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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,

CIVIL NO. 20-00433 JAO-RT

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

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

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

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 MEMORANDUM IN PARTIAL OPPOSITION TO THE FEDERAL DEFENDANTS' SECOND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISIDCTION [ECF #107]

Plaintiffs' Third Amended Complaint ("TAC") suffers from the same standing defect as the Second Amended Complaint ("SAC") and should similarly be dismissed. The Federal Defendants correctly note that "without the need to revisit any of its prior holdings, the Court could easily resolve this case by application of its prior opinion, in which the Court concluded that 'Plaintiffs have not established the redressability element of standing.'" ECF #107, p. 14. Doing so would resolve the case in the Defendants' favor. The Federal Defendants

nevertheless seek to revisit: (1) the Court's prior holding that under either theory of disparate treatment, "Plaintiffs have sufficiently alleged an injury in fact for standing purposes[;]" and (2) the Court's reasoning for finding that redressability is lacking. For the reasons discussed below, the Court should decline to do so.

A. Plaintiffs' Injuries are Traceable to UOCAVA and the Federal Defendants

In its April 23, 2021 Order Granting Federal Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction, the Court opined in relevant part:

> Plaintiffs' equal protection claim appears to be based on two theories: (1) disparate treatment between residents of territories and residents living overseas and in the NMI and (2) disparate treatment between territories. Under either theory, Plaintiffs have sufficiently alleged an injury in fact for standing purposes.
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> . . .
>
> Hawai'i law alone may prevent Plaintiffs from *voting* absentee, but it is not the exclusive source of the identified *disparate treatment*. UOCAVA bears equal responsibility for that purported injury. Accordingly, Plaintiffs' asserted injuries are traceable to UOCAVA and the Federal Defendants.

ECF #102, pp. 11, 14.

The Federal Defendants contend that "the Court erred in allowing Plaintiffs to conflate their inability to vote absentee – an undisputed Article III injury . . . with some separate, abstract harm of 'disparate treatment[,]'" and urge the Court to

find that the injury in fact is Plaintiffs' inability to vote, not disparate treatment. ECF #107, pp. 9-10. The apparent objective being that if the Court agrees that the inability to vote is Plaintiffs' injury in fact, then the Court will necessarily find that traceability is lacking with respect to UOCAVA and the Federal Defendants because it previously held that Hawaii law alone prevents Plaintiffs from voting absentee. The Federal Defendants' argument fails for three reasons.

First, the Court must accept as true the factual allegations set forth in the TAC, not what the Federal Defendants believe should have been asserted. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, [the court] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."). Just as with the SAC, Plaintiffs clearly assert a disparate treatment injury in the TAC:

> 6. The federal and state laws at issue violate the fundamental guarantee of equal protection with respect to voting rights. Congress selectively extended the franchise to only some disenfranchised U.S. citizens residing outside the States, while denying it to others who are similarly situated. Under UOCAVA, States are required to allow former state citizens residing outside the United States or in the [Northern Mariana Islands] to vote on an absentee basis in federal elections. But under the same law, States are free to deny that right to similarly situated persons residing in the other U.S. Territories overseas.

. . .

> 12. Plaintiffs are individuals who are injured by virtue of the Defendants' disparate treatment of former state residents residing in the Territories and overseas, along with Equally American.

ECF #105, pp. 4-5, 7 (emphasis added).

That Plaintiffs seek the right to vote absentee as a *remedy* for the alleged disparate treatment[1] does not mean that Plaintiffs' "real" injury is their inability to vote. The relief sought does not dictate what injury can be alleged, let alone what has actually been alleged. This is especially true where, as in this case, there is a "clearly articulated" equal protection claim based on alleged disparate treatment. *See* ECF #102, p. 9.

Second, in equal protection cases such as this one, the "injury in fact" is the "denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit."[2] *Northeastern Florida Chapter of*

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[1] *See id*., ¶13 ("Plaintiffs seek a declaration and injunction requiring the Defendants to enforce the provisions of UOCAVA and UMOVA with an even hand, extending absentee voting privileges to former Hawaii residents living in Puerto Rico, Guam the U.S. Virgin Islands, and American Samoa on the same terms as to former Hawaii residents living in foreign counties and NMI.").

[2] It should be noted that the Chief Election Officer does not agree that UMOVA and HAR § 3-122-600 are barriers because Plaintiffs cannot be prevented from doing something that they do not have the right to do in the first place. *See* ECF #98, pp. 4-5. Plaintiffs, however, allege that Hawaii law prevents Plaintiffs from voting absentee and for purposes of the instant motion to dismiss, Plaintiffs' material allegations are to be accepted as true. *Warth*, 422 U.S. at 501.

*Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

Third, there is nothing "abstract" about the alleged disparate treatment. There is no dispute that the definition of the term "United States" as it is used in UOCAVA *includes* Guam, Puerto Rico, the U.S. Virgin Islands, and American Samoa, but *excludes* the Northern Mariana Islands ("NMI"). ECF #75, pp. 8-9. Nor is there any dispute that as a result of this statutory definition, UOCAVA treats former state residents living in the NMI as living "outside" the United States and former state residents living in Guam, Puerto Rico, the U.S. Virgin Islands, and American Samoa as living "within" the United States. *Id*. Thus, Plaintiffs' assertion that they have been injured as a result of such disparate treatment is an allegation which the Court must accept as true and construe in the Plaintiffs' favor for purposes of the instant motion to dismiss. *Warth*, 422 U.S. at 501.

There being no material change in the nature of Plaintiffs' equal protection claim in the TAC, the Court should once again find that Plaintiffs sufficiently alleged an injury in fact and that "UOCAVA bears equal responsibility for [Plaintiffs'] purported injury[,]" such that it is "traceable to UOCAVA and the Federal Defendants." ECF #102, p. 14.

B. The Court Does Not Have the Power to Award the Relief Requested in the TAC

The Federal Defendants urge the Court to adopt an alternative reasoning for finding that redressability is lacking because:

> [t]he 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).

ECF #107, p. 17, n. 5.

While there will always be a risk that the Court's opinion may be misconstrued, the potential for misguided actions by third parties should not deter the Court from applying its previous ruling to the TAC. Moreover, there is no real risk here because at no time did the Court hold or otherwise indicate that it lacks the power to enjoin the enforcement or implementation of state or federal legislation that it determines to be unconstitutional. Instead, the Court very plainly stated that it lacks the power 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" which "do not currently exist[.]" ECF #102, p. 21, n. 17. The Court's

holding is supported by the long-established principle that it is "not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

The Court should therefore decline to modify its redressability analysis and apply it in equal measure to the TAC for the reasons set forth in Section III, pages 14-17 of the Federal Defendants' Second Motion to Dismiss, as supplemented by the Chief Election Officer's partial joinder (ECF #109).

DATED: Honolulu, Hawai'i, July 16, 2021.

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