BRIAN M. BOYNTON
Acting Assistant Attorney General

JUDITH A. PHILIPS
Acting United States Attorney
District of Hawaii

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

STEPHEN M. PEZZI
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Phone: (202) 305-8576
Fax: (202) 616-8470
Email: stephen.pezzi@usdoj.gov

DANA A. BARBATA #9112
Assistant U.S. Attorney
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
Phone: (808) 541-2850
Fax: (808) 541-3752
Email: Dana.Barbata@usdoj.gov

Attorneys for Federal Defendants 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

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' REPLY IN SUPPORT OF SECOND MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION Hearing Date: August 13, 2021 Time: 9:00 a.m. Judge: Honorable Jill A. Otake

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

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INTRODUCTION

A few months ago, faced with a nearly identical complaint, this Court held that "Plaintiffs have not established the redressability element of standing," and dismissed the Second Amended Complaint in its entirety. *Reeves v. Nago*, Civil No. 20-00433 JAO-RT, --- F. Supp. 3d ----, 2021 WL 1602397, at *8 (D. Haw. Apr. 23, 2021). So the Court need only decide whether Plaintiffs' Third Amended Complaint cures the standing defects in their Second Amended Complaint.

It does not, and could not—all of the standing problems in this case go to fundamental questions about the judicial power under Article III of the U.S. Constitution, or the undisputed interactions (or lack thereof) between state and federal election laws. To resolve those threshold legal questions of Article III standing, the precise language in Plaintiffs' prayer for relief is largely irrelevant—Plaintiffs cannot expand this Court's power or alter federal law by wordsmithing their pleadings. Instead, what matters is that in the Third Amended Complaint, Plaintiffs ultimately seek the same result they sought in their prior three complaints: to vote in federal elections in Hawaii by absentee ballot, even though UOCAVA does not require that result, and Hawaii law forbids it. And so, because Plaintiffs' injuries are neither traceable to UOCAVA, nor likely to be redressed by a favorable decision, all of Plaintiffs' claims should be dismissed for lack of Article III standing—just like they were in April.

ARGUMENT

I. Plaintiffs' injuries are not traceable to UOCAVA.

"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.* If UOCAVA were repealed, Plaintiffs would remain ineligible to vote absentee in Hawaii elections, because of Hawaii law. Likewise, if Hawaii decided to provide absentee voting rights to Plaintiffs, this case would be moot, without the need for any changes to UOCAVA. So UOCAVA cannot be the cause of their injuries.

a. In an effort to solve their traceability problem, Plaintiffs argue that the relevant injury in this "'equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.'" Pls.' Opp'n to Federal Defs.' Second Mot. to Dismiss 9, ECF No. 121 ("Pls.' Opp'n") (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)); *see also* Hawaii's Partial Opp'n to Federal Defs.' Second Mot. to Dismiss 4, ECF No. 122 ("Hawaii Partial Opp'n"). Federal Defendants agree that, if UOCAVA actually imposed a "barrier" to Plaintiffs voting absentee in Hawaii, then their alleged disparate-treatment injury might be traceable to UOCAVA.

But in fact, UOCAVA is *not* a barrier to Plaintiffs voting absentee in federal elections in Hawaii—the only barrier is Hawaii law. Hawaii has explicitly conceded as much. *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."). So the "barrier" principle at work in cases like *City of Jacksonville* confirms only that Plaintiffs' alleged injuries—even if defined as a "denial of equal treatment," 508 U.S. at 666, in the abstract, *but see infra*, Section I(b)—are traceable to the source of the only actual "barrier," which is Hawaii law.

For similar reasons, Federal Defendants do not dispute that "there's no requirement that the defendant's conduct comprise the last link" in the causal chain. Pls.' Opp'n 11 (quotation omitted). But UOCAVA is not a necessary link in the causal chain *at all*, which is why if Hawaii changed its election laws to provide Plaintiffs voting rights—as all agree it could—UOCAVA would be no obstacle to Plaintiffs voting absentee in Hawaii. Likewise, if UOCAVA were repealed, Plaintiffs' absentee voting rights would be unchanged. The problem is not that causation is insufficiently "proximate," Pls.' Opp'n 11, it is that UOCAVA does not cause Plaintiffs' injuries *at all*, *see Segovia*, 880 F.3d at 387.

Plaintiffs also assert that "Hawaii law draws a distinction between former residents living in favored and disfavored Territories only" because of UOCAVA, which makes "federal law a but-for cause of this aspect of discrimination." Pls.' Opp'n 10. But that position cannot be squared with Hawaii's (unavoidable) concession that UOCAVA would not prohibit Hawaii from allowing Plaintiffs to vote absentee. Hawaii has made an independent (and rational) legislative judgment not to extend voting rights to these Plaintiffs, but that outcome is not required by UOCAVA. Nor would UOCAVA prohibit Hawaii from providing those rights now. In any event, the relevant question is not whether the words printed in the text of UOCAVA are a "but-for cause of . . . discrimination" in some abstract sense, it is whether UOCAVA is a but-for cause of Plaintiffs' Article III *injuries*. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (requiring "an injury in fact . . . that is fairly traceable to the challenged conduct of the defendant"). It is not.[1]

b. The other parties try to recast Plaintiffs' injuries as "unequal treatment" in the abstract, as distinct from their inability to vote. *See* Pls.' Opp'n 8-9; Hawaii Partial Opp'n 3-4. Presumably, that is because if Plaintiffs were injured solely by the words in the U.S. Code—*i.e.*, the definition of "United States" in 52 U.S.C.

[1] Plaintiffs are wrong to say that "the Court must accept" their causation theory just because this is "the motion-to-dismiss stage." Pls.' Opp'n 12. Legal conclusions are not entitled to the presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In any event, this allegation is implausible in light of Hawaii's concessions. *See* Hr'g Tr. at 19:8-10, 21:4-8.

§ 20310(8)—then it would be easier to argue that Plaintiffs' injuries are traceable to UOCAVA (or that they are redressable, *but see infra* Section II). This effort fails.

For one, even Plaintiffs repeatedly describe their injuries as stemming directly from the denial of the right to vote. Plaintiffs claim that they "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." Pls.' Opp'n 8 (emphasis added). And they say "[t]heir injury is the denial of equal access *to the vote*." *Id.* (emphasis added); *see also id.* at 7 ("[P]laintiffs 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.") (emphasis added). Plaintiffs' own descriptions of their injuries cannot be squared with the idea that the relevant injury is "unequal treatment" in the abstract, which somehow may be analyzed distinctly from their "concrete injury of lack of access to absentee ballots." *Id.* at 7.

For the first time, Plaintiffs now rely heavily on a line of cases about stigmatic injuries, most clearly expressed by *Heckler v. Mathews*, 465 U.S. 728 (1984), in which "discrimination itself" was enough for Article III injury:

> [D]iscrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

Id. at 739-40 (citation omitted) (cited in *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015), in turn cited in *Harrison v. Kernan*, 971 F.3d 1069 (9th Cir. 2020)). But those allegations find no analogue here. As explained before, Plaintiffs have never pleaded such an injury (nor could they). *See* Reply Mem. in Supp. of Mot. to Dismiss 9, ECF No. 88 ("First MTD Reply") ("There are no allegations here, for example, that UOCAVA 'generates a feeling of inferiority as to [Plaintiffs'] status in the community that may affect [children's] hearts and minds in a way unlikely ever to be undone.' *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).").

Defendants also noted that "when UOCAVA was enacted, it treated all inhabited territories *identically*, and the mere fact that Congress did not later recalibrate the statute's definitions section upon finalization of the United States's covenant with the CNMI carries no stigma or sanction, nor any badge of inferiority." *Id.* All UOCAVA says is that Plaintiffs' home territories are *included* in the "United States." 52 U.S.C. § 20310(8). That is not a message that Plaintiffs are "innately inferior," or belong to a "disfavored group," *Heckler*, 465 U.S. at 739-40. So "unlike the appellee in *Heckler v. Mathews*, [Plaintiffs] do not allege a stigmatic injury" at all, *Allen v. Wright*, 468 U.S. 737, 755 (1984), and cannot solve their standing problems by recasting their injuries as "unequal treatment" alone—divorced from their "concrete injury of lack of access to absentee ballots," Pls.' Opp'n 7.

Even if Plaintiffs had tried to plead a "stigmatic injury," that would still "require[] identification of some concrete interest with respect to which [they] are personally subject to discriminatory treatment," *and* "[t]hat interest must independently satisfy the causation requirement of standing doctrine." *Allen*, 468 U.S. at 757 n.22 (distinguishing *Heckler*, 465 U.S. at 728); *see also, e.g.*, *Alamo v. Clay*, 137 F.3d 1366, 1370 (D.C. Cir. 1998) (assertions of stigma insufficient when plaintiffs fail to allege "any detrimental consequences" from the stigma). So in the end, Plaintiffs either must show causation (and standing generally) based on their actual inability to vote absentee, or not at all.

* * *

In sum, "plaintiffs lack standing to challenge the federal UOCAVA because their injury derives not from the federal statute, but from the failure of [Hawaii] law to guarantee them absentee ballots." *Segovia*, 880 F.3d at 392.

II. Plaintiffs' injuries are not redressable by a favorable decision.

Plaintiffs also lack standing to challenge UOCAVA because it is not "likely, as opposed to merely speculative, that the[ir] injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quotations omitted). That is because, even if Plaintiffs were to prevail on the merits, the appropriate remedy would be to treat the Commonwealth of the Northern Mariana Islands (CNMI) as UOCAVA already treats all other inhabited U.S. territories—because that is "the remedial course

Congress likely would have chosen had it been apprised of [any] constitutional infirmity." *Sessions v. Morales-Santana*, 137 S. Ct. 1679, 1701 (2017) (citation omitted). And although Plaintiffs "may derive great comfort and joy" from an opinion saying UOCAVA is unconstitutional, "that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

a. Federal Defendants anticipated that Plaintiffs might try to solve their redressability problem by suggesting that the Third Amended Complaint not only challenges favorable treatment for former Hawaii residents living in the CNMI, "but also for those living in foreign countries." Fed. Defs.' Second Mot. to Dismiss 11-12, ECF No. 107 ("Second MTD") (citing Third Am. Compl., Prayer for Relief ¶ (b)). Federal Defendants thus explained why "Plaintiffs cannot, by artful pleading, vaguely gesture at new (and plainly meritless) theories solely to sidestep a conclusion that the Court lacks subject-matter jurisdiction." Second MTD at 12 (footnote omitted). And Federal Defendants noted that Ninth Circuit precedent is inconsistent with such a theory, Second MTD at 12 n.4 (citing *Att'y Gen. of Territory of Guam v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984)).

Plaintiffs entirely ignored this point in their opposition brief—with the exception of one conclusory, parenthetical remark, which includes no citation or

explanation. *See* Pls.' Opp'n 26. But "bare assertions without more, will not preserve an argument for review[.]" *Young v. Hawaii*, 992 F.3d 765, 781 (9th Cir. 2021). So the Court need only ask whether Congress, if it were aware of any constitutional infirmity, would have preferred to treat the CNMI how it treated all the other then-existing *territories* (not other countries). And it is undisputed "that UOCAVA was enacted prior to the NMI officially joining the United States and so the NMI's exclusion from the definitions is likely the result of happenstance." *Reeves*, 2021 WL 1602397, at *1 n.3. So "instead of extending voting rights to all the territories, the proper remedy would be to extend them to none of the territories," which "means a holding that the UOCAVA violates equal protection would not remedy the plaintiffs' injuries." *Segovia*, 880 F.3d at 389 n.1.

b. Plaintiffs suggest that this argument improperly commingles standing and the merits. *See* Pls.' Opp'n 21. Not so. Federal Defendants' redressability argument *assumes* (for purposes of argument) that Plaintiffs will prevail on the merits—even though every court who has ever considered such a claim has rejected it. And redressability analysis often requires consideration of available remedies—distinct from the merits—to decide whether an injury "is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. A leading treatise agrees: "standing may be denied if the court . . . concludes that the only remedy would hurt others without helping the plaintiff[.]" Wright & Miller, 13A Fed. Practice & Procedure

§ 3531.6 (3d ed.); *see also id.* ("[S]tanding may be denied at the outset of litigation as a matter of an imperfect remedial prediction made without the benefit of a full record."). So has the Ninth Circuit. *See Regents of Univ. of Cal. v. Shalala*, 82 F.3d 291, 298 (9th Cir. 1996) (no redressability in challenge to exception benefiting others, because "[a] decision . . . that the Secretary could no longer permit religiously affiliated providers to [use] the exception would not benefit" plaintiff).

c. Plaintiffs spend considerable time supporting the (undisputed) proposition that a court may conduct a severability analysis, *see* Pls.' Opp'n 15-18, but severability and redressability are distinct doctrines. So despite Plaintiffs' heavy reliance on Justice Kavanaugh's opinion (for three justices) in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), severability is not the question. And if *AAPC* has any relevance, the (equally non-binding) opinion from Justice Gorsuch (for two justices) cuts sharply the other direction. *See id.* at 2366 ("It isn't even clear the plaintiffs would have standing to challenge the government-debt exception. . . . What is the point of fighting this long battle . . . if the prize for winning is no relief at all?"). *AAPC* does not resolve this case. *See* Fed. Defs.' Mem. in Supp. of Mot. to Dismiss 23 n.6, ECF No. 75 ("First MTD").

d. Plaintiffs are correct that some analogous plaintiffs have lost on the merits, including in prior challenges to UOCAVA. *See* Pls.' Opp'n at 22-24. But where "standing was neither challenged nor discussed," the Supreme Court has "repeatedly

held that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *see also* First MTD Reply at 5-6. That is also why Plaintiffs' vote-counting in *AAPC*, Pls.' Opp'n 27-28—including the votes of several justices who did not address standing—is to no avail.

e. Plaintiffs contend that Federal Defendants' traceability and redressability arguments are "internally inconsistent." Pls.' Opp'n 27. In fact, they are routine arguments in the alternative: although Federal Defendants believe that Plaintiffs' injuries are not traceable to UOCAVA (which would require dismissal before any consideration of redressability), if the Court disagrees, then those injuries are still not redressable by a favorable decision with respect to UOCAVA, for the reasons above. There is no inconsistency between those independent, alternative arguments.

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). On that basis, the Court dismissed Plaintiffs' previous complaint for lack of jurisdiction, concluding that it was "without the power" to "grant Plaintiffs (and those similarly situated) absentee voting rights" given that those rights "do not currently exist." *Reeves*, 2021 WL 1602397, at *7-8. The scope of this Court's power has not changed since April. Nor have the existing

rights that are granted (or not) by federal or state voting laws. So the Court's prior conclusions about its remedial powers apply equally to the latest complaint.

Although Federal Defendants have advocated for a narrower theory, *see* Second MTD at 17 n.5, many of Plaintiffs' criticisms of the Court's prior opinion are meritless, and their brief reads more like a motion to reconsider—rather than any reason to conclude that their fourth complaint materially differs from their third.

a. Declaratory Relief. As the Court correctly explained in its prior opinion, "a declaration that the [challenged] laws are unconstitutional would not enable Plaintiffs to vote absentee," absent further court action. *Reeves*, 2021 WL 1602397, at *6. "And 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.

Plaintiffs' arguments in opposition lack merit. To start, they misread the relevant passage from *Juliana v. United States*, *see* Pls.' Opp'n 19, which was accurately cited by the Court. *See Reeves*, 2021 WL 1602397, at *6 (citing 947 F.3d 1159, 1170 (9th Cir. 2020), introduced by a "see, e.g.," signal). In *Juliana*, the Ninth Circuit first considered whether a declaration would redress plaintiffs' injuries, and then separately considered an injunction—exactly how this Court approached the issue. *Compare Reeves*, 2021 WL 1602397, at *6-7, *with Juliana*, 947 F.3d at 1170. The Ninth Circuit held that "[a] declaration, although undoubtedly likely to benefit

the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action." *Juliana*, 947 F.3d at 1170. So although Plaintiffs are correct (at 19) that the Ninth Circuit also identified *another* redressability problem with those plaintiffs' requests for injunctive relief, *Juliana*, 947 F.3d at 1170, that does not displace the Ninth Circuit's prior holding regarding declaratory relief.

Plaintiffs rely heavily on *Franklin v. Massachusetts*, but appear not to realize that the (brief) discussion of redressability on which they stake nearly their entire argument is not from a majority opinion. *See* 505 U.S. 788 (1992). Justice Scalia, who provided the fifth vote joining (the rest of) the plurality's analysis, wrote separately to *disagree* with the loose conception of redressability-by-declaration that Plaintiffs advance now. As he explained, "[r]edressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Id.* at 825 (Scalia, J., concurring in part and concurring in the judgment).[2]

This Court reached a similar conclusion in April: "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,

[2] Even on its own terms, the *Franklin* plurality's redressability conclusion relies on a concession from counsel about the likely effectiveness of a declaratory judgment under the circumstances of that case. *See Franklin*, 505 U.S. at 803 (opinion of O'Connor, J.). No defendant has made any analogous concession here.

without more, will not require Defendants to redress Plaintiffs' claimed injuries." *Reeves*, 2021 WL 1602397, at *6. And so did a *majority* of the Supreme Court, which, last month, in dismissing for lack of standing, explained that "a declaratory judgment . . . is the very kind of relief that cannot alone supply jurisdiction otherwise absent." *California v. Texas*, 141 S. Ct. 2104, 2116 (2021). So this Court was right.

b. Injunctive Relief. As for injunctive relief, 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." *Reeves*, 2021 WL 1602397, at *7. Phrasing tweaks to Plaintiffs' pleadings cannot expand this Court's Article III power—either the Court has the authority, or not.

Curiously, although this was the basis for the prior dismissal order, Plaintiffs barely engage on this question, instead repeatedly suggesting that Federal Defendants have "conceded" this (jurisdictional) point, and offering the conclusory statement (followed by no citation) that "the remedy" they seek "does not require or amount to an improper amendment of a statute[.]" Pls.' Opp'n 17. Indeed, as with *Segovia*, the Ninth Circuit's opinion in *M.S. v. Brown* does not appear once in Plaintiffs' brief, despite the Court's prior orders addressing it in detail, and the warning that "conclusory assertion[s]" about the Court's remedial authority or "simply distinguishing *M.S.* will not suffice." *Reeves*, 2021 WL 1602397 at *8 n.19. Plaintiffs did even less—they do not even acknowledge the existence of *M.S.*

In any event, Article III courts always "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). And the State and Local Defendants continue to argue vigorously that the Court's prior holding about the scope of its authority was entirely correct. *See* ECF Nos. 98, 99, 100, 109, 110, 122, 123. So unless the Court dismisses on other grounds, it must address this issue again.

Federal Defendants continue to believe that the Court should avoid broad pronouncements that are "vulnerable to being misconstrued" as to whether courts "*generally* lack[] the authority to enjoin the enforcement or implementation" of unconstitutional laws. Second MTD at 17 n.5 (emphasis added). But the Court need not issue any such pronouncements to dismiss again for lack of standing (including on redressability grounds). *See id.* And Hawaii argues that it is the Federal Defendants who have misconstrued the breadth of the Court's prior holding, such that the concerns expressed in footnote 5 of Federal Defendants' motion to dismiss may be unfounded. *See* Hawaii Partial Opp'n 6. If so, there is no obstacle to the Court dismissing again for lack of standing, including based on the prior opinion.

CONCLUSION

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

Dated: July 30, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

JUDITH A. PHILIPS
Acting United States Attorney
District of Hawaii

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

/s/ *Stephen M. Pezzi*
STEPHEN M. PEZZI
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Phone: (202) 305-8576
Fax: (202) 616-8470
Email: stephen.pezzi@usdoj.gov

DANA A. BARBATA #9112
Assistant U.S. Attorney
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
Phone: (808) 541-2850
Fax: (808) 541-3752
Email: Dana.Barbata@usdoj.gov

Attorneys for the Federal Defendants