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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

VICENTE TOPASNA BORJA, EDMUND FREDERICK SCHROEDER, JR., RAVINDER SINGH NAGI, PATRICIA ARROYO RODRIGUEZ, LAURA CASTILLO NAGI, and EQUALLY AMERICAN, Plaintiffs, v. SCOTT NAGO, in his official capacity as the Chief Election Officer for the Hawaii Office of Elections, GLEN TAKAHASHI, in his official capacity as Clerk of the City and County of Honolulu,	No. CV 20-00433 JAO-RT Honorable Judge Jill A. Otake Honorable Magistrate Judge Rom Trader **PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' SECOND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (DKT. NO. 107), AND DEFENDANT SCOTT NAGO'S (DKT. NO. 109), AND GLEN TAKAHASHI'S (DKT. NO. 110), PARTIAL JOINDERS TO THE FEDERAL DEFENDANTS' SECOND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION;**

UNITED STATES OF AMERICA,

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

FEDERAL VOTING ASSISTANCE PROGRAM, and

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

Defendants.

CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE

Hearing:
Date: August 27, 2021
Time: 9:00 a.m.
Judge: Honorable Jill A. Otake

PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' SECOND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (DKT. NO. 107), AND DEFENDANT SCOTT NAGO'S (DKT. NO. 109), AND GLEN TAKAHASHI'S (DKT. NO. 110) PARTIAL JOINDERS TO THE FEDERAL DEFENDANTS' SECOND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

Plaintiffs, former Hawaii residents now living in Guam and the U.S. Virgin Islands, have standing to challenge their disparate exclusion from access to absentee ballots extended to similarly situated former Hawaii residents living in the Northern Mariana Islands ("NMI") and overseas. That exclusion violates the Constitution's equal-protection guarantee. As this Court already correctly concluded in its April 23, 2021 order, plaintiffs allege a paradigm injury in fact—unequal treatment in access to a government benefit. And as the Court also correctly held, those injuries are equally traceable to the challenged provisions of federal and Hawaii law. Hawaii law acts as a conduit for the Uniformed Overseas Citizens Absentee Voting Act ("UOCAVA"), by dint of Congress's power to prescribe state and local procedures related to national elections. While UOCAVA requires states to make absentee ballots available to former state residents living in the NMI and overseas, it withholds that same benefit from former state residents living in Guam and the U.S. Virgin Islands, as well as Puerto Rico and American Samoa. Hawaii law does not become solely responsible simply because Hawaii has not decided take upon itself the task of remedying UOCAVA's discriminatory regime. Both of this Court's earlier holdings follow from well-established principles in decades-old Supreme Court decisions.

That leaves redressability. In the last round, this Court held that (a) plaintiffs had not sufficiently pled how declaratory relief could redress their unequal treatment and (b) the Court could not order defendants to accept plaintiffs' applications to vote absentee in future elections because the Court lacks power to expand existing laws. But the Court granted plaintiffs leave to amend their complaint to replead relief that could redress their disparate treatment.

The Third Amended Complaint ("TAC"), Dkt. No. 105, addresses the issues identified by the Court. It explains how, under decades of Supreme Court precedent reaffirmed just this past year, federal courts have the power to sever unconstitutional portions of statutes to reflect the likely intent of the legislature had it known of the constitutional infirmity at the time of enactment. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349-50, 2343-44, 2355-56 (2020) ("*AAPC*") (plurality) (citing cases); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (discussing cases). And the Third Amended Complaint further pleads that the challenged statutes here are severable under those precedents. For instance, the Court need only strike "the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa" from the definition of "United States" in 52 U.S.C. § 20310(8) and "Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States" from the definition of "United States" in H.R.S. § 15D-2.

Critically, that relief doesn't require any further legislation or legislative amendments. Much to the contrary, it honors the legislative "commitment to the residual policy—the main rule, not the exception—and consider[s] the degree of potential disruption of the statutory scheme that would occur" by withdrawing absentee ballots altogether. *Morales-Santana*, 137 S. Ct. at 1700 (cleaned up). In contrast, the alternative of abrogation—which is disfavored in most cases, *see id.* at 1699—would mean withdrawing the benefit of absentee ballots from former Hawaii residents living in the NMI and overseas so that they are treated just the same as former Hawaii residents living in Guam and the U.S. Virgin Islands. Congress could not have wanted that result. But even that relief would redress plaintiffs' unequal treatment. *See Heckler v. Mathews*, 465 U.S. 728, 738 (1984).

Further, the Third Amended Complaint requests declaratory and injunctive relief requiring all defendants to enforce the challenged laws as severed. As an initial matter, a declaration of unconstitutionality and severance alone suffices to establish redressability—after all, courts expect officials to "abide by [their] authoritative interpretation[s]." *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). In any event, under the Supreme Court's precedents, this Court has the power—without legislating or requiring legislation—to sever a statute and order it enforced as severed, acknowledging that "Congress may address the issue" again

in the future. *Morales-Santana*, 137 S. Ct. at 1701. The Court has the power to grant that relief, and it would redress plaintiffs' injuries.

Despite all this, defendants once again move to dismiss on standing grounds. But they largely rehash arguments this Court has already rejected. And they agree with the severability framework outlined above, retreating from this Court's grounds for finding a lack of redressability in its April 23 order. *See* Federal Defs.' Mem. in Supp. of Second Mot. to Dismiss ("MTD") at 17 n.5, Dkt. No. 107-1. Their primary argument is instead that the correct remedy on a finding of unconstitutionality would be to withdraw absentee ballots from former Hawaii residents living in the NMI rather than extending absentee ballots to plaintiffs.

But that is wrong thrice over under Supreme Court precedent. For one thing, even ***that*** remedy would redress plaintiffs' injuries of unequal treatment, because "when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of ***equal*** treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740 (citation omitted). For another, the argument confuses the remedial inquiry with the redressability inquiry. The redressability question is whether the requested relief would redress the injuries, not whether it is the correct relief on the merits. And on top of that, extension of absentee ballots is the correct remedy.

In short, plaintiffs have standing, and the motions should be denied.

BACKGROUND

Plaintiffs assume familiarity with the parties, the factual and statutory background regarding UOCAVA, Hawaii's Uniform Military and Overseas Voters Act ("UMOVA"), and H.A.R. § 3-177-600, and the application and effects of these statutes and regulations on plaintiffs. The prior briefing and plaintiffs' Third Amended Complaint provide a more extensive background.

In summary, plaintiffs challenge UOCAVA and Hawaii law as unconstitutional under the equal-protection guarantee. The federal defendants moved to dismiss the Second Amended Complaint (*see* Dkt. No. 73), arguing that (1) plaintiffs' injuries are not traceable to federal law and (2) plaintiffs' claims are not redressable by a favorable decision. Dkt. No. 75. The state and local defendants joined in the federal defendants' redressability argument. Dkt. Nos. 78, 79, 80. Following oral argument, the parties submitted supplemental briefing to address specific questions from the Court regarding redressability and relief. Dkt. Nos. 96, 98, 99, 100, 101.

On April 23, 2021, the Court granted the federal defendants' motion to dismiss for lack of standing. *Reeves v. Nago*, No. 20-00433 JAO-RT, 2021 WL 1602397 (D. Haw. Apr. 23, 2021), Dkt. No. 102. It held that plaintiffs "sufficiently alleged an injury in fact" and that plaintiffs' injuries "are traceable to

UOCAVA and the Federal Defendants." *Id.* at *4-5. Even so, it held that the Second Amended Complaint failed to establish redressability. The Court held that it lacked "the power to expand the existing laws" to order defendants to "accept Plaintiffs' applications to vote absentee in future federal elections" and "expand voting rights to all former Hawaii citizens, including those in all territories." *Id.* at *7. The Court then concluded that, without injunctive relief, plaintiffs' requested declaratory relief would not redress their injuries. *Id.* at *6. Nevertheless, the Court noted that further amendments "could ***potentially*** address" these issues and granted leave to amend. *Id.* at *8.

Plaintiffs filed their Third Amended Complaint on May 14. Responding to the Court's prior order, plaintiffs seek declaratory and injunctive relief barring enforcement of specified provisions of the federal and state statutory and regulatory provisions, severing those laws accordingly, and requiring defendants to enforce those laws as shorn of their constitutional infirmities, such that they no longer subject plaintiffs to unequal treatment by extending the right to vote absentee on a discriminatory basis. *See* TAC, Prayer For Relief ¶¶ a-b. The requested relief falls squarely within federal courts' well-established power to sever unconstitutional statutes—as the federal defendants concede, MTD at 17 n.5—and turns, ultimately, on legislative intent. It does not require enactment of any new laws or amendment of any existing statutes.

On June 14, the federal defendants filed their Second Motion to Dismiss, making many of the same arguments previously rejected by this Court. Dkt. No. 107. The state and local defendants submitted partial joinders later the same day. *See* Dkt. Nos. 109, 110.

LEGAL STANDARDS

Motions to dismiss for lack of standing are governed by Federal Rule of Civil Procedure 12(b)(1). *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). The court must accept as true all material allegations of the complaint, and must construe the complaint in the plaintiff's favor. *Reeves*, 2021 WL 1602397, at *2. To have standing, a plaintiff must have suffered an injury in fact that is fairly traceable to the challenged conduct of the defendant and that is likely to be redressed by a favorable judicial decision. *Id.* at *3.

ARGUMENT

The Court should deny the federal defendants' motion to dismiss because the Third Amended Complaint establishes that plaintiffs have Article III standing. Under UOCAVA, UMOVA, and Hawaii law, plaintiffs have personally suffered the concrete injury of lack of access to absentee ballots, on unequal terms with similarly situated former Hawaii residents living in the NMI and overseas. Those injuries are traceable to federal law's disparate treatment of former Hawaii residents living in certain U.S. territories, as well as to Hawaii law (as the state and

local defendants do not contest), which is a conduit for that federal disparate treatment. Finally, the Court has the power to redress plaintiffs' injuries by declaring UOCAVA, UMOVA, and H.A.R. § 3-177-600 unconstitutional; severing the provisions of those laws causing plaintiffs' disparate treatment; and ordering those laws to be enforced shorn of their constitutional infirmities.

I. Plaintiffs have suffered injury in fact.

As the Court correctly held, plaintiffs have personally suffered concrete injury as a result of both UOCAVA and UMOVA. *Reeves*, 2021 WL 1602397, at *4. Their injury is the denial of equal access to the vote, which federal and Hawaii law extend to similarly situated former Hawaii residents residing in other territories and foreign countries but not to those former Hawaii residents, like plaintiffs, residing in Guam and the U.S. Virgin Islands. Plaintiffs are injured because they are unable to apply for absentee ballots in Hawaii to vote in federal elections as a result of both UOCAVA and Hawaii law.

The federal defendants suggest that plaintiffs have suffered no injury because the "abstract harm of 'disparate treatment'" is not cognizable. MTD at 9. That argument disregards well-established principles articulated by the Supreme Court and Ninth Circuit. The equal-protection guarantee "is essentially a direction that all persons similarly situated should be treated alike." *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Where the "law provides a

benefit to a class of persons that it denies" to others, it causes an equal-protection "injury [the Supreme Court has] long recognized as judicially cognizable." *Davis v. Guam*, 785 F.3d 1311, 1314 (9th Cir. 2015) (quoting *Heckler*, 465 U.S. at 738). "The 'injury in fact' in an equal protection case … is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The Ninth Circuit has rejected arguments just like defendants', noting that under Supreme Court precedent, "unequal treatment is an injury even if curing the inequality has no tangible consequences." *Davis*, 785 F.3d at 1315 (citing *Heckler*, 465 U.S. at 739); *see also, e.g.*, *Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995).

In sum, as the Supreme Court has recently reiterated, "a plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others." *AAPC*, 140 S. Ct. at 2349-50, 2355 (plurality); *see id.* at 2356-57 (Sotomayor, J., concurring in the judgment). Plaintiffs have "alleged that [they are] being denied 'equal treatment under law,' which is 'a judicially cognizable interest that satisfies the case or controversy requirement of Article III.'" *Harrison v. Kernan*, 971 F.3d 1069, 1074 (9th Cir. 2020) (quoting *Davis*, 785 F.3d at 1315).

II. Plaintiffs' injuries are traceable to UOCAVA and UMOVA.

As the Court has correctly recognized, plaintiffs' injury is traceable to both UOCAVA and UMOVA, on the one hand, and Hawaii law, on the other, because federal and state law "bear[] equal responsibility" for depriving plaintiffs of equal access to absentee ballots. *Reeves*, 2021 WL 1602397, at *5. In brief, UOCAVA—pursuant to Congress' robust Election Clause "authority to oversee the states' procedures related to national elections," *Gonzalez v. Arizona*, 677 F.3d 383, 390-91 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013)—requires Hawaii to allow absentee ballots for former state residents residing overseas and in the NMI, but not in territories like Guam and the U.S. Virgin Islands. Federal law is a cause of plaintiffs' injury because it expressly provides for discriminatory treatment, and Hawaii law yields to that federal command, enforcing it against plaintiffs. Hawaii law draws a distinction between former residents living in favored and disfavored Territories only as a result of its incorporation of UOCAVA's requirements, making federal law a but-for cause of this aspect of discrimination.

The federal defendants nonetheless insist that federal law does not cause plaintiffs' injury because it does not prevent Hawaii from extending absentee ballots on equal terms. MTD at 7-9. The government further contends that Hawaii

could "moot" this case by extending the absentee ballot "tomorrow," proving that federal law does not cause plaintiffs' injury.

Those arguments misunderstand the traceability inquiry. Traceability does not require proximate or sole cause. Instead, it means only that "the plaintiff must demonstrate a causal nexus between the defendant's conduct and the injury." *Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016) (citation omitted). Thus, as the Ninth Circuit has explained, "[c]ausation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's conduct comprise the last link in the chain." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014). A primary concern is that the plaintiff's injury be traceable to "the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). And even then, the traceability requirement may be satisfied where "the government's unlawful conduct, while not directly causing [the] injury, nonetheless led third parties to act in a way that injured" the plaintiffs. *Mendia*, 768 F.3d at 1013. For example, the Ninth Circuit has found traceability where plaintiffs' alleged injuries were caused by carbon emissions increased by federal subsidies and leases, even though the causal chain "depends in part on the

independent actions of third parties." *Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020).

Here, it takes no "speculation or guesswork" to conclude that federal law is "at least a substantial factor motivating" plaintiffs' unequal access to absentee ballots. *Mendia*, 768 F.3d at 1013-15. And all the relevant parties are before the Court. By ***not*** taking any independent action except to default to the federal "floor," Hawaii functionally serves as a conduit for federal discrimination; and where the actions of the federal government are at least a substantial factor in producing the outcome, that suffices to establish traceability. That makes sense, because the states are "obligated to conform to and carry out whatever procedures Congress requires," *Gonzalez*, 677 F.3d at 390-91—and no more.

Additionally, the Court must accept at the motion-to-dismiss stage that Hawaii law discriminates ***because*** federal law discriminates—and defendants have not offered any alternative theory. *See, e.g., Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 75-76 (1978) (accepting district court's finding that the harmful "nuclear plants would be neither completed nor operated absent the [challenged] Price-Anderson Act"). The argument that Hawaii ***could*** remedy plaintiffs' injury by taking further action is simply proof of an unremedied injury traceable equally to ***both*** federal and state law. Finally, another way to remedy the equal-protection violation would be to withdraw access to absentee ballots for

other former Hawaii residents (even though such action is not the proper remedial course, *see infra* § III.C.3). But such a remedy would also require nullifying or severing federal law—proving that federal law is a cause of the harm in the first place.

III. Plaintiffs' injuries are redressable.

Plaintiffs' injuries are redressable because the Court, consistent with legislative intent here and a long line of Supreme Court precedent, has the power to sever UOCAVA and Hawaii law to treat former Hawaii residents living in Guam and the U.S. Virgin Islands on equal terms with those former residents living in the NMI and overseas. Plaintiffs' injuries are also independently redressable because withdrawing the right to absentee ballots—the federal defendants' proposed remedy—likewise would cure plaintiffs' unequal treatment.

In fact, the federal defendants recognize this Court's power to sever statutes. *See* MTD at 17 n.5. What they press instead are arguments conflating the remedial question with redressability. For the reasons that follow, plaintiffs' injuries are redressable because (a) the Court has the power to issue a remedy; (b) the Third Amended Complaint properly invokes that power; and (c) the federal defendants' arguments concerning the proper remedy are ultimately immaterial to the issue of standing and in any event lack merit.

A. A court confronting unequal treatment can sever or nullify the challenged laws to require extension of the benefit on equal terms or not at all.

As the Supreme Court recently reiterated, "a plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others." *AAPC*, 140 S. Ct. at 2349-50, 2355 (plurality). Depending on congressional intent, a court may "cure[] unequal treatment by, for example, extending a burden or nullifying a benefit" or by extending that benefit to others. *Id.* at 2354-56 (citing *Morales-Santana*, 137 S. Ct. at 1701). That is because "when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of ***equal*** treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740 (citation omitted). Ultimately, "[t]he choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand"—i.e., "what the legislature would have willed had it been apprised of the constitutional infirmity." *Morales-Santana*, 137 S. Ct. at 1699 (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010)).

B. The Third Amended Complaint establishes redressability.

The Third Amended Complaint establishes redressability and responds to any perceived deficiency identified in the Court's April 23, 2021 order.

1. a. To begin, as the Third Amended Complaint explains, the Court can redress plaintiffs' injury under bedrock severability principles. Depending on legislative intent, the Court can either sever the challenged statutes to require extension of absentee ballots with an even hand to former Hawaii residents residing in all U.S. territories and overseas, or nullify access to absentee ballots altogether. Although extension is the proper course on the merits—as is ordinarily the case with government benefits, *see, e.g.*, *Morales-Santana*, 137 S. Ct. at 1699—"standing doesn't depend on the merits." *Davis*, 785 F.3d at 1316 (cleaned up). The key point is that plaintiffs' injuries are redressable ***either way***. Nullification of a benefit can cure an equal-protection violation "even if that equal treatment would bring no tangible benefit to the party asserting it." *Harrison*, 971 F.3d at 1074 (cleaned up). Indeed, the Supreme Court held that such a nullification remedy was sufficient to confer standing where an express congressional severability clause barred extension in the event of unconstitutionality. *See Heckler*, 465 U.S. at 744-50. Unsurprisingly, given the weight of authority, the federal defendants acknowledge this Court's "authority to enjoin the enforcement or implementation of state or federal legislation that it determines is unconstitutional." MTD at 17 n.5.

b. This point is consistent with this Court's acknowledgment in its April 23 order that it might find redressability if plaintiffs could show how declaratory

relief would lead to plaintiffs' being "treated like citizens who move overseas or to the NMI under UOCAVA, UMOVA, and HAR § 3-177-600." *Reeves*, 2021 WL 1602397, at *6. The Third Amended Complaint illustrates precisely how declaratory and injunctive relief could sever the challenged statutes to require federal and state law and officials to treat plaintiffs equally. And the Court has the power to sever those laws, as the federal defendants concede. MTD at 17 n.5. As explained below, severability is a question of discerning legislative intent, not a "power to expand the existing laws." *Reeves*, 2021 WL 1602397, at *7.

Specifically, the Third Amended Complaint asks the Court to strike "the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa" from the definition of "United States" in 52 U.S.C. § 20310(8) and "Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States" from the definition of "United States" in H.R.S. § 15D-2, and to order those provisions unenforceable (by declaration and injunction). Those definitions are used to distinguish who lives "outside the United States" (and is therefore entitled to absentee ballots) and who lives inside the United States (and who therefore, under the statutes, is not entitled to absentee ballots).

That request falls squarely within this Court's authority to remedy an equal-protection violation. Where a provision of law is found to be unconstitutional, a

court's "power … to partially invalidate [the] statute … has been firmly established since *Marbury v. Madison*." *AAPC*, 140 S. Ct. at 2350 (plurality). Indeed, under longstanding Supreme Court precedent, a court has the power to engage in "surgical severance" of a statute to avoid "wholesale destruction." *Id.* at 2350-51 (discussing cases). As the Ninth Circuit has expressly recognized, when a portion of a statute is held to be unconstitutional, "severance is the remedy that must be applied when it is possible to do so." *United States v. Rundo*, 990 F.3d 709, 720 (9th Cir. 2021).

The question of how to sever the statute—and whether severance is feasible—is a question of following, not usurping, legislative intent. The Court asks what the legislature would have desired had it been apprised of the constitutional infirmity. *See AAPC*, 140 S. Ct. at 2343, 2350, 2353-54 (plurality); *Morales-Santana*, 137 S. Ct. at 1699 (discussing multiple Supreme Court cases extending benefits). As the Ninth Circuit has explained, legislative intent may permit "severing small portions of the statutory language—even words or phrases." *Rundo*, 990 F.3d at 720 (citing Ninth Circuit cases in which severance was applied). In other words, the remedy does not require or amount to an improper amendment of a statute, and it does not require any order of the Court instructing any legislature to pass or repeal any law.

Here, the Court's well-established power to sever or nullify unconstitutional statutory provisions, as requested in the Third Amended Complaint, makes plaintiffs' injuries redressable and establishes standing. And as explained below, severance resulting in equal extension of absentee ballots to plaintiffs and similarly situated individuals is the proper course because it honors congressional commitment to UOCAVA's purpose while striking the offending provision. *See infra* § III.C.3.

2. a. To the extent the Court reasoned that declaratory relief would not redress plaintiffs' injuries, *see Reeves*, 2021 WL 1602397, at *6 (citing *Juliana*, 947 F.3d at 1170), plaintiffs respectfully submit that Supreme Court caselaw says otherwise. Declaring the challenged laws unconstitutional and severing them would for all intents and purposes require federal and state officials to enforce those laws with an even hand. As the Supreme Court has explained, redressability requires only "a 'substantial likelihood' that the relief requested will redress the injury," *Duke Power*, 438 U.S. at 75 n.20, and an injury "is likely to be redressed by declaratory relief" against government officials because courts "may assume it is substantially likely" that those "officials would abide by an authoritative interpretation" from a court, *Franklin*, 505 U.S. at 803; *see also Steffel v. Thompson*, 415 U.S. 452, 470-71 (1974) (officials are likely to yield to declaratory judgment).

Juliana does not hold otherwise. There, the Ninth Circuit held that alleged harms from carbon emissions were not redressable because even an injunction would "not, according to [plaintiffs'] own experts' opinions, suffice to stop catastrophic climate change or even ameliorate their injuries." 947 F.3d at 1170.

b. Regardless, plaintiffs do not request only declaratory relief. They also ask the Court to sever the provisions of UOCAVA and Hawaii law that fail to extend absentee ballots to plaintiffs on equal terms and to require enforcement of those laws shorn of their unconstitutional infirmities.

The Court also has the power to enforce a declaration of unconstitutionality and any severance or nullification remedy by injunction. *See, e.g.*, *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 575 (9th Cir. 1980) (noting that 28 U.S.C. § 2202 authorizes district courts to grant injunctive relief to enforce declaratory judgments). Contrary to defendants' claim that plaintiffs request an order that would compel officials to accept ballots and defendants to expand voting rights, the Third Amended Complaint simply asks for an order enjoining defendants from enforcing the laws at issue "in a manner that violates" plaintiffs' equal-protection rights "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." TAC, Prayer For Relief ¶ b.

In other words, plaintiffs ask the Court to declare that UOCAVA, UMOVA, and H.A.R. § 3-177-600 violate the Constitution's equal-protection guarantee, to sever the statutes to remedy those violations, and to grant injunctive relief requiring enforcement of the statutes as severed. As explained above, that request does not entail any order to enact or amend legislation, or any freestanding order imposing affirmative obligations outside of those imposed by the statutes themselves, shorn of their constitutional infirmities. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1700-01 (equal-protection violation required Supreme Court to "adopt the remedial course Congress likely would have chosen 'had it been apprised of the constitutional infirmity'" and requiring equal enforcement "prospectively," even though Congress could revisit the issue (citation omitted)).

C. The federal defendants' renewed argument lacks merit and the Court should again reject it.

The federal defendants also argue that plaintiffs' claims are not redressable because redressability turns on "an additional remedial question," i.e., whether the "unconstitutional disparate treatment [should] 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." MTD at 11. As the federal defendants concede, "the Court previously declined to adopt this argument." *Id.* at 13. Correctly so. Their argument fails for several reasons.

1. For starters, the question of the appropriate remedy is a merits question. "But Article III standing in no way depends on the merits," *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1109 (9th Cir. 2014) (cleaned up); *accord Davis*, 785 F.3d at 1316, and the Court "must assume that the party asserting federal jurisdiction is correct on the legal merits of his claim, that a decision on the merits would be favorable and that the requested relief would be granted," *Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1179-80 (D.C. Cir. 2015) (cleaned up). Indeed, the Supreme Court has repeatedly cautioned that "standing does not depend on the merits of a claim," *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011) (cleaned up), warning courts and litigants not to "confuse [perceived] weakness on the merits with absence of Article III standing," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) (cleaned up).

Here plaintiffs have asked the Court to declare that UOCAVA and Hawaii law violate the Constitution's equal-protection guarantee, to sever the statutes to treat plaintiffs and other former Hawaii residents equally, and to require defendants to enforce the statutes as severed. For purposes of the redressability analysis, the Court must assume that plaintiffs' claim is meritorious and that such relief would be granted.

2. In addition, plaintiffs' injuries are redressable regardless of the proper remedy on the merits. As the Court correctly recognized, "disparate treatment is Plaintiffs' central allegation," and it "allege[s] an injury in fact for standing purposes." *Reeves*, 2021 WL 1602397, at *3-4. And as the Supreme Court has recently reiterated, "the appropriate remedy" for such a plaintiff "is a mandate of ***equal*** treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Morales-Santana*, 137 S. Ct. at 1698 (cleaned up); *Heckler*, 465 U.S. at 740. The upshot is that "a plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others." *AAPC*, 140 S. Ct. at 2349-50, 2355 (plurality). That is so even if, depending on the remedial course, the challenger "might gain nothing from his success" in court beyond equal treatment. *Orr v. Orr*, 440 U.S. 268, 272 (1979); *accord AAPC*, 140 S. Ct. at 2355 (plurality).

For example, the plaintiffs in *AAPC* had standing to challenge a provision of the Telephone Consumer Protection Act granting favorable treatment only to government-debt collectors (which they were not)—even though the proper remedy was severance eliminating that favorable treatment rather than extending it to the plaintiffs (or nullifying the entire statutory scheme and the burdens it imposed on the plaintiffs). 140 S. Ct. at 2343-44, 2355-56 (plurality). And in *Morales-Santana*, the Supreme Court found no standing or redressability problem

in concluding, under the unique facts before it, that the proper remedy was to contract rather than expand the right at issue, leaving the challenger without his desired remedy. *See* 137 S. Ct. at 1700-01.

The Supreme Court's approach to discriminatory state-law regimes is similarly instructive. The question remains how "to implement what the legislature would have willed had it been apprised of the constitutional infirmity," and "[t]he relief the complaining party requests does not circumscribe this inquiry." *Levin*, 560 U.S. at 427. Given comity concerns flowing from "the State's legislative prerogative," the Supreme Court "generally remands the case" after review of a state-court decision, "leaving the remedial choice in the hands of state authorities." *Id.* (citing, among other decisions, *Orr*, 440 U.S. at 283-84). That means that "the interim solution [is] in state-court hands, subject to subsequent definitive disposition by the State's legislature." *Id.* at 428. Yet despite "hav[ing] no way of knowing how the State will in fact respond" to a challenge "to underinclusive statutes," the Supreme Court "ha[s] not denied a plaintiff standing on this ground." *Orr*, 440 U.S. at 272.

Here, plaintiffs are injured by their inability to access absentee ballots on equal terms. Just as in *Heckler*, *AAPC*, and *Morales-Santana*, a mandate of equal treatment would remedy their injuries. For that reason alone—because withdrawal of benefits by itself could remedy their injuries, just as in *Heckler*—plaintiffs'

injuries are redressable ***even if*** the federal defendants are right about the proper remedy on the merits. Stated another way, even if "success here will not ultimately bring" plaintiffs their desired relief, *Orr*, 440 U.S. at 272, UOCAVA and UMOVA are no different than all the other underinclusive statutes the Supreme Court has found plaintiffs have standing to challenge. Indeed, the federal defendants rely on decisions ***issuing*** remedies—albeit less than what the plaintiffs desired—to argue that plaintiffs here lack standing. Of course, if the reasoning in those decisions precluded standing, the courts involved could never have issued relief of any kind because "Article III jurisdiction is always an antecedent question." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). The Court should therefore reject the federal defendants' invitation to pre-decide merits issues pertaining to remedy.

3. In any event, and for full context, the proper remedy in this voting-rights case is to sever statutory language in a manner that expands the right to vote, not to narrow or invalidate absentee voting rights. As noted above, when a court is faced with an unconstitutional statute, it must sever the offending portions if possible, and do so in a way that furthers legislative intent. *See, e.g.*, *AAPC*, 140 S. Ct. at 2343, 2353-54 (plurality) (severing government-debt exception to the Telephone Consumer Protection Act's robocall restriction regime where "seven Members of the Court" "[a]ppl[ied] traditional severability principles" to conclude

that the unconstitutional government-debt collection exception "must be invalidated and severed from the remainder of the statute").

In fact, expansion is the default rule, as the Supreme Court expressly recognized in *Morales-Santana*. 137 S. Ct. at 1701; *see also AAPC*, 140 S. Ct. at 2354 (plurality) ("The Court's precedents reflect that preference for extension rather than nullification."). In a long line of cases addressing entitlement to public benefits, the Court has ordered those benefits be extended to the disfavored group, rather than stripped from the favored group. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89, 93 (1979) (stating that "this Court has suggested that extension, rather than nullification, is the proper course" and affirming "the simplest and most equitable extension possible"); *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974) (remanding case to allow previously disfavored group "to establish … eligibility … under the Social Security Act"); *Frontiero v. Richardson*, 411 U.S. 677, 691 n.25 (1973) (invalidating statute that "require[d] a female [service] member to prove the dependency of her spouse" to obtain benefits for him). Defendants have not pointed to a single equal-protection case involving voting rights where the remedy was to contract rather than expand those rights. In effect, they are asking this Court to be the first.

The Court should decline that invitation. Every relevant consideration militates in favor of applying the default rule here and extending favorable

treatment to plaintiffs who challenge unconstitutional discrimination. Absent an express severability clause (and there is no such clause here), "a court should measure the intensity of commitment to the residual policy—the main rule, not the exception—and consider the degree of potential disruption of the statutory scheme that would occur by extension [of the benefit] as opposed to abrogation [of the statute]." *Morales-Santana*, 137 S. Ct. at 1700 (cleaned up). And here, the main rule is access to absentee ballots. *See* 52 U.S.C. § 20302(a)(1) ("Each State shall—(1) permit … overseas voters to use absentee registration procedures and to vote by absentee ballot …."). The stated legislative intent of UOCAVA was to expand voting rights to reduce the unfairness inherent in allowing some former state residents, but not others, to vote. Expanding suffrage to those who move to the currently disfavored Territories is consistent with that purpose, whereas denying it to residents of favored Territories and foreign countries is not. (And contrary to the federal defendants' suggestion, MTD at 11, abrogation would mean withdrawing the ballot from former Hawaii residents overseas, not just those in the NMI.) Here, it is only the discrete group of former Hawaii residents who move to four disfavored Territories that are denied protection of their right to vote. They are the exception, making this situation precisely the type of circumstance in which the Court has "reiterated" that "extension, rather than nullification, is the proper course." *Morales-Santana*, 137 S. Ct. at 1699 (citation omitted).

Beyond all that, the right to vote (unlike the rights to public benefits at issue in the cases above) is "fundamental" because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "The right to vote is foundational in our democratic system." *Davis v. Guam*, 932 F.3d 822, 830 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2739 (2020). Thus, as a general matter, statutes that expand voting rights are considered to be remedial in nature and are to be "liberally construed to effectuate [their] purpose." 3B *Sutherland Statutory Construction* § 73:8 (8th ed.). That general purpose is consistent with the residual policy of UOCAVA and UMOVA.

4. Finally, the federal defendants' arguments are internally inconsistent. If abrogation is the proper remedy, then the unequal treatment is clearly ***traceable*** to federal law—the Court cannot sever Hawaii law to remove access to absentee ballots across the board given that UOCAVA requires absentee ballots for former Hawaii residents living in the NMI and overseas. By the same logic, of course, plaintiffs' disparate treatment injuries are redressable by declaratory and injunctive relief severing or abrogating UOCAVA and UMOVA.

* * *

The Supreme Court "has squarely held that a plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others." *AAPC*, 140 S. Ct. at 2355 (plurality); *see id.* at 2343 ("Six Members of the Court"

agreeing that challengers should prevail on merits and "seven Members" "[a]pplying traditional severability principles"). The same goes for plaintiffs here.

CONCLUSION

Plaintiffs respectfully request that the Court deny the federal defendants' motion to dismiss and the partial joinders by state and local defendants.

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Respectfully submitted,

/s/*Anthony "T.J." Quan*

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