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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

VICENTE TOPASNA BORJA, *et al.*, *Plaintiffs*, v. SCOTT NAGO, in his official capacity as Chief Election Officer for the Hawaii Office of Elections, *et al.*, *Defendants*.	CIVIL NO. 20-00433 JAO-RT FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF SECOND MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION Judge: Hon. Jill A. Otake

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

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INTRODUCTION

Plaintiffs' Third Amended Complaint, like those that came before it, is brought by former residents of Hawaii who now live in Puerto Rico, the U.S. Virgin Islands, American Samoa, and Guam, but who still wish to vote in federal elections in Hawaii. As before, Plaintiffs allege that the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") and Hawaii's Uniform Military and Overseas Voters Act ("UMOVA"), violate the Fifth and Fourteenth Amendments to the Constitution. Plaintiffs are not arguing that residents of U.S. territories, as a general matter, have a constitutional right to vote in federal elections, for good reason: that argument is foreclosed by binding precedent. *See Att'y Gen. of the Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984). Instead, Plaintiffs continue to argue that, because Hawaii allows some *other* former Hawaii residents to vote absentee in federal elections in Hawaii, it violates the equal protection guarantees of the U.S. Constitution for these Plaintiffs to be deprived of that same opportunity. If this Court ever reaches the merits of that constitutional question, the argument would fail—as every federal judge to consider the question has concluded.

But before the Court considers the merits, it must first decide whether it has subject-matter jurisdiction. It does not, because Plaintiffs lack Article III standing—as this Court has already held. *See Reeves v. Nago*, Civil No. 20-00433 JAO-RT, 2021 WL 1602397, at *8 (D. Haw. Apr. 23, 2021), ECF No. 102 ("Plaintiffs have

not established the redressability element of standing."). Accordingly, the Third Amended Complaint should now be dismissed—just as the Second Amended Complaint was, only two months ago.

Although the Court also granted leave to amend, the Third Amended Complaint does not cure any of the problems that the Court identified. That is because the redressability issues relied upon in the Court's opinion rejecting Plaintiffs' standing go to the scope of this Court's authority—rather than to any factual nuance in Plaintiffs' pleadings, or their prayer for relief.

The Federal Defendants' prior motion to dismiss set forth additional reasons why Plaintiffs' claims should be rejected on traceability and redressability grounds and, while the Court did not adopt those arguments, the Government preserves and reasserts them here. Federal Defendants respectfully submit that the grounds for dismissal that they have advanced are more straightforward as a matter of law, and apply equally to require dismissal of the Third Amended Complaint. But, regardless, even if this Court maintains the reasoning of its prior opinion in full, all of Plaintiffs' claims must be dismissed for lack of Article III standing.

Accordingly, for the reasons below, and those set forth in Defendants' prior filings and at oral argument, *see* ECF Nos. 75, 88, 93, 101, which Defendants incorporate here by reference, all of Plaintiffs' claims should—once again—be dismissed for lack of subject-matter jurisdiction.

BACKGROUND[1]

Plaintiffs are residents of Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands who formerly resided in Hawaii, along with an organization whose members include residents of those same territories, who also formerly resided in Hawaii. *See* Third Am. Compl. ¶¶ 15-20, ECF No. 105. Last October, Plaintiffs filed suit against various federal, state, and local entities and officials alleging that UOCAVA and Hawaii UMOVA "as applied to them violate the Fifth Amendment and the Fourteenth Amendment, respectively." Compl. ¶ 13, ECF No. 1. Plaintiffs based their equal protection arguments on the ground that Hawaii authorizes absentee voting by citizens who move from Hawaii to the Commonwealth of the Northern Mariana Islands (CNMI), but not by citizens who move to Puerto Rico, Guam, American Samoa, or the U.S. Virgin Islands. *See id.* ¶¶ 1-13.

The Federal Defendants previously moved to dismiss, arguing that the Court lacked subject-matter jurisdiction for two separate and independent reasons: (1) all of Plaintiffs' alleged injuries were traceable to Hawaii law, rather than to UOCAVA or the Federal Defendants; and (2) Plaintiffs' claims were not redressable by a

[1] Federal Defendants now assume familiarity with the factual and statutory background surrounding the enactment of UOCAVA and its application to the territories, and thus provide here only an updated version of the procedural background of this litigation. For a detailed description of UOCAVA and the relevant territorial history, the Court may refer to the background section of Federal Defendants' prior motion to dismiss. *See* ECF No. at 75 at 3-11.

favorable decision, because a "victory" here would result at most in the disenfranchisement of other former Hawaii residents who are not before the Court. The State and Local Defendants joined in the Federal Defendants' redressability argument, but not their traceability argument. *See* ECF Nos. 78, 79, 80. After oral argument, the parties filed supplemental briefing in response to five different questions from the Court, including the significance of the Ninth Circuit's opinion in *M.S. v. Brown*, 902 F.3d 1076 (9th Cir. 2018). *See* ECF Nos. 96, 98, 99, 100, 101.

On April 23, 2021, the Court granted Federal Defendants' motion to dismiss, and dismissed the case for lack of subject-matter jurisdiction, but on different grounds. The Court did not adopt either of Federal Defendants' standing arguments—disagreeing with an opinion of the Seventh Circuit on the same issues, *Segovia v. United States*, 880 F.3d 384 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 320 (2018)—but the Court also recognized that "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). And so, in reliance on a third standing argument that had been raised by the Court *sua sponte* and addressed in the parties' supplemental briefs, the Court concluded that it "would have to order federal and state officials to repeal UOCAVA, UMOVA and HAR § 3-177-600 and enact new laws/rules or amend the foregoing to grant Plaintiffs (and those similarly situated) absentee voting rights." *Reeves*,

2021 WL 1602397, at *8. Because the Court "is without the power to do so," the Court held that "Plaintiffs have not established the redressability element of standing," and thus dismissed the case for lack of subject-matter jurisdiction. *Id.*

While granting the Federal Defendants' motion to dismiss, the Court also granted leave to amend. On May 14, Plaintiffs filed their Third Amended Complaint, which asserts all of the same claims as before. *See* ECF No. 105. As for their requested relief, Plaintiffs now offer a slightly more detailed recitation of the declaratory and injunctive relief that they seek, but ultimately they request the same, bottom-line result: an order against "the enforcement of 52 U.S.C. § 20310, H.R.S. § 15D-2, and H.A.R. § 3-177-600 by Defendants, . . . in a manner that violates the Fifth Amendment, the Fourteenth Amendment, or 42 U.S.C. § 1983 by implementing these provisions in such a way as to extend the right to vote absentee or accept absentee ballots on a basis that discriminates against Plaintiffs relative to other similarly situated former Hawaii residents." Third Am. Compl., Prayer for Relief ¶ (b). In other words, Plaintiffs still seek to vote in federal elections in Hawaii by absentee ballot—even though UOCAVA does not require that result, and Hawaii law forbids it.

LEGAL STANDARD

"Standing is 'an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Southcentral Found. v. Alaska Native Tribal Health*

Consortium, 975 F.3d 831, 837 (9th Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff who seeks to establish standing "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. "[S]tanding is not dispensed in gross." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). Instead, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (citation omitted). Arguments that the court lacks "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez*, 565 U.S. at 141.

ARGUMENT[2]

Nothing material has changed since the Court's prior action dismissing this case. Federal Defendants continue to assert that Plaintiffs' injuries are traceable to Hawaii law, rather than to UOCAVA or the Federal Defendants, and that a "victory" in this case would not redress Plaintiffs' injuries. And despite some cosmetic tweaks

[2] Pursuant to the Court's Order of November 24, 2020, this motion addresses only Article III standing. As contemplated by that order, if any claims against any of the Federal Defendants survive this motion, Federal Defendants would defend UOCAVA on the merits, if necessary, in a future motion for summary judgment. *See* Nov. 24, 2020 Order ("The parties dispute Plaintiffs' standing, a threshold issue concerning subject matter jurisdiction. . . . Only after standing is resolved should the parties file their anticipated motions for summary judgment.").

to their pleadings, Plaintiffs continue to seek an order from this Court that would displace a rational legislative judgment made by the State of Hawaii regarding the absentee voting rights to be afforded to its former residents. Although Plaintiffs have revised some of the phrasing in their complaint—in apparent hopes of finding a way around the Court's opinion—the bottom-line goal they are trying to accomplish through this lawsuit is exactly the same as before. Accordingly, the Court's prior conclusion—that it "is without the power" to grant the relief that Plaintiffs would need to redress their injuries, *Reeves*, 2021 WL 1602397, at *8—would apply equally to the Third Amended Complaint. This case should once again be dismissed for lack of subject-matter jurisdiction.

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

Federal Defendants recognize that the Court rejected their prior argument that Plaintiffs' alleged injuries are not fairly traceable to UOCAVA or to any of the Federal Defendants, but respectfully preserve that argument for this renewed round of litigation, and re-state it here.

As a unanimous Seventh Circuit panel held in a materially identical lawsuit filed by former Illinois residents who reside in the same territories at issue here, "UOCAVA does not prevent [the State] from providing the plaintiffs absentee ballots, and so it does not cause their injury." *Segovia v. United States*, 880 F.3d 384, 387 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 320 (2018). Instead, "[t]o the extent

the plaintiffs are injured, it is because they are not entitled to ballots under state law." *Id.* In other words, UOCAVA sets a federal law floor, by requiring certain minimum absentee voting rights for some military and overseas voters. But it sets no ceiling, and instead leaves to each State to determine how broadly to permit absentee voting by current or former residents—consistent with the Constitution's general grant of authority to each State to set "[t]he Times, Places and Manner" of elections for federal office. U.S. Const. art. I, § 4, cl. 1; *see also* U.S. Const., art. II, § 1, cl. 2. If UOCAVA were repealed tomorrow, Plaintiffs would remain ineligible to vote absentee in Hawaii elections, because of Hawaii law. Given that reality, it cannot be UOCAVA that is the cause of their alleged injuries.

At oral argument on Federal Defendants' prior motion to dismiss, 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."). That (unavoidable) concession is dispositive here. As the Seventh Circuit put it, "[i]n short, the reason the plaintiffs cannot vote

in federal elections in [Hawaii] is not the UOCAVA, but [Hawaii's] own election law." *Segovia*, 880 F.3d at 388. And nothing in Plaintiffs' Third Amended Complaint changes that (or could change that).

The Court previously held that although "Hawai'i law alone may prevent Plaintiffs from *voting* absentee," in the Court's view, it is still the case that "UOCAVA bears equal responsibility" for Plaintiffs' injuries—at least if that injury is conceived of as "*disparate treatment*" in the abstract. *Reeves*, 2021 WL 1602397, at *5. Federal Defendants respectfully submit that the Court erred in allowing Plaintiffs to conflate their inability to vote absentee—an undisputed Article III injury, which the Court correctly recognized is traceable to "Hawai'i law alone," *id.*—with some separate, abstract harm of "disparate treatment."[3] There would be no "disparate treatment" if Hawaii made a different legislative judgment—as all agree that it could, without running afoul of UOCAVA.

For example, if Hawaii changed its election laws tomorrow to permit absentee voting by any former resident who now lives in any U.S. territory, UOCAVA would still list Plaintiffs' home territories, but not the Northern Mariana Islands—which is allegedly what has caused Plaintiffs "disparate treatment." Nevertheless, upon Hawaii's decision to allow Plaintiffs to vote absentee, this case would plainly be

[3] The same argument—that Plaintiffs have suffered "disparate treatment" separate and apart from their actual inability to vote—would have been available in *Segovia*. Nevertheless, the Seventh Circuit held that those plaintiffs lacked standing.

moot. Even if Plaintiffs insisted that UOCAVA still provides for "disparate treatment" in the abstract, that allegation by itself could not support standing.

The same concept applies here. "Disparate treatment" only works here as a distinct Article III injury if meant as a shorthand for what is actually causing real-world harm to Plaintiffs: their inability to vote absentee in federal elections in Hawaii. Indeed, this Court recognized as much later in its opinion, concluding (correctly) that "[b]ecause Plaintiffs ultimately want to vote absentee in federal elections, a declaration that UOCAVA, UMOVA, and HAR § 3-177-600 violate the Fifth and Fourteenth Amendments, without more, will not require Defendants to redress Plaintiffs' claimed injuries." *Id.* at *6. The Court also correctly recognized that that injury—Plaintiffs' inability to vote—stems from "Hawai'i law alone." *Id.* at *5. So although the Court ultimately rejected Federal Defendants' traceability argument, the logic and reasoning of the Court's opinion supports it.

Accordingly, the Court should dismiss all of Plaintiffs' claims challenging UOCAVA, and all claims against the Federal Defendants, for failure to satisfy the traceability requirement of Article III standing. *See also* ECF No. 75, at 14-20; ECF No. 88, at 2-10; ECF No. 101, at 4-6.

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

Even if Plaintiffs could show that their injuries are traceable to UOCAVA or the Federal Defendants, Plaintiffs still lack Article III standing because their claims

are not redressable by this Court. That is because, Plaintiffs' claims on the merits turn primarily on the assertion that former residents of Hawaii who now live in the CNMI receive preferential treatment under UOCAVA, which violates the equal protection guarantees of the U.S. Constitution. But even if Plaintiffs were right about that, the Court would still be presented with an additional remedial question: should any unconstitutional disparate treatment be remedied by (1) eliminating preferential treatment for the CNMI, or (2) granting new absentee-voting rights to all former Hawaii residents who reside in Guam, Puerto Rico, the U.S. Virgin Islands, or American Samoa?

The answer is the former: the only appropriate remedy would be to treat CNMI as UOCAVA already treats all of the other territories listed in the statute, which is "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) (citation omitted). That means any "victory" for Plaintiffs here would be Pyrrhic: it would result in the withdrawal of certain voting-related benefits for some residents of the CNMI, but would not alter Plaintiffs' inability to vote absentee in Hawaii. Plaintiffs therefore also lack standing for this additional reason.

Nothing in the Third Amended Complaint warrants a different conclusion. Plaintiffs added some additional, conclusory references to alleged preferential treatment not just for those living in the CNMI, but also for those living in foreign

countries. *See, e.g.*, Third Am. Compl., Prayer for Relief ¶ (b) (referencing without explanation "residency in a foreign country or the NMI"). But Plaintiffs cannot, by artful pleading, vaguely gesture at new (and plainly meritless[4]) theories solely to sidestep a conclusion that the Court lacks subject-matter jurisdiction. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) ("A claim invoking federal-question jurisdiction . . . may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' . . . .") (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). And fairly read, the core of Plaintiffs' claims—that there is no rational basis for "drawing lines within the statutory definitions even between U.S. citizens based on the *particular* overseas Territory in which they reside, Third Am. Compl. ¶ 51—is unchanged. Accordingly, Federal Defendants' redressability argument still applies to the Third Amended Complaint. At the very least, the argument applies to the extent that Plaintiffs continue to rely on allegedly unconstitutional preferential

[4] The Ninth Circuit, considering a predecessor to UOCAVA, has already rejected the argument that residents of Guam should be permitted to vote in Presidential elections just because Congress separately provided that "citizens who live outside this country may vote by absentee ballot in their last state of residency[.]" *Att'y Gen. of Territory of Guam v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984); *see also Romeu v. Cohen*, 265 F.3d 118, 125 (2d Cir. 2001) ("[W]e hold that Congress acted in accordance with the requirements of the Equal Protection Clause in requiring States and territories to extend voting rights in federal elections to former resident citizens residing outside the United States, but not to former resident citizens residing in either a State or a territory of the United States."); *Igartua De La Rosa v. United States*, 32 F.3d 8, 9-11 (1st Cir. 1994) (same).

treatment for former state residents living in the CNMI as the basis for their equal protection claims.

Again, Federal Defendants recognize that the Court previously declined to adopt this argument, but the Government preserves its position as it pertains to the Third Amended Complaint. Respectfully, on this issue, the error discussed above—that is, the Court's conclusion that Plaintiffs have alleged a distinct and cognizable injury solely related to "disparate treatment," beyond their actual inability to vote—led the Court away from the primary redressability dispute in the parties' briefing, which focused on "whether contraction or expansion" of voting rights "would ultimately be the appropriate remedy." *Reeves*, 2021 WL 1602397, at *7. The Court should conclude that "instead of extending voting rights to all the territories, the proper remedy would be to extend them to none of the territories." *Segovia*, 880 F.3d at 389 n.1; *see also Morales-Santana*, 137 S. Ct. at 1701 (holding that courts must adopt "the remedial course Congress likely would have chosen had it been apprised of the constitutional infirmity") (citation omitted). And "[t]hat means a holding that the UOCAVA violates equal protection would not remedy the plaintiffs' injuries," *Segovia*, 880 F.3d at 389 n.1. For these reasons, the Court should dismiss all of Plaintiffs' claims for failure to demonstrate redressability. *See also* ECF No. 75, at 20-24; ECF No. 88, at 10-15; ECF No. 101, at 3-4.

III. The Court's prior conclusion about the scope of its authority applies equally to the Third Amended Complaint.

Even if all other requirements for standing were satisfied, and "even where a plaintiff requests relief that would redress her claimed injury, there is no redressability if a federal court lacks the power to issue such relief." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). And so, without the need to revisit any of its prior holdings, the Court could resolve this case by application of its prior opinion, in which the Court concluded that "Plaintiffs have not established the redressability element of standing." *Reeves*, 2021 WL 1602397, at *8.

a. Declaratory Relief. The Court's redressability analysis proceeded in two parts. First, as for Plaintiffs' requests for declaratory relief, the Court concluded correctly that, "[b]ecause Plaintiffs ultimately want to vote absentee in federal elections, a declaration that UOCAVA, UMOVA, and HAR § 3-177-600 violate the Fifth and Fourteenth Amendments, without more, will not require Defendants to redress Plaintiffs' claimed injuries." *Id.* at *6 (citing *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) (holding that "a declaration that the government is violating the Constitution" is relief that "alone is not substantially likely to mitigate the plaintiffs' asserted concrete injuries" and "is unlikely by itself to remediate their alleged injuries absent further court action"). In other words, "a declaration that the laws are unconstitutional would not enable Plaintiffs to vote absentee." *Id.* And as the Court explained, "Plaintiffs have not adduced facts suggesting that Defendants

or a third party would redress the situation based solely on the issuance of the requested declaration." *Id.*

All of that is equally true today. And, despite the Court's allowing the possibility that, at least theoretically, "amendment could *potentially* cure this defect," *id.*, in fact, all of these conclusions apply equally to the Third Amended Complaint. Arguably, Plaintiffs have now requested a slightly more specific declaratory judgment than they did before. But the additional precision in Plaintiffs' prayer for relief does nothing to change the only relevant legal principle: as the Court correctly recognized, a declaratory judgment standing alone (in the absence of an injunction) does not require any immediate change in a defendant's behavior. *See id.* (citing *Juliana*, 947 F.3d at 1170); *accord 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)). And so, there is *no* declaratory judgment that, standing alone, would redress Plaintiffs' claimed injuries—and nothing in the Third Amended Complaint changes that (or could change that).

b. Injunctive Relief. As for injunctive relief, the Court noted that "an order requiring Defendants to (1) accept Plaintiffs' applications to vote absentee in future federal elections in Hawai'i and (2) expand voting rights to all former Hawai'i citizens, including those in all territories," would "arguably redress the alleged injuries because Plaintiffs would be able to vote." *Reeves*, 2021 WL 1602397, at *7. But the opinion ultimately held that "the Court lacks the power to expand the existing laws," *id.*, which was fatal to Plaintiffs' redressability arguments. *See also, e.g.*, *id.* ("Here, the salient inquiry is whether the Court has the authority to force Defendants to expand voting rights, as this is the relief presently sought by Plaintiffs. The Court is not convinced it has the power to order Defendants to confer rights that do not currently exist."); *id.* at *8 ("To effectuate the expansion requested by Plaintiffs, the Court would have to order federal and state officials to repeal UOCAVA, UMOVA and HAR § 3-177-600 and enact new laws/rules or amend the foregoing to grant Plaintiffs (and those similarly situated) absentee voting rights. It is without the power to do so. As a result, Plaintiffs have not established redressability.").

If the Court follows the reasoning of its decision in April 2021, nothing material has changed since—including in Plaintiffs' Third Amended Complaint—which would lead to a different outcome. Plaintiffs cannot alter the scope of this Court's Article III authority by an amended pleading. In any case, the goal of this lawsuit—that is, to displace a rational legislative judgment about absentee voting rights by the State of Hawaii—has been consistent across all four of Plaintiffs' complaints. It is equally true today that "the salient inquiry is whether the Court has the authority to force Defendants to expand voting rights, as this is the relief presently sought by Plaintiffs." *Id.* at *8. The Court's concerns about the limitations of its own power would apply in exactly the same way to the Third Amended Complaint as they did to the Second Amended Complaint.[5]

[5] Federal Defendants believe that the ultimate conclusion of the Court's prior opinion—*i.e.*, that Plaintiffs' claims are not redressable by this Court, and that Plaintiffs therefore lack Article III standing—was correct, though for the reasons that the Government has advanced in this and prior filings. The Government is concerned that at least some of the Court's prior reasoning is vulnerable to being misconstrued to suggest that an Article III court generally lacks the authority to enjoin the enforcement or implementation of state or federal legislation that it determines is unconstitutional—when, in fact, at least where a plaintiff has Article III standing and all other jurisdictional prerequisites are satisfied, that power does generally fall within the authority of a federal court (even if a court cannot specifically proscribe new laws or rules to replace legislation held to be unconstitutional). Thus, Federal Defendants respectfully submit that the more straightforward bases for dismissal are that (1) Plaintiffs' alleged injuries are caused by Hawaii law alone (and thus are not traceable to UOCAVA or the Federal Defendants); and (2) a favorable decision on Plaintiffs' claims would not actually result in their being granted absentee voting rights in Hawaii (and thus Plaintiffs' claims are not redressable). If the Court maintains its prior reasoning regarding the

CONCLUSION

For these reasons, all of Plaintiffs' claims should be dismissed for lack of subject-matter jurisdiction.

scope of its authority, it may wish to consider also adopting the Government's alternative grounds for dismissal to avoid any potential confusion on any appeal.

Dated: June 14, 2021

Respectfully submitted,

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