawaii has the ability to eliminate
16 disparate treatment but has not done so in and of itself is not
17 an independent act that severs traceability. And given the
18 timing of the enactment of UOCAVA, there's good reason for that
19 disparate treatment. So any suggestion that the state can but
20 refuses not to provide a remedy is really of no consequence
21 because that disparate treatment is in fact constitutional.
22 There's simply no reason to act. And the failure to act, when
23 there's no reason to do so, doesn't sever traceability. Nor
24 does such inaction take away from the fact that the disparate
25 treatment still emanates from UOCAVA.

1 So if the Court finds that the plaintiffs have
2 standing, then the federal defendants should have a seat at the
3 table and a prominent one at that. Thank you.

4 THE COURT: Thank you. Ms. Tanigawa, I have a really
5 basic question, and I'm -- that I'm struggling with, and
6 hopefully you can help me with this. Even -- let's assume that
7 there is traceability, and let's assume that there is --
8 everybody's in agreement that there is an injury.

9 with regard to redressability, what authority do I
10 have to expand the coverage of the administrative rule here?
11 In other words, could I, even if I wanted to, direct the state
12 to promulgate a different administrative rule or an amended
13 administrative rule that would allow for the ballots to be sent
14 to the plaintiffs here?

15 MS. TANIGAWA: No, Your Honor. I -- I don't believe
16 that the Court would have that authority. You know, the -- the
17 plaintiffs don't have -- and this is, you know, going into the
18 merits a little bit, but the plaintiffs don't have a
19 fundamental right to vote in federal elections. So if they
20 want that ability, they need to pursue it through the
21 democratic process, not through the Court.

22 THE COURT: All right. Thank you.

23 All right. Let me ask our court reporter whether or
24 not she needs any break.

25 THE COURT REPORTER: (Off the record.)

1 THE COURT: Okay. Thank you.

2 Let's turn now to Mr. Hanson for the plaintiffs.

3 MR. HANSON: Thank you, Your Honor. My name's Andrew
4 Hanson on behalf of plaintiffs in this case.

5 Your Honor, federal defendants' view of Article III
6 standing (indiscernible) would make the federal government
7 immune from a wide variety of legal challenges. And frankly,
8 we find their argument rather astounding, and it's not
9 supported by the case law here.

10 Now, while none of the parties are directly disputing
11 the -- whether plaintiffs were injured in this case, it is
12 important to clarify the nature of the injury.

13 It's undisputed that UOCAVA and Hawaii law do not
14 provide plaintiffs with the ability to vote absentee for
15 President or voting members of Congress. Plaintiffs are among
16 the discrete group of former state residents who, based on
17 where they live, are not provided with this benefit; yet other
18 state -- former state residents who move almost anywhere
19 else in the world, whether that's to be -- (indiscernible) --

20 (The court reporter requested clarification.)

21 MR. HANSON: Yes, ma'am.

22 So for our plaintiffs, they are among a discrete
23 group of former state residents who, because of where they
24 live, were unable to vote absentee under these statutes; yet
25 other former state residents, who live almost anywhere else in

1 the world, whether that be a foreign country or 10 of the 14
2 territories that are governed by Congress, those individuals do
3 have the ability to vote absentee.

4 Equal protection principles in our Constitution
5 protect a citizen's right to participate in elections on an
6 equal basis when that right is threatened by statutes that
7 selectively distribute the franchise.

8 And once the franchise is granted to the electorate,
9 lines may not be drawn that are inconsistent with the equal
10 protection principles in our Constitution.

11 The parties do not dispute that plaintiffs are
12 treated differently under the law, and plaintiffs need not show
13 more for an equal protection case. As the Supreme Court made
14 clear, the injury in fact in an equal protection case is the
15 denial of equal treatment, and plaintiffs have factually
16 alleged such disparate treatment in this case.

17 Now, in terms of causation and traceability, as
18 defendant Nago pointed out, it is federal law that creates the
19 regime that requires Hawaii to provide a benefit to a subset of
20 former state residents.

21 This is not a case where the denial -- or where the
22 causal chain is broken by the independent actions of a third
23 party. Rather, states like Hawaii are required to provide this
24 benefit to a subset of former state residents. And as the
25 district court in the Segovia case made clear, UOCAVA requires

1 states to provide certain voters with certain benefits. And
2 defendant Nago makes clear in their briefing that otherwise
3 Hawaii law would treat former state residents living in any
4 U.S. territory completely the same.

5 Plaintiffs are not required under Article III to show
6 something akin to proximate cause, nor that -- nor are they
7 required to show that federal defendants are the last step in
8 the causal chain.

9 And the Supreme Court has recognized a plaintiff's
10 standing to challenge government actions that authorize or fail
11 to prevent the injurious conduct of third parties.

12 Moreover, Your Honor, it's important to note that the
13 First and Second Circuits have considered challenges to UOCAVA
14 against federal defendants, and both have necessarily
15 recognized the plaintiffs' standing in reaching the merits in
16 those cases.

17 Now, there's been much argument about the states'
18 ability to go further than federal law. And while states could
19 theoretically go further than federal law requires, our
20 position is that that is not relevant to the standing analysis.
21 In fact, we think it is a rather shocking argument that would
22 be one of broad-based immunity from challenge.

23 So taken to its logical conclusion, the federal
24 government's position would be that if the federal government
25 enacted a law that required states to provide absentee ballots

1 to all male voters or to all white voters, such obviously
2 unconstitutional statutes would be immune from challenge so
3 long as the states could theoretically step in and fix the
4 obvious flaws in the federal regime.

5 when it boils down to it, UOCAVA requires Hawaii to
6 provide a benefit, absentee voting, to a subset of former state
7 residents. It requires them to treat former state residents
8 differently based on where they live.

9 with respect to the redressability prong, Your Honor,
10 plaintiffs have satisfied their relatively modest burden of
11 showing that it is likely that their injury will be redressed
12 by a favorable decision here.

13 Generally, there is a presumption of redressability
14 when a lawsuit challenges a government action or inaction and
15 the plaintiffs are the object of that action or forgone action.
16 However, even without the presumption of redressability, if
17 there are available remedies that would redress the injuries to
18 plaintiffs, then the redressability prong is satisfied. In
19 this case, there are available remedies.

20 The Supreme Court, in the Morales-Santana case that
21 was discussed earlier, makes clear that when the right invoked
22 is that to equal treatment, the appropriate remedy in such
23 cases is a mandate of equal treatment. And that remedy can be
24 accomplished two ways, either by withdrawal of the benefit from
25 the favored group or expansion of the benefit to the currently

1 denied group.

2 THE COURT: I understand that. But help me
3 understand, Mr. Hanson. If I were to contract the benefit,
4 right, which is -- essentially would amount to taking away the
5 vote from former Hawaii residents in the NMI, how does that in
6 any way redress your injury?

7 MR. HANSON: Well, Your Honor, again, you know, the
8 nature of plaintiffs' injury here is the denial of equal
9 treatment. And so insofar as the Court were to -- and, you
10 know, we'll get to the point that we think that's not the
11 appropriate remedy in this case.

12 But insofar as the Court were to contract the right
13 to vote, it would put plaintiffs on equal footing with other
14 former state -- former state residents living in NMI. And so
15 insofar as the injury alleged is a denial of equal treatment, a
16 mandate of equal treatment, be that a mandate that everyone
17 gets to vote absentee or a mandate that no one gets to vote
18 absentee, is a remedy that is available to the Court that would
19 redress the plaintiffs' injury.

20 Now, that said, we think the precise remedy, I think
21 as the parties have made clear thus far, is, you know, a merits
22 question that's better suited after the parties have had the
23 full opportunity for a merits briefing. But we do strongly
24 disagree with the erroneous position that in a voting rights
25 equal protection case such as this that the appropriate remedy

1 is to contract the right to vote.

2 And we say that because the Morales-Santana case,
3 which is very recent, makes clear that the ordinary and
4 preferred rule is to expand the benefit. And that is
5 especially true in a case where the Court is being asked, as it
6 is here, to strike the denial of a benefit to a discrete group.

7 THE COURT: Doesn't the Morales-Santana case really
8 urge me to look at what Congress would have done if it had been
9 aware of the disparate -- of the disparity?

10 MR. HANSON: Certainly. Your Honor, the Morales-
11 Santana case directs the court -- it says when choosing between
12 these two remedial alternatives, abrogation versus expansion,
13 the court should look to the commitment to the -- the
14 commitment -- the intensity of commitment to the residual
15 policy or the main rule in the statutory regime, not the
16 exception, and then also consider the potential destruction
17 that would happen in the event of abrogation versus expansion.
18 And --

19 THE COURT: And so here, wouldn't it be logical that
20 what Congress would have done if the CNMI were a part of the
21 United States at the time that UOVACA (sic) was passed --
22 UOCAVA was passed, that it would have included the NMI in the
23 list of territories that are considered part of the definition
24 of the territorial United States or -- or states?

25 MR. HANSON: Well, I think, Your Honor, when you look

1 at UOCAVA, I think the main rule to be derived from that
2 statute is that if you are a citizen of the 50 states and you
3 move outside of those 50 states, the main rule would be you get
4 to vote absentee. And I say that because if you move to any
5 foreign country or 10 of the 14 territories governed by
6 Congress, you are allowed the ability to vote absentee. It is
7 only --

8 THE COURT: Right, but those ten territories are not
9 populated, from what I understand.

10 MR. HANSON: There's a significant number that are
11 not populated, but I think that just goes to the absurdity of
12 the current statutory regime whereby a former Hawaii resident
13 who moves to Guam would not be able to vote absentee, but if
14 they were stationed in an uninhabited island, they would be --
15 or stationed during an election season, at least, they would be
16 able to vote.

17 But I think, again, looking at the broader scheme of
18 the UOCAVA regime, it basically says if you leave the 50
19 states, the general rule is that you'll be able to vote
20 absentee. It is only for that subset of residents -- former
21 state residents who move to these four discrete territories
22 that are denied that benefit. So --

23 THE COURT: But isn't it really in the definitions
24 of -- in UOCAVA? Isn't that what we're really concerned about,
25 is how UOCAVA defines states and United States?

1 MR. HANSON: Well, I mean, I think that is -- those
2 are the provisions at issue here. But what's really at issue
3 is the disparate treatment that UOCAVA compels among former
4 state residents. And so --

5 THE COURT: Right. And I understand that. But
6 what -- what I hear you saying is that -- the primary argument
7 that you're making is that the disparate treatment is between
8 those who are residing in Puerto Rico, Virgin Islands, Guam,
9 and American Samoa versus the Northern Mariana Islands, right?

10 MR. HANSON: Well, I would actually say that our
11 position is that it's the disparate treatment between former
12 state residents who reside in Puerto Rico, Guam, the Virgin
13 Islands, and American Samoa versus the rest of the former state
14 residents living overseas, outside of the 50 states.

15 And so when you look at it that way -- and this,
16 again, looking at the Morales-Santana case, they were looking
17 at these immigration statutes. And there, the main rule that
18 they derived from that was if you were a married couple or
19 unwed father, you were subject to the ten-year, five-year
20 presence requirement before you can impart citizenship on
21 the -- your children born abroad. It was only the discrete
22 group of unwed mothers who received the more favorable benefit
23 of a one-year presence requirement. And so the reason the
24 court didn't take the expansion route there is because it was
25 being asked to strike the favorable benefit to the favored

1 class, if you will.

2 what's being asked here is to strike the denial of a
3 benefit to a discrete group, which is what the court in
4 Morales-Santana said was the situation where you take the
5 ordinary or preferred rule in such cases.

6 And so if you look at the main rule of UOCAVA
7 being -- if you're a former state resident who moves outside of
8 the 50 states, you will be able to vote absentee; then
9 Morales-Santana directs that when considering the decision
10 between expansion or abrogation, you should follow that main
11 rule. And that would lead to expanding the ability to vote
12 absentee to the discrete group that is currently being denied,
13 of which plaintiffs are among that discrete group.

14 It's also important to note, Your Honor, that in the
15 Morales-Santana case, the court did not dismiss that case for
16 lack of redressability. And in looking at the briefing for the
17 federal government in that case, they did not raise an argument
18 that it was -- that the injury to the plaintiff there was not
19 redressable, even though in the briefing in that case they --
20 they made the argument we're making now, that there are two
21 alternative remedial options, expansion or abrogation, in that
22 the court should look to the -- the sort of the main rule from
23 the statutory scheme.

24 And again, in the end, the court did not dismiss that
25 case for -- for lack of redressability. Rather, it provided

1 the remedy that is not one the plaintiffs sought out in that
2 case. The plaintiff in that case sought out the one-year
3 favorable requirement being applied to him, so that he could
4 obtain citizenship; yet the court imposed the
5 ten-year/five-year main rule that it derived from the
6 immigration statutes to all, including unwed mothers.

7 So in the end, that plaintiff still did not get the
8 remedy that he sought. Yet the court did not dismiss that case
9 for lack of standing based on a plaintiff getting a remedy that
10 is not the one that they preferred in the -- in the ultimate
11 outcome.

12 THE COURT: So what would your position be if I were
13 to ask you whether or not the -- under the statutes the NMI
14 exclusion is favorable treatment for a discrete group?

15 MR. HANSON: Well, I mean, I think, again, our -- our
16 position is -- is that looking at the class that we are
17 identifying is former state residents generally, living outside
18 of the 50 states. And so that is the -- the context we're
19 looking at. That is the -- the way that we're framing our --
20 our class, if you will. And so we would view it not as
21 favorable treatment to NMI but rather a disfavorable (sic)
22 treatment being applied to the discrete group of the -- you
23 know, the former state residents living in the four territories
24 of which our plaintiffs are a part of.

25 THE COURT: Okay. So would you then -- sorry. Let

1 me back up and slow this down a little bit.

2 So are you saying that you don't view it as favorable
3 treatment for NMI -- for former state residents living in the
4 NMI or former state residents living overseas?

5 MR. HANSON: Yes. It -- well, so it -- we -- it is
6 favorable treatment -- a favorable benefit being provided to
7 former state residents who live overseas in a foreign country
8 or in NMI. And it is a favorable benefit being denied to our
9 discrete group, which is former state residents living in these
10 four territories.

11 THE COURT: So are you telling me then that at least
12 under the Morales-Santana case I do not need to look at whether
13 or not -- and I'm quoting at 1701 from the Morales-Santana
14 case -- whether "the remedial course Congress likely would have
15 chosen" -- what "the remedial course Congress would have chosen
16 'had it been apprised of the constitutional infirmity'?"

17 MR. HANSON: No, I mean, I think that is -- I think
18 that's what we're all saying, is that it's -- you know, the
19 choice between the two options is sort of governed by the
20 legislature's intent. And, again, so the hypothetical what
21 would Congress have done had it been apprised of the infirmity,
22 the court in that case directs the courts to -- to look at
23 Congress's commitment to the residual policy.

24 In other words, what was the main rule in the
25 statutes at hand rather than the exception? And then, you

1 know, you would be -- you would sort of be per -- you know,
2 governed by that, that main rule, not the exception.

3 And so our position is that the main rule, looking at
4 UOCAVA, and looking at the legislative history of the
5 predecessor statutes to UOCAVA, it envisioned a goal to expand
6 the right to vote and -- and to make sure that U.S. citizens
7 who move outside of the 50 states maintain their ability to
8 vote in federal elections, recognizing that U.S. citizens who
9 move abroad have a stake in the federal system, in the federal
10 government. And I think that's particularly true for the
11 plaintiffs here in this case, and the residents living in the
12 territory. There's nearly 4 million people, U.S. citizens
13 living in these territories, and they -- they serve in our
14 military. They are subject to the federal criminal laws. They
15 pay federal taxes. And so, you know, it's certainly important
16 and it makes sense that Congress sought to make sure that when
17 citizens leave the 50 states that they have a -- they maintain
18 a connection to their country and have a voice in the elections
19 of that country.

20 THE COURT: Right. But at the time that UOCAVA was
21 passed, I mean, there's a reason why Congress must have
22 included Puerto Rico, Guam, American Samoa in its list, right?
23 what I hear you saying is, on the one hand, UOCAVA was meant to
24 protect the rights of people, U.S. citizens moving into foreign
25 countries and overseas, right? But if that's the case, why did

1 they actually add any of the territories to this list?

2 MR. HANSON: I mean, Your Honor, I think, like we've
3 noted in our -- in our complaints, and I'm sure when we move on
4 to -- well, hopefully move on to more substantive briefing on
5 the merits, you know, we found no articulable justification for
6 the disparate treatment that we find in these statutes. And
7 so, you know, plaintiffs' position is that there really is no
8 good rational reason for the disparate treatment that we are --
9 are complaining of.

10 THE COURT: All right. Let me ask you the same
11 question I've been asking the other attorneys about what power
12 I have. So let's assume for the sake of argument that I agree
13 with everything that you've said in terms of standing in this
14 case. Do I have the power to order Congress or direct Congress
15 to enact or amend legislation?

16 MR. HANSON: Well, Your Honor, you know, obviously
17 Article III courts don't have the power to, you know, require
18 Congress to enact or amend legislation. But the federal courts
19 do have the equitable authority and powers to declare a law
20 enacted by Congress unconstitutional.

21 THE COURT: Okay.

22 MR. HANSON: And insofar as the laws are
23 unconstitutional and declared as such, you know, obviously the
24 states and federal government would not be able to implement
25 those, those statutes.

1 THE COURT: So what law are you asking me to declare
2 unconstitutional? I know you stated it in your complaint, but
3 I'm asking you this question to just kind of walk you through a
4 few more questions after that.

5 MR. HANSON: Right. So we are challenging UOCAVA and
6 Hawaii law, the UMOVA statute as well as the regulations
7 implementing UMOVA in the way that it sort of com -- you know,
8 incorporates the requirements of UOCAVA.

9 THE COURT: Okay. And specifically, then, are you
10 challenging the definitions of what constitutes states and
11 United States in UOCAVA?

12 MR. HANSON: Your Honor, yeah, I think the way --
13 given that those are the operative provisions that lead to the
14 outcome where plaintiffs are being, you know, denied their
15 equal -- equal protection rights, yes, it would be the
16 definitional provisions that are -- plaintiffs take issue with
17 in particular.

18 THE COURT: Okay. So let me just reiterate what I
19 think you're saying to make sure that I understand what you're
20 saying.

21 So what you're telling me is that you are asking for
22 a declaration from this court that the UOCAVA definitions of
23 what constitutes United States and states are unconstitutional?

24 MR. HANSON: I think, yes, Your Honor, because as
25 applied in this case, it's obvious that it is -- the result of

1 the definitions, the way the definitions are written out is
2 that U.S. citizens who move outside of the 50 states based on
3 where they live are being denied equal treatment under the
4 laws.

5 Again, our plaintiffs are treated differently than
6 similarly situated plaintiffs living overseas, outside of the
7 50 states, and that is flowing from the definitional provisions
8 in UOCAVA and the regulations in Hawaii's laws that incorporate
9 the requirements of UOCAVA.

10 THE COURT: And so the thought being that if I strike
11 the definitions of UOCAVA, which include, for example, Guam and
12 American Samoa and the U.S. Virgin Islands, that if I strike
13 that, then your clients would have the right to vote?

14 MR. HANSON: Well, I think, Your Honor, I think if
15 you were to declare the -- these statutes unconstitutional, and
16 we're also seeking an order enjoining the federal and state
17 defendants to require them to accept absentee ballots on behalf
18 of our plaintiffs, so I think what we'd be asking is a
19 declaration that those statutes, the provisions are -- are
20 unconstitutional.

21 I don't know off the top of my head if striking those
22 provisions in and of themselves would result in plaintiffs
23 being able to vote. But a order from the court directing
24 federal and state defendants to accept absentee ballots for
25 voting it -- for President or voting members of Congress would

1 accomplish the remedy that plaintiffs are seeking here.

2 THE COURT: Okay. So let me just again try to
3 reiterate what I understand you saying, because I want to make
4 sure I really understand your argument.

5 You're saying that if I -- you don't know whether or
6 not if I strike the definitions in UOCAVA that include the
7 non-NMI territories, you don't know whether or not that means
8 that your clients would then have the opportunity to vote,
9 correct?

10 MR. HANSON: So the way the statute is structured is
11 it requires the states to provide absentee ballots to citizens
12 who are eligible to vote in the state when they last resided
13 there but moved overseas. And then in defining, you know, what
14 that class of people is, it lays out essentially anyone that
15 moves outside of the 50 states or, you know, outside of the --
16 the rest of the world except for the four territories.

17 And so if the Court were to strike the language with
18 respect to the current four territories that are being excluded
19 from the benefit of absentee voting, then the definitional
20 provisions, the way the statute would operate, would be that
21 any citizen who moves outside of the 50 states, including
22 moving to any of the territories which have now been struck,
23 would be able to vote absentee under UOCAVA.

24 THE COURT: Okay. So your position is that your
25 clients would then have the opportunity to vote?

1 MR. HANSON: Yeah, I -- yeah, as I -- as I art -- as
2 I speak it out loud, yes, yes. I think that's the way that the
3 statute would operate if we were to strike the -- the
4 provision, the definitional provision that carved out the four
5 U.S. territories.

6 THE COURT: Okay. And by extension, then, you're
7 saying that if I did that, that would obviously affect the
8 Hawaii Administrative Rule, which then -- which relies on
9 UOCAVA, or, I should say, incorporates it?

10 MR. HANSON: Right.

11 THE COURT: Okay. Okay. I think I understand your
12 argument, counsel. But you still have additional time, so
13 please continue.

14 MR. HANSON: Yes, Your Honor.

15 The last points that I wanted to make were that, you
16 know, we're -- we're not aware of any other equal protection
17 case involving voting rights where the remedy order was to
18 contract the right to vote. I don't believe the federal
19 defendants have identified any either.

20 And there are prominent voting rights scholars who
21 have indicated that such a holding would be unprecedented. And
22 in any event, again, Your Honor, because the mandate of equal
23 treatment is -- is possible here, either through ordering
24 expansion or abrogation, the redressability prong is satisfied.

25 And so, Your Honor, given that plaintiffs have

1 satisfied all of the requirements of Article III standing,
2 there's an injury in fact. The -- the injury is traceable to
3 UOCAVA and -- and Hawaii law. And it's redressable because
4 there are -- you know, either one of the -- all remedial
5 alternatives are available. Plaintiffs believe that federal
6 defendants' motion to dismiss based on standing grounds should
7 be denied.

8 So thank you, Your Honor. Unless you have any other
9 questions, that's -- that's all the time that I needed to take.

10 THE COURT: All right. Thank you, Mr. Hanson.

11 Mr. Pezzi, you have seven minutes left.

12 MR. PEZZI: Thank you, Your Honor.

13 The first thing I would just like to say is a lot of
14 the argument from my friend on the other side touched on the
15 merits, and I think most of that is irrelevant to the -- the
16 jurisdictional question that's now before this Court as to
17 whether plaintiffs have Article III standing to even bring
18 these claims at all.

19 So, for example, plaintiff referred to the several
20 million people living in the U.S. territories and how they're
21 generally unable to vote in federal elections. That's, of
22 course, true. But this case is about a much narrower subset of
23 individuals, and that is former state residents, in particular,
24 former Hawaii residents who have moved to the U.S. territories.

25 But as a general class of citizens living in the

1 territories, it is settled law in the Ninth Circuit -- and I
2 don't think plaintiffs would dispute this -- that there is no
3 constitutional right to vote in federal elections for residents
4 of the U.S. territories. That is because those rights inure to
5 citizens of the states. The only exception being the District
6 of Columbia, for which a constitutional amendment was required,
7 the 23rd Amendment, which allows residents of the District of
8 Columbia to vote in presidential elections.

9 And so plaintiffs' counsel called the statutory
10 scheme absurd. Although I don't think Your Honor needs to
11 decide that today, I don't think there's anything absurd or
12 even surprising about the fact that if you moved from one of
13 the 50 states to somewhere outside of the 50 states that you
14 will in most cases lose your right to vote in elections in
15 those 50 states. But to be clear, plaintiffs can still vote in
16 federal elections in Guam, in American Samoa, in the Virgin
17 Islands, and Puerto Rico. Now, those federal elections may be
18 for, for example, non-voting delegates to the U.S. Congress.
19 But that, you know, general constitutional structure and scheme
20 has been upheld as constitutional by the Ninth Circuit.

21 So as for the specific claim that plaintiffs are
22 bringing here, again, I think it's important to remember their
23 equal protection claim hinges on allegedly inappropriate line
24 drawing between former Hawaii residents who live in the
25 Northern Mariana Islands, on one hand, and former Hawaii

1 residents who live in Guam, American Samoa, Puerto Rico, and
2 the Virgin Islands on the other.

3 THE COURT: How do you respond to his statement a
4 moment ago that they are including also this disparate
5 treatment between former Hawaii residents who are living in
6 Guam, American Samoa, etc., as opposed to former Hawaii
7 residents who are living in Japan or Zimbabwe or England?

8 MR. PEZZI: So I don't -- frankly, it's not how I
9 read their papers, and so some of that was a little bit
10 surprising to me to hear it today. Although I don't think
11 anything turns on that for purposes of their Article III
12 standing.

13 Now, on the merits, it might matter quite a bit. And
14 so if this case did proceed to the merits, I think that's
15 something we would need to nail down.

16 But, I mean, I certainly think there's a rational
17 basis for treating former U.S. -- former state residents who
18 live in the territories differently than former state residents
19 who live in foreign countries. As I just mentioned a moment
20 ago, former state residents who live in the territories still
21 can vote in the United States federal elections that at least
22 indirectly can affect the system of government; whereas a
23 former state resident who moves to France or Japan or Germany
24 would otherwise lose that right entirely, which is why they're
25 protected by UOCAVA, I presume.

1 But, again, I think all that is more relevant to the
2 merits, and none of it really answers the ultimate question
3 before Your Honor, which is: To the extent plaintiffs are
4 injured here -- and again, we don't dispute that they are
5 injured in the sense that they want to vote absentee in Hawaii
6 and are currently unable to do so. But to the extent they are
7 injured, it is injured by Hawaii law.

8 Ms. Tanigawa I don't think disputed, nor could she
9 dispute, that UOCAVA would be no obstacle whatsoever if the
10 State of Hawaii decided it wanted to allow these plaintiffs to
11 vote or if it wanted to allow all former Hawaii residents who
12 live in the territories to vote, just as Illinois has already
13 in fact done with respect to former state residents who live in
14 American Samoa.

15 THE COURT: But let me ask you --

16 MR. HANSON: And so --

17 THE COURT: Let me ask you a question about that.
18 You know, one of her arguments was that it's really UOCAVA
19 that's setting the floor here, right? And that's -- that floor
20 is what creates the disparity, that they have to treat the
21 Northern Mariana Islands differently because of UOCAVA.

22 MR. PEZZI: So I would say a few things in response
23 to that, Your Honor.

24 First of all, it is not true that they have to treat
25 the Northern Mariana Islands differently. They could provide

1 the same rights that are provided to former state residents who
2 live in the Northern Mariana Islands to former state residents
3 who live in all of the territories. So I disagree with the
4 premise that federal law or any law requires Hawaii to treat
5 residents of the Northern Marianas differently.

6 Now, I don't dispute -- and obviously it's the
7 framing that we used in our brief -- that UOCAVA does set a
8 floor. It does set certain minimum requirements that, of
9 course, Hawaii is obligated to comply with, but that floor is
10 not what causes plaintiffs' injury. What causes plaintiffs'
11 injury is Hawaii law, which does not allow them to vote
12 absentee; and that is not the requirement of federal law, nor
13 would Hawaii be prohibited by federal law from changing that
14 regime.

15 So Ms. Tanigawa, again, I think she said that Hawaii
16 law does not treat different -- does not vary its treatment of
17 its former residents based on where they live in the
18 territories. Respectfully, I just don't think that can
19 possibly be true. We know from this case, and we know from
20 reading the Hawaii statutes and the administrative regulations,
21 that a former Hawaii resident who moves to the Northern Mariana
22 Islands is in fact treated differently from a former Hawaii
23 resident who moves to other territories, and ultimately that is
24 a decision that is made by Hawaii. It does not have to do it
25 that way. And again, Illinois does not do it that way, at

1 Least with respect to American Samoa. And they're --

2 THE COURT: I'm sorry, Mr. Pezzi, just because I know
3 we're running short on time, I do want ask you one question
4 with regard to one of Mr. Hanson's arguments next.

5 He said that really what he's asking me to do, what
6 the plaintiffs are asking me to do is to declare as
7 unconstitutional the definitional language in UOCAVA. Right?
8 And so let me hear your response to that.

9 I mean, I -- one of the things I expressed that I'm
10 struggling with is whether or not I have the power to expand
11 the group of people who are voting, right, under the Hawaii
12 Administrative Rule or arguably under UOCAVA to basically
13 create more of an opportunity to vote for the former Hawaii
14 residents who are now living in American Samoa and Guam, for
15 example.

16 How do you respond to his argument that, really,
17 Judge, what we're asking you to do is to strike as
18 unconstitutional this definitional language in UOCAVA?

19 MR. PEZZI: So, I mean, there's a few ways that I
20 could respond to that. Obviously on the merits, I don't agree
21 that there's anything at all constitutionally suspect about
22 that definition. But more relevant to standing purposes --

23 THE COURT: Right.

24 MR. PEZZI: -- I don't -- I don't think it's a proper
25 request because that definition is not the cause of any of

1 plaintiffs' injuries. And as I started the argument, I mean,
2 if UOCAVA, not just the definition section but in its entirety,
3 were to be repealed tomorrow and the entire thing were to be
4 thrown in the trash heap of history, Hawaii law would remain,
5 and Hawaii law would still say that these plaintiffs are not
6 entitled to absentee ballots. And so I think that is why
7 ultimately any injury is traceable to Hawaii law. And that is
8 even, you know, before we get to the redressability argument,
9 that obviously Ms. Tanigawa and the County defendants agree
10 with the federal government on the redressability point that
11 Morales-Santana requires an inquiry about hypothetical
12 Congressional intent.

13 And as I think Your Honor already addressed in the
14 colloquy with Mr. Hanson, there is ample reason to think that
15 if Congress were apprised of any constitutional infirmity here,
16 the way Congress would have addressed it would be by treating
17 former state residents in the NMI the same way Congress already
18 decided to treat former state residents in every other
19 inhabited territory, Guam, Puerto Rico, American Samoa, and
20 U.S. Virgin Islands.

21 And I think I'm running short on time. If Your Honor
22 has any further questions, I'd be happy to answer them.
23 Otherwise, we would ask that the Court grant the motion to
24 dismiss.

25 THE COURT: Thank you.

1 Ms. Tanigawa, I didn't offer you an opportunity for
2 rebuttal, so I don't know that you're prepared for it. Let me
3 ask you the same question that I asked Mr. Pezzi about, in
4 particular because the Hawaii Administrative Rule does adopt
5 the UOCAVA, does incorporate UOCAVA. And so, you know, through
6 the administrative rules, Hawaii allows former residents now
7 residing in the NMI to vote absentee, and does so by referring
8 to UOCAVA is how I view it.

9 And how would you respond to Mr. Hanson's argument
10 that I just asked Mr. -- also asked Mr. Pezzi about, about, you
11 know, if I announced that the definition -- first of all, he's
12 asking me to strike as unconstitutional the definition section
13 of UOCAVA. And -- and from your position, how does that affect
14 the standing analysis with regard to the Hawaii Administrative
15 Rule?

16 MS. TANIGAWA: So first, Your Honor, I would
17 respectfully disagree that Hawaii law incorporates UOCAVA.
18 Hawaii law acknowledges that there -- it has responsibilities
19 to implement UOCAVA, but it doesn't adopt as its own or
20 incorporate Hawaii's UMOVA as an independent --

21 (The court reporter requested clarification.)

22 (Whereupon, the record was read.)

23 MS. TANIGAWA: Okay. I apologize. I might have to
24 put in my headphones soon because there's landscaping going on
25 outside.

1 (Discussion was held off the record.)

2 THE COURT: And, I'm sorry, Ms. Tanigawa, I guess
3 "incorporate" isn't the right verb. But in looking at the
4 Hawaii Administrative Rule, it does say ballot packages may
5 generally be issued in the following context. And then it says
6 pursuant to a request covered under the -- under UOCAVA.

7 MS. TANIGAWA: Right. So that administrative rule
8 merely provides a mechanism, you know, an acknowledgment of the
9 state's requirement to comply with UOCAVA. But that's an
10 administrative rule. It doesn't con -- it's not allowed to
11 contravene Hawaii's UMOVA. And Hawaii's UMOVA very
12 specifically and clearly states that, you know, residents,
13 former residents who live in territories are not going to be
14 considered a covered voter under UMOVA.

15 So I just wanted to clarify that, you know, our
16 position is that Hawaii's law does not adopt as its own UOCAVA.
17 Their -- it's an independent statutory scheme which
18 acknowledges that it has responsibilities to follow UOCAVA, but
19 it doesn't adopt as its own.

20 Now, with respect to Your Honor's question regarding
21 plaintiffs' request to -- to strike the definition, you know,
22 in striking the definition, then that would require the Court,
23 I think, to rewrite the statute, which I don't think the Court
24 would have the authority to do so.

25 If they say the -- the Court should strike the

1 definition, well, then what's going to be -- what's going to
2 take its place? You know, that's something that -- that
3 Congress should do, not the Court. So that would, you know, be
4 my response to the plaintiffs' suggestion.

5 THE COURT: All right. Thank you, Ms. Tanigawa.

6 Thank you, everyone, for your argument this morning.
7 I appreciate it. It was I think very, very helpful to me. And
8 as I mentioned earlier, your briefs were as well.

9 Please do stay safe. We will endeavor to issue an
10 order within a reasonable timeframe. Thank you again, and we
11 are adjourned.

12 COURTROOM MANAGER: This Honorable Court is now
13 adjourned.

14 (The proceedings concluded at 10:12 a.m., March 5,
15 2021.)

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COURT REPORTER'S CERTIFICATE

I, Ann B. Matsumoto, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. Sec. 753 the foregoing is a complete, true, and correct transcript of the stenographically recorded proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, March 12, 2021.

/s/ Ann B. Matsumoto
ANN B. MATSUMOTO, RPR