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Attorneys for Defendant

SCOTT NAGO, in his official capacity as

Chief Election Officer for the Hawaii Office of Elections

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

VINCENTE TOPASNA BORJA,
EDMUND FREDERICK
SCHROEDER, JR., RAVINDER
SINGH NAGI, PATRICIA ARROYO
RODRIGUEZ, LAURA CASTILLO
NAGI, and EQUALLY AMERICAN,

Plaintiffs,

vs.

SCOTT NAGO, in his official capacity
as Chief Election Officer for the Hawaii
Office of Elections,

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

CIVIL NO. 20-00433 JAO-RT

DEFENDANT SCOTT NAGO’S
PARTIAL JOINDER IN THE
FEDERAL DEFENDANTS’
SECOND MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISIDCTION [ECF #107]

UNITED STATES OF AMERICA,

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

FEDERAL VOTING ASSISTANCE
PROGRAM, and

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

Defendants.

**DEFENDANT SCOTT NAGO’S PARTIAL JOINDER IN THE
FEDERAL DEFENDANTS’ SECOND MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISIDCTION [ECF #107]**

Pursuant to Local Rule 7.7, Defendant Scott Nago, in his official capacity as Chief Election Officer for the Hawaii Office of Elections (the “Chief Election Officer”), through the Attorney General, State of Hawai‘i and her undersigned deputies, joins in part in the Federal Defendants’ Second Motion to Dismiss for Lack of Subject Matter Jurisdiction, ECF #107 (“Second Motion to Dismiss”) on the grounds that Plaintiffs have not established redressability. Specifically, the Chief Election Officer joins in the redressability arguments set forth in Section II,

pages 10-13,¹ and Section III, pages 14-17² of the Second Motion to Dismiss (collectively, “Redressability Arguments”). The Chief Election Officer does not join in the remaining arguments submitted by the Federal Defendants and reserves the right to file a timely opposition thereto.

In its April 23, 2021 Order Granting Federal Defendants’ Motion to Dismiss for Lack of Subject-Matter Jurisdiction, the Court determined that Plaintiffs failed to establish the redressability element of standing because the requested declaratory relief would not enable Plaintiffs to vote absentee and the Court lacked the power to expand absentee voting rights as requested by Plaintiffs. ECF #102, pp. 17, 21. The Court dismissed Plaintiffs’ SAC but granted leave to amend. *Id.*, p. 22.

In an attempt to cure their standing defect, Plaintiffs filed a Third Amended Complaint (“TAC”), seeking: (a) an order (i) declaring that UOCAVA, UMOVA and HAR § 3-177-600 violate the Fifth and Fourteenth Amendments, (ii) striking and ordering unenforceable the inclusion of the Commonwealth of Puerto Rico (“Puerto Rico”), Guam, the Virgin Islands, and American Samoa in the definition of “United States” in UOCAVA; and (iii) striking and ordering unenforceable the inclusion of Puerto Rico, Guam, the Virgin Islands, and American Samoa in the

¹ The Chief Election Officer does not join in the Federal Defendants’ contention that the Court erred in recognizing a disparate treatment injury on page 13 of Section II.

² The Chief Election Officer does not join in footnote 5 on page 17 of Section III.

definition of “United States” in UMOVA; and (b) a preliminary and permanent order enjoining the Defendants’ enforcement of UOCAVA, UMOVA, and HAR § 3-177-600 in a manner that violates the Fifth and Fourteenth Amendments. ECF #105, pp. 40-41. Although the TAC restructured the form of Plaintiffs’ requested remedy, the standing defect persists.

The main problem lies not in the form of the requested relief, but in the fact that the Court lacks the power to grant the ultimate relief being requested. Because Plaintiffs cannot vote in presidential elections or for voting members of Congress, Plaintiffs want to vote absentee in Hawaii in federal elections. *Id.*, ¶¶12-13. There being no constitutional provision or law which permits Plaintiffs to do so, Plaintiffs seek to leverage equal protection principles to secure a court order amending UOCAVA and UMOVA’s definition of the “United States” to *exclude* Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa. The apparent objective being that former states residents living in those territories would then be afforded absentee voting rights under UOCAVA and UMOVA similar to former state residents who move to the Commonwealth of the Northern Mariana Islands or overseas.

But as this Court already held:

[t]o effectuate the expansion [of voting rights] 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.

ECF #102, p. 21 (emphasis added). In so holding, the Court made it clear that “it lacks the power to expand the existing laws.” *Id.*, p. 18.

Although the Court’s holding was based on the SAC, it applies in equal measure to the TAC. Paragraphs (a)(ii) and (a)(iii) of the TAC’s prayer for relief request that the Court amend UOCAVA and UMOVA in such a manner as to confer absentee voting rights on Plaintiffs. But as this Court already held, such relief is beyond the Court’s remedial power. *Id.* at pp. 18-21.

Absent paragraphs (a)(ii) and (a)(iii), the remaining request for declaratory relief in paragraph (a)(i), standing alone, cannot establish redressability. *See* ECF #102, p. 17 (“Because 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.”).

The same goes for paragraph (b) of Plaintiffs’ prayer for relief. To the extent paragraph (b) seeks an order requiring the Defendants to allow Plaintiffs to vote absentee in Hawaii in federal elections, the Court lacks the power to do so. *See* ECF #102, p. 19 (“The Court is not convinced it has the power to order Defendants to confer rights that do not currently exist.”). Because Court lacks the

power to grant the ultimate relief sought, Plaintiffs cannot establish redressability and thus, standing. *M.S. v. Brown*, 902 F. 3d 1076, 1082 (9th Cir. 2018).

Accordingly, the Chief Election Officer respectfully requests that if the Court grants the Federal Defendants' Second Motion to Dismiss based on the Redressability Arguments, it also find that Plaintiffs' claims against the Chief Election Officer arising from challenges to the constitutionality of UMOVA and HAR § 3-177-600 should be dismissed for lack of subject-matter jurisdiction.

DATED: Honolulu, Hawai'i, June 14, 2021.

/s/ Lori N. Tanigawa
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SCOTT NAGO, in his official capacity as Chief
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