**United States Department of Justice**
**Uniformed and Overseas Citizens Absentee Voting Act**
**Annual Report to Congress**
**2022**

## I. Summary

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986, 52 U.S.C. §§ 20301-20311, as amended by the Military and Overseas Voter Empowerment Act (MOVE Act) of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009), requires States to afford military and overseas voters a meaningful opportunity to register and vote absentee in elections for Federal office. Protecting the voting rights of military and overseas voters remains one of the highest priorities of the Department of Justice ("Department"). This report describes the Department's compliance monitoring work in 2022 to enforce this important statute.

In preparation for its nationwide compliance monitoring program for the 2022 Federal election cycle, the Department wrote to all the chief State election officials[1] in December 2021 to remind them of their UOCAVA responsibilities and to request teleconferences to discuss their preparations for the primary elections. As in prior Federal election cycles, we requested that the State election offices monitor the transmission of absentee ballots and provide confirmation to the Department that ballots that were requested by the 45th day prior to the Federal elections were transmitted by that date. In advance of the UOCAVA deadline for the general election, we reached out again to all the State election offices to inquire whether plans were in place to ensure timely transmission of the UOCAVA ballots for the Federal general election.

Throughout the election cycle, the Department monitored the numerous state and federal court actions involving redistricting, ballot access issues, election contests, and other events that could potentially delay ballot certifications and the timely transmission of ballots to military and overseas voters. We communicated regularly with State election officials to discuss these potential obstacles to their ability to transmit ballots in accordance with UOCAVA and available measures they could take to avoid delays, and to evaluate any need to pursue enforcement action.

The Department's monitoring resulted in additional enforcement work in one State, Ohio, to ensure that the ballots were timely transmitted to their military and overseas voters, and the filing of a Statement of Interest in a case filed in Illinois to address issues affecting UOCAVA voters.

The Department also continued significant work to enforce UOCAVA through its

[1] UOCAVA defines "State" to include the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa. 52 U.S.C. § 20310(6). Consequently, our general references in this report to the phrase "State" include the District of Columbia and the enumerated territories.

monitoring of a number of special elections held in 2022 to fill congressional vacancies.[2] The Department closely monitored the scheduling of these elections, and requested that States confirm to the Department that they timely transmitted UOCAVA ballots for the special elections.

## II. Background

UOCAVA, enacted in 1986, requires that States and Territories allow American citizens who are active duty members of the United States uniformed services and merchant marine, their spouses and dependents, and American citizens residing outside the United States to register and vote absentee in elections for Federal offices. UOCAVA was strengthened significantly in 2009 when Congress passed the MOVE Act to expand the protections for individuals eligible to vote under its terms. One of the key provisions added by the MOVE Act is the requirement that States transmit absentee ballots to military and overseas voters no later than 45 days before an election for Federal office when the request has been received by that date. 52 U.S.C. § 20302(a)(8)(A).

The Secretary of Defense is the Presidential designee with primary responsibility for implementing the Federal functions mandated by UOCAVA, and the Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out the provisions of UOCAVA. 52 U.S.C. § 20301(a); 52 U.S.C. § 20307(a). The Attorney General has assigned responsibility for enforcement of UOCAVA to the Civil Rights Division. Since UOCAVA was enacted in 1986, the Division has initiated and resolved numerous cases to enforce UOCAVA. A case list and selected documents are available at http://www.justice.gov/crt/about/vot/litigation/caselist.php.

Under the MOVE Act amendments, UOCAVA requires that the Attorney General submit an annual report to Congress by December 31 of each year on any civil action brought under the Attorney General's enforcement authority under UOCAVA during the preceding year. 52 U.S.C. § 20307(b). As detailed in its prior reports to Congress, the Department has engaged in extensive enforcement of the MOVE Act's requirements since they went into effect for the 2010 general election.

## III. UOCAVA Enforcement Activity by the Attorney General in 2022

### A. Enforcement Activity in 2022 to Obtain UOCAVA Compliance

**Ohio**: On March 18, 2022, the Department entered into a Memorandum of Agreement with the State of Ohio concerning compliance with UOCAVA for the May 3, 2022, federal primary election. The Agreement provided for additional time for election officials in Ohio to receive and count absentee ballots from eligible UOCAVA voters to ensure that such voters would have sufficient time to receive and submit their absentee ballots for the May 3, 2022, primary election.

In 2022, the Supreme Court of Ohio required the post-decennial census districts

[2] In 2022, special Federal elections were held on dates other than regularly-scheduled elections in six States.

for the Ohio General Assembly and Representative to Congress to be redrawn, and thus the districts for these offices were established much closer to the May 3, 2022, primary election than expected. In light of the delay in the ability to have ballots prepared due to the litigation, Ohio requested from the Department of Defense a hardship exemption from UOCAVA's 45-day advance transmission requirement for the primary election. On March 4, 2022, the Department of Defense denied the application for a waiver because Ohio's original plan for sending UOCAVA ballots did not provide sufficient time for UOCAVA voters to receive, mark and return their ballots in time to have their votes counted.

Immediately following denial of the waiver, the Department of Justice worked with Ohio officials to devise measures to remedy the anticipated UOCAVA violation. To implement the Agreement on remedies reached with the Department, Ohio enacted emergency legislation and the Secretary of State issued a directive to the county boards of elections. The remedial measures included an extension of the ballot receipt deadline for an additional 10 days -- to May 23, 2022 -- so long as ballots were executed and sent by the close of the polls on May 3, 2022, and otherwise valid, and an extension of time for UOCAVA voters to vote, sign and transmit completed ballots through the close of polls on election day for the May 3 election. Under the agreement, election officials also were required to transmit ballots to UOCAVA voters by expedited means and the state would provide a means for voters to have expedited delivery for their voted ballots when returned to the county election boards, at the state's expense.

**Illinois**: On August 31, 2022, the Department of Justice filed a Statement of Interest in a private lawsuit in Illinois, *Bost v. Illinois State Board of Elections* (N.D. Ill.). The lawsuit challenged Illinois' allowance of extra time for mail in ballots to be received after election day.

The Department argued that permitting the counting of otherwise valid ballots cast by election day even though they are received thereafter does not violate federal statutes setting the day for federal elections. The Statement explained that this practice not only complies with federal law but can be critical to ensuring that military and overseas voters are able to exercise their right to vote. The extension of ballot receipt deadlines for UOCAVA ballots voted by election day is a common practice in States, and it is the principal remedy the Department has sought and obtained to remedy UOCAVA violations and protect UOCAVA voters' ability to cast their ballots and have them counted.

The case remains pending.

## B. Litigation to Defend the Constitutionality of UOCAVA

***Reeves v. Nago and United States***: The Department is defending the United States and the Federal defendants in a case raising constitutional claims concerning the application of UOCAVA and Hawaii law to residents of certain U.S. territories. Plaintiffs were former Hawaii residents now residing in those territories and an organization. The complaint named, as defendants, local election officials in Hawaii as well as the United States and the Department of Defense, asserting equal protection and due process challenges to UOCAVA and the Hawaii law governing voting by military and overseas voters. The case was filed on October 8, 2020, in Federal district court in Hawaii. *Reeves, et al. v. Nago, et al*., 1:20-cv-00433 (D. Haw.). On September 6, 2022, the court granted the defendants' cross-motions for summary judgment, finding that UOCAVA does not violate the Equal Protection Clause by declining to extend the right to vote absentee in Federal elections to former Hawaii residents now residing in Guam and the U.S. Virgin Islands. The plaintiffs have appealed to the Ninth Circuit Court of Appeals. *Borja, et al. v. Nago, et al.*, No. 22-16742 (9th Cir. filed Nov. 14, 2022).

# ATTACHMENTS

# III. UOCAVA Enforcement Activity by the Attorney General in 2022

## A. Enforcement Activity in 2022 to Obtain UOCAVA Compliance

# Ohio

**UNDER SECRETARY OF DEFENSE**
**4000 DEFENSE PENTAGON**
**WASHINGTON, D.C. 20301-4000**

**PERSONNEL AND READINESS**

MAR - 4 2022

The Honorable Frank LaRose
Secretary of State
State of Ohio
22 North Fourth Street, 16th Floor
Columbus, Ohio 43215

Dear Secretary LaRose:

On February 26, 2022, the Department of Defense received from the State of Ohio an application dated February 26, 2022 for an undue hardship waiver under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) for the May 3, 2022 primary election.

Under delegated authority from the Secretary of Defense as the Presidential Designee for UOCAVA, I have reviewed the State's application, consulted with the representative of the Attorney General, and find it does not meet the requirements for a one-time undue hardship waiver under 52 U.S.C. § 20302(g)(2). Accordingly, I deny the State of Ohio's request to waive the application of 52 U.S.C. § 20302(a)(8)(A) for the May 3, 2022 primary election.

In rendering this decision, I carefully considered the assertions made by the State in support of its waiver request, which are addressed in detail in the enclosure to this letter. Based on the rationale summarized in the enclosure, I have determined the following: (1) Ohio has established an undue hardship on the grounds that the State has suffered a delay in generating ballots due to a legal contest, prohibiting compliance with UOCAVA's requirement to transmit ballots at least 45 days prior to the May 3, 2022 primary election; and (2) Ohio's comprehensive plan does not provide absent UOCAVA voters sufficient time to receive and submit absentee ballots in time to be counted in the May 3, 2022 primary election.

If you have any questions or concerns, please contact Scott Wiedmann, Deputy Director, Federal Voting Assistance Program, at 571-255-9755 or scott.wiedmann@fvap.gov.

Sincerely,

Gilbert R. Cisneros, Jr.

Enclosure:
As stated

cc:
Director Amanda Grandjean

**Denial of the State of Ohio's Waiver Request**
**under 52 U.S.C. § 20302(g)(2)**
**for the May 3, 2022, Ohio Primary Election**

The Federal Voting Assistance Program (FVAP) of the Department of Defense received the application of the State of Ohio (the State), dated February 26, 2022, for an undue hardship waiver for the May 3, 2022 Ohio primary election, as provided by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[1] The denial of the waiver request relies on matters submitted by the State in support of its February 26, 2022 official, waiver request and supplementary information provided during a telephonic conference call on March 1, 2022, in which the State, FVAP, and the United States Department of Justice participated.

Pursuant to authority delegated by the Secretary of Defense, to serve as the Presidential Designee[2] for UOCAVA,[3] the Under Secretary of Defense for Personnel and Readiness has reviewed the State's application and consulted with the representative of the Attorney General. The Under Secretary has determined that the State's application does not meet the requirements for a one-time undue hardship waiver under 52 U.S.C. § 20302(g)(2),[4] and has therefore denied the State's waiver request under 52 U.S.C. § 20302(a)(8)(A)[5] for the May 3, 2022 Ohio primary election.

## I. Background and Initial Findings

UOCAVA authorizes the Presidential Designee to grant a waiver to a State when at least one of following conditions is met:

1. The State's primary election date prohibits the State from complying with the requirement to transmit an absentee ballot to an absent Uniformed Service member or overseas civilian as prescribed in UOCAVA 52 U.S.C § 20302(a)(8)(A)
2. The State has suffered a delay in generating ballots due to a legal contest; or
3. The State Constitution prohibits the State from complying with 52 U.S.C. § 20302(a)(8)(A)

Under UOCAVA, if a State determines that it is unable to comply with the requirement to transmit timely-requested absentee ballots at least 45 days before an election for Federal office (45-day advance transmission requirement) due to one of the three situations referenced above resulting in an undue hardship, the Chief State Election Official shall request a waiver from the

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[1] 52 U.S.C § 20302 (formerly 42 U.S.C. § 1973ff, et seq.). UOCAVA's waiver provision is found at 52 U.S.C. § 20302(g)(2).

[2] For purposes of this Memorandum, the term "Presidential Designee" includes those officials exercising authority delegated by the Presidential Designee.

[3] The Secretary of Defense was designated as the Presidential Designee by Executive Order 12642 (June 8, 1988), 53 FR § 21975. The Secretary of Defense delegated this authority to the Under Secretary of Defense for Personnel and Readiness in DoD Directive 5124.02.

[4] Formerly 42 U.S.C. § 1973ff-1(g)(2)(B)(ii).

[5] Formerly 42 U.S.C. § 1973ff-1(a)(8)(A).

Presidential Designee pursuant to the Act. The Presidential Designee shall approve such a request if the Presidential Designee determines that:

1. One or more of the three referenced situations creates an undue hardship for the State; and
2. The State's comprehensive plan presented in support of its request provides absent uniformed services and overseas voters (UOCAVA voters) sufficient time to receive and submit absentee ballots they have requested in time to be counted in the election for Federal office.

The Presidential Designee's findings in regard to each of these requirements are addressed separately below.

By memorandum of February 7, 2012, to Chief State Election Officials, the Director of FVAP provided guidance on UOCAVA ballot delivery waivers. Appendix A, Section IV of the guidance, Evaluation of Comprehensive Plans, provides:

> In summary, a State's comprehensive plan must provide sufficient time for UOCAVA voters to receive, mark, and return the ballot in time to be counted. The burden is upon the State to demonstrate that a waiver qualifying condition exists, that compliance with the requirements of UOCAVA in light of the condition presents an undue hardship to the State, and that the comprehensive plan provides the UOCAVA voters sufficient time to receive, mark, and return their ballots in time to be counted. To serve as a substitute for the 45-day prior requirement, the comprehensive plan must provide UOCAVA voters sufficient time to successfully vote as compared to the time available by strictly complying with UOCAVA's minimum ballot transmission requirements.[6]

Specifically, the comprehensive plan proposed by Ohio must be assessed based on its ability to meet the following requirements set forth in UOCAVA:

1. The steps the State will take to ensure that UOCAVA voters have time to receive, mark, and submit their ballots in time to have those ballots counted in the election;
2. Why the plan provides UOCAVA voters sufficient time to vote as a substitute for the requirements of the UOCAVA; and
3. The underlying factual information that explains how the plan provides such sufficient time to vote as a substitute for such requirements.[7]

Further, as required by 52 U.S.C. § 20302(g)(l)(A), the State's application includes recognition that the purpose of the Act's 45-day transmission requirement is to allow UOCAVA voters enough time to vote and to have their votes counted in an election for Federal office. In determining whether the State's comprehensive plan provides sufficient time to vote as a

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[6] Guidance on Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) Ballot Delivery Waivers, Memorandum dated February 7, 2012, available at http://www.fvap.gov/eo/waivers.

[7] 52 U.S.C. § 20302(g)(1)(D) (formerly 42 U.S.C. § 1973ff-1(g)(1)(D)).

substitute for the requirement to transmit ballots 45 days before the election, the Presidential Designee considered that the minimum absentee ballot requirements under the law require timely-requested ballots to be transmitted 45 days prior to Election Day, by the voter's choice of either postal mail or electronic transmission method.

The State's comprehensive plan was evaluated against several criteria; whether the plan provides sufficient time was examined by considering the totality of circumstances presented. Among the criteria considered was the total time afforded a voter to receive, mark, and return the ballot, and have it counted (including the number of days before and after Election Day). Also considered were the cumulative number and accessibility of alternative methods of ballot transmission, and, if applicable, ballot return, as a number of alternative methods increases the likelihood that more UOCAVA voters will have sufficient time to receive, vote, return their ballot, and have it counted. Finally, the comprehensive plan was reviewed for any additional efforts made by the State to improve the likelihood that a UOCAVA voter would be able to receive, vote, and return the ballot, and have it count in the election.

**II. The State Has Shown Undue Hardship.**

The State asserts an undue hardship based on 52 U.S.C. § 20302(g)(2)(B)(ii): that the State has suffered a delay in generating ballots due to a legal contest. On May 3, 2022, Ohio will conduct a primary election for various offices, including the Federal offices of U.S. Senate and U.S. House of Representatives seats. As a result of litigation, the Ohio Supreme Court required the post-decennial census districts for the Ohio General Assembly and Representative to Congress to be redrawn, and thus the final districts for these offices are not yet settled. With respect to the General Assembly districts, once the court has approved the districting plans, there must be a 30-day period under state law for individuals to change residence to run for election, the candidate qualifying period must be held, any subsequent candidate protests must be resolved, and then ballots must be prepared, proofed, and printed. With respect to the Congressional districts, the waiver request States that "[i]t is unclear when final districts will be established for Representative to Congress." Once the congressional districts are established and approved by the court, county boards of elections are subject to time constraints for candidate qualifying, resolving potential candidate protests, and ballot preparation, ballot proofing, and printing of ballots for Representative to Congress candidates. As a result, the State advises that Ohio's boards of elections cannot timely prepare ballots for any of the offices at issue in the litigation by March 19, the 45th day before the May 3 primary election.

According to the waiver request, the Ohio Secretary of State has repeatedly raised concerns with the Ohio General Assembly regarding the redistricting delay and resulting challenges in conducting the primary election on May 3, 2022. Ohio law prohibits the Secretary of State from moving the date of the election. As of the March 1, 2022 telephonic conference call with the State of Ohio, state legislative leaders have not taken action to adopt a later primary election date.

For these reasons, the State has established an undue hardship.

## III. The State's Comprehensive Plan Does Not Provide Sufficient Time for *UOCAVA* Voters to Vote and Have Those Votes Counted

Even though the State has demonstrated an undue hardship, the State also must show that its comprehensive plan provides "sufficient time for UOCAVA voters to receive, mark, and return the ballot in time to be counted."[8] In reaching a determination, the Presidential Designee must examine the totality of circumstances presented in the plan to determine whether it provides sufficient time to vote as a substitute for UOCAVA's requirement that ballots be transmitted at least 45 days prior to Election Day. Among the issues considered is the time voters have to receive, mark, and return their ballots, and have them counted (both before and after Election Day); the cumulative number of alternative methods of ballot transmission and return; and the accessibility of the alternative ballot transmission methods presented in the comprehensive plan.

Ohio's comprehensive plan to provide sufficient time to vote as a substitute for UOCAVA's 45-day advance transmission requirement, comprises the following:

1. Send UOCAVA ballots as quickly as possible after the state of Ohio has prepared final ballots for the primary election. At the time of its application, the State admitted it was not in the position to identify a date by which the ballots would be finalized, but identified a "goal" of sending the ballots by April 5, 2022;
2. Conduct outreach to communicate with UOCAVA voters that ballots may be delayed, and encourage them to provide an email address in order to receive their ballots by email.

Absent a waiver, States are required by UOCAVA to transmit timely-requested absentee ballots 45 days prior to Election Day. A waiver request is necessary when a State is not able to meet this requirement. In this case, March 19, 2022 is 45 days before the May 3, 2022 election day. Ohio states that its goal is to have UOCAVA ballots ready by April 5, 2022, although it is not a certainty given the status of the litigation affecting the establishment of the districts. Assuming Ohio is able to transmit UOCAVA ballots by April 5, 2022, only 28 days will remain before the primary election on May 3, 2022. In Ohio, UOCAVA ballots must be voted and submitted for mailing not later than 12:01 a.m. (at the place where the voter completes the ballot) on the date of the election, and received no later than 10 days after Election Day (May 13, 2022), in order to be counted. This would afford UOCAVA voters only 38 days to receive, mark, and return their ballots, 7 days fewer than UOCAVA voters are guaranteed under 52 U.S.C. § 20302(a)(8)(A).

To help ensure sufficient time for voters to receive, mark, and return their ballot in time to be counted, Ohio proposes to communicate with affected voters regarding the delay in transmission of their ballots and encourage voters to request their blank ballot be sent to them electronically. We note that UOCAVA protections afford voters 45 days in advance of the election to return the voted ballot even when the ballot is transmitted to them electronically. In addition, although some UOCAVA voters may benefit from available electronic transmission options, States must ensure that all UOCAVA voters who elect to receive and/or return paper ballots by postal mail have sufficient time to receive, mark, and return them in time to be

[8] 52 U.S.C. § 20302(g)(2)(A) (formerly 42 U.S.C. § 1973ff-1(g)(2)(A)).

counted. This is necessary both to accommodate voters with limited access to the internet or to electronic equipment, and to permit voters the option guaranteed by UOCAVA to receive and return their ballots through regular mail to avoid any concerns they may have related to electronic transmission, such as the security or secrecy of their ballot.

On the March 1, 2022 telephonic conference call between the State, FVAP, and the Department of Justice, the State mentioned an intent to reach out to the United States Postal Service to try to expedite delivery of mailed blank ballots. With regard to the possibility of providing voters with cost-free options to return their voted ballots by expedited means such as express mail or courier, the State advised that no funding is currently available for such measures, although the State is exploring options for obtaining additional funds for the election. Assuming that the State is able to transmit ballots by its goal of April 5, it is unlikely, however, that even expedited mail service would compensate for the time lost to voters by the 17-day late transmission by the state of their ballots, and the resulting loss of 7 days out of the total 45 days overall for ballot return (taking into account the state's existing 10-day extension for receipt of ballots after the election). We are thus unable to conclude that Ohio's plan ensures sufficient time for all UOCAVA voters to receive, mark, and return their ballots in time to be counted. Although voters who have requested electronic transmission of their ballots will receive their ballots on the day of transmittal, they will still have 7 fewer days than UOCAVA provides to return the ballot. Also of note is the likelihood that at least some UOCAVA voters will not have access to means for receiving the voted ballot by email, and Ohio law does not permit electronic return of voted ballots.

In some cases, in which a State is unable to transmit ballots by the 45-day deadline, the State is able to extend the ballot return or receipt deadline to make up for that lost time. Ohio acknowledged that the Secretary of State does not have the authority under state law to extend the date for ballot receipt beyond the current receipt deadline of May 13, 2022.

Based on the totality of the circumstances in this case, the Presidential Designee finds that the State's comprehensive plan does not provide UOCAVA voters with sufficient time to receive, mark, and return their ballots in time to be counted.

## IV. Conclusion

Given the foregoing and considering the totality of the circumstances presented, Ohio's waiver request is denied. The Presidential Designee has determined that the State has established an undue hardship on the grounds that the State has suffered a delay in generating ballots due to a legal contest, prohibiting compliance with UOCAVA's requirement to transmit ballots at least 45 days prior to the May 3, 2022 primary election. The Presidential Designee has further determined that Ohio's comprehensive plan does not provide absent UOCAVA voters sufficient time to receive and submit absentee ballots in time to be counted in the May 3, 2022 primary election. The determination that the plan is not a sufficient substitute for 52 U.S.C. § 20302(a)(8)(A)'s[9] requirement to transmit timely-requested ballots 45 days in advance of Election Day in Federal elections, serves as the basis for denying a hardship waiver under 52 U.S.C. § 20302(g)(2).[10]

[9] Formerly 42 U.S.C. § 1973ff-1(a)(8)(A).
[10] Formerly 42 U.S.C. § 1973ff-1(g)(2).

**MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES AND THE STATE OF OHIO, THROUGH SECRETARY OF STATE FRANK LAROSE, REGARDING COMPLIANCE WITH THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT FOR THE MAY 3, 2022, PRIMARY ELECTION FOR FEDERAL OFFICE**

A. Introduction.

This agreement is entered into between the United States of America, through the United States Department of Justice ("United States" or "the Department"), and the State of Ohio through the Ohio Secretary of State Frank LaRose ('the Secretary"), in his official capacity of Chief Election Officer of the State of Ohio, in order to secure the voting rights of absent uniformed services and overseas voters protected by the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301 *et seq*. UOCAVA provides that absent uniformed services voters and overseas voters ("UOCAVA voters") shall be permitted "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 52 U.S.C. § 20302.

This matter arises out of UOCAVA's requirement that states transmit validly requested absentee ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election, unless a waiver is granted pursuant to Section 102(g) of UOCAVA. 52 U.S.C. § 20302(a)(8)(A) and (g). Secretary LaRose's office is the single state office responsible for the implementation of UOCAVA in Ohio. Ohio Rev. Code Ann. § 3501.05(CC). Ohio's primary election date is set by Ohio statute and this year is on May 3, 2022. Ohio Rev. Code Ann. § 3501.01(E)(1). Under Ohio law, only the Ohio General Assembly may prescribe "the time, place, and manner" of an election. Ohio Rev. Code Ann. § 3501.40. To date, the Ohio General Assembly has not changed the date of the

2022 primary election. The Ohio Secretary of State has no authority to change the date of the primary election. *Id.*

The Supreme Court of Ohio has required the post-decennial census districts for the Ohio General Assembly and Representative to Congress to be redrawn, and thus the districts for these offices were established on February 24, 2022, and March 2, 2022, respectively, much closer to the May 3, 2022, primary election than expected. On March 16, 2022, the Ohio Supreme Court held that the revised districts for the Ohio General Assembly were unconstitutional. *See generally League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Op. No. 2022-Ohio-789 (Mar. 16, 2022). The redistricting plans for Representative to Congress remain subject to pending litigation.

On February 26, 2022, the State through Secretary LaRose requested from the Presidential Designee for UOCAVA, the Secretary of Defense, a hardship exemption from UOCAVA's 45-day advance transmission requirement for the May 3, 2022, primary election. 52 U.S.C. § 20302(g). In its waiver request, Ohio claimed an undue hardship due to a legal contest. 52 U.S.C. § 20302(g)(2)(B)(ii). On March 4, 2022, the Department of Defense, pursuant to delegated authority from the Secretary of Defense as the Presidential Designee for UOCAVA, denied the State's application for a waiver.

The United States and the Secretary, through their respective counsel, have conferred and agree that this matter should be resolved without the burden and expense of litigation. The parties share the goal of ensuring that Ohio's UOCAVA voters will have sufficient opportunity to receive absentee ballots that they have requested and submit marked absentee ballots in time to be counted for the May 3, 2022, primary election for Federal office. As consideration for this Agreement, the United States has agreed to forgo litigation under UOCAVA as to the May 3,

2022, primary election, subject to compliance with the terms of this Agreement. The parties negotiated in good faith and hereby enter into this Agreement as an appropriate resolution of the UOCAVA claims alleged by the United States.

B. Recitals.

The United States and the State stipulate and agree that:

1. The United States District Court for the Southern District of Ohio has jurisdiction to enforce the provisions of UOCAVA, 52 U.S.C. §§ 20301 *et seq.*, and the Federal Court would have jurisdiction over an action brought by the United States to enforce the terms of this Agreement.
2. The United States Attorney General is authorized to enforce the provisions of UOCAVA, 52 U.S.C. § 20307.
3. The State of Ohio, by and through its Secretary of State, is responsible for complying with UOCAVA and ensuring that validly requested absentee ballots are transmitted to UOCAVA voters in accordance with the statute's terms. *Id.*
4. Frank LaRose is the Secretary of State of Ohio. The Ohio Secretary of State is the chief election officer in Ohio responsible for overseeing election administration, Ohio Rev. Code Ann. § 3501.04, and the Secretary of State's Office is the single state office responsible for the implementation of UOCAVA, *id.* § 3501.05(CC). The Secretary of State delegates to the eighty-eight county boards of elections certain responsibilities for the implementation of that act. *Id.* However, the parties acknowledge that the Secretary on behalf of the State remains responsible for ensuring compliance with UOCAVA and the terms of this Agreement.

5. Section 102(a)(8)(A) of UOCAVA requires that states transmit validly requested ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election, unless a waiver is granted by the Department of Defense pursuant to Section 102(g) of UOCAVA. 52 U.S.C. § 20302(a)(8)(A) and (g).

6. States can be exempted from the requirement to transmit ballots 45 days in advance of a Federal election if they apply for, and are granted, a waiver from the Presidential Designee for UOCAVA, the Secretary of Defense. 52 U.S.C. § 20302(g). On February 26, 2022, the State through Secretary LaRose applied for a waiver pursuant to Section 102(g) of UOCAVA, claiming an undue hardship due to a legal contest. 52 U.S.C. § 20302(g)(2)(B)(ii). On March 4, 2022, the Department of Defense, pursuant to delegated authority from the Secretary of Defense as the Presidential Designee for UOCAVA, agreed that the State had established an undue hardship because of a legal contest, but the Department of Defense denied the State's application for a waiver because the original, proffered plan in the waiver application filed at that time by the State through the Secretary, did not provide sufficient time for UOCAVA voters to vote and have their votes counted.

7. On May 3, 2022, absent any court order or new legislation delaying the date of the primary election, the State will conduct a primary election for Federal office in which voters will select candidates for the Federal general election on November 8, 2022. The 45th day before the May 3, 2022, primary election is March 19, 2022.

8. As of March 9, 2022, elections officials of the State had received timely requests for absentee ballots for the May 3, 2022, primary election for Federal office from

approximately 554 voters who are entitled to vote pursuant to the provisions of UOCAVA.

9. The Secretary has indicated that the litigation concerning districts for Ohio General Assembly and Representative to Congress caused the districts to be redrawn much closer to the election than was expected. Thus, the Secretary anticipates that some of its eighty-eight county boards of election will be unable to transmit validly requested absentee ballots to UOCAVA voters on March 19, 2022, and may need until on or about April 5, 2022, to do so, although that mailing date is not a certainty given the status of the litigation affecting the establishment of districts. The Secretary believes all of its county boards of election will be able to transmit ballots to UOCAVA voters, from whom valid UOCAVA ballot requests were received at least 29 days before the election, by no later than 28 days in advance of the May 3, 2022, primary election for Federal office, i.e., April 5, 2022.

10. Under Ohio law as of the time the hardship waiver was denied, UOCAVA ballots had to be voted and submitted for mailing not later than 12:01 a.m. (at the place where the voter completes the ballot) on the date of the election, and received no later than 10 days after Election Day (May 13, 2022), in order to be counted. Ohio Rev. Code Ann. §§ 3511.09, 3511.11. If the State's eighty-eight county boards of election were to transmit UOCAVA ballots on April 5, 2022, this would afford UOCAVA voters only 38 days to receive, mark and return their ballots for the May 3, 2022, Federal primary election.

11. The failure by Ohio to either transmit ballots to UOCAVA voters by the 45th day before the May 3, 2022, Federal primary election or to obtain a hardship waiver from

the Department of Defense would constitute a violation of Section 102(a)(8)(A) of UOCAVA. Absent corrective action, the failure of election officials in Ohio to transmit absentee ballots to UOCAVA voters who had validly requested them by the 45th day in advance of the May 3, 2022, Federal primary election will deprive United States citizens protected under UOCAVA of a sufficient opportunity to vote in that election.

12. The parties have engaged in extensive discussions and have reached an agreement on a series of actions that the State will take to remedy the potential violation of Section 102(a)(8)(A) of UOCAVA arising from some Ohio county boards of elections' possibly missing the March 19, 2022, UOCAVA deadline to transmit UOCAVA ballots for the May 3, 2022, Federal primary election, which could result in some UOCAVA voters not having a sufficient opportunity to receive, mark, and timely return the absentee ballots they have requested in time for them to count in the May 3, 2022, Federal primary election. It is the intent of the parties that the State immediately undertake and complete the actions set forth in this Agreement.

13. The parties recognize that the Secretary and the State have taken actions to begin implementation of this Agreement. Among these actions, on March 11, 2022, Ohio's Governor signed newly enacted legislation for the May 3, 2022, primary election that: 1) extends the ballot receipt deadline for UOCAVA ballots returned by mail from UOCAVA voters through the twentieth day after the day of the election; 2) extends the time for UOCAVA voters to vote, sign and transmit completed ballots through the close of polls on election day; 3) requires the Secretary of State to take all steps necessary to expedite the delivery of blank ballots to UOCAVA voters and the return

of those completed ballots to the boards of elections. Ohio Am. Sub. S.B. No. 11 (2022). The legislation includes an appropriation of funds that will ensure that the costs of expedited delivery and return of ballots for the May 3, 2022, Federal primary election are not incurred by the UOCAVA voters. The parties also recognize that on March 11, 2022, the Secretary of State transmitted Directive 2022-29 to county boards of elections, regarding voting by UOCAVA voters under the terms of S.B. 11 for the May 3, 2022, primary election. Finally, the parties also recognize that the Secretary of State has committed to continuing to conduct outreach to UOCAVA voters as described in the waiver application dated February 26, 2022, and has conferred with the Federal Voting Assistance Program on the most effective means of expediting transmission of ballots to UOCAVA voters.

14. The parties agree that the plan specified in paragraph 13 above, implemented in accordance with the Terms of Agreement below, will provide sufficient time for UOCAVA voters to receive, mark, and timely return their absentee ballots so they can be counted in the May 3, 2022, Federal primary election.

C. Terms of Agreement.

Now, therefore, for full and adequate consideration given and received, the United States and the State agree that:

1. The State through Secretary LaRose shall ensure that the county boards of elections transmit ballots for the May 3, 2022, Federal primary election either electronically or by mail, according to the UOCAVA voter's choice, to all of the State's UOCAVA voters who have validly requested such ballots as soon as the ballot is finalized, and no later than April 5, 2022. With regard to all UOCAVA voters who have requested

transmission by mail, the State through Secretary LaRose shall provide for transmittal and return of such ballots as set forth in Paragraphs 4-5 below.

2. Should it at any time appear that any Ohio election officials will be unable to transmit UOCAVA ballots for the May 3, 2022, Federal primary election by April 5, 2022, or the State through the Secretary determines it is premature to do so, due to a pending candidate-related protest, an order of the Ohio Supreme Court or other court in relevant litigation, or any other reason, the Secretary shall immediately notify the United States of the circumstances causing the expected delay, and the parties shall meet and confer to discuss appropriate modification of this Agreement or other necessary remedial measures.

3. Ohio law has already been amended to extend the ballot receipt deadline for voted UOCAVA ballots returned by mail and received at the office of the board of elections after the close of the polls on Election Day through the twentieth day after the day of the election. Such ballot is eligible to be counted, unless the identification envelope is signed after the close of the polls on Election Day. The State through the Secretary shall ensure that each of its county election boards count as validly cast ballots in the May 3, 2022, primary election all ballots, including Federal Write-In Absentee Ballots, from qualified UOCAVA voters that are executed and sent by the close of polls on May 3, 2022, received by the appropriate county election board by May 23, 2022, and are otherwise valid.

4. The Secretary shall at his office's expense provide for express delivery, by the method he deems most appropriate based on the delivery destination, for the transmittal of blank ballots and return of completed ballots for UOCAVA voters.

Voted UOCAVA ballots returned using express delivery, either by mail or courier, shall be deemed "returned by mail" for purposes of the return deadline extension for voted UOCAVA ballots.

5. The Secretary shall take the necessary steps to ensure that each ballot sent by express mail or express delivery service to UOCAVA voters be accompanied by a pre-addressed express mail or express delivery form and appropriate envelope for a voter to utilize to return the ballot to appropriate election officials, as well as a set of instructions developed by the Secretary explaining how to return the ballot by express mail or express delivery. For ballots transmitted electronically, the Secretary shall provide instructions for the voter on returning the ballot by express mail or express delivery at the State's expense. The Secretary shall ensure that all the county boards of elections take all necessary steps to provide affected UOCAVA voters a reasonable opportunity to learn of the terms of this Agreement as they apply individually to such voter. The Secretary agrees to post this Agreement on the Secretary's web page dedicated to UOCAVA voting – voteohio.gov/uocava. Such notice to individual UOCAVA voters shall occur by telephone, facsimile, or e-mail where such contact information is available. Otherwise, a written notice will be mailed to each affected voter. The notice shall, at minimum: (a) explain that the deadline for the voter's ballot to be executed and sent is the close of polls on May 3, 2022; (b) explain the new extended deadline for receipt of the affected voter's ballot; and (c) provide appropriate contact information for assistance at the relevant election office.
6. The State shall provide a report to the United States Department of Justice no later than April 6, 2022, concerning the transmittal of UOCAVA ballots for the May 3,

2022, Federal primary election. The report shall (a) certify when ballots were transmitted in each county; and (b) specify for each county the number of requests received, the number of UOCAVA ballots transmitted, and the method of transmittal.

7. The State shall provide a report to the United States Department of Justice no later than May 31, 2022, in a format agreed to by the parties to this Agreement, concerning the UOCAVA ballots received and counted for the May 3, 2022, Federal primary election.

8. In consideration of the State through the Secretary complying with the terms of this Agreement, the United States agrees to forgo litigation under UOCAVA as to the May 3, 2022, primary election.

D. Time Period of Agreement.

The State's obligations under this Agreement shall commence immediately and shall expire in their entirety on June 30, 2022.

E. Enforcement.

The terms of this Agreement are intended to resolve the potential violation of Section 102(a)(8) of UOCAVA arising from the anticipated late transmission, by at least some of Ohio's county boards of elections, of UOCAVA ballots for the May 3, 2022, primary election and the denial of the State's waiver application on March 4, 2022.

If the parties are unable to resolve any dispute regarding the terms of this Agreement, the parties agree that the dispute may be resolved by the United States District Court for the Southern District of Ohio in an action brought by the United States to enforce this Agreement and/or UOCAVA.

Where the State materially fails in any manner to comply with the terms of this Agreement, this Agreement is enforceable immediately in the United States District Court for the Southern District of Ohio as set forth above, and additionally, in such event, the United States may also take any other actions necessary to enforce Section 102(a)(8) of UOCAVA in the United States District Court, including seeking appropriate relief as a substitute for or in addition to the actions that are subject of this Agreement. Nothing in this Agreement precludes the United States from taking appropriate enforcement action against the State for any other violations of UOCAVA that are not subject of this Agreement.

F. General.

This Agreement is binding on the parties and their successors in office. The parties agree to the admissibility of this Agreement in any subsequent proceeding for its enforcement, or other action filed to enforce Section 102(a)(8) of UOCAVA.

The undersigned enter this Agreement this 18th day of March 2022.

FOR THE UNITED STATES OF AMERICA:

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Civil Rights Division

PAMELA S. KARLAN
Principal Deputy Assistant General
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FOR THE STATE OF OHIO THROUGH THE OHIO SECRETARY OF STATE:

Date: 18 March 2022

FRANK LAROSE
Ohio Secretary of State

# Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
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| MICHAEL J. BOST; LAURA POLLASTRINI; and SUSAN SWEENEY,<br><br>Plaintiffs,<br><br>v.<br><br>THE ILLINOIS STATE BOARD OF ELECTIONS; and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections<br><br>Defendants. | Civil Action No. 1:22-cv-02754 |

**STATEMENT OF INTEREST OF THE UNITED STATES**

## I. INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517 which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States." This case presents an important question relating to enforcement of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), 52 U.S.C. §§ 20301 to 20311, as amended by the Military and Overseas Voter Empowerment Act of 2009, Pub L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) ("MOVE Act").[1]

The Attorney General is charged with the responsibility of enforcing UOCAVA, 52 U.S.C. § 20307. The United States submits this statement of interest to address legal questions regarding the post-election counting of ballots cast in person or by mail on or before election day. Permitting the counting of otherwise valid ballots cast by election day even though they are received thereafter does not violate federal statutes setting the day for federal elections. This practice not only complies with federal law but can be vital in ensuring that military and overseas voters are able to exercise their right to vote. The United States expresses no view on any issues other than those set forth in this brief.

## II. PROCEDURAL BACKGROUND

The Illinois election code authorizes voting by mail and provides that vote-by-mail ballots received "after the polls close on election day" and before "the close of the [fourteen-day] period for counting provisional ballots" shall be counted. 10 Ill. Comp. Stat. (ILCS) § 5/19-8(c) (2022); *id.* § 5/18A-15(a). The Illinois statute also requires that such ballots be "postmarked no later than election day." *Id.* Alternatively, if the ballot has no postmark or trackable bar code, it

[1] The provisions of UOCAVA were originally codified at 42 U.S.C. § 1973ff *et seq.*

must have a certification date, which is provided by the voter at the time of completing the ballot, on election day or earlier.[2] *Id.*

On May 25, 2022, plaintiffs Michael J. Bost, Laura Pollastrini, and Susan Sweeney filed a complaint against the Illinois State Board of Elections and its Executive Director, Bernadette Matthews, challenging Illinois's law that provides for counting ballots cast by election day and received within the fourteen-day period following election day. Compl., *Bost v. Ill. Bd. of Elections*, No. 1:22-cv-02754 (N.D. III. May 25, 2022), ECF No. 1. Plaintiffs seek a judgment declaring Illinois's ballot receipt deadline to be unlawful and an injunction prohibiting counting any ballots received after election day, regardless of their postmark date.

Defendants Illinois State Board of Elections and its Executive Director moved to dismiss Plaintiffs' complaint on July 12. Def. Mot. Dismiss Pls.' Compl., ECF No. 25. On July 15, Plaintiffs moved for partial summary judgment on Counts I and II, requesting a declaration that 10 ILCS § 5/19-8(c) violates 2 U.S.C. § 7, the federal statute setting a uniform date for Congressional elections.[3] Pls.' Mot. Summ. J., ECF No. 32. The Court set a consolidated briefing schedule for Defendants' Motion to Dismiss and Plaintiffs' Motion for Partial Summary Judgment, with responses to both motions due on August 22, and replies due on September 7.

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[2] The certification requirement in Illinois law serves as an indicia that the ballot has been voted, executed, and sent by the close of polls on election day only in those instances where no postmark is evident.

[3] Counts I and II of Plaintiffs' Complaint allege a violation of the rights to vote and stand for office, under 42 U.S.C. § 1983. Compl., ECF No. 1. Despite Plaintiffs' Motion for Partial Summary Judgment being directed toward Counts I and II, the motion does not discuss alleged violations of 42 U.S.C. § 1983. *See generally* Pls.' Mem. Supp. Mot. Summ. J., ECF No. 33. The United States understands Plaintiffs' motion to seek relief as to the alleged violation of 2 U.S.C. § 7, which is labeled Count III in Plaintiffs' Complaint.

## III. LEGAL STANDARD

In assessing a motion to dismiss, courts "accept all of the well-pleaded factual allegations in the plaintiff's complaint as true and draw all reasonable inferences in favor of the plaintiff." *Help At Home Inc. v. Medical Capital LLC*, 260 F.3d 748, 752 (7th Cir. 2001). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Tobey v. Chibucos*, 890 F.3d 634, 639 (7th Cir. 2018) (internal quotation marks omitted).

Where the facts are not in dispute, summary judgment may be granted prior to the parties engaging in discovery. *See Spierer v. Rossman*, 798 F.3d 502, 506 (7th Cir. 2015). Summary judgment is appropriate only where the moving party demonstrates that based on the evidence, viewed in the light most favorable to the nonmoving party, "there is no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

## IV. STATUTORY BACKGROUND

UOCAVA guarantees members of the uniformed services absent from their place of residence due to service on active duty (and their spouses and dependents who are also absent due to that active service) and United States citizens residing overseas the right "to vote by absentee ballot in general, special, primary, and runoff elections for federal office." 52 U.S.C. § 20302(a)(1). UOCAVA reflects Congress's determination that participation in federal elections by military and overseas voters is a vital national interest. *See Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000) ("[Voting is] a sacred element of the democratic process. For our citizens overseas, voting by absentee ballot may be the only practical means to exercise that right. For the members of our military, the absentee

ballot is a cherished mechanism to voice their political opinion. . . . [It] should be provided no matter what their location.").

The MOVE Act reaffirmed Congress's commitment to ensuring that UOCAVA voters have sufficient time to receive, mark, and return their ballots in time to be counted. *See* MOVE Act, 156 Cong. Rec. S4513, S4518 (daily ed. May 27, 2010). To provide sufficient time for these voters to exercise their right to vote, the MOVE Act amended UOCAVA to require that states transmit validly requested ballots to UOCAVA voters at least 45 days before an election for federal office when the request is received by that date. 52 U.S.C. § 20302(a)(8) ("Each state shall . . . transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election."); 52 U.S.C. § 20302(g)(1)(A) ("the purpose [of the 45-day requirement] is to allow absent uniformed services voters and overseas voters enough time to vote"); *see also* 156 Cong. Rec. at S4518 (discussing development of 45-day deadline based upon evidence before Congress). Despite the adoption of the MOVE Act's 45-day advance-transmission requirement for UOCAVA ballots, military and overseas voters continue to face difficulties having sufficient time to receive, mark, and return their ballots.[4] Illinois's vote-by-mail ballot receipt deadline helps to ensure that otherwise valid ballots cast by the state's military and overseas voters, among other citizens, on or before election day are

[4] According to the Federal Voting Assistance Project's 2020 Report to Congress concerning the most recent general election, "there were 1,249,601 UOCAVA ballots transmitted to voters from election officials. Election officials received 913,734 voted ballots issued by states, and 33,027 [Federal Write-In Absentee Ballots]." *2020 Report to Congress,* FED. VOTING ASSISTANCE PROGRAM 55, https://perma.cc/CVH4-X97K. The median return rate as a percentage of UOCAVA ballots transmitted among the various states was 82.3 percent. *Id.* at 57. The Report notes that "[m]issing the deadline was the most common reason for rejection [of returned ballots] among both [groups of UOCAVA voters,] at rates of 44.7 percent for Uniformed Service members and 41.3 percent for overseas civilians." *Id.*

received in time to be counted, notwithstanding the logistical challenges that can often result from transporting ballots from overseas or distant locations across the country.

## V. ARGUMENT

### A. Counting ballots mailed on or before election day does not violate the Federal Election Day Statutes.

"The Elections Clause of the Constitution, Art. 1, § 4, cl. 1 . . . is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (citation omitted). "[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject." *Voting Integrity Project v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000); *Foster*, 522 U.S. at 68. By enacting 2 U.S.C. §§ 1 and 7 and 3 U.S.C. § 1 ("Federal Election Day Statutes"), Congress exercised its power under the Elections Clause to set federal election day as the first Tuesday after the first Monday in November. In Illinois, vote-by-mail ballots are counted if postmarked on or before election day and received during the fourteen calendar days following the election. 10 ILCS § 5/19-8; *id.* § 5/18A-15(a). Provisional ballots in Illinois are also examined and tallied (if valid) during this fourteen-day period, a practice Plaintiffs do not challenge. *Id.* § 5/18A-15(a). The text of the Federal Election Day Statutes does not preempt the acceptance of ballots postmarked or certified on or before election day and received within the fourteen-day period for counting ballots provided by state law.[5]

[5] Numerous other states aside from Illinois have adopted ballot receipt deadlines that extend for some period of time after election day, either for voters by mail generally or for some or all UOCAVA voters in particular. *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NAT'L CONF. OF STATE LEGISLATURES (July 12, 2022), https://perma.cc/Z6DV-SRPL

The Supreme Court has embraced a narrow view of what state laws the Federal Election Day Statutes preempt, imposing only the limitation that an election may not conclude prior to election day. *Foster*, 522 U.S. at 71, 72 n.4. Plaintiffs argue by implication first that *Foster*'s holding applies equally to *post*-election day ministerial actions related to the transmission, processing, and counting of mail-in ballots, and second that tallying ballots cast by mail on or before election day constitutes prohibited post-election day voting. Both of these assertions are incorrect.

In *Foster*, the Supreme Court considered Louisiana's practice of holding in October of federal election years an "open primary," which "provide[d] an opportunity to fill" Congressional offices "without any action to be taken on federal election day." *Id.* at 68-69. A candidate who received a majority of the votes in the open primary was "elected" *Id.* at 70. As a practical matter, a candidate was elected in over 80 percent of Louisiana's open primaries. *Id.* The Court, finding that Louisiana's practice violated 2 U.S.C. § 7, wrote: "[I]t is enough to

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(noting states with extended ballot receipt deadlines that apply generally and are not targeted specifically at UOCAVA voters); *see also Voting Assistance Guide*, FED. VOTING ASSISTANCE PROGRAM, https://perma.cc/78G5-VSXK (compiling information on ballot receipt deadlines for each state, including those that apply specifically to UOCAVA voters, such as Florida's 10-day extension to receive ballots after election day that only applies to UOCAVA voters who are overseas and only if their ballots returned by mail are postmarked/dated by election day for certain elections, and Pennsylvania's seven-day extension after election day to receive ballots from UOCAVA voters that are signed as having been mailed by the day before election day). In addition, the Uniform Military and Overseas Voters Act (UMOVA), a model statute drafted by the Uniform Law Commission, suggests that states adopt various measures to protect UOCAVA voters, not dissimilar to some of those adopted here by Illinois. UMOVA suggests an extended post-election day ballot receipt deadline, *e.g.*, as the "latest deadline for completing the county canvass or other local tabulation used to determine the official results." *See* UMOVA § 12. UMOVA also suggests that timeliness of voting a UOCAVA ballot can be proven in several ways, *e.g.*, evidence such as a postmark or certification by the voter under penalty of perjury. *See* UMOVA §§ 10, 12. The Uniform Law Commission indicates that UMOVA has been adopted by sixteen states. *See Military and Overseas Voters Act*, UNIF. L. COMM'N, https://perma.cc/5AVP-QP7X.

resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day" violates the Federal Election Day Statutes. *Id.* at 72. So long as there remains under state law an "act in law or in fact to take place on" election day, *id.*, *Foster* does not support the preemption of that state law. *See id.* at 71 (noting the legality of holding a run-off election after federal election day); 2 U.S.C. § 8 (allowing states to prescribe procedures for holding elections for vacancies "caused by a failure to elect at the time prescribed by law"). In Illinois, that act is the requirement for the casting of ballots by election day, including the certification and transmission of absentee ballots to election officials, as established by the postmark or certification date. And thus, *Foster* does not support preemption of Illinois's ballot receipt deadline.

By necessity, *calculating* voters' final selection often can stretch into the days following election day, and courts repeatedly have rejected the argument that post-election ballot tallying violates the Federal Election Day Statutes. As the court observed in *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317 (N.D. Fla. 2000), "while it is possible for everyone to vote on election day, it is highly unlikely that every precinct will be able to guarantee that its votes would be counted by midnight on election day. This has been the case for years, yet votes are not routinely being thrown out because they could not be counted on election day." *Harris*, 122 F. Supp. at 1324-25, *aff'd sub nom. Harris v. Fla. Elections Comm'n*, 235 F.3d 578 (11th Cir. 2000) ("Routinely, in every election, hundreds of thousands of votes are cast on election day but are not counted until the next day or beyond."); *see also Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020) ("New Jersey's law permitting the canvassing of ballots lacking a postmark if they are received within forty-eight hours of the closing of the polls

is not preempted by the Federal Election Day Statutes because the Federal Election Day Statutes are silent on methods of determining the timeliness of ballots.").

Plaintiffs concede that casting a ballot is distinct from counting a ballot, and that the Federal Election Day Statutes permit post-election day counting. Mem. Supp. Mot. Summ. J. at 13, ECF No. 33. Yet in the same breath, Plaintiffs contend that Illinois's decision to count absentee ballots that were timely cast violates the Federal Election Day Statutes. *Id.* Plaintiffs' position hinges on the Federal Election Statutes prohibiting Illinois from defining the casting of a ballot to include putting it in the mail. But "[p]roviding various options for the time and place of depositing a completed ballot does not change the day for the election." *Millsaps v. Thompson*, 259 F.3d 535, 545 (6th Cir. 2001) (internal quotation marks omitted). Illinois law establishes a mailbox rule for absentee ballots, considering the placement of a marked ballot in the post for delivery to election officials as an act of voting. 10 ILCS § 5/19-8. And Congress has "decline[d] to preempt state legislative choices" such as "methods of determining the timeliness of mail-in ballots." *Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020) (quoting *Foster*, 522 U.S. at 69).[6] The plain text of the Federal Election Day Statutes does not preclude state law procedures designating particular times or places for casting, receiving, processing, and counting ballots—in this case, Illinois's statute allowing for the counting of ballots cast by mail on or before election day, provided they are received by officials within fourteen days after election day.

[6] Plaintiffs cite a 1944 case from the Montana Supreme Court stating that "[n]othing short of the delivery of the ballot to the election officials for deposit in the ballot box constitutes casting the ballot." Pls.' Mem. Supp. Mot. Summ. J. at 5, ECF No. 33 (quoting *Maddox v. Bd. of State Canvassers*, 149 P.2d 112, 115 (Mont. 1944)). This was true under Montana state law in 1944—the law that court was interpreting. The court premised its holding on the fact that "the state law provides for voting by ballots deposited with the election officials." *Maddox*, 149 P.2d at 115. By contrast, in this case, Illinois law provides for voting by ballots deposited with election officials or deposited in the mail. 10 ILCS § 5/19-8.

The Illinois statute at issue in this case clearly does not permit voters to cast votes after election day is over. Illinois law requires that voters must vote and mail in their ballots on or before election day, before any election results are publicized. This system ensures that there is a level playing field for all voters and that no voters have access to cumulative vote tallies before casting their vote. Federal law does not preclude Illinois's decision to *count* ballots validly cast by mail on or before election day but received and tallied in the following fourteen days. As such, 10 ILCS § 5/19-8 does not conflict with the Federal Election Day Statutes, which set a uniform date for federal general elections. As described more fully herein, Illinois law includes standard measures commonly used in other state laws and in model legislation, and in the United States' own UOCAVA consent decrees, to ensure that mail-in voters have timely voted their ballots and transmitted them back to elections officials by election day and to avoid voters actually casting votes after election day.

**B. Illinois's ballot receipt deadline protects the voting rights of military and overseas voters.**

Absentee voting laws generally are the only means by which U.S. citizens who are deployed in the uniformed services or otherwise living overseas can exercise their right to vote. Despite Congress's repeated efforts, many military and overseas voters have continued to face difficulties exercising their franchise. *See, e.g., Bush*, 123 F. Supp. 2d at 1310. Prior to the adoption of UOCAVA, the "single largest reason for disenfranchisement of military and overseas voters [was] State failure to provide adequate ballot transit time." H.R. Rep. No. 99-765, at 10 (1986). After problems with delayed UOCAVA ballots persisted, Congress enacted the MOVE Act in an attempt to address the issue further. *See* H. Rep. No 111-288, at 744 (2009) (noting that the MOVE Act would "require States to transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter at least 45 days before an election for

federal office"); *see also* Cong. Rec. S4518 (daily ed. May 27, 2010) (Statement of Sen. Schumer) (describing Congress's adoption of the 45-day requirement as an effort to provide sufficient time for UOCAVA voters to request, receive, and cast their ballots in time for them to be counted). This history of Congressional action reflects a strong commitment to ensuring military service members and overseas citizens have access to the ballot box comparable to that enjoyed by domestic civilians.

As noted above, the Attorney General is charged with the responsibility of enforcing UOCAVA, 52 U.S.C. § 20307. Since UOCAVA's enactment, the United States repeatedly has found it necessary to take action against states that transmitted ballots late, in order to prevent military and overseas voters from being disenfranchised in particular federal elections. *See., e.g., United States v. Alabama*, 857 F. Supp. 2d.1236, 1242 (M.D. Ala. 2012) (finding that "[t]he State denies its legal obligation to ensure UOCAVA compliance; the State has violated [UOCAVA] in two consecutive elections, the extent of these violations has been widespread, systemic, and worsening; and the State has failed to establish mechanisms to avoid UOCAVA voter disenfranchisement."); *United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263, at *1 (N.D.N.Y. 2012) (observing "[h]aving had ample opportunity to correct the [UOCAVA] problem, [the state] ha[d] failed to do so"). In most of these UOCAVA cases, the remedy has involved extending the deadline after election day for receiving military and overseas voters' absentee ballots cast by election day. For example, just since the year 2000, UOCAVA ballot receipt deadlines were extended by court-ordered consent decree, court order, or settlement agreement, allowing validly-cast ballots to be received and counted after election day, in 29 of the United States' cases and agreements. Indeed, the use of such ballot receipt extensions as remedies for late transmission of UOCAVA ballots stretches back to the earliest of the United

States' cases brought to enforce UOCAVA after that federal statute was enacted in 1986. *See Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act*, DEP'T OF JUST., (Mar. 24, 2022), https://perma.cc/7LZE-7Q7H. Many of the agreements or court orders addressing UOCAVA violations based on late ballot transmissions have extended ballot receipt deadlines for UOCAVA voters for the number of days after election day commensurate with the number of days that UOCAVA ballots were transmitted after the federal law deadline, in order to protect the right to vote of military and overseas voters who did not receive ballots in time due to late transmission by election officials.[7] In Illinois alone, the United States has sued the State for late ballot transmissions to UOCAVA voters twice in the last twelve years. The remedies in those cases have included an extension of Illinois's existing ballot receipt deadline and other changes to election calendars to ensure UOCAVA voters have sufficient time to receive, mark, and return their ballots. Consent Decree, *United States v. Illinois*, No. 1:10cv06800 (N.D. Ill. Oct. 22, 2010); Consent Decree, *United States v. Illinois*, No. 1:13cv00189 (N.D. Ill. Jan. 11,

[7] *See, e.g., United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W.Va. Nov. 3, 2014) (extending ballot receipt deadline by 7 days); *United States v. Wisconsin*, No. 3:12-cv-00197 (W.D. Wis. Mar. 23, 2012) (extending deadline by number of days of late transmission); *United States v. New York*, No. 1:09-cv-00335 (N.D.N.Y. Mar. 26, 2009) (extending deadline by 6 days); *United States v. Michigan*, No. L 88-208 CA5 (W.D. Mich. July 29, 1988) (extending deadline by 10 days); *United States v. Idaho*, No. 88-1187 (D. Idaho May 21, 1988; entered May 23, 1988) (extending deadline by 10 days); *United States v. Oklahoma*, No. CIV-88-1444 P (W.D. Okla. Aug. 22, 1988) (extending deadline by 10 days); *United States v. New Jersey*, No. 3:90-cv-02357 (D.N.J. June 5, 1990) (extending deadline by 10 days); *United States v. Colorado*, No. 1:90-cv-01419 (D. Colo. Aug. 10, 1990) (extending deadline by 10 days); *United States v. New Jersey*, No. 3:92-cv-2403 (D.N.J. June 2, 1992) (extending deadline by 14 days); *United States v. Michigan*, No. 1:92-cv-00529 (W.D. Mich. Aug. 3, 1992) (extending deadline by 20 days); *United States v. Georgia*, No. 1:04-cv-02040 (N.D. Ga. July 16, 2004) (extending deadline by 3 business days). Many UOCAVA cases are collected at the Department of Justice's website. *See Voting Section Litigation*, DEP'T OF JUST. (Aug. 30, 2022), https://perma.cc/T27P-C33C.

2013).[8] And like the Illinois law at issue here, the relief sought by the United States in UOCAVA cases is designed not only to provide an adequate opportunity for voters to return their ballots, through the extension of the receipt deadline, but also to avoid the risk of votes being cast after election day, by providing that ballots must be executed and sent by election day.

The Illinois statute at issue here provides a prophylactic protection for UOCAVA voters (and other mail-in voters) to ensure that they have time to receive, vote, and return their ballots in time for them to be counted. This Illinois law is not dissimilar to the statutes adopted by other states and the remedies proposed and ordered in UOCAVA cases brought by the United States.

## VI. CONCLUSION

For the foregoing reasons, the United States submits that Illinois's post-election day ballot receipt deadline is consistent with the Federal Election Day Statutes, 2 U.S.C. §§ 1 and 7 and 3 U.S.C. § 1. Such post-election day ballot receipt deadlines are a common remedial measure that the United States has sought and obtained in UOCAVA cases to ensure UOCAVA voters have sufficient time to receive, mark, and return their ballots in time for them to be counted, and are also a common prophylactic measure that states have adopted by legislation or rule to protect the right to vote of UOCAVA voters and other mail-in voters.

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[8] Contrary to Plaintiffs' assertion, Pls.' Resp. Opp'n Defs.' Mot. Dismiss 2, ECF No. 43, Michigan does not require all ballots to be received by election day. In 2012, Michigan enacted legislation extending the "ballot receipt deadline for any [UOCAVA] absentee voter ballots . . . that were not transmitted" by UOCAVA's 45-day deadline, by "the total number of days beyond the deadline [that they were] transmitted. . . ." MICH. COMP. LAWS § 168.759a (16); 2012 Mich. Legis. Serv. P.A. 523 (S.B. 810) (effective March 28, 2013). Such "ballots received during the extension time [are] counted and tabulated for the final results of the election provided that the absentee voter ballots are executed and sent by the close of the polls on election day . . . ." *Id*. This Michigan legislation effectively adopts the post-election day ballot receipt extension remedy entered by stipulated order in earlier litigation brought by the United States to enforce UOCAVA. *United States v. Michigan*, No. 1:12-cv-00788 (W.D. Mich. Aug. 6, 2012), https://perma.cc/ESJ6-8SK8.

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**CERTIFICATE OF SERVICE**

I certify that on August 31, 2022, I filed the foregoing via the CM/ECF system, which sends notice to counsel of record.

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## B. Litigation to Defend the Constitutionality of UOCAVA

# Reeves v. Nago and United States

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

| | |
|---|---|
| VICENTE TOPASNA BORJA, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>SCOTT NAGO, in his official capacity as Chief Election Officer for the Hawaii Office of Elections, et al.,<br><br>Defendants. | CIVIL NO. 20-00433 JAO-RT<br><br>ORDER (1) GRANTING DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND (2) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT |

**ORDER (1) GRANTING DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND (2) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Vicente Topasna Borja ("Borja"), Edmund Frederick Schroeder, Jr. ("Schroeder"), Ravinder Singh Nagi ("R. Nagi"), Patricia Arroyo Rodriguez ("Rodriguez"), Laura Castillo Nagi ("L. Nagi"), and Equally American Legal and Defense and Education Fund ("Equally American") (collectively, "Plaintiffs") challenge the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), codified at 52 U.S.C. §§ 20301 to 20311, Hawaii's Uniform Military and Overseas Voters Act ("UMOVA"), codified at Hawai‘i Revised Statutes ("HRS") §§ 15D-1 to -18, and Hawai‘i Administrative Rules ("HAR") § 3-177-600. Although this case broadly implicates voting rights, the

narrow issue before the Court is whether UOCAVA and UMOVA violate the Equal Protection Clause by declining to extend the right to vote absentee in federal elections to Plaintiffs, who are former Hawai‘i residents now residing in Guam and the U.S. Virgin Islands ("Virgin Islands").

The parties cross move for summary judgment, with Plaintiffs arguing that UOCAVA and UMOVA are unconstitutional, and Defendants United States of America, Lloyd J. Austin, III, Federal Voting Assistance Program, David Beirne,[1] Scott Nago ("Nago"), and Glen Takahashi ("Takahashi")[2] (collectively, "Defendants") arguing that UOCAVA and UMOVA survive rational basis review. For the following reasons, the Court GRANTS Defendants' cross-motions for summary judgment and joinder, ECF Nos. 140, 142, 144, and DENIES Plaintiffs' Motion for Summary Judgment. ECF No. 137. The Court rejects Plaintiffs' argument that the statutes are unconstitutional merely because they do not grant Plaintiffs a right given to others, particularly when Plaintiffs' fellow territorial residents lack such a right.

[1] These defendants are collectively referred to as the "Federal Defendants."

[2] Nago and Takahashi are collectively referred to as the "Hawai‘i Defendants."

## BACKGROUND

### A. Factual History

#### 1. Plaintiffs

Plaintiffs — all former Hawai‘i residents[3] — allege that UOCAVA, UMOVA, and HAR § 3-177-600 preclude them from voting in Hawai‘i by absentee ballot for President and Hawaii's U.S. congressional delegation because they currently reside in Guam or the Virgin Islands. ECF No. 105 ¶¶ 1–2, 14–20.

Borja, a U.S. citizen born in Guam, was a Hawai‘i resident in 1990. ECF No. 138-2 ¶¶ 1, 3, 7; ECF No. 105 ¶ 15.a. He currently resides in Guam. ECF No. 138-2 ¶ 1. Schroeder is a U.S. citizen who was born in North Carolina. ECF No. 138-4 ¶¶ 1, 3. He lived in Hawai‘i from 1976 to 1984, then moved to Guam, where he currently resides. *Id.* ¶¶ 1, 5–7. R. Nagi, a U.S. citizen born in Guam, currently resides in the Virgin Islands. ECF No. 138-5 ¶ 1. He resided in Hawai‘i from 2002 to 2005. *Id.* ¶¶ 3–4. Rodriguez is a U.S. citizen who was born in Texas. ECF No. 138-6 ¶ 1. She lived in Hawai‘i from 1978 to 1994 and currently resides in Guam. *Id.* ¶¶ 1, 3. A U.S. citizen born in Illinois, L. Nagi was a resident of Hawai‘i from 2002 to 2005. ECF No. 138-7 ¶¶ 1, 3, 5. She currently lives in the Virgin Islands. *Id.* ¶ 1. Equally American has members, including Borja,

[3] Or, in the case of Equally American, has members, who are former Hawai‘i residents. ECF No. 105 ¶ 20.

Schroeder, R. Nagi, Rodriguez, and L. Nagi (collectively, the "Individual Plaintiffs"), who reside in Guam, the Virgin Islands, Puerto Rico, American Samoa, and the Northern Mariana Islands ("NMI"), and formerly resided in a state. ECF No. 138-8 ¶ 7.

**2. UOCAVA, UMOVA, And HAR § 3-177-600**

Enacted in 1986, UOCAVA's purpose was to "facilitate absentee voting by United States citizens, both military and civilian, who are overseas." H.R. Rep. No. 99-765, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2009. Overseas voters include absent uniformed services voters and those residing outside the United States who (1) are qualified to vote in the place they were last domiciled before leaving the United States and (2) who would be qualified to vote in the place last domiciled before leaving the United States but for their current residence outside the United States. *See* 52 U.S.C. § 20310(5)(B)–(C). "States" and the territorial use of "United States" include a state of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and American Samoa. *See* 52 U.S.C. § 20310(6) & (8). The NMI is excluded from these definitions. *See id*.

UMOVA authorizes U.S. citizens who are former Hawai‘i residents and living outside the United States to vote by absentee ballot in federal elections. HRS § 15D-1 to -18. Its purpose was "to ensure the ability of members of the military and other[] eligible voters who are overseas to participate in all elections

for federal, state, and local offices." ECF No. 143-4 at 1; S. Stand. Comm. Rep. No. 2450, https://www.capitol.hawaii.gov/session2012/commreports/HB461_SD1_SSCR2450_.HTM. UMOVA defines "United States" as "the several states, the District of Columbia, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States." HRS § 15D-2. While UMOVA does not itself distinguish between the NMI and other territories, through administrative rules, Hawai‘i allows former Hawai‘i citizens now residing in the NMI to vote absentee in federal elections like overseas voters by authorizing the issuance of ballot packages to voters covered by UOCAVA. *See* HAR § 3-177-600. Because UOCAVA excludes the NMI from the definition of "states" and territorial use of "United States," *see* 52 U.S.C. § 20310(6) & (8), U.S. citizens residing in the NMI are treated as overseas voters and therefore able to vote absentee. *See* HAR § 3-177-600. UMOVA additionally permits absentee voting by U.S. citizens born outside the United States who have never resided in the United States or registered to vote in any state, if their parents or guardians last resided in Hawai‘i and would have been eligible to vote in Hawai‘i before moving overseas. *See* HRS § 15D-2. As a result, certain U.S. citizens who have never resided in the United States can vote in Hawaii's federal elections while former Hawai‘i residents lose the right to participate in such

elections if they move to Guam, the Virgin Islands, American Samoa, or Puerto Rico. *See id.*

Plaintiffs challenge the distinction in UOCAVA, UMOVA, and HAR § 3-177-600 between U.S. citizens residing in the NMI or in a foreign country, with those residing in Guam, the Virgin Islands, American Samoa, or Puerto Rico. ECF No. 105 ¶¶ 2, 51, 62. Because Plaintiffs reside in Guam and the Virgin Islands, they are unable to vote for President or members of Congress. ECF No. 138-2 ¶ 9; ECF No. 138-4 ¶ 11; ECF No. 138-5 ¶ 14; ECF No. 138-6 ¶ 10; ECF No. 138-7 ¶ 9.

**3. Stipulated Facts**

The parties stipulate that the Individual Plaintiffs: are not current Hawai‘i residents; are not currently registered to vote in Hawai‘i; did not apply to register to vote absentee nor request an absentee ballot pursuant to UOCAVA or UMOVA; are not "overseas voters" or "covered voters" as defined by HRS § 15D-2; are not "absent uniformed services voters" or "overseas voters" as defined by 52 U.S.C. § 20310(1) and (5); seek to vote absentee in presidential and congressional elections in Hawai‘i; and do not seek to vote absentee in state or local elections in Hawai‘i. ECF No. 136 ¶¶ 1–8, 14–15. Borja, Schroeder, and Rodriguez are registered to vote in Guam. *Id.* ¶¶ 9–10, 12. R. Nagi and L. Nagi are registered to vote in the Virgin Islands. *Id.* ¶¶ 11, 13.

### 4. Procedural History

Plaintiffs commenced this action on October 8, 2020. On October 29, 2020, they filed an Amended Complaint. ECF No. 39. Pursuant to the Stipulation Permitting Leave to Plaintiffs to File Second Amended Complaint and Order, *see* ECF No. 72, Plaintiffs filed a Second Amended Complaint ("SAC") on December 18, 2020. ECF No. 73.

On January 14, 2021, the Federal Defendants filed a Motion to Dismiss for Lack of Subject-Matter Jurisdiction, *see* ECF No. 74, and were joined in part by the Hawai‘i Defendants.[4] ECF Nos. 78–80. The Court issued an Order Granting Federal Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction ("Dismissal Order"), concluding that Plaintiffs established an injury in fact and traceability but not redressability, and gave Plaintiffs leave to amend. ECF No. 102; *see also Reeves v. Nago*, __ F. Supp. 3d__, 2021 WL 1602397 (D. Haw. Apr. 23, 2021).

On May 14, 2021, Plaintiffs filed a Third Amended Complaint ("TAC"). ECF No. 105. The TAC asserts a single 42 U.S.C. § 1983 claim — UOCAVA and UMOVA violate the Equal Protection and Due Process Clauses of the Fifth and

[4] At the time, the Hawai‘i Defendants also included Kathy Kaohu, but she was later dismissed. ECF No. 106.

Fourteenth Amendments[5] by protecting the voting rights of certain former Hawai‘i residents based on whether they live overseas or in specified territories. *Id.* at 40.

Plaintiffs pray for: (1) an order (a) declaring that UOCAVA, UMOVA, and HAR § 3-177-600 violate the Fifth Amendment, the Fourteenth Amendment, and § 1983 by allowing former Hawai‘i residents living in foreign countries or the NMI to vote absentee while disallowing those living in Puerto Rico, Guam, the Virgin Islands, or American Samoa from doing so, (b) striking and ordering unenforceable the inclusion of the "the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa" in UOCAVA's definition of "United States," and (c) striking and ordering unenforceable the inclusion of "Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States" in UMOVA's definition of "United States"; (2) a preliminary and permanent order enjoining the enforcement of UOCAVA, UMOVA, and HAR § 3-177-600 in a manner that violates the Fifth or Fourteenth

[5] Plaintiffs again allege a violation of 42 U.S.C. § 1983 but "one cannot go into court and claim a 'violation of § 1983' — for § 1983 by itself does not protect anyone against anything." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 978 (9th Cir. 2004) (some internal quotation marks and citation omitted). This is because § 1983 "does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials." *Id.* (internal quotation marks and citation omitted). Therefore, the Court will treat Plaintiffs' claim as alleging violations of the Fifth and Fourteenth Amendments.

Amendments or § 1983; (3) attorneys' fees and costs; and (4) further just and appropriate relief. *Id.* at 42–44.

On June 14, 2021, Defendants again sought dismissal for lack of subject matter jurisdiction. ECF Nos. 107, 109–110. The Court denied the request. ECF No. 128; *Borja v. Nago*, CIVIL NO. 20-00433 JAO-RT, 2021 WL 4005990 (D. Haw. Sept. 2, 2021). It found that Plaintiffs had standing because they met the injury in fact, traceability, and redressability requirements. *See Borja*, 2021 WL 4005990, at *4–11.

On November 22, 2021, Plaintiffs filed the present Motion for Summary Judgment. ECF No. 137. The Federal Defendants and Nago responded with oppositions and cross-motions for summary judgment. ECF Nos. 140, 142. Takahashi joined in the foregoing. ECF No. 144. On January 21, 2022, Plaintiffs filed a Combined Reply in Support of their Motion for Summary Judgment and Opposition to Defendants' Cross-Motions for Summary Judgment. ECF No. 151. On February 11, 2022, Nago, joined by Takahashi, filed a Reply. ECF Nos. 154–55. The Federal Defendants filed also filed a Reply the same day. ECF No. 156.

On March 10, 2022, the Court stayed the case pending the resolution of *United States v. Vaello Madero*, 596 U.S. __, 142 S. Ct. 1539 (2022). ECF No. 163. The stay was lifted in April and the parties filed supplemental briefing

regarding the impact of *Vaello Madero* on their arguments. ECF Nos. 165, 166, 168–70.

The Court held a hearing on the pending motions on August 12, 2022. ECF No. 178.

## LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). "A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). In a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party. *See State Farm Fire & Cas. Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989) (per curiam).

Once the moving party has met its burden of demonstrating the absence of any genuine issue of material fact, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See T.W. Elec.*, 809 F.2d at 630; Fed. R. Civ. P. 56(c). The opposing party may not defeat a motion for

summary judgment in the absence of any significant probative evidence tending to support its legal theory. *See Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). The nonmoving party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630; *Blue Ocean Pres. Soc'y v. Watkins*, 754 F. Supp. 1450, 1455 (D. Haw. 1991) (citing *id.*).

If the nonmoving party fails to assert specific facts beyond the mere allegations or denials in its response, summary judgment, if appropriate, shall be entered. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990); Fed. R. Civ. P. 56(e). There is no genuine issue of fact if the opposing party fails to offer evidence sufficient to establish the existence of an element essential to that party's case. *See Celotex*, 477 U.S. at 322; *Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964 (9th Cir. 1994) (citing *id.*); *Blue Ocean*, 754 F. Supp. at 1455 (same).

In considering a motion for summary judgment, "the court's ultimate inquiry is to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec.*, 809 F.2d at 631 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)) (footnote omitted). Inferences must be drawn in favor of the nonmoving party. *See id.* However, when the opposing party offers no direct evidence of a

material fact, inferences may be drawn only if they are reasonable in light of the other undisputed background or contextual facts and if they are permissible under the governing substantive law. *See id.* at 631–32. If the factual context makes the opposing party's claim implausible, that party must come forward with more persuasive evidence than otherwise necessary to show there is a genuine issue for trial. *See Bator v. Hawaii*, 39 F.3d 1021, 1026 (9th Cir. 1994) (citing *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987)).

**DISCUSSION**

Plaintiffs argue that UOCAVA and UMOVA violate their equal protection rights by denying them the right to vote for President of the United States and representation in Congress merely because they live outside the 50 states, while protecting the voting rights of U.S. citizens who live overseas or in the NMI. ECF No. 137-1 at 19–20. Plaintiffs postulate that UOCAVA and UMOVA are subject to strict scrutiny but cannot even satisfy heightened scrutiny or rational basis review because these statutes discriminate against a quasi-suspect class and do not advance any legitimate interest. *Id.*

The Federal Defendants contend that rational basis review applies because (1) no fundamental rights are restricted given that territorial residents do not have a fundamental right to vote in federal elections and (2) territorial residents — more

specifically, former Hawai‘i residents who moved to particular territories — are not a protected class. ECF No. 140-1 at 22–23, 29–30. And under such review, UOCAVA rationally distinguishes between U.S. citizens who reside out of the country from those who reside in the subject territories. *Id.* at 32–45.

The Hawai‘i Defendants argue that no scrutiny applies to UMOVA but that if scrutiny applies, it should be rational basis review, which UMOVA survives. ECF No. 142-1 at 12–26; ECF No. 144.

**A. Equal Protection**

The Equal Protection Clause mandates "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citation omitted). To prevail on an equal protection claim, Plaintiffs must show disparate treatment of a similarly situated class. *See Boardman v. Inslee*, 978 F.3d 1092, 1117 (9th Cir. 2020) (citation omitted). Plaintiffs urge the Court to apply strict scrutiny and find UOCAVA, UMOVA, and HAR § 3-177-600 unconstitutional. Three levels of scrutiny are at issue when a law is alleged to violate equal protection rights: "strict scrutiny, intermediate scrutiny, or rational basis review." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004) (citation omitted). "Strict scrutiny is applied when the classification is made on 'suspect' grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of

association." *Id.* (citation omitted); *see Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam) (holding that strict scrutiny of a legislative classification in the equal protection context is required "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class" (footnotes omitted)). When laws discriminate based on other suspect classifications, such as gender, they are subject to intermediate scrutiny. *See Kahawaiolaa*, 386 F.3d at 1277 (citation omitted). Finally, if a law does not involve a suspect class or burden a fundamental right, rational basis review applies. *See id.* at 1277–78 (citation omitted).

**1. Strict Scrutiny And Intermediate Scrutiny Are Inapplicable**

**a. Right To Vote**

Plaintiffs frame the subject violation of equal protection rights as an infringement on the fundamental right to vote. Although the statutes at issue affect the right to vote, they do not infringe upon the right to vote. *See Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.2 (1st Cir. 1994) ("*Igartua I*") (per curiam) (stating that UOCAVA "does not infringe [the] right [to vote] but rather limits a state's ability to restrict it"). Territorial residents have no right to vote in federal elections and U.S. citizens who move to certain territories likewise have no right to vote absentee in their former states of residence.

### i. Territorial Residents Do Not Have A Fundamental Right To Vote In Federal Elections

It is well established that territorial residents do not have a right to vote in federal elections. In accordance with Article II of the U.S. Constitution, electors, not citizens, elect the President and Vice President. *See Att'y Gen. of the Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) (citations omitted); U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]"). Thus, "[t]he right to vote in presidential elections under Article II inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors," *Att'y Gen. of Guam*, 738 F.2d at 1019, and "no U.S. citizen, whether residing in a State or territory or elsewhere, has an expressly declared constitutional right to vote for electors in presidential elections." *Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) (citation omitted). Because territories are not states,[6] they have no electors, and their residents consequently "cannot

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[6] Significantly, the Supreme Court recently reaffirmed Congress's broad authority to legislate differently between U.S. territories and the states pursuant to the Territory Clause of the Constitution, which permits Congress to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." *Vaello Madero*, 596 U.S. at __, 142 S. Ct. at 1541 (quoting U.S. Const. art. IV, § 3, cl. 2 (alteration in original) (internal quotation marks omitted)). This "longstanding congressional practice reflects both national and local

(continued . . .)

exercise individual votes in a presidential election." *Att'y Gen. of Guam*, 738 F.2d at 1019; *see also Igartúa v. United States*, 626 F.3d 592, 601–02 & n.9 (1st Cir. 2010) (holding that the right to elect Representatives to the House of Representatives "is given to residents of the States, not to citizens," and that voting rights are conferred upon "citizens 'of the several States'"). Simply put, "the residents of the territories have no fundamental right to vote in federal elections." *Segovia v. United States*, 880 F.3d 384, 390 (7th Cir. 2018);[7] *see Romeu*, 265 F.3d at 123 ("[A]ll U.S. citizens living in U.S. territories . . . possess more limited voting rights than U.S. citizens living in a State.").

**ii. U.S. Citizens Have No Fundamental Right To Vote In Their Former States Of Residence**

U.S. citizens who move to a territory or another state have no constitutional right to vote in their *former* states of residence, and Plaintiffs concede as much. ECF No. 137-1 at 28; *see also Segovia*, 880 F.3d at 390 ("The unmistakable conclusion is that, absent a constitutional amendment, only residents of the 50

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(continued . . .)
considerations" including "policy judgments that account not only for the needs of the United States as a whole but also for (among other things) the unique histories, economic conditions, social circumstances, independent policy views, and relative autonomy of the individual Territories." *Id.*

[7] The Court previously declined to adopt the Seventh Circuit's standing analysis but finds persuasive its equal protection analysis.

States have the right to vote in federal elections. The plaintiffs have no special right simply because they *used to* live in a State."); *Igartua I*, 32 F.3d at 10 (holding that UOCAVA's distinction between "those who reside overseas and those who move anywhere within the United States" does not affect a fundamental right); *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969) ("It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots."). The Supreme Court "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens *in the jurisdiction*." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (emphasis added) (collecting cases); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (1978) ("No decision of this Court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." (citations omitted)). It bears emphasis that Plaintiffs effectively assert a constitutional right to vote in Hawai‘i, even though they left, in most cases, decades ago. As much as Plaintiffs wish to retain *former* voting rights, they are no longer Hawai‘i residents, and territorial residents do not have the right

to vote in federal elections, so UOCAVA and UMOVA do not treat Plaintiffs differently than others in their respective jurisdictions.

Plaintiffs' talking points address general voting rights principles and, while those are important, they have no bearing on the circumstances here. For example, Plaintiffs argue that "strict scrutiny is especially important when the individuals selectively denied the right to vote for government officials are subject to that government's power." ECF No. 137-1 at 27. However, *Evans v. Cornman*, 398 U.S. 419 (1970), which they cite, concerned the denial of voting rights to Maryland residents living in a federal enclave. *See id.* at 419–20. In other words, people *within a single state* were being treated differently. The Supreme Court held that it was a violation of equal protection rights to exclude the enclave residents from voting because they had a stake in electoral decisions equal to other Maryland residents and were treated by the state as residents to a significant degree. *See id.* at 423–26. As already mentioned, territorial residents have no right to vote in federal elections even though they are affected by federal law. The Court accordingly rejects Plaintiffs' assertion that strict scrutiny must apply given that they are governed by federal law and are treated as U.S. residents for most purposes in the application of federal law. ECF No. 151 at 14. Moreover,

Plaintiffs have no stake in electoral decisions affecting Hawai‘i residents, nor does Hawai‘i treat them as residents.[8]

Plaintiffs also contend that the government is prohibited from discriminating among former state residents once voting rights have been extended. ECF No. 137-1 at 28. Plaintiffs cite no cases for the proposition that a former state resident has a fundamental right to vote in that state, however. They instead rely on cases involving disparate treatment in the voting context *within a single geographical jurisdiction*, and Plaintiffs' counsel conceded this at the hearing. *See*, *e.g.*, *Charfauros v. Bd. of Elections*, 249 F.3d 941, 952 (9th Cir. 2001) (finding unconstitutional the administration of pre-election day voter challenge procedures that precluded a certain class of voters from voting in an election on Rota Island in the NMI). This is a key distinction that Plaintiffs ignore. *See*, *e.g.*, *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) (identifying the two types of voting regulations subjected to strict scrutiny by the Supreme Court: those "that unreasonably deprive some residents in a geographically defined governmental unit from voting in a unit wide election" and those "that contravene the principle of 'one person, one vote' by diluting the voting power of some qualified voters within

[8] The Court is aware that Plaintiffs only wish to vote absentee in Hawai‘i in federal elections, not state or local elections, *see* ECF No. 136 ¶¶ 14–15, but the Court makes this point because Hawai‘i is the jurisdiction in which they claim an entitlement to vote.

the electoral unit" (some internal quotation marks and citations omitted)); *Green v. City of Tucson*, 340 F.3d 891, 900 (9th Cir. 2003) (explaining that the types of voting restrictions subject to strict scrutiny concern "the equal treatment of voters within the governmental unit holding the election, be it a school district, a city or a state" (citations omitted)).

Plaintiffs attempt to define the relevant governmental or electoral "unit" as "former state residents who do not obtain the right to vote in their new homes." ECF No. 151 at 15. But the governmental/electoral unit is Hawai‘i, and they are not part of that unit, so they are not deprived of any voting rights simply because the right to vote in federal elections has not been *extended* to them, as it has to those in foreign countries and the NMI. Indeed, Plaintiffs mischaracterize the lack of an extension of the right to vote absentee in federal elections as a wholesale exclusion from that right, *see id.*, even though anyone who moves from a state to another state or a territory other than the NMI is similarly denied an extension of that right.

Where, as here, voting rights have been extended to some, strict scrutiny is not required just because Plaintiffs are not among those who benefit. A "statute is not invalid under the Constitution because it might have gone farther than it did." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (internal quotations marks and citation omitted); *McDonald*, 394 U.S. at 809 ("[A] legislature traditionally has

been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,'" and "a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." (citations omitted)). Plaintiffs criticize Defendants' reliance on *Katzenbach v. Morgan* for the broad rule that no statute seeking to expand the franchise can be subject to strict scrutiny. ECF No. 151 at 17. However, Defendants limit *Katzenbach*'s application to the statutes at issue here. ECF No. 140-1 at 27– 28; ECF No. 142-1 at 21–22. Despite Plaintiffs' mischaracterization of this case as involving the denial of voting rights, the issue is whether Congress and/or Hawai'i violated the Constitution by not extending absentee voting rights to Plaintiffs.

Relevant here, *Katzenbach* addressed a complaint that "Congress violated the Constitution by not extending the relief effected in § 4(e) [of the Voting Rights Act of 1965] to those educated in non-American-flag schools." *Katzenbach*, 384 U.S. at 643, 656–57. Section 4(e) provided "that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English." *Id.* at 643. It prohibited the

enforcement of an English literacy requirement "for those educated in American-flag schools (schools located within United States jurisdiction) in which the language of instruction was other than English, and not for those educated in schools beyond the territorial limits of the United States in which the language of instruction was also other than English." *Id.* at 656.

The Supreme Court reasoned that because § 4(e) did "not restrict or deny the franchise but in effect extend[ed] the franchise to persons who otherwise would be denied it by state law," it was unnecessary to "decide whether a state literacy law conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminate[d] invidiously against those educated in non-American-flag schools." *Id.* at 657. In deciding the relevant issue — "whether the challenged limitation on the relief effected in § 4(e) was permissible" — the Supreme Court found strict scrutiny inapplicable because the challenged distinction was "presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise." *Id.* The Supreme Court was guided by the principles that (1) a "statute is not invalid under the Constitution because it might have gone farther than it did"; (2) "a legislature need not strike at all evils at the same time"; and (3) "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* (internal quotation marks and

citations omitted). Like *Katzenbach*, this case is about the constitutionality of the extension of the right to vote to those who would otherwise lose the right. *See id.*; *see also McDonald*, 394 U.S. at 807–08 (applying rational basis review and upholding absentee voting statutes, which were "designed to make voting more available to some groups who cannot easily get to the polls" and did not deny the exercise of the right to vote).

Finally, Plaintiffs argue that strict scrutiny applies to voting in the territories. ECF No. 137-1 at 28. That territorial residents have constitutionally protected voting rights does not promote Plaintiffs' desired application of strict scrutiny, as they are registered voters in their respective territories, and their territorial voting rights are not at issue. ECF No. 136 ¶¶ 9–13. Plaintiffs instead seek absentee voting rights in Hawai‘i to participate in federal elections, which would be *superior* to those conferred upon their fellow territorial residents and frankly could result in a far more serious equal protection problem than what is alleged here. *See infra* Part A.2.a.

For these reasons, no fundamental right mandating the application of strict scrutiny is affected.

**b. Plaintiffs Are Not Members Of A Suspect Or Quasi-Suspect Class**

Plaintiffs alternatively argue that at least heightened scrutiny applies because territorial residents are members of a quasi-suspect class, described by Plaintiffs as

"a discrete and insular minority of U.S. citizens who have been excluded from participating in the political system for over a century." ECF No. 137-1 at 35–39. But this case does not concern territorial residents as a whole; it concerns U.S. citizens who move from Hawai'i to certain territories. Even if territorial residents in general were the subject of this litigation, as explained above, it is settled law that the inability of territorial residents to vote in federal elections is not unconstitutional. And while Plaintiffs repeatedly protest that their "disfavored" territories are singled out, they disregard the fact that UOCAVA, UMOVA, and HAR § 3-177-600 treat their territories the same as all states and the District of Columbia. Therefore, Plaintiffs' irrelevant arguments about the historic disenfranchisement of territorial residents are unavailing. The Individual Plaintiffs are all former Hawai'i residents who moved to Guam or the Virgin Islands, and members of Equally American are former state residents who currently reside in these territories plus Puerto Rico, American Samoa, and the NMI. The federal voting rights sought by Plaintiffs would confer no general benefit upon the territorial residents whose history they impute to themselves/adopt as their own, unless those residents previously lived in Hawai'i.

The salient question is whether former Hawai'i residents who move to a territory other than the NMI constitute a quasi-suspect class. Plaintiffs have not

cited — and the Court has not found — any cases to support such a classification.[9] To the contrary, courts have concluded that plaintiffs who move from a state to a territory are not a suspect or quasi-suspect class. *See*, *e.g.*, *Segovia*, 880 F.3d at 390 (holding that the plaintiffs are not a suspect class because their "current condition is not immutable, as nothing is preventing them from moving back to Illinois" and "there has been no suggestion that the plaintiffs form a class of people historically subjected to unequal treatment," and doubting "that 'people who move from a State to a territory' even constitute a class of people recognized by the law"); *Igartua I*, 32 F.3d at 10 (finding that those "who previously voted in presidential elections while residing elsewhere" were not a suspect class).

[9] The following factors are relevant to the determination of whether a classification is suspect or quasi-suspect and Plaintiffs apply them to argue that territorial residents are a quasi-suspect class:

> "A) whether the class has been historically subjected to discrimination; B) whether the class has a defining characteristic that frequently bears a relation to ability to perform or contribute to society; C) whether the class exhibits obvious, immutable or distinguishing characteristics that define them as a discrete group; and D) whether the class is a minority or politically powerless."

*Karnoski v. Trump*, 926 F.3d 1180, 1200 n.17 (9th Cir. 2019) (citation omitted). Applied to the proper "class," however, these factors do not support a finding that Plaintiffs constitute a quasi-suspect class.

Nor have Plaintiffs explained how a group of former Hawai‘i residents wishing to vote absentee for President and Hawaii's U.S. congressional delegation could constitute a suspect or quasi-class. The Court finds that they do not.

At issue then is not whether Plaintiffs' right to vote is compromised, or whether Plaintiffs constitute a quasi-suspect class, but whether UOCAVA and UMOVA's extension of voting rights to former Hawai‘i residents who move to a foreign country and to the NMI — without extending the same rights to Plaintiffs — violates Plaintiffs' equal protection rights. Because there is no infringement of a fundamental right or involvement of a suspect or quasi-suspect class, rational basis review applies.

### 2. UOCAVA, UMOVA And HAR § 3-177-600 Survive Rational Basis Review

Under rational basis review, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440; *see Boardman*, 978 F.3d at 1118 (stating that under the Equal Protection Clause, a statute "'need only rationally further a legitimate state purpose' to be valid" (some internal quotation marks and citations omitted)). The party challenging the statute must "'negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Boardman*, 978 F.3d at 1118 (some internal quotation marks omitted) (quoting *Heller v. Doe*, 509 U.S. 312, 320–21

(1993)). "[A] classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller*, 509 U.S. at 320 (citation omitted). The Supreme Court rarely "strikes down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, 585 U.S. __, 138 S. Ct. 2392, 2420 (2018). On the limited occasions it has, "a common thread has been that the laws at issue lack any purpose other than a 'bare . . . desire to harm a politically unpopular group.'" *Id.* (alteration in original) (citation omitted).

Plaintiffs argue that their equal protection rights are violated because there is no rational basis for treating them differently than former Hawai'i residents who move to a foreign country or to the NMI. ECF No. 137-1 at 42–46; ECF No. 151 at 21–29. The Federal Defendants counter that UOCAVA is constitutional because (1) defining Guam, the Virgin Islands, Puerto Rico, and American Samoa as part of the "United States" places those who move from a state to one of those territories on equal footing with other residents of that territory; (2) the NMI can be treated differently than the other territories; (3) it is rational to treat former state residents who move to territories differently than those who move to foreign countries because the latter lose all voting rights; and (4) it is rational to treat individuals moving to uninhabited territories differently than those who move to

inhabited territories or the states.[10] ECF No. 140-1 at 33–45. The Hawai‘i Defendants contend that UMOVA's distinction between those who live in foreign countries and those who move anywhere within the "United States" is rationally related to its purpose of enabling those who are outside the "United States" to participate in elections. ECF No. 142-1 at 25. Insofar as UMOVA easily survives rational basis review, it is unnecessary to address the Hawai‘i Defendants' argument that no scrutiny applies.

**a. It Is Rational To Define Guam, The Virgin Islands, Puerto Rico, And American Samoa As Part Of The "United States," While Excluding The NMI**

The Federal Defendants explain that UOCAVA includes Guam, the Virgin Islands, Puerto Rico, and American Samoa in its definition of "United States" to place on equal footing state residents who move to one of those territories with residents already there. ECF No. 140-1 at 33–34. Defendants submit that extending absentee voting to all former state residents who move to any territory would create a class of "super citizens" whose ability to vote in federal elections — a right not given to territorial residents — would turn on prior residence in a state. *Id.* at 34; ECF No. 142-1 at 27 n.5. Plaintiffs argue that Defendants have not identified a legitimate government interest regarding the super citizen argument,

[10] Plaintiffs did not respond to this last point and it is unnecessary to address it given the rational bases supporting the constitutionality of the statutes at issue.

especially because the NMI's exclusion from UOCAVA's definition of "United States" allows super citizens there. ECF No. 151 at 23. And they emphasize that the denial of voting rights to avoid uncomfortable questions about voting rights in the territories does not further a legitimate government interest. *Id.* at 24. This speculation falls well short of negating Defendants' proffered rationale.

Concern about the disparity that would result from the creation of super citizen territorial residents who could vote in federal elections is a plausible policy reason for treating the subject territories as part of the "United States." *See Segovia*, 880 F.3d at 391 ("[W]e think it is significant that were we to require Illinois to grant overseas voting rights to all its former citizens living in the territories, it would facilitate a larger class of 'super citizens' of the territories."). The relationship of the subject classifications to the goal of avoiding super citizens "is not so attenuated as to render the distinction arbitrary or irrational." *Boardman*, 978 F.3d at 1118 (internal quotation marks and citation omitted).

Relatedly, the creation of a "super citizen" group of territorial residents who previously lived in states and are now eligible to vote in federal elections could result in wealth-based inequity:

> [I]f the UOCAVA had done what plaintiff contends it should have done — namely, extended the vote in federal elections to U.S. citizens formerly citizens of a State now residing in Puerto Rico while not extending it to U.S. citizens residing in Puerto Rico who have never resided in a State — *the UOCAVA would have created a distinction of questionable*

> *fairness among Puerto Rican U.S. citizens, some of whom would be able to vote for President and others not, depending [on] whether they had previously resided in a State. The arguable unfairness and potential divisiveness of this distinction might be exacerbated by the fact that access to the vote might effectively turn on wealth.*

*Romeu*, 265 F.3d at 125 (emphasis added). The Court has already discussed the inability of territorial residents to vote in federal elections. Declining to extend absentee voting rights in federal elections to former Hawai‘i residents — most of whom have not been residents for decades — to avoid conferring greater voting rights to them than their fellow territorial residents, is at least rational. Plaintiffs' continued efforts to transform this issue into one concerning territorial voting rights is misguided and ineffective. UOCAVA, UMOVA, and HAR § 3-177-600 do not address or affect the voting rights of territorial residents as a whole, so Plaintiffs' conjecture that their right to vote was denied to avoid uncomfortable questions about territorial voting rights does not cause the statutes to fail rational basis review. As the Court earlier clarified, this case is not about the denial or deprivation of the right to vote, but about whether a failure to extend voting rights that do not otherwise exist violates the Equal Protection Clause. The statutes are not unconstitutional merely because they do not grant Plaintiffs a right given to others, especially when Plaintiffs' fellow territorial residents lack such a right.

It is also rational for the NMI to be excluded from UOCAVA's definition of "United States," even though it creates a distinction between the NMI and the

"disfavored" territories. Plaintiffs argue that there is no basis for this distinction because any justification that may have existed around the time UOCAVA was enacted is too attenuated or irrelevant today. ECF No. 137-1 at 44–46; ECF No. 151 at 23–26.

The Federal Defendants correctly note that territories have historically been — and continue to be — treated differently from each other. *Compare Rabang v. INS*, 35 F.3d 1449, 1454 (9th Cir. 1994) (holding that individuals born in the Philippines when it was a U.S. territory were not entitled to citizenship by birth because they were not born "in the United States" as contemplated by the Citizenship Clause of the Fourteenth Amendment (alteration in original)) *and Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967 (9th Cir. 2003) (identifying residents of American Samoa as noncitizen nationals (citations omitted)), *with Att'y Gen. of Guam*, 738 F.2d at 1018 (noting that Guamanians are American citizens (citing 8 U.S.C. § 1407)); *see also* 42 U.S.C. § 619 (defining "State" as the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and American Samoa). Therefore, an equal protection violation in this context does not result solely because of differences in treatment.

"[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with

mathematical nicety or because in practice it results in some inequality.'" *Heller*, 509 U.S. at 321 (some internal quotation marks and citation omitted). Governments have practical problems that "may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Id.* (internal quotation marks and citations omitted). Statutes need not be "perfectly calibrated in order to pass muster under the rational-basis test." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 85 (1988) (citation omitted).

Plaintiffs make much of the fact that the only relevant inquiry is whether a statute serves a rational purpose *today*, not at the time it was enacted. ECF No. 151 at 22. They posit that the justifications for the NMI's differential treatment when UOCAVA was enacted no longer exist. However, the reasons offered by Defendants provide ample support today. It is conceivable that Congress viewed — and still views — the NMI as more analogous to a sovereign country than a territory due to its history. The fact that Congress could update UOCAVA to include the NMI in the definition of "United States" does not require it to do so for UOCAVA to pass constitutional muster. *See Heller*, 509 U.S. at 321; *Bankers Life*, 486 U.S. at 85.

The NMI, the newest territory,[11] has a unique historical and political relationship with the United States. *See Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir. 1984). The NMI was a part of the Trust Territory of the Pacific Islands, administered by the United States as a United Nations Trusteeship. *See id*. (footnote and citation omitted). "The United States exercise[d] powers of administration, legislation, and jurisdiction in the Trust Territory under the general supervision of the United Nations Security Council" but lacked sovereignty over the NMI. *Id.* (citations omitted). "After a period of transition, in 1986 the trusteeship terminated, and []NMI was fully launched." *Mtoched v. Lynch*, 786 F.3d 1210, 1213 (9th Cir. 2015) (citation omitted). When UOCAVA was passed, the NMI had not yet become a U.S. territory. Even after becoming a territory, the NMI retained control over certain laws and did not enjoy some rights given to the "disfavored" territories. *See*, *e.g.*, *Eche v. Holder*, 694 F.3d 1026, 1027 (9th Cir. 2012) (explaining that the NMI government "retained nearly exclusive control over immigration to the territory" until the Consolidated Natural Resources Act of 2008 took effect on November 28, 2009 (citations omitted)); 48 U.S.C. § 1806(a)(2) (identifying a transition period ending on December 31, 2029 for the NMI to

[11] Spain ceded Puerto Rico and Guam to the United States as part of the Treaty of Paris following the Spanish-American War; the United States purchased the Virgin Islands in 1917; and American Samoa became a territory in 1900. ECF No. 140-1 at 14.

implement the Immigration and Naturalization Act); 48 U.S.C. § 1751 (authorizing representation of the NMI in Congress by a Resident Representative, who "shall be a nonvoting Delegate to the House of Representatives").

Plaintiffs attempt to impose a requirement that the foregoing historical and political justifications must "individually relate[] to overseas voting rights." ECF No. 151 at 25. That is not what rational basis review requires, however. It is enough that the foregoing demonstrate a plausible policy reason for treating the NMI differently than the "disfavored" territories, and they do. *See Heller*, 509 U.S. at 319 ("[R]ational-basis review in [an] equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" (citations omitted)). Accordingly, there is a rational basis for defining Guam, the Virgin Islands, Puerto Rico, and American Samoa as part of the "United States," while excluding the NMI.

**b. It Is Rational To Extend Absentee Voting Rights To Those Who Move To Foreign Countries**

Plaintiffs also challenge UOCAVA's and UMOVA's distinction between former state residents who move to territories and those who move to foreign countries. ECF No. 137-1 at 43–44; ECF No. 151 at 26–29. Plaintiffs claim to have a greater interest in federal elections than those who move abroad due to Congress's broad authority over territories, and assert that former residents who move to foreign countries, like territorial residents, have no freestanding right to

vote in federal elections. ECF No. 137-1 at 43–44. These arguments fail to negate the conceivable bases for treating those who move to foreign countries differently than those who move to territories.

"The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal." *McDonald*, 394 U.S. at 809. A legislature's "statutory classifications will be set aside only if no grounds can be conceived to justify them." *Id.* (citations omitted). The distinction between those who move to a foreign country and those who move elsewhere in the "United States" is more than justified here, and is related to the goal of preserving a right to vote that would otherwise be lost entirely.

First, as the First Circuit aptly pointed out, UOCAVA "does not distinguish between those who reside overseas and those who take up residence in [the "disfavored" territories], but between those who reside overseas and those who move anywhere within the United States." *Igartua I*, 32 F.3d at 10. Plaintiffs accuse UOCAVA of singling out and discriminating against former state residents who move to four territories (five under UMOVA), while extending the right to vote to those who move to nearly 200 countries. ECF No. 151 at 26. UOCAVA and UMOVA in fact treat Plaintiffs the same as former state residents who move to

another state or the District of Columbia, so the actual disparity is nothing close to Plaintiffs' dramatic portrayal. *See Romeu*, 265 F.3d at 125 ("[I]t is significant to note that in excluding citizens who move from a State to Puerto Rico from the statute's benefits, the UOCAVA treats them in the same manner as it treats citizens of a State who leave that State to establish residence in another State."). Viewed through the proper lens, it is difficult to find unconstitutional UOCAVA's and UMOVA's decision to treat Plaintiffs identically with former state residents who move to another state or the District of Columbia, even when compared with former state residents who move to foreign countries.

Second, without UOCAVA and UMOVA, former state residents who move to foreign countries — many of whom serve in the military — would ordinarily lose the right to vote in *any* election in the United States. *See id.* at 124–25. By contrast, former state residents who move to a territory can obtain voting rights in that territory, even if not in federal elections,[12] and those who move to another state can obtain voting rights there. *See Igartua I*, 32 F.3d at 10–11 (holding that Congress had a rational basis to protect the absentee voting rights of those who move to a foreign country because they could lose the right to vote in federal

[12] As detailed above, the inability to vote in federal elections is not caused by UOCAVA or UMOVA; it is a consequence of constitutional limitations. *See Igartua I*, 32 F.3d at 11.

elections, while those who move anywhere within the "United States" can vote in their new places of residence); *Romeu*, 265 F.3d at 125 ("Congress thus extended voting rights in the prior place of residence to those U.S. citizens who by reason of their move outside the United States would otherwise have lacked any U.S. voting rights, without similarly extending such rights to U.S. citizens who, having moved to another political subdivision of the United States, possess voting rights in their new place of residence." (citations omitted)).

Finally, Plaintiffs' arguments do not undermine the rationality of UOCAVA and UMOVA articulated above. The fact that Plaintiffs may have a greater interest in federal elections than former state residents who move to a foreign country, or that the latter have no freestanding right to vote in federal elections, does not invalidate otherwise logical policy reasons supporting the distinctions made. This is true even when some inequality results. At bottom, Plaintiffs are upset that UOCAVA and UMOVA are not as expansive as they want. But for the multitude of reasons discussed herein, UOCAVA and UMOVA satisfy rational basis review and do not offend equal protection principles. *See Romeu*, 265 F.3d at 124 ("The distinction drawn by the UOCAVA between U.S. citizens moving from a State to a foreign country and U.S. citizens moving from a State to a U.S. territory is supported by strong considerations, and the statute is well tailored to serve these

considerations."). Summary judgment is therefore GRANTED in Defendants' favor and Plaintiffs' request for summary judgment is DENIED.

## CONCLUSION

For the reasons stated herein, the Court GRANTS Defendants' cross-motions for summary judgment, *see* ECF Nos. 140, 142, as well as Takahashi's Joinder, *see* ECF No. 144, and DENIES Plaintiffs' Motion for Summary Judgment. ECF No. 137.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, September 6, 2022.

Jill A. Otake
United States District Judge