U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Joseph R. Biden
President
United States Senate
Washington, DC 20510

Dear Mr. President:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

for

Peter Kadzik
Assistant Attorney General

Enclosure

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Orrin G. Hatch
President Pro Tempore
United States Senate
Washington, DC 20510

Dear Mr. President:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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Assistant Attorney General

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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Assistant Attorney General

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Harry Reid
Minority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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Assistant Attorney General

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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Assistant Attorney General

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Paul D. Ryan
Speaker
U.S. House of Representative
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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Sincerely,

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Peter Kadzik
Assistant Attorney General

Enclosure

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Kevin McCarthy
Majority Leader
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Leader:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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Sincerely,

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Peter Kadzik
Assistant Attorney General

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, DC 20515

Dear Madam Leader:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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Assistant Attorney General

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 29, 2016

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Conyers:

Pursuant to 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, § 587, we are pleased to transmit to you the Attorney General's annual report.

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Enclosure

United States Department of Justice
Uniformed and Overseas Citizens Absentee Voting Act
Annual Report to Congress
2016

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 work to enforce this important statute in 2016.

In the 2016 Federal election year, the Department devoted significant resources to monitoring UOCAVA compliance throughout the country leading up to the primary elections, in advance of special congressional elections, and in the months and weeks leading up to the general election. In this cycle, one State, New York, sought an undue-hardship waiver of the 45-day ballot transmission deadline from the Defense Department pursuant to UOCAVA, 52 U.S.C. § 20302(g). That waiver request was granted by the Department of Defense but as a result of the related litigation, discussed further herein, the waiver proved unnecessary.

In preparation for its nationwide compliance monitoring program for the 2016 Federal election cycle, the Department wrote to all the chief State election officials[1] in November 2015 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 to its military and overseas voters 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.

In 2016, the Department successfully concluded its 2012 litigation brought to ensure UOCAVA compliance for Federal runoff elections in Alabama. In addition, the Department participated in two cases to defend the constitutionality of UOCAVA. Copies of the United States' briefs and significant court orders referenced herein are attached to this report.

In addition to our ongoing monitoring and enforcement efforts, the Department continues to advocate for legislation to provide even stronger protections for military and overseas voters.

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[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.

As referenced in its 2015 UOCAVA Annual Report, last year the Department prepared a set of legislative proposals to enhance the enforcement of UOCAVA. These proposals were transmitted to Congress on November 10, 2015 as part of the Department of Justice's Servicemembers Legislative Package, and are similar to sets of proposals transmitted to Congress in September 2011, May 2013, and April 2014 (referenced in the Department's UOCAVA Annual Reports to Congress in 2011, 2013, and 2014). The Department's UOCAVA proposals would enhance our ability to enforce these important protections, and we continue to strongly urge their passage.

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.

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 case 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 for 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. Enforcement Activity by the Attorney General in 2016

A. Litigation in 2016 to Defend the Constitutionality of UOCAVA

Segovia v. Board of Election Commissioners for the City of Chicago: The Department defended the Federal defendants named in *Segovia v. Board of Election Commissioners for the City of Chicago,* 1:15-CV-10196 (N.D. Ill.), a case that included a challenge to the constitutionality of UOCAVA. In this case, filed in November 2015, plaintiffs who are former Illinois residents now residing in the territories sued local election officials in Illinois as well as the United States and the Department of Defense, asserting an equal protection challenge against UOCAVA and against the Illinois law governing voting by military and overseas voters.

On February 10, 2016, the Federal defendants filed a motion to dismiss for failure to state a claim, followed by a combined cross motion for summary judgment, opposition to the plaintiffs' motion for summary judgment and reply in support of its motion to dismiss on April 18, and a reply brief on May 17. The Department's briefs argued, *inter alia*, that the plaintiffs lacked standing and that UOCAVA is constitutional. On August 23, 2016, the court ruled that the Federal defendants were entitled to summary judgment as to plaintiffs' equal protection claims based on UOCAVA.

On October 19, 2016, the Federal defendants filed a combined cross motion for summary judgment and opposition to the plaintiffs' second motion for summary judgment (based on substantive due process issues). On October 28, 2016, the court rejected plaintiffs' remaining challenges to the constitutionality of UOCAVA. It granted the Federal defendants' cross-motion for summary judgment, denied the plaintiffs' second motion for summary judgment, and entered final judgment.

Pidot v. New York State Bd. of Elections: The Department filed two Statements of Interest in *Pidot v. New York State Bd. of Elections*, No. 1:16-CV-859 (N.D.N.Y.), a case that raised a potential constitutional challenge to UOCAVA. In this case, plaintiffs sought a new Republican primary election for New York's Third Congressional District, and also challenged UOCAVA's constitutionality to the extent that the statute's 45-day advance ballot transmission requirement was construed to limit the court's power to schedule a new primary election.

Prior to the federal court proceedings, in New York state court, plaintiff Philip Pidot challenged the New York State Board of Elections' invalidation of his petition to be designated on the June 28 primary election ballot as a candidate for the Republican nomination for New York's Third Congressional District. UOCAVA's 45-day ballot transmission deadline for that election fell on May 14, 2016. On June 24, the state court held that, although plaintiff qualified for the ballot, it could not grant the relief requested—to include plaintiff's name on the June 28, 2016, Republican primary ballot—due to timing considerations. In addition, by not addressing plaintiff's oral request for a new election, the court effectively denied that request. Plaintiff appealed on July 7, 2016. On July 21, 2016, the state appellate court affirmed the trial court's decision.

On July 13, 2016, while the state court appeal was pending, plaintiff Pidot and three eligible Republican Party voters filed suit in federal court seeking an order requiring a new Republican primary and challenging the constitutionality of UOCAVA's 45-day advance ballot transmission requirement to the extent it precluded the court from ordering that primary election. On July 19, the United States District Court for the Northern District of New York certified to the United States Attorney General the constitutional challenge to UOCAVA, allowing the Attorney General to intervene in the matter within 60 days. On August 16, the Department filed a Statement of Interest explaining why the court did not need to address the constitutionality of UOCAVA to resolve the case, and indicating the Department's intent to intervene if

the court concluded that it must resolve plaintiffs' constitutional challenge. At the conclusion of a hearing on August 17, the court ordered New York to (1) hold a Republican primary election for the Third Congressional District on October 6, 2016 and (2) seek a hardship exemption from UOCAVA's 45-day advance transmission requirement for the November 8, 2016 general election. The court did not address the constitutionality of UOCAVA's 45-day advance transmission requirement.

On August 19, 2016, Defendant-Intervenor Jack Martins, the presumptive Republican candidate for the Third Congressional District, moved for relief from judgment, asking that the court either move the general election for the Third Congressional District to December 6, or else withdraw altogether the order setting a new primary on October 6. The court denied this motion from the bench at a hearing on August 30, leaving the previously-ordered election schedule in place.

On August 22, 2016, the State applied to the Department of Defense for a hardship waiver. On August 29, the Department of Defense granted the State's request on the condition that the district court grant an eight-day extension of New York's ballot receipt deadline for the November 8 general election for the Third Congressional District. On August 31, New York moved for an order extending the State's ballot receipt deadline. On September 1, the Department filed a supplemental Statement of Interest in the *Pidot* case, indicating that it did not oppose the proposed ballot receipt deadline extension. That same day, the court granted the extension.

On September 1, 2016, Martins appealed the district court's August 17 and 30 orders to the United States Court of Appeals for the Second Circuit. *Martins v. Pidot*, No. 16-3028 (2d Cir.). On September 14, the Second Circuit held oral argument and reversed the decision of the district court from the bench. The Second Circuit vacated the order setting the October 6 primary election and remanded with instructions to dismiss the complaint. The district court subsequently vacated its September 1 order, dismissed the complaint, and entered judgment in favor of the defendants. Thus the results of the June 28, 2016, Republican primary election in the Third Congressional District stood, and because no new primary election was held, the waiver of the 45-day advance transmission requirement for the November 8 Federal general election proved unnecessary.

B. Activity in Other Litigation by the Attorney General under UOCAVA

United States v. Alabama: In 2016, the Department successfully concluded the remedial phase of its litigation against Alabama, initiated in 2012 based on Alabama's failure to transmit ballots to UOCAVA voters at least 45 days prior to the 2012 Federal primary election and failure to ensure ballots would be transmitted by the 45th day before any Federal primary runoff election that would be needed. *United States v. Alabama*, No. 2: 12-cv-179 (M.D. Ala.); *see also Alabama v United States*, No. 14-11298 (11th Cir.).

As detailed in the Department's 2012-2015 UOCAVA Annual Reports to Congress,

as of 2015, the Department had achieved a favorable resolution of its claims concerning Alabama's violations of UOCAVA's 45-day advance transmission deadline in several Federal elections, and on February 12, 2015, the Eleventh Circuit affirmed the district court's summary judgment ruling that UOCAVA's 45-day advance transmission requirement applies to Federal runoff elections.

On August 14, 2015, the governor of Alabama signed into law Act No. 2015-518, which permits the use of ranked ballots for Alabama's UOCAVA voters during any applicable Federal primary (and runoff) election. On August 24, 2015, Alabama filed a motion requesting that the court vacate its injunction requiring Alabama to hold any Federal primary runoff election 63 days after the primary election and allow Act No. 2015-518 to be implemented in its stead. On September 25, 2015, the United States filed with the court a notice that it did not oppose Alabama's motion. On October 5, 2015, the court granted Alabama's motion to permit the State to (1) use ranked ballots in Federal elections for UOCAVA voters only and (2) return the date for Federal primary runoff elections to 42 days following the Federal primary election. The court further ordered monitoring and reporting requirements for the 2016 Federal election cycle.

In 2016, the Department continued to monitor Alabama's compliance with UOCAVA and the federal district court's orders governing State procedures for ensuring UOCAVA compliance. On March 23, 2016, Alabama filed with the court a notice stating that it had adopted final administrative regulations concerning the adoption and use of a ranked balloting process for applicable Federal primary (and runoff) elections. Those regulations detail the process by which the State will administer the ranked ballot system, including procedures for the transmission and counting of ranked ballots.

ATTACHMENTS

I. Enforcement Activity by the Attorney General In 2016

A. Litigation in 2016 to Defend the Constitutionality of UOCAVA

Segovia v. Board of Election Commissioners for the City of Chicago

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

LUIS SEGOVIA, *et al.*, Plaintiffs, v. BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO, *et al.*, Defendants.	15-cv-10196 Judge Joan B. Gottschall

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Date: February 10, 2016

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Branch Director

ZACHARY T. FARDON
United States Attorney

THOMAS WALSH
Assistant United States Attorney

/s/ Caroline Anderson
Caroline J. Anderson
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Counsel for Federal Defendants

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INTRODUCTION

Plaintiffs in this action are six individuals who allege they are former residents of Illinois that now reside in Puerto Rico, Guam, or the U.S. Virgin Islands, along with two organizations that promote voting rights in the territories, and who challenge the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310 ("UOCAVA") and Illinois Military and Overseas Voter Empowerment law ("Illinois MOVE"), 10 Ill. Comp. Stat. Ann. 5/20-1. Plaintiffs seek declaratory and injunctive relief, asserting that these statutes operate to preclude them from voting absentee in Illinois in federal elections in violation of their equal protection and due process rights.[1]

Plaintiffs' claims should be dismissed for failure to state a claim against the Federal Defendants because UOCAVA does not impose the voting disability of which Plaintiffs complain. Rather, that restriction results from requirements imposed by *Illinois* law, as well as provisions of the Constitution, which delegate to the states the authority to regulate voting in federal elections. It is not UOCAVA that prevents citizens who have become qualified to vote in a particular state from continuing to vote in that state by absentee ballot during a period of residence in Puerto Rico, Guam, or the U.S. Virgin Islands.

As an independent basis for dismissal, UOCAVA meets the requirements of Equal Protection and Due Process. UOCAVA neither affects a suspect class nor infringes upon a fundamental right, and the statute accordingly must be upheld so long as it is rationally related to

[1] Specifically, Plaintiffs seek a declaratory judgment holding that UOCAVA and Illinois MOVE violate the Fifth Amendment, the Fourteenth Amendment, and 42 U.S.C. § 1983 by defining the United States in a manner that discriminates among former Illinois residents living overseas. Further, Plaintiffs seek an order directing Defendants - the United States, Secretary of Defense Ashton Carter, the Federal Voting Assistance Program, Director of the Federal Voting Assistance Program Matt Boehmer (hereafter "the Federal Defendants"), and the Board of Election Commissioners for the City of Chicago, Chairman of the Board of Election Commissioners, and the Rock Island County Clerk (hereafter "the Illinois Defendants") - to accept from the individual Plaintiffs applications to vote absentee in the next federal election in Illinois.

a legitimate government interest. Under that highly deferential standard, UOCAVA satisfies constitutional requirements. In enacting UOCAVA, Congress sought to expand voting rights to citizens overseas who, in the absence of the statute, might otherwise be completely disenfranchised. As the First and Second Circuits have concluded, Congress had a rational basis for the distinction in absentee voting rights drawn by UOCAVA between State residents who move overseas and those who move within the United States, as defined to include Guam, Puerto Rico, and the U.S. Virgin Islands. Absent UOCAVA, some citizens who move to foreign countries might lose the right to vote in federal elections entirely. Former Illinois residents that move to Puerto Rico, Guam, and the U.S. Virgin Islands, by contrast, gain the right to vote in federal elections for each of the territories' representatives in Congress. Moreover, insofar as UOCAVA's protections have not been expanded, Congress is entitled to legislate incrementally in addressing absentee voting rights for overseas voters, without resolving all issues that may arise. For these reasons, the Complaint should be dismissed as against the Federal Defendants for failure to state a claim.[2]

BACKGROUND

I. LEGAL FRAMEWORK

Article II, section 1, of the Constitution provides, "[e]ach *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" to elect the President and Vice-President of the United States. U.S. Const. art. II, § 1, cl. 2 (emphasis added). Accordingly, the right to vote for President and Vice-President of the United States inheres in states, rather than in citizens. *See Anderson v. Celebrezze*, 460 U.S. 780, n.18 (1983)

[2] As addressed below, beyond the failure to state a claim, the Federal Defendants cannot in any event be enjoined to "accept applications to vote absentee" in Illinois federal elections.

("The Constitution expressly delegates authority to the states to regulate selection of Presidential electors . . ."); *Att'y General of the Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985) ("[T]he Constitution does not grant to American citizens the right to elect the President."). Accordingly, "U.S. citizens who are residents of Puerto Rico and the other U.S. territories have not received similar rights to vote for presidential electors because the process set out in Article II for the appointment of electors is limited to 'States' and does not include territories." *Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001). Because Puerto Rico, Guam, and the U.S. Virgin Islands are not states, "those Courts of Appeals that have decided the issue have all held that the absence of presidential and vice-presidential voting rights for U.S. citizens living in U.S. territories does not violate the constitution." *Id.* (per curiam) (citing *Igartua De La Rosa v. United States*, 32 F.3d 8, 9-10 (1st Cir. 1994)) [hereinafter *Igartua I*]; *Att'y General of the Territory of Guam*, 738 F.2d at 1019 ("Since Guam . . . is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election.").

Article I, section 2, of the Constitution states that:

> [t]he House of Representatives shall be composed of Members chosen every second Year by the People *of the several States*, and Electors in each *State* shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature . . . The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed *in each State* by the Legislature thereof . . .

U.S. CONST. art. I, § 2, cl. 1-4 (emphasis added). The Seventeenth Amendment to the Constitution similarly specifies that "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . The electors *in each State* shall have the qualifications requisite for electors . . ." U.S. CONST. amend. XVII (emphasis added). The text of Article I and the Seventeenth Amendment make clear that only the people of a *state* may vote for the Senators and members of the House of Representatives from that state. *See Igartua*

v. United States, 626 F.3d 592, 596 (1st Cir. 2010) ("The text of the U.S. Constitution grants the ability to choose, and so to vote for, members of the House Representatives to 'the People of the Several States'.") (internal citation omitted). As with the election of the President and Vice-President, citizens of the territories do not possess the right to vote for members of the House of Representatives and the Senate. *See id.* at 597-98 (holding that because Puerto Rico is not a state of the United States within the meaning of the Constitution, under Article I its residents do not have the right to vote for members of the House of Representatives).

In UOCAVA, Congress directed that "[e]ach State shall permit absent uniformed services voters and overseas voters 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(a)(1). The statute defines "overseas voter" as:

> (A) an absent uniformed services voter who, by reason of active duty or service, is absent from the United States on the date of the election involved;
> (B) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or
> (C) a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States.

52 U.S.C. § 20310(5). UOCAVA further defines "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa," *id.* § 20310(6), and it defines "United States, where used in the territorial sense," to mean "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa," *id.* at § 20310(8). In sum, under UOCAVA, states shall permit overseas voters covered by the Act to vote absentee if they live outside of the territorial United States (defined to include Puerto Rico, Guam, the U.S. Virgin Islands, and

American Samoa – and thus excluding those locations from the Act's provisions).[3] In so doing, the statue sets a floor for absentee voting rights, but does not restrict states from extending them further.

The Illinois statute at issue here (MOVE), which also addresses voting rights of overseas citizens in federal elections, states in relevant part: "[a]ny non-resident civilian citizen, otherwise qualified to vote, may make application to the election authority having jurisdiction over his precinct of former residence for a vote by mail ballot containing the Federal offices[4] . . . " 10 Ill. Comp. Stat. Ann. 5/20-2.2, and defines "non-resident civilian citizens" as:

> civilian citizens of the United States (a) who reside outside the territorial limits of the United States, (b) who had maintained a precinct residence in a county in this State immediately prior to their departure from the United States, (c) who do not maintain a residence and are not registered to vote in any other State, and (d) whose intent to return to this State may be uncertain.

Id. at 5/20-1(4). In turn, the "[t]erritorial limits of the United States" are defined to include "each of the several States of the United States and includes the District of Columbia, the Commonwealth of Puerto Rio, Guam and the Virgin Islands; but does not include American Samoa, the Canal Zone, the Trust Territory of the Pacific Islands or any other territory or possession of the United States." *Id*. at 5/20-1(1). In other words, Illinois law generally tracks UOCAVA in extending absentee voting rights but, notably in contrast, also allows overseas former State residents who have moved to American Samoa to vote absentee in Illinois.

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[3] Under UOCAVA, U.S. citizens who are in the military or the merchant marine and their spouses and dependents – "absent uniformed services voter[s]" – retain the right to vote in federal elections by absentee ballot in their last state of residence even if they move to a United States territory such as Puerto Rico, Guam, or the U.S. Virgin Islands. *See* 52 U.S.C. § 20310(1)(A-C) (member of "uniformed service on active duty" or "merchant Marine" need only be "absent from the place of residence where the member is otherwise qualified to vote.").

[4] "Federal office" is defined to include "the offices of President and Vice-President of the United States, United States Senator, Representative in Congress, delegates and alternate delegates to the national nominating conventions and candidates for the Presidential Preference Primary." 10 Ill. Comp. Stat. Ann. 5/20-1(6).

II. PLAINTIFFS' ALLEGATIONS

Plaintiffs are six individuals that allege they are former residents of Illinois who have since moved to Puerto Rico, Guam, or the U.S. Virgin Islands, and two organizations, the Iraq Afghanistan and Persian Gulf Veterans of the Pacific ("IAPGVP") and League of Women Voters of the Virgin Islands ("LWV-VI"). Compl. ¶¶ 11-18, ECF No. 1. Each individual Plaintiff alleges that he or she voted for President and/or voting members of the U.S. House of Representatives and Senate while residing in Illinois, *id.* at ¶¶ 11-15, save for one individual Plaintiff that alleges she voted by absentee ballot while working in the Virgin Islands temporarily before permanently residing there, *id.* at ¶ 16. IAPGVP alleges that its mission is "to provide opportunities to engage, enrich, and empower Pacific Island Veterans . . . and their families," and is composed of current residents of Guam who are former residents of Illinois and other states. *Id.* at ¶ 17. LWV-VI was founded to promote "political responsibility through informed voters who actively participate in government" and its membership includes current residents of the Virgin Islands who are former residents of Illinois and other states. *Id.* at ¶ 18.

In their claims for relief, Plaintiffs allege that UOCAVA and Illinois MOVE violate the equal protection and due process guarantees of the Fifth and Fourteenth Amendments and 42 U.S.C.§ 1983 by "treating similarly situated former state residents differently based on where they reside overseas." *Id.* at ¶ 52. Specifically, Plaintiffs claim that "under Illinois law, former Illinois residents living in a foreign country, or American Samoa or the [Northern Mariana Islands] NMI – but not other U.S. Territories overseas – may vote in Illinois by absentee ballot" for federal office.[5] *Id.* at ¶ 47. Plaintiffs seek an order declaring that UOCAVA and Illinois MOVE violate the Constitution, a preliminary and permanent order enjoining Defendants to

[5] As noted, the State of Illinois has extended absentee voting rights to former residents in American Samoa by statute. As addressed further below, the NMI is not included in UOCAVA's statutory definition of the "United States."

accept applications to vote absentee in the next federal election in Illinois from individual Plaintiffs, and fees and costs. Compl. at 21 (Prayer for Relief ¶¶ a-d). These claims must be dismissed for failure to state a claim upon which relief can be granted against the Federal Defendants.

ARGUMENT

I. PLEADING STANDARDS

To withstand a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In considering such a motion under Rule 12(b)(6), the Court is to construe the complaint in the light most favorable to the plaintiff. *Tamayo v.* Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008). The complaint must describe the claim in sufficient detail to give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *E.E.O.C. v. Concentra Health Servs, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007).

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. UOCAVA Does Not Prohibit Plaintiffs from Voting for Federal Office via Absentee Ballot.

Contrary to their allegations, UOCAVA does not prevent Plaintiffs from voting absentee in Illinois for federal office. Instead, as a result of limitations established by the Constitution, it is the State of Illinois which imposes the voting restrictions of which Plaintiffs complain. As described above, the Constitution provides that it is the States, rather than the federal government, that determine the manner in which their presidential, vice-presidential, and congressional electors are chosen. U.S. CONST. art. II, § 1, cl. 2; *id.* at art. I, § 2, cl. 1-4; *id.* at amend. XVII. Because Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa are

concededly not states, these territories are not entitled under Article II to choose electors for President, *Igartua I*, 32 F.3d at 9-10 (internal citations omitted), or under Article I and the Seventeenth Amendment to elect members of Congress or the Senate. As the First Circuit noted, this disadvantage is not imposed by any federal statutory scheme, but is a consequence of the Constitution itself. *Igartua I*, 32 F.3d at 10-11.

In turn, it is the State of Illinois – not the Secretary of Defense, the Federal Voting Assistance Program, its director, or the United States of America – that determines how to fashion absentee voting rights in Illinois. UOCAVA merely supplies a floor for these rights, providing that "[e]ach State shall *permit*" absent overseas voters "to vote by absentee ballot" in elections for Federal office. 52 U.S.C. § 20302(a)(1) (emphasis added). By directing states to *permit* absent overseas voters to vote by absentee ballot for federal office, UOCAVA in no sense denies states the ability to broaden the right to vote by absentee ballot to individuals who do not meet the federal statute's definition, *see* 52 U.S.C. §§ 20310(5)-(6), (8). Indeed, Illinois has already done precisely that: Illinois MOVE extends absentee voting rights to former state residents that now reside in American Samoa, despite the fact that such residents are expressly *not* covered by UOCAVA. *See* 10 Ill. Comp. Stat. Ann. 5/20-1(1) (excluding American Samoa from its definition of the United States); *cf.* 52 U.S.C. § 20302(a)(1) (defining the United States to *include* American Samoa, such that individuals living in that territory are not considered overseas voters with guaranteed absentee voting rights under UOCAVA). The federal statute likewise provides no barrier to Illinois extending the same rights to former state residents living in Puerto Rico, Guam, or the U.S. Virgin Islands, such as Plaintiffs. Thus, UOCAVA does not prevent Plaintiffs from voting absentee in Illinois, rather, the State that imposes this restriction.

Indeed, Plaintiffs' Complaint acknowledges as much and effectively alleges that state law governs their absentee voting rights. Plaintiffs appear to recognize that it is the definition

articulated in Illinois MOVE, *not* UOCAVA, that governs their voting rights: "Under UOCAVA and Illinois MOVE, [an individual plaintiff] would continue to be able to vote for President and voting Members of the U.S. House and Senate by absentee ballot in Illinois if he were a resident of the NMI, *American Samoa*, or a foreign country." Compl. ¶ 14(a) (emphasis added). But it is only Illinois law that extends absentee voting rights to residents of American Samoa, such that Plaintiffs' allegation is only an accurate restatement of Illinois MOVE, and not the federal statute. *Cf.* 10 Ill. Comp. Stat. Ann. 5/20-1(1) with 52 U.S.C. § 20302(a)(1).

Plaintiffs further acknowledge that the Illinois Defendants, rather than the Federal Defendants, are capable of providing to Plaintiffs the relief they seek. Although in their Prayer for Relief Plaintiffs seek an injunction against "Defendants" generally, *see* Compl. at 21 (Prayer for Relief ¶ b), the Complaint singles out the Illinois Defendants in its specific request for relief, seeking an "injunction directing Defendants Board of Election Commissioners for the City of Chicago, Langdon D. Neal [its Chairman], and Karen Karen Kinney [Rock Island County Clerk] to accept Individual Plaintiffs' applications to vote absentee in federal elections in Illinois." Compl. ¶ 10. Plaintiffs apparently recognize that only the Illinois Defendants can deliver the remedy they seek, as the Federal Defendants have no role in accepting or rejecting Illinois absentee ballots. Because it is state law, rather than UOCAVA, which prohibits Plaintiffs from voting absentee in Illinois, Plaintiffs have failed to state a claim upon which relief can be granted against the Federal Defendants.

B. UOCAVA Meets the Requirements of the Equal Protection and Due Process.

Plaintiffs allege that UOCAVA violates equal protection and due process principles, as protected by the Fourteenth Amendment and the Fifth Amendment. Compl. ¶ 54. They claim that by "protect[ing] the right to vote for *certain* U.S. citizens who move overseas, while denying it to others who are similarly situated," UOCAVA unfairly discriminates among U.S. citizens

and violates the Constitution. Compl. ¶¶ 48-51 (original emphasis). As the First and Second Circuits each concluded in analogous cases, this claim lacks merit. *See Igartua I*, 32 F.3d at 10-11 (upholding UOCAVA against an equal protection and due process challenge brought by former state residents seeking to vote by absentee ballot from Puerto Rico); *Romeu*, 265 F.3d at 127 (same).

i. Standard of Review

The Supreme Court has explained the proper method for analyzing claims under the Equal Protection Clause: "[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." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (internal citations omitted); *Romeu v. Cohen*, 121 F.Supp.2d 264, 283 (S.D.N.Y. 2000), *aff'd* 265 F.3d 118 (2d Cir. 2001). The First Circuit affirmed the applicability of this standard to an equal protection and due process challenge to UOCAVA, holding that the distinction Plaintiffs identify "need only have a rational basis to pass constitutional muster" because it "neither affects a suspect class nor infringes a fundamental right." *Igartua I*, 32 F.3d at 10; *see also id.* at 10 n.2 ("Although it affects the right to vote, [UOCAVA] does not infringe that right but rather limits the state's ability to restrict it.").

The Supreme Court has also indicated that this type of statutory classification is subject only to rational basis review. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), plaintiffs challenged section 4(e) of the Voting Rights Act, which barred states from applying English literacy requirements to voters educated in American-flag schools in which English was not the predominant classroom language. *Id.* at 643 & n.1. Plaintiffs claimed that the statute discriminated against voters educated in a language other than English in non-American-flag schools, meaning "that Congress violated the Constitution by not extending the relief effected in

[the relevant section] to those educated" outside a territory of the United States. *Id.* at 656-57. The Court explained that, because "the distinction challenged by [plaintiffs] is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise" the Court should be "guided by the familiar principle that a statute is not invalid under the Constitution because it might have gone farther than it did." *Id.* (internal citations omitted). The Supreme Court rejected plaintiffs' discrimination claim, holding that "the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . [was] inapplicable." *Id.* at 657. Because the Court found legitimate grounds that "might well have been the basis for the decision of Congress to go 'no farther than it did,'" the Court upheld section 4(e) against the plaintiffs' equal protection challenge. *Id.* at 658. Rational basis review, rather than the heightened scrutiny appropriate for distinctions in laws *denying* rights, likewise applies to Plaintiffs' challenge to UOCAVA.[6]

ii. UOCAVA Passes Rational Basis Review

In extending absentee voting protections, Congress distinguished between U.S. citizens who move to a different jurisdiction within the United States and those who move overseas. The "primary purpose" of UOCAVA "is to facilitate absentee voting by United States citizens, both military and civilian, who are overseas" and "who would otherwise be disenfranchised." *See* H.R. REP. NO. 99-765, at 5-6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2009-2010 [hereinafter "1986 House Report"]. Congress expressed concern that "most American citizens residing outside the United States, who are in the private sector, continue to be excluded from the

[6] Although relevant Supreme Court precedent describes rational basis review as the appropriate legal standard, the Second Circuit declined to decide the precise standard of review in a similar challenge to UOCAVA, explaining that "regardless whether this distinction is appropriately analyzed under rational basis review or intermediate scrutiny, or under some alternative analytic framework independent of the three-tier standard that has been established in Equal Protection cases . . . Congress may distinguish between those U.S. citizens formerly residing in a State who live outside the U.S., and those who live in the territories."). *Romeu*, 265 F.3d at 124.

democratic process of their own country." S. REP. NO. 94-121, at 5 (1975), *reprinted in* 1975 U.S.C.C.A.N. 2359, 2363.

Absent UOCAVA, citizens that move outside the United States might be completely excluded from participating in federal elections in the United States, *Romeu*, 265 F.3d at 124-25, as would be the case for citizens moving from Illinois to a foreign country. But citizens that move from the United States to Puerto Rico, Guam, or the U.S. Virgin Islands such as Plaintiffs acquire new voting rights in these territories and may vote in local elections for officials of the territories' respective governments, as well as in each territory's federal elections for non-voting delegates. Thus, the First Circuit concluded that because "voters who move overseas could lose their right to vote in all federal elections . . . [while] voters who move to a new residence within the United States are eligible to vote in a federal election in their new place of residence," "Congress had a rational basis for seeking to protect the absentee voting rights only of the former." *Igartua I*, 32 F.3d at 11.

Plaintiffs' Complaint boils down to a dissatisfaction with the fact that former Illinois residents that move to American Samoa or the NMI gain new voting rights *and* retain the right to vote absentee in Illinois for federal office, whereas former Illinois residents that move to Puerto Rico, Guam, or the U.S. Virgin Islands do not retain that right. *See* Compl. ¶ 44. But, as previously explained, *supra* at 7-9, it is Illinois MOVE, not UOCAVA, that defines the relevant territorial boundaries of the United States for purposes of Illinois absentee voting rights. Illinois has already extended absentee voting rights to former residents currently residing in American Samoa – a protection that goes beyond that which is provided for in the federal statute – and UOCAVA likewise does not restrict Illinois from similarly extending such rights to former residents living in Puerto Rico, Guam, or the U.S. Virgin Islands. Thus, Plaintiffs' grievance can

be addressed through state law and does not result from UOCAVA, which expands absentee voting rights.

Moreover, the fact that former Illinois residents that move to the NMI – also a U.S. Territory – may vote absentee in Illinois does not render UOCAVA unconstitutional. Plaintiffs' claim in this respect appears to rest not with any express distinction in the statute among U.S. territories but, more likely, turns on a matter of historical timing. At the time UOCAVA was enacted in August 1986, the Covenant between the U.S. and the NMI regarding its territorial status was not yet fully effectuated, and the NMI was not included in the definition of the territorial United States in the Act.[7]

The fact that this anomaly was not corrected in the Act after the NMI became a U.S. territory does not render UOCAVA unconstitutional. Again as noted, UOCAVA does not restrict any voting rights but expands them to cover certain overseas voters. The distinction drawn by Congress in doing so was within its constitutional authority and has a rational basis. *See Romeu*, 265 F.3d at 124-25. The law is clear that Congress was not required to extend absentee voting rights to all U.S. territories but could permissibly provide a partial remedy to a problem of disenfranchisement even if legislation could have swept more broadly. As *Katzenbach* instructs, voting rights reform legislation "is not invalid under the Constitution because it might have gone farther than it did." 384 U.S. at 657; s*ee also Romeu*, 265 F.3d at 125 (upholding absentee voting statutes that were "designed to make voting more available to some groups who cannot easily get to the polls," without making voting more available to all such groups, on the ground that legislatures may "take reform 'one step at a time'" (citing

[7] The NMI and the United States reached a Covenant Agreement that became fully effective on November 4, 1986, whereby NMI became a Commonwealth of the United States and residents of the NMI became citizens of the United States. *See* Horey, Joseph E., *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 Asian-Pac. L. & Pol'y J. 180, 245, n. 49 (2003), (citing 48 U.S.C.A. § 1801 (West 2015)). UOCAVA was passed by Congress roughly three months prior, on August 7, 1986. *See* 1986 House Report.

McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807-809 (1969))). The Supreme Court's teaching that a legislature need not "strike at all evils at the same time," *Semler v. Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935), plainly applies to Congress's decision to extend absentee voting rights to some, but not all, overseas voters simultaneously. And, the fact that a distinction now exists between one U.S. territory and the others under the Act can be addressed under state law, where the Constitution places that responsibility. Thus, the fact that former residents of Illinois currently living in the NMI (but not other U.S. territories) retain the right to vote absentee for federal office does not render UOCAVA unconstitutional.

Nor would inclusion of the NMI as part of the definition of the territorial United States now under UOCAVA (and thus exclusion from the protections of the Act) redress the alleged injury of former Illinois residents in other U.S. territories such as Plaintiffs. Rather, what Plaintiffs appear to demand is that, in part because the NMI is not included in the definition of the territorial United States, the Court should declare the Act unconstitutional, supplant Congress's judgment to limit the expansion of absentee voting rights to certain overseas locations, and legislate such rights for Plaintiffs who reside in all U.S. territories expressly excluded from the Act. Nothing in the Constitution remotely requires or permits this result.

As *Romeu* noted, Congress's regulation of U.S. territories under Article IV of the Constitution "is not 'subject to all the restrictions which are imposed upon [Congress] when passing laws for the United States.'" 265 F.3d at 122 (citing *Dorr v. United States*, 195 U.S. 138, 143 (1904)). For voting rights, the status of a U.S. citizen living in U.S. territories is not identical to that of a U.S. citizen living in a State. *See id.* That is again because the process set out in Article II for the appointment of electors is limited to "States" and does not include territories. *See id*. at 123; *see also* U.S. CONST. art. I, § 2, cl. 1-4; *id.* at amend. XVII (same for Congress). Thus "[w]hile the [UOCAVA] does not guarantee that a citizen moving to Puerto

Rico [or Guam, or the U.S. Virgin Islands] will be eligible to vote in a presidential [or Congressional] election, this limitation is not a consequence of the Act but of the constitutional requirements . . . . " *Igartua I*, 32 F.3d at 11. For this reason, Plaintiffs' challenge appropriately lies with the State of Illinois, which has independent authority to regulate the extension of absentee voting rights for former residents such as Plaintiffs, not as to the Federal Defendants. Ultimately, "the absence of presidential and vice-presidential [and Congressional] voting rights for U.S. citizens living in U.S. territories does not violate the Constitution." *See Romeu*, 265 F.3d at 123; *Igartua I*, 32 F.3d at 9-10.

C. Plaintiffs' § 1983 Claim Against the Federal Defendants Must Be Dismissed.

Finally, Plaintiffs fail to state a § 1983 claim against the Federal Defendants. Section 1983 enables aggrieved individuals to redress deprivations of Constitutional rights where the deprivations occur under the color of state law. *See* 42 U.S.C. § 1983. The Seventh Circuit has confirmed that in order to seek relief under § 1983, plaintiffs must allege that the defendant acted under color of *state* law, *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996), and that the federal government and its officers act under color of *federal* law. *Meiners v. Moriarity*, 563 F.2d 343, 348 (7th Cir. 1977); *see also District of Columbia v. Carter*, 409 U.S. 418, 424 (1973) ("[t]he statute deals only with those deprivations of rights that are accomplished under the law of 'any State or Territory' . . . actions of the Federal Government and its officers are beyond the purview" of § 1983). Here, Plaintiffs have not alleged that the Federal Defendants acted under the color of state law vis a vis UOCAVA. Accordingly, Plaintiffs' § 1983 claim against the Federal Defendants must be dismissed.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed for failure to state a claim upon which relief can be granted against the Federal Defendants.

Dated: February 10, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2016, a copy of the foregoing Memorandum in Support of the Federal Defendants' Motion to Dismiss was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Caroline J. Anderson
Caroline J. Anderson

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

LUIS SEGOVIA, *et al.*, Plaintiffs, v. BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO, *et al.*, Defendants.	15-cv-10196 Judge Joan B. Gottschall

FEDERAL DEFENDANTS' COMBINED MEMORANDUM REPLY IN SUPPORT OF THEIR MOTION TO DISMISS, IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Date: April 18, 2016

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INTRODUCTION

The individual Plaintiffs, former Illinois residents currently residing in Puerto Rico, the U.S. Virgin Islands, and Guam, claim their equal protection rights are violated by operation of both Federal and Illinois laws because they cannot cast absentee ballots in Illinois in federal elections, in contrast to former Illinois residents currently residing in American Samoa and Northern Mariana Islands ("NMI"). These circumstances do not result from the operation of the federal statute at issue – the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310 ("UOCAVA"). Rather, under the Constitution, States possess the authority to regulate voting in federal elections in the first instance, and it is the Illinois law that Plaintiffs challenge, the Illinois Military and Overseas Voter Empowerment law ("Illinois MOVE"), 10 Ill. Comp. Stat. Ann. 5/20-1, that bars them from voting absentee, though it permits residents currently residing in NMI or American Samoa to do so. Whatever the merit of Plaintiffs' challenge to that state law, UOCAVA does not require States to limit absentee voting rights to particular Territories, does not cause Plaintiffs' alleged injuries, and does not violate the Constitution.

The purpose and effect of UOCAVA is permissive – it requires States to *extend* absentee voting rights to former State residents that reside outside the United States. Plaintiffs' complaint with UOCAVA is that, as enacted in 1986, it defines "United States" to include all but one U.S. territory – NMI. As a result, the protections established by UOCAVA do not extend to former Illinois residents who reside in Territories, save for NMI, because they are not included in the statutory definition of "United States." The Federal Defendants pointed out that this anomaly might be explained in part by the fact that at the time UOCAVA was enacted, the process of NMI becoming a Territory was not yet complete. Regardless, UOCAVA has not caused Plaintiffs' alleged injuries; Plaintiffs' true grievance is that UOCAVA does not *remedy* the alleged harm they identify, which is that Illinois law does not permit them to vote absentee in

federal elections. Not only does the nature of this alleged injury preclude Plaintiffs' standing to challenge UOCAVA, but their claim also fails on the merits. A statute is not constitutionally infirm because it fails to remedy a claimed injury – particularly where that injury results from state law in an area reserved by the Constitution to the States in the first instance.

If the Court reaches Plaintiffs' equal protection challenge to UOCAVA, it should be rejected on the merits. Because UOCAVA neither affects a suspect class nor infringes the right to vote, instead merely imposing a limit upon States' abilities to restrict that right, rational basis review supplies the appropriate legal standard. UOCAVA easily survives this deferential test. In fashioning absentee voting rights for overseas voters, Congress could have rationally distinguished between former State residents that moved to the Territories that existed at the time of UOCAVA's enactment, who would acquire new voting rights in federal elections in the Territories, and those that moved to foreign countries that risked complete disenfranchisement. That NMI became a U.S. Territory subsequent to UOCAVA's enactment, and accordingly is not contained within its definition of the territorial limits of the United States, does not render the statutory scheme unconstitutional. Congress was entitled to *expand* absentee voting incrementally for former residents who moved outside the United States while retaining its authority to make individual determinations about appropriate treatment of the different Territories. Further, relevant Seventh Circuit precedent makes clear that under rational basis review, the fact that a statute may be an imperfect fit between means and ends and results in some practical inequality is not fatal to an otherwise rational statute.

Alternatively, UOCAVA's distinction among the Territories can be upheld on the basis of the unique historical relationship between the United States and NMI. NMI alone was a United Nations Trust Territory before it became a U.S. Territory, and unlike the other U.S. Territories, NMI chose to submit to United States sovereignty only upon reaching a negotiated

agreement embodied in the NMI Constitution. For this reason, courts have recognized that NMI maintains a distinct political status as compared to the other Territories. *See Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 691 n. 28 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244 (1984). Moreover, Plaintiffs mistakenly read the 1975 predecessor to UOCAVA to have treated the Trust Territory of the Pacific Islands ("TTPI"), and therefore NMI, as excluded from the reach of UOCAVA's protections. In fact, NMI was treated under that statute as outside the United States (*i.e.* like a foreign country) and therefore was covered by the Act's absentee ballot protections. Thus, Congress may rationally have decided to maintain that status when NMI completed its transition from a UN Trust Territory to a U.S Territory. Accordingly, there exists a rational basis for Congress to have concluded that NMI was differently situated than other Territories for purposes of UOCAVA's floor for absentee voting rights.

Finally, the Court should decline to enter the remedy Plaintiffs seek concerning UOCAVA. Plaintiffs ask for a declaration that UOCAVA violates the Equal Protection Clause because it purportedly defines the territorial limits of the United States "in a manner that discriminates among former Illinois residents living overseas outside the States." Compl., Prayer for Relief ¶ a, and an injunction that would require officials to accept their absentee ballots for federal elections. Viewed as a whole, Plaintiffs effectively ask the Court to rewrite UOCAVA by extending its requirements to U.S. Territories (Puerto Rico, Guam, and the U.S. Virgin Islands) that are expressly *excluded* by the statutory text. Such a finding would directly conflict with an express statutory limitation enacted by Congress pursuant to its constitutional authority to regulate with respect to U.S. territories. Instead, the Court should hold that UOCAVA meets all Constitutional requirements and leave to Congress the question of whether and how to fine-tune the definitions in UOCAVA for the purpose of absentee voting in federal elections.

ARGUMENT

In addition to further supporting their Motion to Dismiss,[1] the Federal Defendants, by this submission, oppose the Plaintiffs' Motion for Summary Judgment and Cross-Move for Summary Judgment. Plaintiffs' motion fails to establish any ground on which they are entitled to judgment as a matter of law that UOCAVA violates the Constitution. As the Federal Defendants have shown, Plaintiffs have failed to state a claim as a matter of law with respect to UOCAVA, and even if the Court accepted Plaintiffs' Undisputed Statement of Facts (ECF No. 49), Plaintiffs have failed to establish any grounds for judgment in their favor. In the alternative, Plaintiffs have failed to establish their standing at the summary judgment stage and the Federal Defendants are otherwise entitled to summary judgment as a matter of law.[2]

I. Plaintiffs Lack Standing to Sue the Federal Defendants Because Their Alleged Injury Is Not Fairly Traceable to UOCAVA.

The "irreducible constitutional minimum of standing" requires Plaintiffs to show that he has suffered or is imminently threatened with "(1) a concrete and particularized injury in fact (2) that is fairly traceable to the challenged action of the defendant that is (3) likely to be redressed by a favorable judicial decision." *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 819 (7th Cir. 2014) citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As the Federal Defendants have explained, UOCAVA, a permissive statute, supplies a floor for absentee voting rights and does not deny Plaintiffs the right to vote absentee in Illinois. In enacting UOCAVA, Congress contemplated that States, which have the constitutional authority and duty to prescribe the time, place, and manner of voting in federal elections in the first

[1] The Federal Defendants incorporate by reference their Motion to Dismiss and their Memorandum of Law in Support of their Motion to Dismiss. ECF No. 39, 42.

[2] The Federal Defendants contest Plaintiffs' standing and thus dispute Plaintiffs' averment that the Court has subject matter jurisdiction. Federal Defs.' Rule 56.1(b)(3)(A) Stmt. ¶ 3. Defendants otherwise respond to Plaintiffs' statement separately, but note that even if the Court accepted all of Plaintiffs' factual averments as true, they do not establish their entitlement to judgment as a matter of law regarding UOCAVA.

instance, would extend absentee voting rights as they deemed appropriate.[3] In fact, it encouraged them to do so, noting that nothing in UOCAVA "prevent[s] any State from adopting any voting practice which is *less restrictive* than the practices prescribed by this Act." H.R.Rep. No. 99-765, at 19 (1986) (emphasis added), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2023. Illinois has done precisely that by extending absentee voting rights to former State residents residing in American Samoa. 10 Ill. Comp. Stat. Ann. 5/20-1(1). In any event, it is Illinois MOVE that bars Plaintiffs from voting absentee in Illinois, 10 Ill. Comp. Stat. Ann. 5/20-1(1), *see* Federal Defendants' Mot. to Dismiss at 7-9 ("Defs.' Br."). For these reasons, even assuming arguendo Plaintiffs could establish an injury in fact that is likely to be redressed by a favorable judicial decision, Plaintiffs cannot meet the second prong of the *Lujan* standing test: their alleged injury – the inability to vote absentee in federal elections in Illinois – is not fairly traceable to UOCAVA.[4]

Plaintiffs devote a single paragraph to contradicting the argument that it is Illinois MOVE that denies them the right to vote absentee, claiming that the Federal Defendants' "logic, if accepted, could justify the enactment of federal laws requiring states to guarantee voting rights for one group but not others on entirely arbitrary classifications."[5] Pls.' Mot. for Summ. J. at 15

[3] The Seventh Circuit has described the regulation of elections for federal office in Article I, Section 4 of the Constitution thusly: "The first sentence tells the states that they, not Congress, must regulate the times, places, and manner of holding federal elections …. Article I section 4 goes on to provide that Congress can if it wants step in and either make its own regulations or alter those adopted by the state pursuant to the duty imposed by the first sentence." *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995). UOCAVA is premised at least in part on Congress' Article I, Section 4 authority.

[4] The organizational Plaintiffs also lack associational standing because they do not "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497-98 (2009). Plaintiffs' failure to provide allegations of this nature, let alone provide factual support, is fatal to their attempt to invoke this Court's jurisdiction.

[5] Plaintiffs cite *Howard v. State Board of Election Laws*, 976 F. Supp. 350, 351 (D. Md. 1996) for the proposition that "federal laws give cover to states to make similar distinctions [to those in UOCAVA] of their own," Pls.' Br. at 15. However, the distinctions within *restrictive* State statutes placing *limits* on the right to vote (as compared to permissive federal statutes such as UOCAVA, which merely limits States' abilities to restrict that right), must survive the more exacting strict scrutiny standard of review.

("Pls.' Br."). That argument is meritless. First, the distinction drawn in UOCAVA was not arbitrary at the time of its enactment, *see infra* at 8-9, nor is it arbitrary today, *see infra* at 10-14. Second, , UOCAVA is a *permissive* statute which not only extends absentee voting rights broadly but explicitly encourages States to extend absentee voting rights beyond that which is provided for in the statute if they see fit. H.R. Rep. No. 99-765, at 19. In short, UOCAVA directs States to expand certain voting rights, and encourages them to do more, but does not restrict absentee voting rights anywhere. Thus, UOCAVA does not "deny the franchise" to Plaintiffs; it is Illinois MOVE that denies Plaintiffs the ability to vote absentee in Illinois. *See* Defs.' Br. at 7-9. Because Plaintiffs' alleged injury is not fairly traceable to UOCAVA, the Court lacks jurisdiction to adjudicate Plaintiffs' claims as to the Federal Defendants.

II. UOCAVA Meets the Requirements of the Equal Protection and Due Process.

i. Standard of Review

Were the Court to reach Plaintiffs' claim that UOCAVA violates the Equal Protection Clause by distinguishing among the Territories, that claim fails on the merits. Plaintiffs first contend that strict scrutiny must be applied to UOCAVA based on the theory that UOCAVA "'grant[s] the right to vote to some citizens' (former Illinois residents who reside in foreign countries and NMI . . .) while 'deny[ing] the franchise to others," Pls.' Br. at 8-9 (internal citation omitted). This contention is incorrect. Even assuming *arguendo* that Plaintiffs' characterization of UOCAVA was accurate, both the First and Second Circuits have addressed the appropriate standard of review for a statute that grants absentee voting rights to some – former state residents living outside of the United States in foreign countries – while "denying" (in Plaintiffs' terminology) that right to others in Puerto Rico, and concluded that rational basis

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See Pls.' Br. at 8 (collecting cases applying strict scrutiny to restrictive state statues infringing upon the right to vote). Thus, it cannot be said that UOCAVA, a statute subject to the highly deferential rational basis standard, in any sense gives "cover" to States to make similar distinctions.

review represents the appropriate standard. *See Igartua De La Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994) (per curiam) ("*Igartua I*") (applying rational basis review to UOCAVA); *Romeu v. Cohen*, 265 F.3d 118, 124 (2d Cir. 2001) (rejecting strict scrutiny as the appropriate standard).

Plaintiffs cannot point to a single court that has applied strict scrutiny to the statute. All of the cases Plaintiffs cite apply strict scrutiny to state statutes that placed *restrictions* on existing voting rights of state residents, effectively infringing upon the right to vote. *See Dunn v. Blumstein*, 405 U.S. 330 (1972) (state durational residency voting requirement); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (state poll tax); *Burdick v. Takushi*, 504 U.S. 428 (1992) (state prohibition on write-in voting). UOCAVA, by contrast, does not "infringe [the right to vote] but rather limits a state's ability to restrict it," *Igartua I*, 32 F.3d at 20 & n. 2, and is instead analogous to the federal statute at issue in *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (applying rational basis to statute barring states from applying English literacy requirements to voters educated in American-flag schools in which English was not the predominant classroom language, where protection did not extend to voters educated in a language other than English in non-American flag schools), *see also* Defs.' Br. at 10-11 (discussing *Katzenbach*); *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 810-11 (1969) (applying rational basis in holding Illinois absentee voting statute providing for furnishing of absentee ballots to persons who, for medical reasons, could not go to the polls or would be out of the county did not violate the Equal Protection Clause for failure to extend to certain inmates).[6]

[6] In applying rational basis review to the challenged absentee voting statute, the Court explained that rational basis was appropriate in part because there was "nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote," *McDonald*, 394 U.S. at 807. UOCAVA, like the statutory scheme at issue in *McDonald*, does not deny Plaintiffs the right to vote absentee in Illinois. *See* Defs.' Br. at 7-9.

Plaintiffs argue *Katzenbach* is inapposite because, in that case, "Congress's approach was plausibly viewed as incremental" because of the "unique historic relationship between Congress and the Commonwealth of Puerto Rico," among other reasons, whereas UOCAVA "do[es] not expand voting rights to one group of overseas voters . . . [with] which [Congress] . . . ha[s] a special relationship." Pls.' Br. at 10. But *Katzenbach* is not so narrow; it establishes that when Congress exercises its authority to expand rights, a statute does not violate equal protection simply because "it could have gone farther than it did," so long as there exists a rational basis for the line drawn by Congress. *Id.* Further, Congress and NMI likewise maintain a unique historic relationship, under which NMI transitioned from a UN Trust Territory to a U.S. Territory. *See infra* at 10-14. There is little doubt that rational basis review must be applied to UOCAVA.

ii. UOCAVA Passes Rational Basis Review.

Under rational basis review, a statute "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *City of Chicago v. Shalala*, 189 F.3d 598, 605-06 (7th Cir. 1999) (citation omitted). "[A]ny rational basis will suffice, even one that was not articulated at the time the disparate treatment occurred." *Srail v. Vill. of Lisle, Ill.*, 588 F.3d 940, 946-47 (7th Cir. 2009).

There are several possible rational bases for Congress's distinct treatment of NMI, and as stated, so long as *any* conceivable rational basis justifies the disparity in treatment, UOCAVA passes constitutional muster. *Id.* The first possibility is that, in fashioning a floor for overseas absentee voting rights, Congress distinguished between the U.S. Territories that existed at the time of its enactment and foreign countries. 52 U.S.C. § 20310(8).[7] In so doing, Congress could

[7] Plaintiffs argue that "the apparent premise of the federal defendants' argument – that the NMI was not addressed [in UOCAVA] simply because it did not yet exist or have an established relationship with the United States – is wrong as a matter of history" and "lacks even explanatory force." Pls.' Br. at 12-13. This description misconstrues the underpinning of the Federal Defendants' argument, which is

have reasonably concluded that while former State residents that move to the Territories gain *new* voting rights, such as voting in federal elections for nonvoting delegates to Congress, those that move to foreign countries might be completely disenfranchised. *See* Defs.' Br. at 12; *Igartua I*, 32 F.3d at 11. Every court to address this distinction has concluded that it survives rational basis review – indeed, the Second Circuit concluded it survives even more exacting standards. *Romeu*, 265 F.3d at 124-25, *Igartua I*, 32 F.3d at 11.

The fact that a historical event subsequent to the statute's enactment – specifically, the Covenant between the United States and NMI becoming fully effectuated under which NMI transitioned from a UN Trust Territory to a U.S. Territorial Commonwealth – does not doom the statutory scheme. As a matter of law, the Seventh Circuit has emphasized that a statute survives rational basis review even where it "is not made with mathematical nicety or *because in practice it results in some inequality*." *Shalala*, 189 F. 3d at *id.*; *Srail*, 588 F.3d at 946-47 (emphasis added). Here, the statute does not explicitly draw distinctions between Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa on the one hand and NMI on the other. *See* 52 U.S.C. § 20310(8). By its terms, UOCAVA is silent with respect to NMI, simply defining "overseas voter" to be one residing outside of the territorial limits of the United States, or outside "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa." *Id.* § 20310(5), (8). Accordingly, even if the Court were to find that a subsequent historical event rendered the statute an "imperfect fit between means and ends," *Shalala*, 189 F.3d at 606, UOCAVA nevertheless survives rational basis review.

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that Congress did not include NMI in its definition of the territorial limits of the United States along with Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa because at the time of UOCAVA's enactment, NMI was *not yet a Territory*. Indeed, the Trusteeship Agreement under which NMI was supervised by the United Nations was still in effect, and the Covenant under which NMI became a Territory and granted American citizenship to its residents had not yet become fully effectuated. *See* Defs.' Br. at 13, n.7; *see also* Proclamation No. 5564, 51 Fed. Reg. 40, 399 (1986) (attached as Exh. A); *see also* infra at 11. It is perfectly logical that Congress would therefore exclude it from the definition of the territorial limits of the United States.

Beyond this, there do appear to be reasonable grounds upon which Congress could have decided to treat NMI differently under UOCAVA. As Plaintiffs concede, the legislative history is silent on the question of why NMI was not included within the definition of the territorial United States in UOCAVA. Pls.' Br. at 13 ("Congress . . . chose – for no apparent reason – to elevate the status of former state residents living [in NMI] above the status of similar residents living in" the other Territories). But, it is not clear whether NMI's distinct treatment was the product of historical timing, *see supra* at 9-10; Defs.' Br. at 13, or instead a deliberate choice by Congress. Accordingly, NMI's exclusion from the territorial limits of the United States may be the rational result of Congress recognizing NMI's unique, and continually evolving, relationship with the United States. Indeed, there are any number of reasons that might have led Congress to determine that the former State residents that move to NMI are not similarly situated to former State residents that move to the other Territories.

First and foremost, NMI is not only the newest Territory, it is also the only Territory that independently chose to become part of the United States. The United States' relationship with NMI originated in a Trusteeship Agreement with the Security Council of the United Nations, *Wabol v. Villacrusis*, 958 F.2d 1450, 1458 (9th Cir. 1990), *cert. denied*, 506 U.S. 1027 (1992), under which the United States served as "Administrator of the Trust Territory of the Pacific Islands." *Id.* The United States' administration of the Trust Territory was "subject to United Nations supervision and circumscribed by the United Nations Charter and terms of the Trusteeship Agreement," *id.* (citation omitted), such that "the United States was not a sovereign over, but a trustee for the Trust Territory." *Wabol*, 958 F.2d at 1458 (citations omitted). While all the other islands that comprised the Trust Territory of the Pacific Islands (Micronesia, the Marshall Islands, and Palau) ultimately elected to pursue independent statehood, NMI "expressed different aspirations." *Id.* Under the Covenant to Establish a Commonwealth in

Political Union with the United States of America, *reprinted as amended in* 48 U.S.C.A. section 1681 note (West 1987) ("Covenant"), reached following negotiations between the United States and NMI, NMI "bec[ame] politically united with and 'under the sovereignty of the United States" "upon termination of the Trusteeship Agreement," *Id.* at 1459 (citing Covenant §§ 301, 101). "The Trusteeship was terminated on November 3, 1986," *id.* at n.14, citing Proclamation No. 5564, 51 Fed. Reg. 40, 399 (1986).[8] Through this process and unlike other Territories, NMI came under U.S. sovereignty of its own accord and on its own terms.

NMI's historical relationship with the United States has led courts to deem arguments that "[NMI's] political status is distinct from that of unincorporated territories such as Puerto Rico" as "credible" and having "merit," *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d at 691 n.28, because "[a]s a commonwealth, the NMI will enjoy a right to self-government guaranteed by the mutual consent provisions of the Covenant . . . [and n]o similar guarantees have been made to Puerto Rico or any other territory." *Id.* (citations omitted). As such, NMI's unique status as a former UN Trust Territory presents a rational basis for UOCAVA's distinct treatment of NMI as compared to the other Territories: Congress could have reasonably concluded that as the only Territory with origins as a former Trust under UN supervision, it may be treated more like a foreign country under UOCAVA. Indeed, all other former Pacific Trust Territory Islands ultimately *did* become independent nations, *Wabol*, 958 F.2d at 1458, and "[o]ne of the purposes of the trusteeship was for the United States to promote independence and self-government among the people of those islands," *Davis v. Commonwealth Election Commission*, No. 1-14-CV-00002, 2014 WL 2111065, at *1 (D. N.M.I. May 20, 2014).

[8] By some accounts, the Trusteeship Agreement did not officially terminate until even later, on December 22, 1990, when the United Nations Security Council officially terminated the Trusteeship Agreement. *See* Letter Dated December 1990 From the President of the Trusteeship Council Addressed to the President of the Security Council, December 22, 1990 (attached as Exh. B).

Further, it is well documented that the Covenant, a quasi-international Treaty reached through extensive negotiation with the NMI populace, would not have been realized absent particular provisions aimed at "protecting local culture and values," *Wabol*, 958 F.2d at 1461. *See e.g.*, *id.* ("The legislative history of the Covenant and the Constitution indicate that the political union of the Commonwealth and the United States could not have been accomplished without the [land alienation] restrictions"); *Atalig*, 723 F.2d at 685 ("[T]he drafters of the Covenant noted that without these provisions [restricting right to a trial by jury], 'the accession of the Northern Mariana Islands to the United States would not have been possible.'"). That is to say, NMI retained a unique combination of characteristics aimed at preserving its independence, rooted in its former status as a Trust, even after becoming a U.S. Territory. For this reason, too, Congress could have reasonably concluded that moving from a State to NMI is akin to moving from a State to a foreign country such as Palau, Micronesia, or the Marshall Islands.

And there are still other reasons why Congress might have rationally concluded that NMI enjoys a distinct, evolving political status as compared to the other Territories, entitling former State residents who move there to guaranteed absentee voting rights under UOCAVA. For example, unlike every other Territory, NMI was not entitled to a non-voting delegate to the House of Representatives with full privileges until 2008. Pub. L. No. 110-229, § 711, 122 Stat. 754 (codified at 48 U.S.C. § 1751 (2008)). Although pursuant to the Northern Mariana Islands Commonwealth Constitution NMI was entitled to a Resident Representative to Congress as early as 1978, that Representative "ha[d] no official status in the Congress," H.R Rep. No. 109-110, at 5 (2005); *see also id.* at 3 (describing NMI as "the last and only territory with a permanent population that has no permanent voice in Congress."). By contrast, American Samoa, the second most recent Territory to acquire a nonvoting delegate in the U.S. House of Representatives, obtained that right some thirty years earlier, in 1978. *See Tuaua v. United*

States, 951 F. Supp. 2d 88, 91 (D.D.C. 2013), *aff'd* 788 F.3d 300 (D.C. Cir. 2015). Along the same lines, until very recently, NMI "retained nearly exclusive control over immigration to the territory," and for decades, time spent in NMI did not count towards residency requirements for purposes of obtaining U.S. citizenship. *Eche v. Holder*, 694 F.3d 1026 (9th Cir. 2012).[9] Further, certain other federal voting statutes likewise treat NMI differently than the other Territories. *See* Help America Vote Act, 52 U.S.C.A. § 20901(d)(2)(A)-(B) (West) (providing for a minimum payment to carry out federal election related activities to "the Several States . . . Puerto Rico, Guam, American Samoa, or the United States Virgin Islands" but omitting NMI). Accordingly, Congress could reasonably have concluded that NMI deserves distinct treatment in the realm of absentee voting rights under UOCAVA as compared to the other Territories.

Finally, an additional rationale exists in the historical evolution of UOCAVA. Plaintiffs appear to misread the 1975 predecessor to UOCAVA, which they claim "*excluded* former state citizens residing [in NMI] from the right to vote in federal elections in their prior states of residence." Pls.' Br. at 12 (original emphasis) (citation omitted). That is incorrect. In fact, under the 1975 predecessor to UOCAVA, P.L. 94-203, 89 Stat. 1142, absentee voting rights were extended to TTPI and, thus, to NMI, because the definition of "United States" expressly "*d[id] not include* . . . the Trust Territory of the Pacific Islands." *See* P.L. 94-203, § 2(3). This made sense since TTPI was not a U.S. Territory and so was treated like a foreign country. This also supplies a key rational basis for why Congress has not amended UOCAVA to include NMI among U.S. Territories – in order to maintain absentee voting rights already operative in that location under prior law, history, and practice.

[9] Although Congress has amended these provisions to bring NMI immigration policies more in line with the rest the federal immigration system, that transition is still ongoing. *See* 48 U.S.C. § 1806(a)(2) (transition program extends through December 31, 2019). These developments only underscore the unique and evolving relationship between the United States and NMI.

Thus, there exists a multitude of bases upon which Congress could have rationally distinguished between foreign countries and NMI on the one hand, and Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa on the other in advancing its legitimate interest in extending absentee overseas voting rights. Implicit in Plaintiffs' contrary position is the suggestion that when Congress legislates with respect to the Territories, it must treat each Territory identically. *See* Pls.' Br. at 7-13. This proposition flies in the face of Congress's longstanding understanding and practice to the contrary. *See e.g.*, U.S. Gov't Accountability Off., GAO-98-5, U.S. Insular Areas: Application of U.S. Constitution 1 n.1 (1997) ("Each of these areas [the Territories] has a unique historical and legal relationship with the United States.") (attached as Exh. C). Territories' distinct political and historical backgrounds render them inherently sui generis, requiring Congress to maintain flexibility in exercising its plenary power with respect to the Territories. UOCAVA comports with equal protection principles.

III. The Remedy Plaintiffs Seek Would Require the Court to Rewrite a Clear Statutory Limitation That is Within Congress's Authority Over U.S. Territories.

Finally, the Court should contemplate the sheer breadth of the relief Plaintiffs seek, which would flatly conflict with the plain terms of UOCAVA as well the deference that is due to Congress's plenary power with respect to the Territories.[10] Plaintiffs ask this Court to effectively rewrite the federal statute by requiring that former Illinois residents (the only plaintiffs before this Court) otherwise eligible to vote in Illinois and currently residing in *any* Territory – including Puerto Rico, Guam, the U.S. Virgin Islands, and the American Samoa (which Congress explicitly excluded from its absentee mandate) – be permitted to vote absentee

[10] The Court should be mindful that any declaration that UOCAVA operates in violation of equal protection principles would also call into question the right of former Illinois residents currently living in NMI to vote absentee. The Federal Defendants do not read the Complaint as requesting any relief that would disenfranchise voters in NMI, and the Federal Defendants do not advocate this result, but it is an obvious potential implication of the declaratory relief Plaintiffs seek.

in federal election, and issue an injunction requiring officials to accept their absentee ballots for federal elections. Compl., Prayer for Relief ¶ a. In Plaintiffs' view, the fact that NMI, through negotiations, later became a Territory should have the effect of *invalidating* Congress' pre-existing position with respect to absentee voting rights in other Territories. But this result would directly contravene the express decision of Congress to limit overseas absentee voting rights to those residing outside the territorial limits of the United States (defined to include Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa). The imprudence of this approach is highlighted by the dramatic consequences that would necessarily flow from such a decision, which would extend absentee voting rights to a wave of citizens across the Territories that were expressly excluded by Congress from UOCAVA's reach. *Cf. E.E.O.C. v. Calumet Cty.*, 686 F.2d 1249, 1252 (7th Cir. 1982) (citation omitted) ("Congress is given great deference in selecting the measures necessary and appropriate to secure the guarantees of the Fourteenth Amendment."). Ultimately, the Court should be guided by the familiar principle that it may not "alter the text [of a statute] in order to satisfy the policy preferences" of a party. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). Rather, "[t]hese are battles that should be fought among the political branches . . . . parties should not seek to amend [a] statute by appeal to the Judicial Branch." *Id.*; *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement,"); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress, not th[e] Court, to rewrite [a] statute.").

CONCLUSION

The Federal Defendants' Motion to Dismiss should be granted and Plaintiffs' Motion for Summary Judgment should be denied. Alternatively, the Federal Defendants' Cross-Motion for Summary Judgment should be granted.

Dated: April 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2016, a copy of the foregoing combined Reply in Support of the Federal Defendants' Motion to Dismiss, Opposition to Plaintiffs' Summary Judgment Motion, and Cross-Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Caroline J. Anderson
Caroline J. Anderson

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

LUIS SEGOVIA *et al.*, Plaintiffs, v. BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO *et al.*, Defendants.	15-cv-10196 Judge Joan B. Gottschall

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Dated: May 17, 2016

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INTRODUCTION

The individual Plaintiffs in this case, six former Illinois residents currently residing in Puerto Rico, Guam, and the U.S. Virgin Islands, ask this Court to rewrite a permissive federal statute that extends absentee voting rights to former State residents in foreign countries and the Northern Mariana Islands ("NMI"). Plaintiffs have failed to establish their standing or that their Equal Protection challenge has any merit.

As a threshold matter, Plaintiffs maintain no injury that is fairly traceable to the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310 ("UOCAVA"), the federal statute they seek to challenge. Contrary to Plaintiffs' suggestion, their alleged injury—the inability to vote absentee in federal elections in Illinois—stems *exclusively* from the Illinois Military Overseas Voter Empowerment Act ("Illinois MOVE"), 10 Ill. Comp. Stat. Ann. 5/20-1, a State law that functions as a ceiling for absentee voting rights for former Illinois residents. UOCAVA indisputably supplies only a floor for such rights and does not restrict Illinois from extending those rights further—indeed, Illinois has done precisely that by extending absentee voting rights to former State residents in American Samoa. In claiming that their alleged injury can be traced to both Illinois MOVE *and* UOCAVA, Plaintiffs effectively ask this Court to collapse the traceability and redressability analyses of Article III standing: their logic suggests that because a finding that UOCAVA must extend absentee voting rights to all Territories (contravening the express will of Congress) would *redress* their grievances, the federal statute's selective extension of absentee voting rights must also *cause* their alleged injury. But this faulty reasoning bypasses the essential, independent constitutional requirement of traceability and plainly misconstrues a permissive statute as a restrictive one. Because UOCAVA does not deprive Plaintiffs of the right to vote absentee in federal elections in Illinois, their injury cannot be fairly traced to UOCAVA. The two organizational Plaintiffs lack standing for the additional

reason that they have failed to establish their associational standing. Plaintiffs have not met the requirements of Article III, and their claims against the Federal Defendants must be dismissed.

If the Court reaches the merits of Plaintiffs Equal Protection claims, rational basis review supplies the appropriate standard for evaluating UOCAVA. Plaintiffs' strained efforts to read a statute that *extends* absentee voting to some former residents of States into one that "require[s]" "discrimination," Pls.' Opp'n & Reply in Supp. of their Mot. for Summ. J. at 2 ("Pls.' Opp'n") (ECF No. 58), do not support the conclusion that strict scrutiny is appropriate. Under longstanding Supreme Court precedent, rational basis review plainly applies to statutes, such as UOCAVA, that extend rights. Plaintiffs' reliance on a rhetorical device—inserting "discriminatorily" before "extend[s] absentee voting rights," in describing UOCAVA, Pls.' Opp'n at 1—cannot convert a permissive statute into a restrictive one, and is insufficient to trigger strict scrutiny.

UOCAVA easily meets the requirements of rational basis review. First, Congress could have rationally distinguished between Territories that existed at the time of UOCAVA's enactment (Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa) and foreign countries in fashioning absentee voting rights. In so doing, Congress could have reasonably determined that former State residents that moved to the Territories acquired new voting rights in those Territories, whereas former State residents that moved to foreign countries risked complete disenfranchisement, absent protections such as those in UOCAVA. Plaintiffs' suggestion that this distinction was "patently arbitrary" ignores the relevant historical context. At the time of UOCAVA's enactment, NMI had not yet become a Territory of the United States. Because its status was in flux, it was perfectly logical for Congress to treat NMI differently than Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa, advancing its legitimate interest in appropriately defining the United States for purposes of absentee voting rights. The fact that

NMI subsequently became a Territory and—decades later—acquired representation in Congress comparable to the other four territories may have rendered the statute an imperfect fit between means and ends, but it does not render the rational statute unconstitutional under binding Seventh Circuit precedent.

Second, Congress could have rationally treated NMI differently than the other Territories on the basis of NMI's unique relationship with the United States. In so doing, Congress would have likewise advanced its legitimate interest in appropriately defining the United States for purposes of absentee voting rights, in a manner respectful of the United States' individual relationships with each Territory, including NMI. Because NMI maintains a distinct political, legal, and historical status as compared to the other Territories, it was perfectly rational for Congress to treat NMI more like a foreign country for purposes of absentee voting rights.

Plaintiffs challenge only a single element of this argument, based on their mistaken contention that former State residents in NMI could not vote absentee under UOCAVA's 1975 predecessor statute, such that UOCAVA purportedly effected a change in preexisting law by treating NMI differently than other U.S. Territories. But Plaintiffs again misapprehend the relevant statutory text from the 1975 law; UOCAVA maintained the status quo by preserving the pre-existing tradition of absentee voting rights in NMI. In any event, the longstanding absentee voting rights Congress afforded NMI residents are merely one dimension of NMI's distinct historical relationship with the United States: as the only Territory that was formerly part of a United Nations Trust, NMI became a U.S. Territory only upon reaching a negotiated agreement with the United States. The newest Territory, NMI did not attain representation in Congress with official status until 2008 and has been treated differently than the other Territories in other federal voting statutes. Thus, wholly apart from the impact of the 1975 law, UOCAVA's distinction rationally affirms NMI's unique status.

Finally, the sweeping remedy Plaintiffs seek—extending absentee voting rights to the precise Territorial residents that Congress explicitly identified as *outside* the reach of UOCAVA—would flatly contravene the will of the political branch endowed with plenary power to legislate with respect to the Territories. The Constitution does not require this result. The Court should defer to Congress's expertise in defining the contours of American relations with the Territories and decline Plaintiffs' invitation to restructure UOCAVA.

ARGUMENT

I. Plaintiffs Lack Standing to Sue the Federal Defendants Because Their Alleged Injury Is Not Fairly Traceable to UOCAVA.

Plaintiffs have not demonstrated that their alleged injury—the inability to vote absentee in Illinois—is fairly traceable to UOCAVA and accordingly have not established their standing to sue the Federal Defendants. *See Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 819 (7th Cir. 2014) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)) (defining the "irreducible constitutional minimum of standing" as "(1) a concrete and particularized injury in fact (2) that is fairly traceable to the challenged action of the defendant that is (3) likely to be redressed by a favorable judicial decision"). Plaintiffs fail to address the Government's standing argument on its terms, and instead attempt to distract the Court by reference to the *merits* analyses set forth in *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) and *Weinberger v. Wiesenfeld*, 420 U.S. 636, 647 (1975). *See* Pls.' Opp'n at 13 ("[T]he Supreme Court has analyzed statutes that confer a benefit in a discriminatory fashion using the same framework that applies to restrictive statutes."). But of course, the Court need not, and should not, reach the question of the appropriate analytical merits framework unless Plaintiffs can first establish their standing as to the Federal Defendants.

As outlined in the Federal Defendants' Cross-Motion for Summary Judgment, UOCAVA, a permissive statute, does not deny Plaintiffs the right to vote absentee in federal elections in Illinois. Federal Defs.' Cross-Mot. for Summ. J. at 4–6 ("Cross-Mot.") (ECF No. 51). Rather, it is Illinois MOVE that imposes that restriction. *Id.* Although it is conceivable that extending UOCAVA to provide universal absentee voting rights in all U.S. Territories could theoretically *remedy* Plaintiffs' alleged injury (by requiring Illinois and potentially all other States to amend their implementing legislation accordingly), this notion is of no consequence absent a showing that their alleged injury is fairly traceable to UOCAVA. Plaintiffs have not done so. Article III does not permit Plaintiffs to conflate the independent traceability and redressability requirements set forth in *Lujan*, 504 U.S. at 560–61. The Complaint should be dismissed for lack of standing with respect to the Federal Defendants.

Plaintiffs claim that finding in the Federal Defendants' favor on this point would result in their inability to challenge Illinois MOVE. Pls.' Opp'n at 13. The Federal Defendants take no position on Plaintiffs' standing with respect to the Illinois Defendants, but note that because Illinois MOVE imposes the alleged injury of which Plaintiffs complain—Plaintiffs' inability to vote absentee in federal elections in Illinois—it is not apparent why the traceability argument the Federal Defendants advance here would foreclose Plaintiffs' standing to challenge that state law.[1] Regardless, Plaintiffs' claims against the Federal Defendants must be dismissed for lack of standing.

[1] Plaintiffs all but admit that the two organizational plaintiffs lack standing. Pls.' Opp'n at 14 n.7. Because Plaintiffs failed to make specific allegations establishing that at least *one identified member* had suffered or would suffer harm traceable to UOCAVA, the organizational plaintiffs have not established associational standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009). Plaintiffs appear to concede that they have not named a *specific* individual, instead submitting that they have "alleg[ed] that IAPGVP's and LWC-VI's membership includes *current residents* of Guam and the Virgin Islands who are former residents of Illinois," Pls.' Opp'n at 14 n.7; *see also id.* (referring generally to "people" who are allegedly denied absentee voting rights). But of course, generic references to "current residents" and "people" do not amount to the naming of a specific individual, as the Supreme Court has required.

II. UOCAVA Meets the Requirements of Equal Protection and Due Process.

i. Standard of Review

If the Court reaches the merits of Plaintiffs' claims, UOCAVA need only pass rational basis review in order to satisfy the requirements of the Constitution. In arguing that strict scrutiny must be applied, Plaintiffs first attempt to impugn the First Circuit's determination that rational basis review represents the appropriate standard for Equal Protection challenges to UOCAVA. Pls.' Opp'n at 4 (describing the *Igartua* decision as one reached "without the benefit of oral argument" in a challenge "brought by a *pro se* litigant"); *see Igartua De La Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (per curiam). But no Court has ever applied strict scrutiny to UOCAVA. *See Igartua*, 32 F.3d at 10; *Romeu v. Cohen*, 121 F. Supp. 2d 264, 282–84 (S.D.N.Y. 2000), *aff'd*, 265 F.3d 118 (2d Cir. 2001); *see also Romeu*, 265 F.3d at 124 (concluding that "the UOCAVA[] . . . is not subject to strict scrutiny").

The uniform body of law applying rational basis review to UOCAVA challenges is consistent with numerous other cases establishing that Congress's power to legislate with respect to the Territories is subject only to rational basis review. *See, e.g.*, *Besinga v. United States*, 14 F.3d 1356, 1360 (9th Cir. 1994) ("[T]he broad powers of Congress under the Territory Clause are inconsistent with the application of heightened judicial scrutiny to economic legislation pertaining to the territories."); *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1161 (D.C. Cir. 1991) ("[T]he Territory Clause permits exclusions or limitations directed at a territory . . . so long as the restriction rests upon a rational base."). *Quiban* also puts to rest Plaintiffs' contention that strict scrutiny is justified whenever "the government extends a benefit to one class of individuals

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Summers, 555 U.S. at 498–99. Accordingly, even if the Court were to determine that the individual plaintiffs have established their standing, the two organizational plaintiffs must be dismissed from the case.

while denying it to another."[2] Pls.' Opp'n at 4. In *Quiban*, then-Judge Ruth Bader Ginsburg determined that rational basis review applied in an Equal Protection challenge to two federal statutes that excluded Philippine World War II veterans that had served in the American armed forces from certain veteran's benefits. 928 F.2d at 1154. Because the Philippines were formerly a U.S. Territory, Congress's power under the Territory Clause informed the D.C. Circuit's analysis in upholding the statutes.[3] *See id.* It is clear, therefore, that Plaintiffs' position is not only inaccurate as a general proposition, but also within the specific context of Congress's selective extension of benefits in the Territories.

But even outside the context of Territories, heightened scrutiny does not apply to every voting regulation limiting the franchise. *See, e.g.*, *Green v. City of Tucson*, 340 F.3d 891, 899 (9th Cir. 2003) (rejecting the notion that "every voting regulation [is subject] to strict scrutiny,"); *Snead v. City of Albuquerque*, 663 F. Supp. 1084, 1087 (D.N.M. 1987) ("Because the Plaintiffs in this case have no constitutionally protected right to vote in the city's elections, the mere fact that the New Mexico law extends the right to vote to some non-residents does not implicate strict scrutiny."); *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (heightened scrutiny does not apply to all challenges to voting rights). Plaintiffs, like other U.S. citizens who reside in the Territories, do not have a constitutionally protected right to vote in federal elections for President or voting representation in Congress. *See* Federal Defs.' Mot. to Dismiss at 2–3 (*citing Anderson v. Celebrezze*, 460 U.S. 780, n.18 (1983)) ("The Constitution expressly delegates authority *to the states* to regulate selection of Presidential electors . . .") (emphasis

[2] The Federal Defendants maintain the position, articulated in their Cross-Motion for Summary Judgment, that UOCAVA does not "deny" absentee voting rights to Plaintiffs, instead merely serving as a limitation on the ability of States' to restrict absentee voting rights. *See* Cross-Mot. at 6–7.

[3] President Franklin D. Roosevelt called various Philippine military organizations into the service of American armed forces during World War II. *Quiban*, 928 F.2d at 1154. Two subsequent statutes, the First and Second Supplemental Surplus Appropriation Rescission Act of 1946, provided that service by Philippine veterans "shall not be deemed to have been active military, naval, or air service" for purposes of diverse veterans benefit programs, effectively excluding them from such benefits. *Id.*

added); *Att'y Gen. of the Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) ("[T]he Constitution does not grant to American citizens the right to elect the President."). Thus, the fact that Congress has chosen to require States to extend absentee voting privileges to some U.S. citizens who do not reside in States does not give rise to heightened scrutiny.

Finally, Plaintiffs argue that *Katzenbach v. Morgan*, 384 U.S. 641 (1966) and *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802 (1969) cannot aid the Court's analysis because those cases "identified narrow groups for *inclusion*," Pls.' Opp'n at 5, whereas UOCAVA purportedly "effected near-universal expansion of absentee voting rights to former state residents," while excluding only a "narrow group," *id.* at 6. First, Plaintiffs' characterization of that case law is wrong; as previously explained at length, *Katzenbach* and *McDonald* clearly held that rational basis review applies to statutes, like UOCAVA, that permissively *extend* voting rights. *See* Cross-Mot. at 7–8. But even if the Court were to accept Plaintiffs' reading of *Katzenbach* and *McDonald*, their characterization of UOCAVA is again simply wrong: UOCAVA did not single out a "narrow group" of former State residents that moved to Puerto Rico, Guam, the Virgin Islands, and American Samoa for exclusion from the protections of statute, as Plaintiffs would have this Court believe. This depiction of UOCAVA ignores the obvious. UOCAVA's protections also do not extend to citizens (other than absent uniformed service voters) that move from one State to *any of the 49 other States* in the United States, *see* 52 U.S.C. § 20310(5)(B)–(C) (limiting UOCAVA's application to "overseas voters" who "reside[] outside the United States").[4] Plaintiffs have failed to establish that UOCAVA "singles out a narrow group for exclusion," or otherwise demonstrate that strict scrutiny should be applied. This Court should join the First and Second Circuit in rejecting strict scrutiny's application to

[4] A different federal statute extends certain absentee voting protections to United States citizens that move from one State to another. *See* 52 U.S.C. § 10502(e). But UOCAVA itself did not effect a "near universal expansion of absentee voting rights." Pls.' Opp'n at 6.

UOCAVA, *see Igartua*, 32 F.3d at 10; *Romeu*, 265 F.3d at 124 (2d Cir. 2001), and apply rational basis review.

ii. UOCAVA Passes Rational Basis Review.

As the Federal Defendants have previously set forth, there are several rational bases for Congress's distinct treatment of NMI. Indeed, "[a]ny rational basis will suffice, even one that was not articulated at the time the disparate treatment occurred." *Srail v. Vill. of Lisle*, 588 F.3d 940, 946–47 (7th Cir. 2009). First, Congress could have rationally distinguished between the Territories that existed at the time of the statute's enactment in 1986 and foreign countries, reasoning that citizens that moved to foreign countries risked complete disenfranchisement without federal protections, whereas citizens in the Territories acquired voting rights in federal elections in those Territories. *See* Cross-Mot. at 8–9. Former State residents in NMI, which was not yet a U.S. Territory, *id.* at 11, would *not* have acquired new voting rights for federal representation with official status in Congress. *See* Pub. L. No. 110-229, § 711, 122 Stat. 754 (codified at 48 U.S.C. § 1751 (2008)) (providing for a nonvoting delegate from NMI to Congress with official status for the first time in 2008). Further, at the time of UOCAVA's enactment, NMI's native residents were not yet U.S. citizens. *See* Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986). Far from "arbitrary discrimination," Pls.' Opp'n at 7, it is therefore perfectly logical that Congress would have treated U.S. Territories differently than foreign countries and entities such as NMI. *See Romeu*, 265 F.3d at 124–25, *Igartua*, 32 F.3d at 11. The fact that NMI later became a U.S. Territory in 1986, with representation in Congress comparable to the other Territories in 2008, potentially rendered UOCAVA an "imperfect fit between means and ends," *City of Chicago v. Shalala*, 189 F.3d 598, 606 (7th Cir. 1999), is not fatal under Seventh Circuit precedent. *See* Cross-Mot. at 8–9. Congress was entitled to make a determination with

respect to then-existing territories, while reserving judgment with respect to any hypothetical future territories with unknowable relationships to the United States.

Second, Congress could have rationally treated NMI differently than the other U.S. Territories on the basis of NMI's unique relationship with the United States. *See* Cross-Mot. at 10–14. Plaintiffs do not and cannot contest the unique and evolving relationship between the United States and NMI. Instead, they focus exclusively on one small dimension of this historical relationship, arguing that the Federal Defendants' reading of UOCAVA's 1975 predecessor statute is flawed. *See* Pls.' Opp'n at 6–9. In their view, the Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (1976) ("1975 Act") did not extend absentee voting rights to former State residents in NMI.[5] *See id.* Respectfully, Plaintiffs' interpretation of the 1975 statute continues to be incorrect.

For present purposes, the 1975 Act contains three relevant sections: (1) a "definitions" section which defines relevant terms, including the "United States;" (2) an operative section that grants absentee voting rights to citizens "outside the United States;" and (3) a restrictive subsection, articulating various limitations on that grant of absentee voting rights. *See* Pub. L. No. 94-203, § 2-3. No party disputes that the 1975 Act excluded the Trust Territory of the Pacific Islands ("TTPI"), of which NMI was a part, from the definition of the United States. *See* Pls.' Opp'n at 7. Accordingly, that statute extended absentee voting rights to former State

[5] Plaintiffs suggest that if the Federal Defendants have incorrectly interpreted the 1975 Act, the entire argument that NMI has a unique historical relationship with the United States, justifying NMI's distinct treatment in UOCAVA, is somehow defeated. *See* Pls.' Opp'n at 7–10. The Federal Defendants' argument, however, was in no sense exclusively premised upon NMI's treatment under the 1975 Act. *See* Cross-Mot. at 10–14. NMI'S treatment under the 1975 Act was merely one instance in the sequence of distinct historical treatment accorded to NMI by Congress. *Id.* (discussing UOCAVA's unique historical status as part of a United Nations Trust Territory, various idiosyncratic elements of NMI's negotiated agreement with Congress through which it became a U.S. Territory, the fact that all other parts of the Trust Territory of the Pacific Islands became independent nations, NMI's distinct treatment under other federal voting statutes, and NMI's very recent acquisition of a non-voting delegate to Congress with official status).

residents in NMI, because those citizens were "outside the United States." *See* Cross-Mot. at 3, 13.

Plaintiffs disagree, claiming that the subsection articulating limitations on the grant of absentee voting rights swallows the statute's extension of such rights to NMI. *See* Pls.' Opp'n at 8 ("[t]he Act made clear that citizens who 'maintain a domicile . . . in any *territory or possession* of the United States'—a category defined to include citizens residing in NMI—were *not* guaranteed the right to vote.") (first emphasis added) (citing Pub. L. No. 94-203, § 3(2)). But this argument is flawed. It assumes the conclusion that NMI was a "territory or possession of the United States" at the time of the 1975 statute's enactment. That is incorrect. *See* Cross-Mot. at 10–11. Rather, in 1975, NMI was part of a *United Nations* Trust Territory and did not become a *United States* Territory until November 3, 1986. *See id.*; *see also United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 751 (9th Cir. 1993) ("[T]he *United Nations* established the Trust Territory of the Pacific Islands encompassing . . . Northern Mariana Islands.") (emphasis added); *id.* ("On November 3, 1986 . . . the United States terminated the Trusteeship Agreement with respect to the []NMI by Presidential Proclamation.") (citation omitted). Accordingly, the restriction on the grant of absentee voting rights in the 1975 Act that Plaintiffs identify did not apply to TTPI (and therefore to NMI). As the Federal Defendants explained, the 1975 Act thus extended absentee voting rights to former State residents in NMI, and UOCAVA merely maintained the status quo with respect to NMI absentee voting. [6]

[6] Plaintiffs misread the "domicile" restriction in the 1975 law in other ways. That provision should be read in tandem with the original grant of absentee voting rights, which applied only to allow a U.S. citizen residing outside the United States to cast an absentee ballot in a State in which the citizen "was last domiciled immediately prior to departure from the United States," *see* P.L. 94-203 § 3, and, *inter alia*, if that person "does not maintain a domicile" in another State or U.S. Territory or possession, *see id.* §3(2). In short, the provision was intended to limit absentee voting rights to U.S. citizens that were outside the United States who had only *one* prior domicile and only to that immediate prior domicile. This provision appears to be aimed at establishing an overall rule for the grant of absentee ballot rights, not at disenfranchising the residents of "territor[ies] or possession[s] of the United States."

In any event, the Federal Defendants identify many dimensions of Congress's unique relationship with NMI, justifying its distinct treatment in UOCAVA, that place no reliance whatsoever upon the 1975 Act. *See* Cross-Mot. at 10–14; *see also supra* at 10 n.5. Plaintiffs have failed to meaningfully refute the Federal Defendants' argument that UOCAVA rationally distinguishes between NMI on the one hand, and Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa on the other, on the basis of NMI's unique status. Rather than merely an "explanation," *see* Pls.' Opp'n at 9, this distinction is rationally related to Congress's legitimate interest in appropriately defining the United States, for purposes of absentee voting rights, in such a way that that respects its individualized, historical relationships with the Territories, including NMI.

III. The Remedy Plaintiffs Seek Would Require the Court to Rewrite a Clear Statutory Limitation That is Within Congress's Authority Over U.S. Territories.

Finally, the Federal Defendants reiterate that Plaintiffs are asking this Court to rewrite UOCAVA so as to extend absentee voting rights to the very residents of U.S. Territories that the federal statute expressly excludes from its reach. Pls.' Opp'n at 11. The suggestion that "Congress would have willed [this result] had it been apprised of the constitutional infirmity," *id.* (internal citation omitted), strains credulity. The text of the statute is crystal clear: its protections extend to "person[s] who reside outside the United States," 52 U.S.C. § 20310(5), and defines

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Id. Moreover, even assuming NMI was a "U.S. Territory or possession" in 1975 under Plaintiffs' erroneous reading of the 1975 law, U.S. citizens in NMI who were only temporarily residing there would nevertheless retain absentee voting rights in the State in which they were last domiciled. *See Domicile*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "domicile" as "the place at which a person has been physically present and that the person regards as home; a fixed, principal, and permanent home, to which that person intends to return and remain"). Thus, even under Plaintiffs' flawed reading, the 1975 statute would have extended absentee voting rights to at least some (if not all) former State residents in NMI. Thereafter, in 1986 Congress dispensed with the "domicile" limitations all together by replacing the 1975 Act with UOCAVA– again *before* the NMI was a U.S. Territory – meaning that *all* former State residents in NMI were treated as outside the United States and could vote absentee, and Congress could rationally have decided to extend that practice after the NMI subsequently became a U.S. Territory.

"United States, where used in the territorial sense," to mean "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa," *id.* In other words, Congress specifically clarified that former State residents in Puerto Rico, Guam, the Virgin Islands, and American Samoa *are not* guaranteed absentee voting rights under UOCAVA but are instead treated in the same manner as other citizens living in those jurisdictions. *Id.*; *see also Romeu*, 265 F.3d at 125. Plaintiffs' submission that "extension [of absentee voting rights to Puerto Rico, Guam, the Virgin Islands, and American Samoa], rather than nullification," would comport with the will of Congress, Pls.' Br. at 11, belies logic, and is contradicted by the one true indicia of Congressional intent – the actual statutory language.

Plaintiffs also contend that it is "absurd" for the Federal Defendants to suggest that restructuring an entire federal statute would reap dramatic results. Pls.' Opp'n at 14. The Government respectfully disagrees. Contravening the will of Congress by rewriting UOCAVA to include precisely the U.S. Territorial residents that were explicitly excluded from the statute's reach, extending absentee voting rights to former Illinois residents in three additional Territories, is indeed a dramatic consequence. The Constitution does not require this result, and the Court should not rewrite UOCAVA in this manner as a purported remedy, even if it were to credit Plaintiffs' (meritless) claim against the Federal Defendants.[7] *See* Cross-Mot. at 14–15.

CONCLUSION

[7] Finally, in a footnote, Plaintiffs perplexingly argue that "the federal defendants' remedial argument" could result in the "untenable consequence of requiring Illinois to bar former residents in the NMI from voting absentee . . . contrary to UOCAVA's express mandates." Pls.' Opp'n at 11 n.4. But the Federal Defendants have not argued that the Court should restrict absentee voting rights under Illinois MOVE. In fact, the Federal Defendants have repeatedly emphasized that Illinois can, and *has* extended absentee voting rights beyond that which is required by the federal statute. *See* Federal Defs.' Mot. to Dismiss at 8, Cross-Mot. at 5.

The Federal Defendants' Motion to Dismiss should be granted and Plaintiffs' Motion for Summary Judgment should be denied. Alternatively, the Federal Defendants' Cross-Motion for Summary Judgment should be granted.

Dated: May 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2016, a copy of the foregoing combined Reply in Support of the Federal Defendants' Cross-Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Caroline J. Anderson
Caroline J. Anderson

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

LUIS SEGOVIA, JOSE ANTONIO TORRES, PAMELA LYNN COLON, TOMAS ARES, ANTHONY BUNTEN, LAVONNE WISE, IRAQ AFGHANISTAN AND PERSIAN GULF VETERANS OF THE PACIFIC, and LEAGUE OF WOMEN VOTERS OF THE VIRGIN ISLANDS, **Plaintiffs,**	)	**Case No. 15 C 10196**
v.	)	**Judge Joan B. Gottschall**
BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO, KAREN KINNEY, UNITED STATES OF AMERICA, ASHTON CARTER, FEDERAL VOTING ASSISTANCE PROGRAM, MATT BOEHMER, AND MARISEL HERNANDEZ, **Defendants.**	)	

MEMORANDUM OPINION AND ORDER

As Franklin D. Roosevelt famously said in a 1944 radio address from the White House, "Nobody will ever deprive the American people of the right to vote except the American people themselves and the only way they could do this is by not voting." This statement assumes that all United States citizens can vote if they choose to do so. As this case shows, that assumption is incorrect. The plaintiffs in this action are six United States citizens who are former residents of Illinois and who now reside in Puerto Rico, Guam, or the U.S. Virgin Islands, plus two organizations that promote voting rights in United States Territories. The plaintiffs challenge the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310 ("UOCAVA"), contending that it violates their equal protection and due process rights

by barring them from casting absentee ballots in Illinois for federal elections due to their residence in the United States Territories of Puerto Rico, Guam, or the U.S. Virgin Islands, while allowing United States citizens who were previously qualified to vote in Illinois and currently reside in the United States Territory of the Northern Mariana Islands ("NMI") or in a foreign country to cast absentee Illinois ballots.[1]

The federal defendants (the United States of America, the Federal Voting Assistance Program, Ashton Carter, in his official capacity as the Secretary of Defense, and Matt Boehmer, in his official capacity as Director of the Federal Voting Assistance Program) filed a motion to dismiss and a motion for summary judgment.[2] The plaintiffs filed a cross-motion for summary judgment directed at their claims against the federal defendants. As discussed below, the plaintiffs have standing to challenge the constitutionality of the UOCAVA, the proper standard of review is rational basis, as opposed to strict scrutiny, and under the rational basis standard, the challenged provisions of the UOCAVA are constitutional.

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[1] The plaintiffs raise a similar challenge to the Illinois Military and Overseas Voter Empowerment Act ("Illinois MOVE"), 10 Ill. Comp. Stat. § 5/20-1, which allows voters who were formerly qualified to vote in federal elections in Illinois and who now reside in the United States Territory of American Samoa to vote in federal elections via Illinois absentee ballot. As the motions presently before the court all concern the UOCAVA, the court will not address the plaintiffs' arguments about Illinois MOVE at this time.

[2] The remaining defendants the Board of Election Commissioners for the City of Chicago, Marisel Hernandez (the Chairman of the Board of Election Commissioners for the City of Chicago), and Karen Kinney (the Rock Island County Clerk) have answered.

I. BACKGROUND[3]

A. The Parties

The individual plaintiffs (Luis Segovia, Jose Antonio Torres, Pamela Lynn Colon, Tomas Ares, Anthony Bunten, and Lavonne Wise) are United States citizens and former Illinois residents. Before moving from Illinois, the plaintiffs voted in federal elections administered by Illinois. Currently, Mr. Segovia and Mr. Bunten reside in Guam, Mr. Torres and Mr. Ares reside in Puerto Rico, and Ms. Colon and Ms. Wise reside in the U.S. Virgin Islands, all of which are United States Territories.

The individual plaintiffs all have distinguished careers serving the United States in the armed forces and/or as public servants. Because they reside in Puerto Rico, Guam, or the U.S. Virgin Islands, they cannot vote in federal elections via Illinois absentee ballot. In contrast, former Illinois residents who were qualified to vote in federal elections while living in Illinois can cast Illinois absentee ballots in federal elections if they reside in the NMI (pursuant to the UOCAVA), American Samoa (pursuant to Illinois MOVE), or a foreign country.

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[3] The following facts are drawn from the parties' Local Rule 56.1 submissions. The plaintiffs and the federal defendants failed to reproduce the opposing side's statements of fact when preparing their responses. *See* Loc. R. 56(b)(3)(a). In addition, the parties' summary chart, which was submitted at the court's request due to the unusual combined documents filed by both sides, does not include any of the Local Rule 56.1 submissions or anything filed after April 26, 2016. (Dkt. 57.) It thus is of limited utility, especially since the federal defendants filed their Local Rule 56.1 submissions as attachments to their combined memorandum in support of their summary judgment/opposition to the plaintiffs' cross-motion for summary judgment/reply in support of their motion to dismiss. For the reader's convenience, the statements of facts filed by the plaintiffs and the federal defendants are Dkt. 49 and Dkt. 51-4, respectively. The plaintiffs' response to the federal defendants' facts is Dkt. 59 and the federal defendants' response to the plaintiffs' facts is Dkt. 51-5.

1. Plaintiffs Currently Residing in Puerto Rico

Plaintiff Jose Antonio Torres is a United States citizen born in 1955 in Ponce, Puerto Rico, who currently resides in Carolina, Puerto Rico. Mr. Torres is a Vietnam-era Veteran who has a combined 100% disability rating by virtue of injuries sustained during his military service. He was recruited to join the United States Army as a high school student in Ponce, Puerto Rico. In 1973, he was stationed in Germany as part of the 141st Field Artillery, a posting that required top secret clearance. He was honorably discharged in 1975 due to severe injuries he sustained in Germany.

Mr. Torres resided in Chicago from 1982 to 1993. He began working for the United States Postal Service in 1986. He was transferred from Illinois to Puerto Rico in 1993, where he continued to work for the Postal Service for another fifteen years until he retired in 2008 after 22 years of federal service. As a federal employee in Puerto Rico, Mr. Torres was required to pay the same federal taxes, including federal income tax, as federal employees living on the mainland. When Mr. Torres resided in Illinois, he voted for President; he now votes in Puerto Rico elections.

Plaintiff Tomas Ares is a United States citizen born in San Lorenzo, Puerto Rico in 1955, where he currently resides. From 1967 to 2007, he resided in Chicago, Illinois. He then retired and moved to Puerto Rico. He is a Vietnam-era Veteran who joined the U.S. Army in 1971 at the age of 17, following the footsteps of his father, who was born in Puerto Rico in 1902 and served in the U.S. Army's 65th Infantry from 1920 through 1944. After Mr. Ares was stationed in Germany, he was honorably discharged in 1972 because he was not of the legal age to serve. When Mr. Ares resided in Illinois, he voted for President; he now votes in Puerto Rico elections.

2. Plaintiffs Currently Residing in Guam

Plaintiff Luis Segovia is a United States citizen born in Chicago, Illinois, in 1978. He moved from Chicago to Guam in 2010 and is a decorated veteran. He served in the U.S. Army in Iraq from 2005 to 2006, where his primary mission was to provide security for the 2005 Iraqi elections. He then served in the Illinois National Guard, where he was deployed to Afghanistan from 2008 to 2009. He joined the Guam National Guard in 2010 after becoming a resident of Guam, and was deployed for a ten-month second tour of duty in Afghanistan. He was recently promoted to the rank of Staff Sergeant, and also serves his country as a federal employee with the Department of the Navy's civilian security forces police assigned to Anderson Air Force Base in Guam. When Mr. Segovia resided in Illinois, he voted for President; he now votes in Guam elections.

Plaintiff Anthony Bunten is a United States citizen born in Moline, Illinois in 1976. Mr. Bunten is a Veteran who joined the U.S. Navy directly out of high school in 1994. He was honorably discharged in 1997, when he moved to Guam to join his now-wife, Barbara Perez Hattori. When Mr. Bunten resided in Illinois, he voted for President; he now votes in Guam elections.

3. Plaintiffs Currently Residing in the U.S. Virgin Islands

Plaintiff Pamela Lynn Colon is a United States citizen born in Chicago, Illinois, in 1959. She lived in Chicago until 1992, when she moved to the U.S. Virgin Islands, and currently resides in St. Croix. From 1996 to 2000, Ms. Colon served as the Assistant Federal Public Defender in St. Thomas in the U.S. Virgin Islands. She has defended numerous clients in the U.S. Virgin Islands who were federally prosecuted, including several who faced the possibility of

life in prison or the death penalty. She is the past-President of the Virgin Islands Bar Association. When Ms. Colon resided in Illinois, she voted for President; she now votes in elections in the U.S. Virgin Islands.

Plaintiff Lavonne Wise is a United States citizen born in Queens, New York; she currently resides in St. Croix in the U.S. Virgin Islands. From 2003 to 2009, she resided in Chicago, Illinois. As a resident of Chicago in 2008, Ms. Wise voted for President by absentee ballot while temporarily working in St. Croix, but after she became a resident of St. Croix in 2009, she became unable to vote for President. She now regularly votes in elections in the U.S. Virgin Islands. Previously, from 1990-1992, Ms. Wise moved from Atlanta, Georgia, to St. Maarten, Netherland Antilles. While living in St. Maarten, Ms. Wise was able to vote for President via absentee ballot.

4. Organizational Plaintiffs

The remaining plaintiffs are the Iraq Afghanistan and Persian Gulf Veterans of the Pacific ("IAPGVP") and the League of Women Voters of the Virgin Islands ("LWV-VI"). IAPGVP is a nonprofit organization founded in 2014 whose mission is to provide opportunities to engage, enrich, and empower Pacific Island veterans of Iraq, Afghanistan, and the Persian Gulf and their families. While up to one in eight adults in Guam is a veteran and the casualty rate for Guam soldiers in Iraq and Afghanistan has been up to 4.5 times the national average, in 2012, Guam ranked below every State in medical-care spending per veteran. IAPGVP's position is that political disenfranchisement contributes to the healthcare crisis facing Guam veterans. LWV-VI was founded in 1968 and is a non-profit, non-partisan political organization. Its main goal is to give a voice to all Americans by expanding voter participation. LWV-VI's position is that

continuing political disenfranchisement contributes to many hardships facing Virgin Islanders, including economic development, healthcare, and the environment.

The plaintiffs allege that unspecified former Illinois residents are members of both organizational plaintiffs. IAPGVP and LWV-VI posit that allowing United States citizens who live in their respective territories to vote would provide new opportunities for national political engagement about issues in Guam and the Virgin Islands. All of the plaintiffs allege that they believe that where one lives as a United States citizen should not affect the right to vote.

5. The Defendants

The state defendants are the Board of Election Commissioners for the City of Chicago, Marisel Hernandez (the Chair of the Board of Election Commissioners), and Karen Kinney (the Rock Island County Clerk). The Board of Election Commissioners is the election authority with jurisdiction over the precincts where Mr. Segovia, Mr. Torres, Ms. Colon, Mr. Ares, and Ms. Wise resided before they moved from Illinois. The Rock Island County Clerk is the election authority with jurisdiction over the precinct where Mr. Bunten resided before he moved from Illinois. The Board of Election Commissioners, Ms. Hernandez, and Ms. Kinney agree that individuals who were eligible to vote in federal elections when they resided in Illinois and who now reside overseas in Puerto Rico, Guam, or the U.S. Virgin Islands are ineligible to vote absentee in Illinois, but would be eligible if they resided in the NMI, American Samoa, or a foreign country. The federal defendants are the United States of America, Secretary of Defense Ashton Carter, the Federal Voting Assistance Program, and Director of the Federal Voting Assistance Program Matt Boehmer. All of the individual defendants have been sued in their official capacities.

B. The UOCAVA and Illinois' MOVE Act

The UOCAVA imposes a range of responsibilities on states (here, Illinois, as the individual plaintiffs wish to vote by Illinois absentee ballot) relating to absentee voting in federal elections by uniformed service members or overseas voters, as those terms are defined in the UOCAVA. 52 U.S.C. § 20302.

- The UOCAVA defines "[f]ederal office" as "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." 52 U.S.C. § 20310(3).

- "'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa." 52 U.S.C. § 20310(6).

- "'United States,' where used in the territorial sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa." 52 U.S.C. § 20310(8).

- An "overseas voter" is: "(A) an absent uniformed services voter [serving in the Army, Navy, Air Force, Marine Corps, and Coast Guard, the commissioned corps of the Public Health Service, or the commissioned corps of the National Oceanic and Atmospheric Administration] who, by reason of active duty or service is absent from the United States on the date of the election involved; (B) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or (C) a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States."[4] 52 U.S.C. § 20310(5) & (7).

Because the individual plaintiffs currently are domiciled in Puerto Rico, Guam, and the U.S. Virgin Islands, they fall within the UOCAVA's definition of "State" and thus do not "reside[] outside the United States" for the purposes of the UOCAVA. *See* 52 U.S.C. § 20310(6)

[4] The UOCAVA thus creates a seemingly anomalous situation: a member of the armed forces stationed on, for example, Guam, who was previously qualified to vote in Illinois can vote in federal elections via an Illinois absentee ballot. If that person retires from service and stays in Guam, however, she loses her ability to vote via Illinois absentee ballot.

& (8). Thus, the individual plaintiffs are not "overseas voters" as that term is defined in the UOCAVA. 52 U.S.C. § 20310(5) & (7). This means that their state of former residence where they were eligible to vote in federal elections (here, Illinois) is not required to provide absentee ballots that would allow the individual plaintiffs to vote in federal elections.

Under the UOCAVA, United States citizens who were formerly eligible to vote in federal elections in Illinois and who now live in American Samoa also cannot vote via Illinois absentee ballot, as American Samoa like Puerto Rico, Guam, and the U.S. Virgin Islands falls within the UOCAVA's definition of "State." *See* 52 U.S.C § 20310(6). However, Illinois has extended absentee voting rights to include former Illinois residents who currently reside in American Samoa and are otherwise eligible to vote.[5] *See* 10 Ill. Comp. Stat. § 5/20-1(1) ("'Territorial limits of the United States' means each of the several States of the United States and includes the District of Columbia, the Commonwealth of Puerto Rico, Guam and the Virgin Islands; but does not include American Samoa, the Canal Zone, the Trust Territory of the Pacific Islands or any other territory or possession of the United States").[6]

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[5] Illinois MOVE, like the UOCAVA, does not allow United States citizens who were eligible to vote in Illinois to vote via absentee ballot after they move to Puerto Rico, Guam, and the U.S. Virgin Islands. *See* 10 Ill. Comp. Stat. § 5/20-1(1). However, it allows otherwise similarly situated individuals to vote via absentee ballot if they move to American Samoa. *Id.* Presumably, this will be the subject of a second round of dispositive motions.

[6] The Trust Territory of the Pacific Islands is a former United Nations strategic trusteeship that was administered by the United States. It consisted of the Federated States of Micronesia, the Republic of the Marshall Islands, the NMI, and Palau. *See* http://www.un.org/en/ decolonization/selfdet.shtml; *see also Davis v. Commonwealth Election Comm'n*, No. 1-14-CV-00002, 2014 WL 2111065, at *1 (D. N. Mar. I. May 20, 2014) (the Trust Territory of the Pacific Islands consists of "the islands that later formed the Commonwealth, the republics of Palau and the Marshall Islands, and the Federated States of Micronesia. One of the purposes of the trusteeship was for the United States to promote independence and self-government among the peoples of those islands.").

In 2009, Congress passed the Military and Overseas Voter Empowerment Act, which amended the UOCAVA. *See United States v. Georgia*, 778 F.3d 1202, 1203 (11th Cir. 2015). As amended, the UOCAVA requires states, upon request, to send an absentee ballot to absent uniformed service voters and overseas voters at least 45 days before an election for Federal office, unless the state provides a hardship waiver. *Id*.

III. THRESHOLD ISSUES: JURISDICTION AND STANDING

The federal defendants raise three threshold arguments: (1) this court lacks subject matter jurisdiction to adjudicate the plaintiffs' challenge to the UOCAVA, (2) the organizational plaintiffs lack standing because they have not identified specific former Illinois residents who are members, and (3) the individual plaintiffs lack standing because their alleged injuries are not fairly traceable to the UOCAVA.

A. Federal Question Jurisdiction

The court must "consider subject-matter jurisdiction as the first question in every case" and "must dismiss . . . if such jurisdiction is lacking." *Aljabri v. Holder*, 745 F.3d 816, 818 (7th Cir. 2014) (citations omitted). Here, the federal defendants challenge subject matter jurisdiction, arguing that the plaintiffs lack standing to bring claims against them. "Subject-matter jurisdiction . . . refers to a tribunal's power to hear a case." *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247, 254 (2010). "[A]n issue of statutory standing . . . . has nothing to do with whether there is a case or controversy under Article III." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998). Given the federal constitutional questions at issue, subject matter jurisdiction is unquestionably proper, despite the federal defendants' standing arguments. *See* 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1343 ("The district courts shall have

original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote").

B. Standing

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III" of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must prove that: (1) she suffered a concrete and particularized injury that is actual or imminent; (2) the injury is fairly traceable to the defendant's actions; and (3) it is likely that the injury will be redressed by a favorable decision. *Id*. When evaluating standing, the court accepts the material allegations of the complaint as true and construes the complaint in the plaintiffs' favor. *Davis v. Guam*, 785 F.3d 1311, 1314 (9th Cir. 2015) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

1. Organizational Plaintiffs

The federal defendants challenge the organizational plaintiffs' standing based on the fact that the complaint does not name any members of either organization who were eligible to vote in federal elections when they resided in Illinois. Thus, the federal defendants assert that the organizational plaintiffs have failed to show that they suffered an cognizable injury. "Where at least one plaintiff has standing [for a particular claim], jurisdiction is secure and the court will adjudicate the case whether the additional plaintiffs have standing or not." *Ezell v. City of Chicago*, 651 F.3d 684, 696 n.7 (7th Cir. 2011); *see also Tuaua v. United States*, 951 F. Supp. 2d 88, 92-93 (D.D.C. 2013), *aff'd*, 788 F.3d 300 (D.C. Cir. 2015) (holding that it was unnecessary to address whether the Samoan Federation of America had standing to pursue a citizenship

challenge on behalf of individuals born in American Samoa because it was undisputed that other plaintiffs had standing). The federal defendants do not and cannot question the individual plaintiffs' contention that they have each suffered a concrete and particularized injury due to their inability to vote in federal elections via Illinois absentee ballot. Thus, the court need not delve into the organizational plaintiffs' membership to determine if those plaintiffs also suffered an injury. The federal defendants' arguments about the organizational plaintiffs' standing are unavailing.

2. Standing—Traceability

Next, the federal defendants argue that the plaintiffs lack standing to sue them (as opposed to the state defendants based on Illinois MOVE) because the plaintiffs' alleged injuries are not fairly traceable to the UOCAVA. Specifically, the federal defendants assert that the UOCAVA does not impose the voting disability of which plaintiffs complain; rather, according to the federal defendants, that restriction results from requirements imposed by Illinois law, as well as provisions of the Constitution, which delegate the authority to regulate voting in federal elections to the states.

The federal defendants expressly state that their standing argument is based on traceability.[7] The causation element of Article III standing requires the plaintiffs' injury to be

[7] Another court faced with a similar argument analyzed it under the injury-in-fact element of standing. *See Igartua v. United States*, 86 F. Supp. 3d 50, 55 (D.P.R. 2015). (There are numerous cases captioned *Igartua*, as that plaintiff filed a series of cases addressing voting rights of United States citizens in Puerto Rico. The court will follow the parties' numbering convention in this opinion, but they do not cite to this particular *Igartua* case so it lacks a number). Specifically, that court held that a claim that the UOCAVA was responsible for the inability of United States citizens living in Puerto Rico to vote for representatives from Puerto Rico to the United States House of Representatives did not rise to the level of an "invasion of a legally protected interest" because the UOCAVA did not cause the plaintiffs' injury. *Id*. (quoting

"fairly traceable" to the defendants' actions. *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014). To satisfy this standard, a plaintiff's injury and a defendant's conduct must be causally connected. *Id.*; *see also Indiana v. E.P.A.*, 796 F.3d 803, 809 (7th Cir. 2015) (quoting *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (traceability exists when a plaintiff sustains an injury "'as a consequence of' the challenged conduct")). "If the independent action of some third party not before the court causes [the plaintiff's harm]," she cannot show traceability. *Sierra Club v. Franklin Cnty. Power of Illinois, LLC*, 546 F.3d 918, 926 (7th Cir. 2008) (internal quotations omitted). Without traceability, a plaintiff lacks standing. *See*, *e.g.*, *Cnty. of Cook v. HSBC N. Am. Holdings Inc.*, 136 F. Supp. 3d 952, 959-60 (N.D. Ill. 2015).

The Constitution contains "no reference to the election of the President, which is by the electoral college rather than by the voters at the general election; general elections for President were not contemplated in 1787." *ACORN v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995). Thus, the Constitution does not give individual citizens a direct right to vote for President and Vice President. *See id*. Instead, the Constitution gives this right to "Electors" appointed by "[e]ach State." U.S. Const. art. II, § 2; *see also id*. at amend. XII ("Election of President and Vice-President"). However, the Supreme Court has held that "[h]istory has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors." *Bush v. Gore*, 531 U.S. 98, 104 (2000). With respect to the House of Representatives, the "People of the

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Lujan, 504 U.S. at 560). This is, essentially, the federal defendants' standing argument in this case. Whether their argument is characterized as an alleged lack of injury-in-fact or traceability, the result appears to be the same. In addition, the federal defendants do not rely on the purported lack of an injury-in-fact. Thus, the court will not consider injury-in-fact.

Several States" can choose the members. *Id*. at art. I, § 2, cl. 1-4. In turn, "[t]he Senate of the United States shall be composed of two Senators from each state, elected by the people thereof . . . . " U.S. Const. amend. XVII.

The Constitution gives broad authority to states to regulate both state and federal elections. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators."). Article II section 1 provides that "Congress may determine the Time of chusing the Electors [for President], and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." *ACORN*, 56 F.3d at 793. "This provision has been interpreted to grant Congress power over Presidential elections coextensive with that which Article I section 4 grants it over congressional elections." *Id*. (citing *Burroughs v. United States*, 290 U.S. 534 (1934)).

The federal defendants argue that in enacting the UOCAVA, "Congress contemplated that States, which have the constitutional authority and duty to prescribe the time, place, and manner of voting in federal elections in the first instance, would extend absentee voting rights as they deemed appropriate." (Dkt. 51 at 4-5.) In support, the federal defendants contend that UOCAVA's legislative history makes clear that a state can adopt voting practices which are less restrictive than the practices prescribed by the UOCAVA. *See* H.R. Rep. No. 99-765, at 19 (1986), reprinted in 1986 U.S.C.C.A.N. 2009, 2023. They note that Illinois has done so by extending absentee voting rights in federal elections to individuals who were eligible to vote when they resided in Illinois and then moved to American Samoa. *See* 10 Ill. Comp. Stat.

§ 5/20-1(1). Thus, they conclude that Illinois MOVE not UOCAVA bars the individual plaintiffs from voting absentee in Illinois, because Illinois chose to extend the franchise to qualified voters who move from Illinois to American Samoa, but did not include similarly situated people who move to Puerto Rico, Guam, or the U.S. Virgin Islands. In other words, they characterize the UOCAVA as a floor upon which states may build, as opposed to an independent cause of the plaintiffs' claimed injuries.

The federal defendants' argument that UOCAVA provides a floor and does not prevent Illinois from giving former Illinois residents in Puerto Rico, Guam, or the U.S. Virgin Islands the right to vote in federal elections is besides the point. It is true that states are responsible for ensuring compliance with the UOCAVA. *See United States v. Alabama*, 857 F. Supp. 2d 1236, 1239 (M.D. Ala. 2012) ("Alabama bears full responsibility for compliance with UOCAVA"). The parties also agree that states, such as Illinois, not the federal government, control how federal elections are conducted. However, the federal defendants have not identified any authority that demonstrates that Illinois' failure to extend voting rights insulates them from a constitutional challenge to the UOCAVA's scope or that Illinois' control over aspects of the methodology of the mechanics of voting and Illinois' ability to expand who may vote means that the plaintiffs fail to satisfy the traceability element of standing.

Indeed, the UOCAVA includes multiple provisions that require states to "extend additional protections to the UOCAVA absentee voting process that they might not extend to other absentee voters as a matter of state law." *Alabama*, 778 F.3d at 929. For example, states must accept UOCAVA registration forms and ballot requests received at least thirty days before any election. 52 U.S.C. § 20302(a)(2). States must allow UOCAVA voters to use federal

write-in ballots. 52 U.S.C.§ 20302(a)(3). And states cannot enforce requirements regarding notarization, paper type, or envelope type. 52 U.S.C. 20302(i). The presence of these provisions, as well as the bedrock voting rights for certain overseas voters in the UOCAVA, show that the statute consistent with the Constitution's provisions about voting in federal elections requires states to confer certain benefits on certain voters.

At least one court has held that in the context of a constitutional challenge to the UOCAVA, Article II of the Constitution specifies that "only citizens residing in states can vote for electors and thereby indirectly for the President." *Igartua De La Rosa v. United States* (*Igartua I*), 32 F.3d 8, 9-10 (1st Cir. 1994) (applying this rule to putative federal voters who are United States citizens and reside in Puerto Rico); *see also Attorney General of Guam on behalf of All U.S. Citizens Residing in Guam, etc. v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) (applying this rule to putative federal voters who are United States citizens and reside in Guam); *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007) (applying this rule to putative federal voters who are United States citizens and reside in the U.S. Virgin Islands). *Igartua I*, however, does not stand for the proposition that plaintiffs mounting a challenge to the UOCAVA lacked standing to do so based on traceability. Indeed, that court reached the merits of the plaintiffs' claims and held that under a rational basis standard, UOCAVA's failure to extend the franchise to the plaintiffs was constitutional. *Igartua I*, 32 F.3d at 11 ("While the Act does not guarantee that a citizen moving to Puerto Rico will be eligible to vote in a presidential election, this limitation is not a consequence of the Act but of the constitutional requirements discussed above."). Thus, *Igartua I* and the federal defendants' characterization of UOCAVA as a mere floor does not establish that the plaintiffs' claimed injuries are divorced from the UOCAVA.

The fact that state law governs the mechanism by which former Illinois residents who are United States citizens can cast absentee ballots and that UOCAVA's legislative history indicates that states may extend absentee voting rights to other individuals disenfranchised by the UOCAVA, such as residents of American Samoa, also fails to show that the plaintiffs lack standing to challenge the UOCAVA. *See* H.R. Rep. No. 99-765, at 19. As discussed above, the UOCAVA includes Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa in its definition of state. Illinois MOVE, however, carves out American Samoa. *See* 10 Ill. Comp. Stat. § 5/20-1(1). Thus, an individual who was qualified to vote in a federal election in Illinois can continue to vote in federal elections via an Illinois absentee ballot if she moves to American Samoa, but not if she moves to Puerto Rico, Guam, or the U.S. Virgin Islands.

The federal defendants attempt, without the benefit of authority, to blame Illinois for this situation. However, they are responsible for the terms of the UOCAVA, not Illinois. Illinois' ability to provide redress does not insulate the federal defendants from liability. Relatedly, while the federal defendants have no role in accepting or rejecting Illinois absentee ballots, Illinois is bound by the floor that the federal defendants stress that the UOCAVA provides. If the UOCAVA's definition of "state" excluded Puerto Rico, Guam, and the U.S. Virgin Islands, the individual plaintiffs would be qualified "overseas voters" under the UOCAVA. In that instance, Illinois would have to allow the individual plaintiffs to cast Illinois absentee ballots in federal elections.

For all of these reasons, the federal defendants' claim that Illinois has the ability to broaden the right to vote by absentee ballot to individuals who do not satisfy the UOCAVA does not absolve them from potential liability under UOCAVA; at best, Congress has itself acted in a

specific way and authorized the states to enact their own more expansive laws if they choose to do so. The court fails to see how this destroys the plaintiffs' standing to proceed with equal protection and due process challenges to the UOCAVA against the federal defendants. The federal defendants' request to dismiss the plaintiffs' claims against them or grant summary judgment based on standing is denied.

IV. THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

As is relevant here, the plaintiffs contend that the UOCAVA treats United States citizens who are former Illinois residents who were qualified to vote in federal elections and who now reside in United States Territories differently based on the territory in which they live and thus violates their right to equal protection.[8] The parties dispute the applicable standard of review: the plaintiffs champion strict scrutiny based on their position that the UOCAVA infringes on

[8] In their complaint, the plaintiffs allege that the UOCAVA and Illinois MOVE violate the equal protection and due process guarantees in the Fifth and Fourteenth Amendments. (Dkt. 1 at ¶ 52.) The plaintiffs' memorandum in support of their motion for summary judgment (which they combine with their response to the federal defendants' motion to dismiss), however, refers only to equal protection. In turn, the federal defendants' filings refer generally to both equal protection and due process. The gravamen of the plaintiffs' complaint is that UOCAVA and Illinois MOVE treat "similarly situated former state residents differently based on where they reside overseas." (Dkt. 1 at ¶ 52.) Thus, the plaintiffs' due process claim appears to be an equal protection claim recast in due process terms. "[W]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *See County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). The parties' briefs do not address the viability of a standalone due process claim against the federal defendants. As the court lacks the benefit of the parties' views and the plaintiffs' complaint focuses on equal protection, the court will likewise focus on the plaintiffs' equal protection claim against the federal defendants at this point in the proceedings. The court also expressly declines to consider the plaintiffs' arguments about the constitutionality of Illinois MOVE at this time, as they are not properly before the court in connection with motions directed at the federal defendants based on the UOCAVA.

their fundamental right to vote.[9] In contrast, the federal defendants contend that the court should consider whether the UOCAVA's treatment of certain overseas voters has a rational basis. The parties also dispute whether, under their desired standard of review, the challenged portions of UOCAVA are constitutional. As discussed below, rational basis review applies and the challenged portions of the UOCAVA satisfy that undemanding standard.

This conclusion does not reflect the court's view that the current scheme is desirable or proper. *See generally Igartua v. United States*, 626 F.3d 592, 594 (1st Cir. 2010) (holding that "the U.S. Constitution does not give Puerto Rico residents the right to vote for members of the

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[9] Strict scrutiny also applies to laws that draw distinctions based on suspect categories such as race, religion, and national origin. *See*, *e.g.*, *Srail v. Vill. of Lisle, Ill.*, 588 F.3d 940, 943 (7th Cir. 2009). The plaintiffs, who now reside in Puerto Rico, Guam, and the U.S. Virgin Islands, base their contention that strict scrutiny applies on what they characterize as their fundamental right to vote in federal elections via Illinois absentee ballot, since they were qualified to vote in federal elections when they lived in Illinois. Thus, the court will similarly confine its consideration. However, it notes that the status of unincorporated territories is based, in significant part, on the so-called *Insular Cases*, which state that the United States' possessions are "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought." *Downes v. Bidwell*, 182 U.S. 244, 287 (1901). "It could be argued that because a large segment of the population of the territories is Latino, black, or of Pacific Islander or Asian extraction, the exclusion of U.S. citizens residing in the territories from the vote for electors to the electoral college therefore has a disproportionately discriminatory effect." *Romeu v. Cohen*, 265 F.3d 118, 133 (2d Cir. 2001) (Walker, C.J. concurring). This is consistent with the description of the *Insular Cases* as establishing a race-based doctrine of "separate and unequal" status for residents of overseas United States Territories. *See Paeste v. Gov't of Guam*, 798 F.3d 1228, 1231 (9th Cir. 2015) ("the so-called 'Insular Cases' . . . established a less-than-complete application of the Constitution in some U.S. territories"); *Igartua-De La Rosa v. United States*, 417 F.3d 145, 162 (1st Cir. 2005) (with respect to Puerto Rico, "There is no question that the *Insular Cases* are on par with the Court's infamous decision in *Plessy v. Ferguson* in licen[s]ing the downgrading of the rights of discrete minorities within the political hegemony of the United States"); *Ballentine v. United States*, No. CIV. 1999-130, 2001 WL 1242571, at *7 (D.V.I. Oct. 15, 2001) ("Those who may not realize the extent to which the current status of the Virgin Islands depends on an entirely repugnant view of the people who inhabited the Virgin Islands at the time of their acquisition are invited to read the *Insular Cases*"). But this issue is not presently before the court as the plaintiffs do not argue that strict scrutiny applies because a suspect class is at issue.

House of Representatives because Puerto Rico is not a state" and noting that "the Constitution does not permit granting such a right to the plaintiffs by means other than those specified for achieving statehood or by amendment"). It must be said that the current voting situation in Puerto Rico, Guam, and the U.S. Virgin Islands is at least in part grounded on the *Insular Cases*, which have been described as "establish[ing] a less-than-complete application of the Constitution in some U.S. territories," *Paeste*, 798 F.3d at 1231, based on explicitly racist views which "in today's world seem bizarre." José Trias Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution, 228 (Duke 2001).

The inconsistencies between the constitutional rights afforded to United States citizens living in states as opposed to territories have "been the subject of extensive judicial, academic, and popular criticism." *Id*. (citing Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 77 Rev. Jur. U.P.R. 1 (2008); Last Week Tonight with John Oliver: U.S. Territories, Youtube (https://www.youtube.com/watch?v CesHr99ezWE)); *see also Igartua De La Rosa v. United States* (*Igartua II*), 229 F.3d 80, 85-90 (1st Cir. 2000) (Torruella, J., concurring). Earlier this year, Senator Elizabeth Warren spoke out about the impact that the lack of voting rights has on United States citizens residing in Puerto Rico, Guam, and the U.S. Virgin Islands, calling the current situation "absurd" and noting that these individuals have "second class citizen" status that has "real implications" for their lives. https://www.facebook. com/senatorelizabethwarren/ videos/vb.131559043673264/580677832094714/?type 2&theater. The episode entitled *Island of Warriors* for PBS' America By the Numbers highlights the

struggles of veterans in Guam, and asks if they have been forsaken by the country they swore to defend. http://www.pbs.org/wgbh/ america-by-the-numbers/episodes/episode-102/.

This court's task, however, is not to opine on the wisdom or fairness of the challenged portions of the UOCAVA. It can determine only the proper standard of review and then apply that standard to the plaintiffs' equal protection claim. The court thus turns to these questions.

A. Legal Standard

The federal defendants filed a Rule 12(b)(6) motion to dismiss followed by a motion for summary judgment. The plaintiffs filed a cross-motion for summary judgment directed at their claims against the federal defendants. As both sides submitted Local Rule 56.1 statements of fact that expand on the factual allegations in the complaint, the court will consider those statements and apply the summary judgment standard. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In resolving summary judgment motions, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

B. Standard of Review: Strict Scrutiny or Rational Basis?

When evaluating an equal protection claim, the court must first determine the appropriate standard of review. *See Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). The plaintiffs assert that strict scrutiny applies because the UOCAVA treats former Illinois residents who were eligible to vote in federal elections when they lived in Illinois, but who currently live in territories,

differently depending on where they reside. Specifically, the plaintiffs take issue with the fact that the UOCAVA compels Illinois to allow former Illinois residents who currently reside in the NMI and who were qualified to vote in federal elections when they lived in Illinois to cast Illinois absentee ballots but allows Illinois to deny the franchise to similarly situated individuals who reside in Puerto Rico, Guam, and the U.S. Virgin Islands. According to the plaintiffs, the UOCAVA's "selective enfranchisement" of NMI absentee voters means that Congress singled out Illinois absentee voters in Puerto Rico, Guam, and the U.S. Virgin Islands for disfavored treatment, thereby depriving them of the fundamental right to vote. Based on this reasoning, the plaintiffs conclude that strict scrutiny applies.

1. The Rational Basis and Strict Scrutiny Standards

"Laws duly enacted by the legislature come to court with a presumption of constitutional validity, but the level of scrutiny brought to bear on these laws varies." *One Wisconsin Inst., Inc. v. Nichol*, 155 F. Supp. 3d 898, , No. 15 C 324, 215 WL 9239014, at *2 (W.D. Wis. 2015) (citing *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993)). If a law burdens a fundamental right, it "is subject to strict scrutiny, meaning that the discriminatory action is permissible only if it is narrowly tailored to address a compelling state interest." *Better Broadview Party v. Walters*, No. 15 C 2445, 2016 WL 374144, at *6 (N.D. Ill. Feb. 1, 2016) (citing *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("Restrictions on access to the ballot burden two distinct and fundamental rights . . . . When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest.")).

If no fundamental right is at issue, rational basis review under which a law is constitutional if a plausible rational explanation supports it applies. *Heller*, 509 U.S. at 320. Thus, the Supreme Court "many times [has] said" that:

> [R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.

Id. at 319 (internal quotations, alterations, and citations omitted). "[R]ational basis review focuses on the [government's] justification for its actions, rather than on plaintiffs' disagreement with those actions." *One Wisconsin Inst., Inc. v. Thomsen*, No. 15-CV-324-JDP, 2016 WL 4059222, at *53 (W.D. Wis. July 29, 2016). Thus, the court must determine if "a rational relationship between the disparity of treatment and some legitimate governmental purpose" exists. *Heller*, 509 U.S. at 320.

2. Does the UOCAVA Affect a Fundamental Right?

Generally, the right to vote is both "precious" and "fundamental." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). Nevertheless, as discussed above, to the extent that the Constitution implicitly confers a right to vote on individuals, as opposed to giving the states "broad authority to regulate the conduct of elections, including federal ones, *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004), that right is conferred on citizens of a state. *See Bush*, 531 U.S. at 104 (citizens of "the several States . . . vote for Presidential electors"); U.S. Const. art. I, § 2, cl. 1-4 (the "People of the Several States" choose the members of the House of

Representatives); U.S. Const. amend. XVII ("[t]he Senate of the United States shall be composed of two Senators from each state, elected by the people thereof . . . . ").

Citizens residing in territories do not have a constitutional right to vote as citizens of a state do. *See Igartua II*, 229 F.3d at 83 (holding that "Puerto Rico, which is not a State, may not designate electors to the electoral college" so "residents of Puerto Rico have no constitutional right to participate in the national election of the President and Vice-President"); *Igartua-De La Rosa v. United States*, 417 F.3d 145, 148 (1st Cir. 2005) (en banc) ("That the franchise for choosing electors is confined to 'states' cannot be 'unconstitutional' because it is what the Constitution itself provides. Hence it does no good to stress how important is 'the right to vote' for President").

Without a constitutional right, there can be no fundamental right. *See Echavarria v. Washington*, No. 1:16-CV-107, 2016 WL 1592623, at *3 (W.D. Mich. Apr. 21, 2016) ("A fundamental right is not at issue in this case because there is no constitutional right to release on parole"); *Wolfe v. Alexander*, No. 3:11-CV-0751, 2014 WL 4897733, at *11 (M.D. Tenn. Sept. 30, 2014) (because there is "no constitutional right to be free of health-based dietary restrictions in prison . . there is no right being burdened, much less a fundamental right"); *Gutierrez v. Corr. Corp. of Am.*, No. 3:13CV98-MPM-DAS, 2013 WL 1800205, at *2 (N.D. Miss. Apr. 29, 2013) ("No fundamental right is implicated in this case, as there is no constitutional right to watch television"); *Thomas v. Rayburn Corr.*, No. CIV.A. 07-9203, 2008 WL 417759, at *3 (E.D. La. Feb. 13, 2008) ("The fact that the homosexual prisoners are currently housed in a non-working cell block likewise implicates no fundamental right, because a prisoner has no constitutional right to a prison job."). This is critical, as only "[t]he guaranties of certain fundamental personal rights

declared in the Constitution" apply to the territories. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); *see also Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez*, No. 3:15-CV-03018 (JAF), 2016 WL 1183091, at *46 (D.P.R. Mar. 28, 2016) (quoting *Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987) ("The United States Supreme Court has 'never held that the Commonwealth of Puerto Rico is entitled to all the benefits conferred' and limitations placed 'upon the States under the Constitution.'").[10]

The plaintiffs do not dispute that, as a general proposition, United States citizens residing in territories have no constitutional right to vote in federal elections. Instead, they say that this point is irrelevant because the UOCAVA allows individuals who were qualified to vote in federal elections when they resided in Illinois but now reside in the NMI to continue to vote in federal elections via Illinois absentee ballot but does not allow similarly situated individuals who moved from Illinois to Puerto Rico, Guam, or the U.S. Virgin Islands to vote in federal elections via Illinois absentee ballot. According to the plaintiffs, this differing treatment of former Illinois voters based on the territories they move to merits strict scrutiny.

First, where there is no constitutionally protected right to vote, a state's law "extend[ing] the right to vote to some non-residents does not implicate strict scrutiny." *See Snead v. City of Albuquerque*, 663 F. Supp. 1084, 1087 (D.N.M.) (rejecting a challenge to a state law extending

[10] It is true that some courts have held that "only fundamental constitutional rights necessarily apply in the territories." *Davis v. Commonwealth Election Comm'n*, No. 1-14-CV-00002, 2014 WL 2111065, at *3 (D. N. Mar. I. May 20, 2014) (citing *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990); *Wal-Mart Puerto Rico*, 2016 WL 1183091, at *46 ("To this day, only 'fundamental' constitutional rights are guaranteed to inhabitants of territories.") (internal quotations and alterations omitted). However, as discussed in the text, a right cannot be fundamental unless it is also constitutional.

the right to vote in municipal bond elections to certain non-residents), *aff'd by* 841 F.2d 1131 (10th Cir. 1987) (unpublished order).

Second, the plaintiffs' authority supporting their contention that strict scrutiny applies because they have a fundamental right to vote all involves residents of a state.[11] Based on this authority, the plaintiffs conclude that the UOCAVA allows some citizens (former Illinois residents who live in foreign countries and the NMI) to vote via absentee ballot but denies the franchise to others (former Illinois residents who live in territories other than the NMI). *See* Dkt. 48 at 8-9. But as discussed above, United States citizens living in territories do not have the same fundamental right to vote as United States citizens residing in Illinois who are qualified to vote in federal elections. An Illinois citizen who is qualified to vote in a federal election has a fundamental right to vote. In contrast, because Puerto Rico, Guam, and the U.S. Virgin Islands are territories, not states, the fact that the individual plaintiffs are United States citizens who used to be able to vote in Illinois does not mean that they retain their fundamental right to vote when they move from Illinois to Puerto Rico, Guam, or the U.S. Virgin Islands. *See generally Tuaua*, 788 F.3d at 307-08 (rejecting the claim that "non citizen nationals" born in American Samoa have a constitutional right to United States citizenship where the plaintiffs' cases supporting their claim of a fundamental right to citizenship "do not arise in the territorial context" and thus "do

[11] The following are illustrative samples of the plaintiffs' authority: *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (challenge to the constitutionality of Virginia's poll tax), *Obama for Am. v. Husted*, 697 F.3d 423, 425 (6th Cir. 2012) (challenge to an Ohio law that prevented certain voters from casting in-person early ballots), *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (in the context of a challenge to durational residence requirements, holding that "[i]n decision after decision, this 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"), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (challenge to Hawaii's prohibition on write-in voting).

not reflect the [Supreme] Court's considered judgment as to the existence of a fundamental right to citizenship for persons born in the United States' unincorporated territories").

The plaintiffs also direct the court's attention to *Dunn*, a Supreme Court case that holds that challenges to voting restrictions always merit strict scrutiny. 405 U.S. at 337 ("if a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest") (internal quotations omitted). The holding in *Dunn*, however, is not as broad as the plaintiffs suggest. The Court made its comments in *Dunn* in the context of surveying "state statutes that selectively distribute the franchise" to state voters, not statutes directed at United States citizens residing in United States Territories. *Id*. at 336. Thus, the plaintiffs' authority does not engage with the federal defendants' contention that residents of a United States Territory as opposed to a state do not have a fundamental right to vote in federal elections. Without a fundamental right (or a suspect class, which as discussed above, is not at issue in this case), strict scrutiny is not triggered.

Further, the plaintiffs assert that strict scrutiny applies to laws that extend a benefit to one class of individuals (here, United States citizens who were formerly qualified to vote in federal elections in Illinois and who currently reside in the NMI) while depriving similarly situated individuals (here, United States citizens who were formerly qualified to vote in federal elections in Illinois and who currently reside in Puerto Rico, Guam, and the U.S. Virgin Islands) of that same benefit. The plaintiffs' authority, however, involves a challenge to a law that provided benefits to men but not women. *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). The Court held that the law was subject to "close judicial scrutiny" because classifications based on sex,

like classifications based on race, alienage, and national origin, are subject to strict scrutiny. *Id*. The plaintiffs here have not argued that they belong to a protected class and that the UOCAVA unconstitutionally discriminated based on their membership in that class.[12]

The federal defendants' cases are similarly unhelpful, albeit for a different reason. On a positive note, their cases involve territories.[13] However, they all involve "a constitutional attack upon a law providing for governmental payments of monetary benefits." *Califano*, 435 U.S. at 5. This type of statute "is entitled to a strong presumption of constitutionality." *Id*. (internal

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[12] The court does not express any views on this subject, as the plaintiffs have not raised it and the parties have not briefed it.

[13] The Territory Clause gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State." U.S. Const., Art. IV, § 3, cl. 2. In *Harris v. Rosario*, cited by the federal defendants, the Supreme Court held that the Territory Clause authorized Congress to set a lower statutory limitation on Aid to Families with Dependent Children payments to residents of Puerto Rico. 446 U.S. 651, 651 (1980) (per curiam). The Court rejected an equal protection challenge, concluding that Congress "may treat Puerto Rico differently from States [under the Territory Clause] so long as there is a rational basis for its actions." *Id*. at 651-52. The Court then concluded that the challenged statute satisfied rational basis review because "Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Id*. (citing *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam)). Similarly, in *Besinga v. United States*, also cited by the federal defendants, the Ninth Circuit held that "the broad powers of Congress under the Territory Clause are inconsistent with the application of heightened judicial scrutiny to economic legislation pertaining to the territories." 14 F.3d 1356, 1360 (9th Cir. 1994). And in *Quiban v. Veterans Admin.*, the court held that "the Territory Clause permits exclusions or limitations directed at a territory [regarding certain veterans' benefits] . . . so long as the restriction rests upon a rational base." 928 F.2d 1154, 1161 (D.C. Cir. 1991); *see also Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 26 (D.P.R. 2008) (with respect to certain Medicaid payments, "[i]n an unincorporated United States territory Congress can also discriminate against the territory and its citizens so long as there exists a rational basis for such disparate treatment").

quotations omitted). In contrast, in this case, the right to vote, as opposed to a claim to monetary benefits, is at issue.[14]

The plaintiffs' challenge to UOCAVA's differing treatment of the NMI versus other United States Territories appears to be an issue of first impression. Given this, the court turns to principles that are generally applicable to constitutional challenges involving territories. "[T]he Constitution does not apply in full to acquired territory until such time as the territory is incorporated into, or made a part of the United States by Congress." *United States v. Lebron-Caceres*, No. CR 15-279 (PAD), 2016 WL 204447, at *7 (D.P.R. Jan. 15, 2016) (citing *Boumediene v. Bush*, 553 U.S. 723, 757-758 (2008); *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 469 (1979)). The NMI, Puerto Rico, Guam, and the U.S. Virgin Islands are all unincorporated territories. *Id*. (collecting cases). For unincorporated territories:

> Congress is not restricted except in 2 instances: (1) where constitutional provisions flatly prohibit Congress from enacting certain types of laws; and (2) in case of fundamental constitutional rights." *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1989). Otherwise, Congress may treat territories differently than states provided it has a rational basis for that treatment. *Harris*, 446 U.S. at 651. In this sense, unincorporated territories are subject to the plenary power of Congress subject to (1) structural constitutional limitations; (2) fundamental constitutional rights; and (3) the need for a rational basis for congressional action.

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[14] Relatedly, the federal defendants also contend that even outside the context of United States Territories, heightened scrutiny does not apply to every voting regulation limiting the franchise. In support, they cite authority about state restrictions that limit the ability to vote. *See*, *e.g.*, *Green v. City of Tucson*, 340 F.3d 891, 899 (9th Cir. 2003) (holding that state "[e]lection laws will invariably impose some burden on individual voters" but this does not mean that "every voting regulation [is subject] to strict scrutiny" and must "be narrowly tailored to advance a compelling state interest"). This line of cases does not engage with the plaintiffs' position that the UOCAVA is subject to strict scrutiny because it treats the NMI differently than other United States Territories by extending the franchise for federal elections to former state residents who reside in the NMI while refusing to allow similarly situated residents of Puerto Rico, Guam, and the U.S. Virgin Islands to vote.

Id. The court has already found that the individual plaintiffs do not have a fundamental right to vote via Illinois absentee ballot in federal elections, and the plaintiffs have not alleged that the UOCAVA discriminates due to their membership in a suspect class. *See Sweeney v. Pence*, 767 F.3d 654, 668 (7th Cir. 2014) ("[e]qual protection scrutiny is triggered when a regulation draws distinctions among people based on a person's membership in a suspect class or based on a denial of a fundamental right") (internal quotations omitted).

In addition, as noted above, the Territory Clause specifically authorizes Congress to make rules and regulations respecting territories. U.S. Const. art. IV, § 3. The UOCAVA applies to United States Territories and "does not distinguish between those who reside overseas and those who take up residence in Puerto Rico [and, as relevant here, Guam and the U.S. Virgin Islands], but between those who reside overseas and those who move anywhere within the United States. Given that such a distinction neither affects a suspect class nor infringes a fundamental right, it need only have a rational basis to pass constitutional muster." *Igartua I*, 32 F.3d at 10; *see also Romeu v. Cohen*, 265 F.3d 118, 124 (2d Cir. 2001) (holding that "the UOCAVA's distinction between former residents of States now living outside the United States and former residents of States now living in the U.S. territories is not subject to strict scrutiny"). The plaintiffs here focus on the UOCAVA's distinction between the NMI versus Puerto Rico, Guam, and the U.S. Virgin Islands, as opposed to the distinction between citizens residing in territories and citizens residing in states that was drawn in *Igartua I* and *Romeu*. Neither distinction, however, infringes upon a fundamental right, which is the basis for the plaintiffs' position regarding strict scrutiny.

More generally, "a statute is not invalid under the Constitution because it might have gone farther than it did" as "a legislature need not strike at all evils at the same time."

Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) (internal quotations and citations omitted). Instead, "it is well-established that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' without creating an equal protection violation." *Lamers Dairy Inc. v. U.S. Dep't of Agr.*, 379 F.3d 466, 475 (7th Cir. 2004) (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955)). Thus, the fact that Congress drew a distinction between United States citizens/former state residents now residing in the NMI versus United States citizens/former state residents who now reside in other territories does not mean that it was required to extend absentee voting across the board to all territories. Accordingly, the UOCAVA's differing treatment of the NMI versus Puerto Rico, Guam, and the U.S. Virgin Islands does not trigger strict scrutiny.

C. The UOCAVA: Rational Basis Review Applied to the Plaintiffs' Equal Protection Claim

First, the plaintiffs argue that the challenged portions of the UOCAVA are not supported by a "compelling state interest." (Dkt. 48 at 11.) This is not the appropriate standard for rational basis review. *See*, *e.g.*, *Heller*, 509 U.S. at 320.

Second, the plaintiffs argue that the UOCAVA impermissibly gives the NMI "favored status" among territories. (Dkt. 48 at 12.) As the federal defendants correctly note, however, the NMI's historical relationship with the United States is consistent with the UOCAVA's treatment of the NMI. The NMI are a chain of islands "strategic[ally] located" in the North Pacific Ocean in the area known as Micronesia. *See* https://www.cia.gov/library/publications/the-world-factbook/ geos/cq.html; *United States v. Lebron-Caceres*, No. CR 15-279 (PAD), 2016 WL 204447, at *14 (D.P.R. Jan. 15, 2016). The NMI are just north of Guam, which is also located in

the Mariana Islands chain but is politically separate. *See* https://www.britannica.com/place/Northern-Mariana-Islands.

Stepping back in time:

> Spain controlled [the NMI] from the sixteenth century until the Spanish American War. In 1898 after the war ended, Spain ceded Guam to the United States and sold the rest of the Marianas to Germany. *Saipan v. Director*, 133 F.3d 717, 720 (9th Cir. 1998). Germany's brief control ended with the commencement of World War I, when Japan took possession of all islands except Guam. *Id*. After World War I, Japan continued to govern most of what is now considered Micronesia, including the Northern Mariana Islands, under a mandate from the League of Nations. *Gale v. Andrus*, 643 F.2d 826, 828 (D.C. Cir. 1980).

Lebron-Caceres, 2016 WL 204447, at *14.

After World War II, the United States administered the Trust Territory of the Pacific Islands, which included all of the islands in the Mariana Island archipelago, pursuant to a Trusteeship Agreement with the United Nations Security Council. *Mtoched v. Lynch*, 786 F.3d 1210, 1213 (9th Cir. 2015). "In 1969, the United States began negotiations with the inhabitants of the Trust Territory directed to establishment of a framework for transition to constitutional self-government and future political relationships." *Lebron-Caceres*, 2016 WL 204447, at *14. During the negotiations, the islands comprising the Trust Territories divided into four groups: the NMI, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. *Id*.

Although the other portions of the Trust Territories opted for independent statehood or "free association," the NMI:

> elected to enter into a closer and more lasting relationship with the United States. Years of negotiation culminated in 1975 with the signing of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (hereinafter 'Covenant'). Pub. L. 94-241, 90 Stat. 263

> (1976). After a period of transition, in 1986 the trusteeship terminated, and [the NMI] was fully launched.

Mtoched, 786 F.3d at 1213; *see also* Howard P. Willens & Deanne C. Siemer, *An Honorable Accord: The Covenant Between the Northern Mariana Islands and the United States* 350-52 (2002). The parties agree that the Covenant became fully effective as of 12:01 a.m. on November 4, 1986 (approximately three months after Congress passed the UOCAVA).[15] On December 22, 1990, the United Nations Security Council officially terminated the United Nations Trusteeship Agreement between the Pacific Trust Territories, the United States, and the United Nations Security Council.

The Overseas Citizens Voting Rights Act of 1975 and UOCAVA were passed in 1976 and 1986, respectively, and neither included the NMI as part of the definition of the "the United States." At the time of the UOCAVA's enactment, NMI was not yet a United States Territory, as the parties' summary judgment submissions (which are consistent with the court's research) indicate that the Trusteeship Agreement under which NMI was supervised by the United Nations was still in effect, and the Covenant under which NMI became a United States Territory and

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[15] See http://www.lawsource.com/also/usa.cgi?xcm for a helpful collection of links to proclamations concerning the NMI, including Proclamation No. 5564, dated November 3, 1986. This proclamation is entitled "Placing into Full Force and Effect the Covenant with the Commonwealth of the Northern Mariana Islands, and the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands." In that proclamation, then-President Reagan stated, " I determine that the Trusteeship Agreement for the Pacific Islands is no longer in effect as of . . . November 3, 1986, with respect to the Northern Mariana Islands." Proclamation No. 5564 at § 1. He also stated that "[t]he Commonwealth of the Northern Mariana Islands in political union with and under the sovereignty of the United States of America" and that "[t]he domiciliaries of the Northern Mariana Islands are citizens of the United States" as specified in the Covenant. *Id*. at § 2. Finally, he "welcome[d] the Commonwealth of the Northern Mariana Islands into the American family and congratulate[d] our new fellow citizens." *Id*.

granted American citizenship to its residents was not fully effectuated. Accordingly, a rational reason supports the UOCAVA's exclusion of the NMI which was not yet a United States Territory and had a unique relationship with the United States from its definition of the territorial limits of the United States.

To support the rationality of a challenged statute, a defendant is not "limited to the justifications that the legislature had in mind at the time that it passed the challenged provisions any rational justification for the laws will overcome an equal protection challenge." *One Wisconsin Inst.*, 2016 WL 4059222, at *53; *Heller*, 509 U.S. at 320-21 (the party challenging a statute must negate "every conceivable basis which might support it . . . whether or not the basis has a foundation in the record"). So even if the court accepts the plaintiffs' contention that "the NMI carve-out" in the UOCAVA was a "product of historical timing" and not a deliberate choice by Congress (Dkt. 58 at 7), the so-called "historical timing" supports the UOCAVA's constitutionality. *See City of Chicago v. Shalala*, 189 F.3d 598, 605 (7th Cir. 1999) (holding that "a statute 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" so "[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"); *see also F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (the legislature need not "articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"); *Srail v. Vill. of Lisle, Ill.*, 588 F.3d 940, 946-47 (7th Cir. 2009) ("any rational basis will suffice, even one that was not articulated at the time the disparate treatment occurred").

Next, the plaintiffs approach Congressional purpose from a different angle, contending that Congress expressed its rationale for promoting overseas voting rights in the legislative history of the Overseas Citizens Voting Rights Act of 1975, UOCAVA's predecessor statute. The plaintiffs highlight the following legislative history:

> At present, even if a private citizen residing outside the United States could honestly declare an intent to return to the State of his last residence, he would have a reasonable chance to vote in Federal elections only in the 28 States and the District of Columbia which have statutes expressly allowing absentee registration and voting in Federal elections for citizens "temporarily residing"outside the United States. The remaining 22 States do not have specific provisions governing private citizens temporarily residing outside the United States. Furthermore, all 50 States and the District of Columbia impose residency requirements which private citizens outside the country for more extended periods cannot meet.
>
> The committee has found this treatment of private citizens outside the United States to be highly discriminatory. Virtually all States have statutes expressly allowing military personnel, and often other U.S. Government employees, and their dependents, to register and vote absentee from outside the country. In the case of these Government personnel, however, the presumption is that the voter does intend to retain his prior State of residence as his voting domicile unless he specifically adopts another State residence for that purpose. This presumption in favor of the Government employee operates even where the chances that the employee will be reassigned back to his prior State of residence are remote. The committee considers this discrimination in favor of Government personnel and against private citizens [that violates] the equal protection clause of the 14th amendment.

H.R. REP. 94-649, pt. 1, at 2, 1975 U.S.C.C.A.N. 2358, 2359-60. According to the plaintiffs, this shows that Congress intended the UOCAVA (the Act's successor statute) to extend the federal voting franchise to each and every overseas voter who is a United States citizen and a former resident of a state, regardless of the location of their current overseas residence.

The Overseas Citizens Voting Rights Act of 1975 defined "United States" as "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin

Islands" but not "American Samoa, the Canal Zone, the Trust Territory of the Pacific Islands, or any other territory or possession of the United States."[16] 89 Stat. at 1142. Thus, it differentiated between (1) the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, (2) the Canal Zone (which ended its relationship with the United States in 1979, https://www.britannica.com/place/Canal-Zone), American Samoa (whose residents are United States nationals, not citizens, *Tuaua*, 788 F.3d at 302), and the now-former Trust Territory of the Pacific Islands (which included the NMI); and (3) other United States Trust Territories or possessions. The plaintiffs appear to be asserting that the court should strike down the relevant portions of UOCAVA for lack of a rational basis based on Congress' intent as purportedly expressed in the 1975 legislative history for the UOCAVA's predecessor statute, and find that Congress actually meant to treat voters in all overseas locations alike when it enacted the UOCAVA. This is at odds with the language of the Overseas Citizens Voting Rights Act of 1975 as well as the UOCAVA's language.[17] *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*,

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[16] The Twenty-Third Amendment, passed in 1961, created the means by which the residents of the District of Columbia vote in Presidential elections.

[17] The plaintiffs repeatedly contend that the Overseas Citizens Voting Rights Act of 1975 "***excluded*** former state citizens residing [in NMI] from the right to vote in federal elections in their prior states of residence." (Dkt. 48 at 12) (emphasis in original.) They then conclude that "the federal defendants' argument that the NMI was not addressed [in the UOCAVA] simply because it did not yet exist or have an established relationship with the United States is wrong as a matter of history." (*Id*. at 13.) In support, the plaintiffs contend that the 1975 Act provides that citizens who "maintain a domicile . . . in any territory or possession of the United States" which the plaintiffs claim includes the NMI cannot vote in federal elections in their former state of residence. *Id*. at § 3(2). However, the 1975 Act allowed former state residents residing in the NMI to vote absentee in federal elections as its definition of "United States" specifically excluded "the Trust Territory of the Pacific Islands." *See* P.L. 94-203, § 2(3). Thus, the 1975 Act treated the islands comprising the Trust Territory of the Pacific Islands like a foreign country because they were not United States Territories (and indeed, other than the NMI, none of the trust territories ever became United States Territories). The plain language of the

469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose").

Next, the court agrees with the federal defendants that Congress could have reasonably concluded that because the NMI is the only United States Territory that used to be a Pacific Trust Territory and, as of the date of the UOCAVA's enactment, was not yet a United States Territory, it was more analogous to a foreign country, as opposed to the United States Territories of Puerto Rico, Guam, and the U.S. Virgin Islands. As noted above, the other Pacific Trust Territory Islands (the Federated States of Micronesia, Palau, and the Marshall Islands) chose independent statehood or "free association," but the NMI entered into a covenant with the United States that set forth specific parameters of the relationship. *Com. of N. Mariana Islands v. Atalig*, 723 F.2d 682, 691 (9th Cir. 1984); *An Honorable Accord*, at 57-194.

In doing so, the NMI's status as a former Trust Territory informed its relationship with the United States. When the United States administered the Trust Territories, it did so "based upon the President's treaty power conferred in Article II, Section 2, cl. 2 of the Constitution, rather than under the authority conferred upon Congress by the Territorial Clause." *Lebron-Caceres*, 2016 WL 204447, at *14. Thus, the United States acted as a trustee, not a sovereign power; "[i]ts authority derived from the trust itself." *Id*. (citations omitted).

Overseas Citizens Voting Rights Act of 1975's reference to "any other territory or possession of the United States" did not bar former Illinois residents now living in the NMI from voting, given its specific language granting that right to the "Trust Territory of the Pacific Islands," which included the NMI. *See Loughrin v. United States*, U.S. , 134 S. Ct. 2384, 2390 (2014) ("courts must give effect, if possible, to every clause and word of a statute") (internal quotations and citation omitted).

Accordingly, "the Trust Territory was not considered a territory or an insular possession of the United States." *Id*. (collecting cases). "And so in approving the Covenant with the Northern Mariana Islands, the federal government was constrained by the Trusteeship Agreement." *Id*. (citations omitted).

"In contrast, the sovereignty held by Spain over Puerto Rico was formally transferred to the United States by way of the Treaty of Paris" and "[s]ince then, the United States has administered Puerto Rico through legislation enacted under the Territorial Clause. *Id*. The United States acquired Guam in 1898 when, during the Spanish-American War, Spain ceded Guam to the United States. *See United States v. Vega Figueroa*, 984 F. Supp. 71, 77 (D.P.R. 1997). The United States purchased the U.S. Virgin Islands in 1917. *Id*.; *An Honorable Accord*, at 293.

Courts have concluded that the position that the NMI has a "political status . . . distinct from that of unincorporated territories such as Puerto Rico" is "credible." *Com. of N. Mariana Islands*, 723 F.2d at 691 n.28. The rationale for the distinction is that "[u]nder the trusteeship agreement, the United States does not possess sovereignty over the NMI." *Id*.; *see also Davis*, 2014 WL 2111065, at *1 (summarizing the history of the NMI and its political relationship with the United States); *Lebron-Caceres*, 2016 WL 204447, at *14 (same). Instead, "[a]s a commonwealth, the NMI [enjoys] a right to self-government guaranteed by the mutual consent provisions of the Covenant . . . . No similar guarantees have been made to Puerto Rico or any other territory." *Com. of N. Mariana Islands*, 723 F.2d at 691 n.28; *An Honorable Accord* at 343 ("Against all odds, [the NMI] accomplished what no people preceding them had ever done they joined the United States voluntarily on terms they had negotiated and approved").

In addition, in 2008, the NMI first received a non-voting delegate in the House of Representatives. 48 U.S.C. § 1751 (2008). The NMI was entitled to a Resident Representative to Congress as early as 1978, but that Representative "ha[d] no official status in the Congress." H. Rep. No. 108-761, at 5 (2005); *see also id.* at 3 (describing the NMI as "the last and only territory with a permanent U.S. population that has no permanent voice in Congress."). The plaintiffs say that this "reveal[s], at most, a pattern of unique dealings between the United States and the NMI" and assert that this is not enough to survive rational basis review. (Dkt. 58 at 9.) But the NMI's unique political status is a reason *supporting* its treatment in the UOCAVA, as the plaintiffs can prevail only if they negate "every conceivable basis which might support it . . . whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320-21; *see also One Wisconsin Inst.*, 2016 WL 4059222, at *53 (the rationality of a challenged statute can be based on "any rational justification," not merely the "the justifications that the legislature had in mind at the time that it passed the challenged provisions").

Moreover, until 2008, the NMI retained nearly exclusive control over immigration to the Territory. The transition to the full application of federal "immigration laws," as defined in § 101(a)(17) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(17), in the NMI will end on December 31, 2019. 48 U.S.C. § 1806(a)(2) ("There shall be a transition period beginning on the transition program effective date and ending on December 31, 2019, during which the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of the Interior, shall establish, administer, and enforce a transition program to regulate immigration to the Commonwealth, as provided in this section."). The plaintiffs have not pointed to any parallel provisions regarding

immigration to Puerto Rico, Guam, and the U.S. Virgin Islands.

Finally, the court notes that the plaintiffs' requested relief would not result in a universally applicable rule that permits all United States citizens in Puerto Rico, Guam, and the U.S. Virgin Islands to vote in federal elections. Instead, if the plaintiffs prevail, former Illinois residents who were qualified to vote in federal elections when they lived in Illinois who then moved to Puerto Rico, Guam, and the U.S. Virgin Islands would be able to vote in federal elections via Illinois absentee ballot. As another court considering a challenge brought by a Puerto Rican resident who had previously lived and voted in New York to, among other things, the UOCAVA's provisions preventing him from voting for President via a New York absentee ballot after he moved to Puerto Rico has stated:

> if 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. Puerto Rican voters who could establish a residence for a time in a State would retain the right to vote for the President after their return to Puerto Rico, while Puerto Rican voters who could not arrange to reside for a time in a State would be permanently excluded.

Romeu, 265 F.3d at 125.[18] That reasoning applies equally to Guam and the U.S. Virgin Islands.

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[18] *Romeu* centered on the plaintiff's inability to vote after he moved from New York where he was qualified to vote in federal elections to Puerto Rico. This case, in contrast, centers on the differing treatment of Illinois qualified voters depending on the United States Territory to which they move. This distinction does not affect the applicability of the *Romeu* court's observation to this case. As in *Romeu*, the relief requested by the plaintiffs in this case would cause a similar inequality among United States citizens in Puerto Rico, Guam, and the U.S. Virgin Islands depending on whether they had ever lived, or could arrange to live, in a state and qualify to vote in federal elections there.

It is rational, at least as the term is understood in the context of rational basis review, to enact a law that does not differentiate between residents living in a particular United States Territory based on whether they could previously vote in a federal election administered by a state.[19]

For all of these reasons, the court finds that the UOCAVA's challenged provisions survive rational basis review. In reaching this conclusion, the court notes that it gave the parties' arguments the most serious consideration possible given the gravity of the plaintiffs' constitutional claims. However, the parties' submissions were often repetitive and lacking in substance, and the parties did not take full advantage of their ability to file written submissions adequately addressing the interesting, novel, and complex issues presented by this case.

IV. CONCLUSION

For the above reasons, the federal defendants are entitled to summary judgment as to the plaintiffs' equal protection claim based on the UOCAVA. Thus, the federal defendants' motion for summary judgment [50] is granted, their motion to dismiss [42] is denied as moot, and the plaintiffs' cross-motion for summary judgment [47] is denied. The plaintiffs' standalone due process claim survives these rulings as the parties did not brief it. This case is set for status on September 9, 2016, at 9:30 a.m. The parties should be prepared to discuss further proceedings regarding the plaintiffs' due process claim against the federal defendants and their contention that

[19] It is true that the NMI appears to differentiate in this way (*i.e.*, a United States citizen residing in the NMI who has never been eligible to vote in a state-administered federal election cannot vote for President at all, while a United States citizen who was eligible to vote in federal elections in Illinois and then moved to the NMI can cast an Illinois absentee ballot in a federal election). The plaintiffs, however, have failed to establish that given the undemanding nature of the rational basis standard and the NMI's unique relationship with the United States, the ability of some NMI residents to vote depending on their former state voting rights gives the plaintiffs a similar right.

portions of Illinois MOVE are unconstitutional due to the statute's treatment of American Samoa.

Date: August 23, 2016

/s/
Joan B. Gottschall
United States District Judge

/cc

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

LUIS SEGOVIA, *et al.*, Plaintiffs, v. BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO, *et al.*, Defendants.	15-cv-10196 Judge Joan B. Gottschall

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT

Date: October 19, 2016

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INTRODUCTION

Plaintiffs, six residents of Puerto Rico, Guam, or the U.S. Virgin Islands who formerly resided in Illinois, along with two voting rights groups, seek summary judgment for the second time, challenging the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310 ("UOCAVA") and Illinois Military and Overseas Voter Empowerment law ("Illinois MOVE"), 10 Ill. Comp. Stat. Ann. 5/20-1. Plaintiffs assert that these statutes preclude them from voting absentee in Illinois in federal elections in violation of their equal protection and due process rights under the Fifth and Fourteenth Amendments. The Court previously rejected Plaintiffs' equal protection challenge to UOCAVA, *see* ECF No. 63, Mem. Op. & Order ("Op."), at 18–41, which was brought against the Federal Defendants under the Due Process clause of the Fifth Amendment, but directed further briefing on whether UOCAVA violated Plaintiffs' substantive due process rights, Op. 18 n.8 & 41.

Plaintiffs now advance a substantive due process theory that relies on the very same allegations of discrimination that animated Plaintiffs' failed equal protection claim. Plaintiffs do not contend that the Constitution itself creates a substantive due process right to vote absentee in a former state of residence; rather, they assert that UOCAVA impermissibly infringes their fundamental right to interstate travel by failing to extend absentee voting rights to former Illinois residents who now reside in certain U.S. territories while extending that right to those in the Northern Mariana Islands, thus deterring travel to "disfavored territories." *See* ECF No. 71, Pls. 2d Mot. for Summ. J. ("Pls. 2d Mot."), at 13; *id*. at 14 ("UOCAVA authorizes former state residents living in one Territory but not others to vote absentee."). Not only does this claim rest on Plaintiffs' misunderstanding of the rights afforded under UOCAVA, but the Court already squarely considered and rejected this theory when it held that "UOCAVA's differing treatment of the NMI versus Puerto Rico, Guam, and the U.S. Virgin Islands does not trigger strict

scrutiny," Op. 31, and satisfies rational basis review. *See* Op. 41. The Court's prior holdings apply with equal force to Plaintiffs' supposed substantive due process claim; Plaintiffs' attempt to re-litigate their equal protection claim in the guise of a separate, standalone "right to travel" claim thus should be rejected.

Even if distinct from the equal protection claim, however, Plaintiffs' purported substantive due process claim fails for other reasons. As an initial matter, the claim rests on Plaintiffs' unsupported premise that travel to U.S. territories must be treated identically to travel between the states for Constitutional purposes; Plaintiffs cite no case or constitutional source that would support this contention. But even assuming travel to the territories is akin to the type of interstate travel protected by substantive due process principles, even if UOCAVA somehow implicates a cognizable constitutional right, and even if Plaintiffs had met their burden to show that UOCAVA infringes a fundamental right, UOCAVA satisfies the applicable rational basis standard or even heightened scrutiny. Congress has sound reasons for declining to require that *new* residents of the territories, or residents who lived in a state, be granted voting rights that the rest of the territories' residents do not have. Whatever the scope of a substantive due process right to travel, the Constitution does not require that Congress provide *greater* rights for territorial residents who formerly resided in a state than for the millions of citizens already residing in those territories.

ARGUMENT

I. PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM BASED ON THE CONSTITUTIONAL RIGHT TO INTERSTATE TRAVEL IS MERITLESS.

A. The Court Has Already Rejected the Equal Protection Theory on Which Plaintiffs' "Right to Interstate Travel" Claim Depends.

Plaintiffs' new "right to travel" theory should be rejected for the simple reason that it simply repackages a claim already rejected by the Court. Plaintiffs previously based their equal

protection claim on their assertion that UOCAVA (and Illinois MOVE) "protect the right to vote for *certain* U.S. citizens who move overseas, while denying it to others who are similarly situated, even going so far as to draw lines based on the *particular* territory in which a person resides." Compl. ¶ 51 (original emphasis). Plaintiffs now present their new due process claim in the same equal protection terms: "UOCAVA and MOVE penalize and deter travel by Illinois residents to Guam, Puerto Rico, and the USVI by refusing to extend the right to vote absentee in federal elections in Illinois, even while affording such rights to those who move to American Samoa or the NMI. Because *these distinct classifications* do not advance any substantial government interest, the laws cannot survive scrutiny." Pls. 2d Mot. 2 (emphasis added); *see also id*. at 14 ("UOCAVA and MOVE established 'created rights' to vote in some Territories but not others, and it is this classification . . . that establishes the infringement of the right here."). This is the same argument the Court squarely considered and rejected in ruling on the parties' cross-motions for summary judgment. *See* Op. 18 ("[P]laintiffs contend that the UOCAVA treats United States citizens who are former Illinois residents who were qualified to vote in federal elections and who now reside in United States Territories differently based on the territory in which they live[.]"). Plaintiffs cannot recast their failed equal protection theory, thereby circumventing this Court's prior rulings and controlling circuit precedent, *see infra* Part I(B), by simply changing the label of the claim to substantive due process.[1]

[1] The Federal Defendants respectfully incorporate by reference all facts and defenses raised in their prior motions and in the conference before the Court, including that Plaintiffs have waived or forfeited their newly raised substantive due process claim based on the right to travel. Although the Court appears to have construed Plaintiffs' complaint as including separate due process and equal protection claims against the Federal government, Plaintiffs brought only a single challenge to UOCAVA, which was a claim that by denying Plaintiffs equal protection of the law, the federal statute violates the Due Process clause of the Fifth Amendment (because the Fourteenth Amendment applies only to states). *See, e.g.*, *Bollinger v. Sharpe*, 347 U.S. 497 (1954) (explaining that Fifth Amendment's Due Process clause incorporates equal protection principles as against the federal government). Plaintiffs allege nowhere in their Complaint that

B. Plaintiffs Fail to Assert a Deprivation of a Cognizable Constitutional Right.

1. Plaintiffs Fail to Show That the Fundamental Right to Interstate Travel Encompasses the Right to Travel to U.S. Territories.

"[T]he right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union." *United States v. Guest*, 383 U.S. 745, 767 (1966); *id.* at 758 (describing the right to interstate travel as originating in the Articles of Confederation and as being a "necessary concomitant of the stronger Union the Constitution created"); *Hutchins v. D.C.*, 188 F.3d 531, 536 (D.C. Cir. 1999) (collecting cases). While the Supreme Court has frequently recognized "the constitutional right to travel from one State to another," *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quotation omitted), it has never recognized a fundamental right to travel from a state to a territory of the United States. Plaintiffs

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UOCAVA interferes with their right to interstate travel, and the Complaint sets forth no substantive due process theory or allegations that are independent of the equal protection claims of discriminatory treatment. *See* ECF No. 1, Compl. ¶ 52 ("By treating similarly situated former state residents differently based on where they reside overseas, UOCAVA and Illinois MOVE violate the equal-protection and due process guarantees of the Fifth and Fourteenth Amendments and 42 U.S.C § 1983."); *see also id.* ¶ 53-54 (challenging alleged disparate treatment of similarly situated overseas citizens as deprivation of the equal protection of the law). Indeed, in their prior briefing, Plaintiffs expressly acknowledged that their due process claim is the same as their equal protection claim. *See* ECF No. 48, Pls. MSJ and Opp. at 2 n.2 ("Plaintiffs sue federal defendants directly under the Due Process Clause of the Fifth Amendment based on the federal defendants' violation of the equal-protection component of due process."). By failing to present any distinct arguments to support a "right to travel" claim in their response to the Federal Defendants' prior motion for summary judgment, Plaintiffs have forfeited any those arguments. *See NRRM, LLC v. Mepco Finance Corp.*, 10 C 4642, 2015 WL 1859851, at *3 (N.D. Ill. April 21, 2015) ("Choice elected to make no other arguments opposing Mepco's summary judgment motion, thereby forfeiting any such arguments."). In all events, it is well-established that parties cannot amend their complaints through briefing. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). Having failed to allege any allegations or theory in support of a "right to travel" claim in their complaint, Plaintiffs are barred from raising it now. *See id.*

acknowledge this fact, yet they provide no support for the notion that the fundamental right to *interstate* travel also encompasses travel from the states to the U.S. territories.[2]

It is not clear how Plaintiffs' purported "right to interstate travel" could be squared with the text and structure of the Constitution, which does not, by its terms, apply the Privileges and Immunities clause to citizens of the territories, *see* U.S. Const., art. IV, § 2, or grant all the rights of citizens of a state to citizens of a territory. *See, e.g., Tuaua v. United States*, 788 F.3d 300, 307–08 (D.C. Cir. 2015) (rejecting the claim that "non citizen nationals" born in American Samoa have a constitutional right to United States citizenship after concluding that the "Citizenship Clause is textually ambiguous as to whether 'in the United States' encompasses America's unincorporated territories"). Nor do they explain how Congress's broad power to "make all needful Rules and Regulations" with respect to the territories, U.S. Const., art. IV, § 3, cl. 2, could be reconciled with a "virtually unqualified" fundamental right to travel from the states to all of the territories, Pls. 2d Mot. 7, which each has its own particular relationship with the United States. *See* ECF 51-3 (discussing relationships of the insular areas with the United States); ECF 51-4 (same). Thus, Plaintiffs' attempt to invoke a right to interstate travel misses the special character of the territories under the Constitution.[3] No court has recognized such a right, and this Court need not be the first.

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[2] Plaintiffs note, in passing, that neither the Supreme Court nor any other court "has conclusively resolved the question whether the right to interstate travel applies to travel between all U.S. Territories and the fifty states." Pls. 2d Mot. 11 n.8. By failing to supply any argument in support of a right to travel to U.S. territories, Plaintiffs have waived any substantive due process claim based on this theory. *See Craft v. Health Care Serv. Corp.*, 84 F. Supp. 3d 748, 753–54 (N.D. Ill. 2015) (citing *Ripberger v. Corizon, Inc.*, 773 F.3d 871, 879 (7th Cir. 2014)) (parties waive undeveloped and perfunctory arguments); *Eberhardt v. Brown*, 580 F. App'x 490, 491 (7th Cir. 2014) (parties waive arguments that they raise for the first time in a reply brief).

[3] UOCAVA itself defines "State" to mean "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa." 52 U.S.C. § 20310(8). As this Court and others have observed, it does not follow that U.S. territories are

2. Plaintiffs' Claim Does Not Fall Within the Well-Established Contours of the Fundamental Right to Interstate Travel.

Ultimately, this Court need not decide whether travel to the territories is "interstate travel" for constitutional purposes, because there are ample alternative reasons for concluding that this case does not implicate a constitutionally protected right to travel. Assuming, *arguendo*, that travel by U.S. citizens to U.S. territories constitutes interstate travel that is protected as a fundamental right under the substantive component of the due process clause, Plaintiffs have not established that the right to interstate travel is even implicated by UOCAVA. The right to interstate travel embraces three components: "[1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). As the Supreme Court explained in *Saenz*, the first component—the right to freely cross state borders—was understood to be a fundamental aspect of the union established by the Constitution, and the second and third components are expressly protected by the privileges and immunities clause and the Fourteenth Amendment, respectively. *Id.* at 500–02. Plaintiffs make no effort to identify any component which might be implicated by their claim. The first two recognized theories of a right to travel are plainly inapplicable; UOCAVA does not restrict anyone from entering or leaving a U.S. territory, and Plaintiffs are residents of,

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necessarily "states" for purposes of the U.S. Constitution. Op. 26 ("Puerto Rico, Guam, and the U.S. Virgin Islands are territories, not states."); *Igartua De La Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994) ("Puerto Rico is concededly not a state"). Indeed, in the context of the right to vote absentee in a presidential election—the core of the claim at issue here—the Constitution is also clear that U.S. territories are not states granted the right to select electors. *See id.* (citing U.S. Const. art. II, § 1, cl. 2 ("*each state* … in such manner as the Legislature thereof may direct") (emphasis added); *see also Igartua De La Rosa v. United State*s, 229 F.3d 80, 83 (1st Cir. 2000); *Igartua-De La Rosa v. United States*, 417 F.3d 145, 148 (1st Cir. 2005) (en banc).

not visitors to, U.S. territories. The third prong—the right for those who move to a state to be treated like other residents of the state—is also inapplicable, and only underscores the problem with Plaintiffs' substantive due process claim.[4] At bottom, what Plaintiffs demand is not the right to be treated the same as the other citizens of Puerto Rico, Guam, or the U.S. Virgin Islands, but to a benefit (the right to vote in Illinois elections) the residents of those territories do not have.

The Supreme Court has squarely rejected this type of argument in the context of a right-to-interstate-travel claim against the federal government. In *Califano v. Gautier Torres*, 435 U.S. 1 (1978), the Court held that a federal statute did not infringe the plaintiffs' constitutional right to interstate travel where it excluded residents of Puerto Rico from receiving certain benefits available to those residing in states. *Id.* at 4. The Court reasoned that the right to interstate travel does not permit a person who travels to a new state (or territory) to demand benefits superior to those enjoyed by others residents of that state (or territory) by invoking the law of the state from which the person came. *Id.* Further, it explained that "the broader implications of such a doctrine in other areas of substantive law would bid fair to destroy the independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents." *Id.*

Applying this principle specifically to a "right to travel" challenge to UOCAVA, the Second Circuit, in *Romeu v. Cohen*, held that UOCAVA does not violate "any of the components

[4] "[T]he Privileges and Immunities Clause of Article IV does not constrain the powers of the federal government at all." *Pollack v. Duff*, 793 F.3d 34 (D.C. Cir. 2015). Unlike the Privileges and Immunities Clause, the principle of equal protection applies to the federal government as well as to the states. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (explaining that the Supreme Court "treat[s] the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable").

of the right to travel listed in *Saenz*."[5] 265 F.3d 118, 126 (2d Cir. 2001). As to the first component, the Court observed that "mov[ing] to a U.S. territory . . . require[s] that [one] give up voting for the office of President" *id*., but that UOCAVA was not the cause of that loss. "[The] loss of the right to vote for President is the consequence of [the] decision to become a citizen of a territory in a constitutional scheme that allocates the right to appoint electors to States but not to territories." *Id*. More generally, the Court observed that "[a] citizen's decision to move away from her State of residence will inevitably involve certain losses[]": "She will lose the right to participate in that State's local elections, as well as its federal elections, the right to receive that State's police protection at her place of residence, the right to benefit from the State's welfare programs, and the right to the full benefits of the State's public education system. Such consequences of the citizen's choice do not constitute an unconstitutional interference with the right to travel." *Id*. at 126–27.

The Court in *Romeu* also found that the "second and third components of the travel right are not implicated at all" by UOCAVA. UOCAVA does not "in any way impair [one's] opportunity to be welcomed in [a territory] as a visitor or to be treated like other U.S. citizens residing [there] upon his establishing residence there." *Id*. at 127. There (as here) the plaintiffs "complain[ed] not that [they are] being treated differently from other . . . citizens residing in [the territories], but rather that [they are] being treated identically to them." *Id*. And there (as here) the plaintiffs "[b]y virtue of [their] former residence in [a State], seek[] to be allowed to vote in the [federal] election in a manner denied to other citizens of [the territories]. The denial of that special treatment does not constitute an unconstitutional burden on his right to travel." *Id*.; *see*

[5] The Second Circuit assumed for purposes of the opinion that the constitutional right to interstate travel includes travel to U.S. territories "and that the reference to the right to enter and leave a State includes also the right to change one's residence from one political subdivision of the United States to another." *Romeu*, 265 F.3d at 126.

also Op. 40.[6] Thus, even assuming *Saenz*'s references to States were intended to encompass travel to U.S. territories, UOCAVA imposes no violation of any of the components of the right to travel listed in *Saenz*. *See Romeu*, 265 F.3d at 126.

Plaintiffs' arguments to the contrary are unavailing. Plaintiffs first attempt to distinguish *Califano* on the ground that they have been deprived of "the right to vote absentee in federal elections in Illinois," whereas in *Califano* the plaintiffs had lost government monetary benefits. Br. 13-14. But the fact that the federal benefits statute at issue in *Califano* was entitled to a "strong presumption of constitutionality," *Califano*, 435 U.S. at 5, does not undercut the Supreme Court's conclusion that the constitutional right to travel does not permit a plaintiff to demand benefits from a state in which he does not reside. Rather, *Califano* "makes it abundantly clear" that the constitutional right to interstate travel recognized in the very cases cited by Plaintiffs, *see* Pls. 2d Mot. 12–13—"cannot be the basis for automatically imposing a reverse obligation on the former state" to continue to extend benefits to a former resident. *Fisher v. Reiser*, 610 F.2d 629, 634 (9th Cir. 1979). In analogous contexts, every court of appeals to have considered this question reached the same conclusion based on *Califano*. *See id.*; *see also, e.g.*, *Matsuo v. United States*, 586 F.3d 1180, 1184–85 (9th Cir. 2009); *Minnesota Senior Fed'n v. United States*, 273 F.3d 805, 810 (8th Cir. 2001).

Plaintiffs further attempt to distinguish *Romeu*'s application of *Saenz* to UOCAVA on the basis of a somewhat convoluted theory—that the fundamental right to interstate travel is

[6] This Court relied on *Romeu* to reach a similar conclusion in dismissing Plaintiffs' equal protection claim. *See* Op. 40. Quoting extensively from *Romeu*, the Court found that what Plaintiffs seek is "a distinction of questionable fairness" where, unlike other residents, Plaintiffs, as former residents of Illinois, would retain their right to vote for President in Puerto Rico, Guam, and the U.S. Virgin Islands. *Id.* (quoting *Romeu*, 265 F.3d at 125). The Court's equal protection analysis should informs its assessment of whether the right to travel, discussed in *Saenz*, is implicated by UOCAVA.

"bidirectional," protecting the right to emigrate *from* a state without restriction, Pls. 2d Mot. 12, and that this right to emigrate from Illinois is burdened because UOCAVA denies them access to "created rights"—the right to vote absentee in Illinois—by "penalizing and deterring" interstate travel to Guam, Puerto Rico, and the US Virgin Islands, *see id.* at 13. This argument rests on the faulty premise that UOCAVA deprived Plaintiffs of the right to vote in federal elections by absentee ballot issued by a former state of residence. UOCAVA does no such thing; it does not prohibit states from extending absentee voting rights to former state residents in U.S. territories.

Moreover, the sum and substance of Plaintiffs' argument—that "moving to certain Territories but not others serves as a deterrent to moving to disfavored Territories," Pls. 2d Mot. 13—reduces to the same equal protection theory that already has been rejected by the Court. Plaintiffs' due process claim remains a claim of differential treatment depending on where they chose to move and reside, not a claim that there is a substantive due process right to vote absentee in a state of former residence. Thus, the Court need not resolve a distinct due process claim here; Plaintiffs' complaint is that the statute has drawn an arbitrary line between territories, and the Court has already properly rejected that equal protection argument.

And even if the due process claim is viewed solely within the confines of the right to interstate travel, Plaintiffs "right to emigrate with created rights" theory is no more than a reprise of the theory rejected in *Califano* and *Romeu*—that is, that the right to interstate travel is infringed where benefits do not follow a person to another state.[7] Plaintiffs still fail to cite any

[7] The Supreme Court drew an analogous conclusion in *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976), which held that a city regulation requiring employees to be residents of the city did not impair the constitutional right to interstate travel of a person whose employment was terminated because he moved his permanent residence to a city in another state. The Court explained: "In this case appellant claims a constitutional right to be employed by the city of Philadelphia *while* he is living elsewhere. There is no support in our cases for such a claim." *Id.* at 646–47 (emphasis in original).

authority suggesting that the right to interstate travel to one place would be penalized or deterred because there are greater benefits available if the person chose to travel someplace else.[8] Plaintiffs' assertions thus fall far short of showing that UOCAVA implicates any constitutionally protected right to interstate travel.

II. REGARDLESS OF HOW PLAINTIFFS LABEL THEIR CLAIM, UOCAVA SATISFIES BOTH RATIONAL BASIS REVIEW AND HEIGHTENED SCRUTINY.

Even assuming that UOCAVA somehow implicates a constitutionally protected right to travel, the Court's review of the merits of this claim, like the earlier equal protection claim, should be under the rational basis standard. Plaintiffs assert that precisely the same provisions of UOCAVA (excluding certain U.S. territories from absentee ballot requirements) over precisely the same circumstances (where former Illinois residents now reside in Puerto Rico, Guam, or the U.S. Virgin Islands), is subject to a markedly different standard of review when challenged under the very same constitutional amendment. That makes little intuitive sense, and is not supported by any authority cited by Plaintiffs. Courts deciding equal protection claims based on alleged discriminatory treatment of persons who reside in U.S. territories, have uniformly applied rational basis review based on Congress's broad powers under the Territory Clause of the

[8] UOCAVA also cannot be said to infringe the right to interstate travel because "[t]here is no fundamental right to an absentee ballot. That ballot is a mere gratuitous convenience supplied by the state. Therefore, the restriction which denial of that privilege imposes on the right to travel is not significant and does not overburden the right to travel." *Prigmore v. Renfro*, 356 F.Supp. 427, 433 (N.D.Ala.1972), *summ. aff'd*, 410 U.S. 919 (1973). Plaintiffs' reliance on *Zessar v. Helander*, No. 05-1917, 2006 WL 642646 (N.D. Ill. Mar. 13, 2006), is misplaced. That case addressed procedural (not substantive) due process protections that should be afforded to a person who, after receiving statutory rights to vote by absentee ballot, had his absentee ballot rejected without notice and a hearing. *Id.* at *5. Here, Plaintiffs do not allege that they ever fell within UOCAVA's coverage, let alone that they were deprived of rights they previously received under UOCAVA. If anything, *Zessar* only underscores the normal rule that there is no constitutional right to vote by absentee ballot. *See id.* at *6 ("Defendants correctly assert that state regulations or restrictions on absentee voting do not, as a general matter, violate a fundamental constitutional right.") (citing, inter alia, *Prigmore*, 356 F. Supp. 427).

Constitution, which gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State." U.S. Const., Art. IV, § 3, cl. 2. *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1161 (D.C. Cir. 1991), relying on *Harris v. Rosario*, 446 U.S. 651, 651 (1980) (*per curiam*); *Califano v. Torres*, *supra*, 435 U.S. 1 (1978) (*per curiam*)); *see also Besinga v. United States*, 14 F.3d 1356, 1360 (9th Cir. 1994).

While Plaintiffs attempt to avoid this result by labeling their claimed right to reside in the territories as the right of *interstate* travel, as explained above, no court has resolved that question, and sound constitutionally-based considerations weigh against it. Indeed, Plaintiffs acknowledge that the "right" of *international* travel has been subject to regulation within the ordinary bounds of due process. *See* Pls. 2d Mot. 1; *see also Califano v. Aznavorian*, 439 U.S. 170, 176 (1978) (explaining difference between the freedom to travel internationally and the right of interstate travel); *see also Rahman v. Chertoff*, No. 05 C 3761, 2010 WL 1335434, at *5 (N.D. Ill. March 31, 2010) ("Government action that infringes the right to travel abroad will be upheld unless it is 'wholly irrational.'") (quoting *Califano*, 439 U.S. at 176); *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (The deferential rational basis test applies where, as here, "a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class.") (internal quotation omitted).

In any event, whether analyzed under rational basis review or heightened scrutiny, the result should be the same; as the Second Circuit held in *Romeu*, UOCAVA's extension of absentee voting rights to U.S. citizens formerly residing in a State who live outside the territorial United States "is supported by strong considerations, and the statute is well tailored to serve these considerations." *Romeu*, 265 F.3d at 124. Congress sought to maintain the voting rights of

the place of former residence for those individuals who, by virtue of moving to a foreign country, might be blocked completely from participating in the election of government officials. *Id.* By extending absentee ballot voting rights only to former residents of a state who move away from the United States, UOCAVA treats citizens who move from a state to Guam, Puerto Rico, and U.S. Virgin Islands "in the same manner as it treats citizens who leave a State to establish residence in another State." *Id.* at 125. In both situations, the citizens "possess voting rights in their new place of residence." *Id.*

Congress undoubtedly had a compelling interest in avoiding the result that would follow from Plaintiffs' requested relief. If UOCAVA had extended the vote in federal elections to former citizens of a State who now reside in the territories, it "would have created a distinction of questionable fairness" among U.S. citizens residing in the territories by extending the right to vote in federal elections to U.S. citizens who had previously resided in a State while not doing so for those who have always resided in a territory. *Id.*; *see also* Op. 40. Citizens in U.S. territories with the resources to establish residence in a state would retain the right to vote in federal elections after their return to the territories, while those who could not afford to do so "would be permanently excluded." *Id.* That Congress did not include the NMI in UOCOVA's definition of "United States" only reflects the fact that NMI, "as of the date of the UOCAVA's enactment, was not yet a United States Territory" and "was more analogous to a foreign country, as opposed to the United States Territories of Puerto Rico, Guam, and the U.S. Virgin Islands." Op. 37.

Even setting aside this historical rationale, the fact that Congress extended absentee ballot rights to certain groups but not others does not render the statute unconstitutional. *See McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969) (upholding absentee voting statutes that were "designed to make voting more available to some groups who cannot easily get to the polls," without making voting more available to all such groups, on the ground that

legislatures may "take reform 'one step at a time'" (citations omitted)); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (applying to voting rights reform legislation the rule that "a statute is not invalid under the Constitution because it might have gone farther than it did") (quotation marks omitted)). Thus, even if UOCAVA made travel to certain territories less favorable than travel to other territories, that result would not infringe the constitutional right to travel.

Further, as Plaintiffs concede, "not every law that weighs on the decision to travel is constitutionally significant[.]" Pls. 2d Mot. 12. A "law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Attorney Gen. of N.Y. v. Soto–Lopez*, 476 U.S. 898, 903 (1986) (plurality) (internal quotation marks and citations omitted). Assuming UOCAVA could be said to restrict travel at all, Plaintiffs do not contend that impeding travel is the "primary objective" of UOCAVA, nor that UOCAVA actually deterred them from traveling to the territories in which they now reside. Instead, Plaintiffs argue that UOCAVA created a classification that penalized or deterred their exercise of the right to travel by extending absentee voting rights to certain territories but not others. But as explained above, Plaintiffs failed to establish any violation of the right to interstate travel, and their arguments are otherwise mistaken.

Citing a case involving durational residence requirements for voting, Plaintiffs contend that UOCAVA "disadvantage[s] new state residents in the exercise of fundamental rights like voting[.]" Pls. 2d Mot. 12 (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)). Again, that contention is meritless. UOCAVA extended eligibility to vote by absentee ballot in federal elections to "overseas voters." Congress defined "overseas voters" to include U.S. citizens formerly qualified to vote in the United States who now reside outside the U.S. states or territories, *see supra* note 4 (citing 52 U.S.C. § 20310(5)); that definition does not prevent

Plaintiffs from traveling to any state or to any U.S. territory. *See Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001) (finding no "direct impairment" of interstate movement where state's challenged practices of stopping and detaining certain motorists did "nothing to prevent Chavez from entering or leaving the state[.]"); *Martinez v. Bynum*, 461 U.S. 321 (1983) (holding that a challenged residence requirement "[d]oes not burden or penalize the constitutional right of interstate travel" where "any person is free to move to a State and to establish residence there" to avail themselves of that State's benefits).

Plaintiffs also contend that UOCAVA penalizes or deters interstate travel by "denying" Plaintiffs "the right to vote absentee" in Illinois. Pls. 2d Mot. 13. Once again, this is incorrect. UOCAVA does not deny Plaintiffs, or anyone else, the right to vote absentee. Moreover, to the extent Plaintiffs contend that UOCAVA implicates a constitutional right to travel because it could have the incidental effect of deterring migration to certain territories, that argument fails on the merits under *Saenz* because they are not receiving fewer benefits than available to residents of the state to which they are relocating. *See Minnesota Senior Federation, Metropolitan Region v. United States*, 273 F.3d 805, 810 (8th Cir. 2001) (discussing "deterrence" theory of right-to-travel violations and holding that plaintiff would be treated equally with residents of the state to which she is relocating, and giving up more generous benefits in moving does not penalize her right to travel).

CONCLUSION

For the foregoing reasons, Plaintiffs' second motion for summary judgment should be denied, and summary judgment should be granted in favor of the Federal Defendants.

Dated: October 19, 2016

Respectfully submitted,

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

LUIS SEGOVIA, et al.,	)	
	)	
Plaintiffs,	)	Case No. 15 C 10196
	)	
v.	)	
	)	Judge Joan B. Gottschall
BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The plaintiffs in this action are six United States citizens who are former residents of Illinois and who now reside in Puerto Rico, Guam, or the U.S. Virgin Islands, plus two organizations that promote voting rights in United States territories. The defendants are comprised of state and federal voting-related commissions and groups, as well as the United States of America and several individuals sued in their official capacities. A complete description of the parties and the underlying factual history of the case can be found in this court's August 23, 2016 Memorandum Opinion and Order (the "prior order") [63].

Before the court is the plaintiffs' second motion for summary judgment [70] and the federal defendants' cross–motion for summary judgment [77]. The plaintiffs raise two main arguments: first, they challenge the constitutionality of the Illinois Military Overseas Voter Empowerment Act ("Illinois MOVE"), arguing that this statute violates their equal protection rights by excluding former Illinois voters now living in Puerto Rico, Guam, and the U.S. Virgin Islands ("USVI") from voting by Illinois absentee ballot in federal elections, while allowing former Illinois residents living in American Samoa and the Northern Mariana Islands ("NMI") to

vote absentee. Second, the plaintiffs contend that Illinois MOVE and the Uniformed and Overseas Citizen Absentee Voting Act ("UOCAVA"), infringe upon their substantive due process right to interstate travel.

As discussed below, the court concludes that Illinois MOVE does not violate the plaintiffs' equal protection rights because this statute's different treatment of former Illinois residents living in various U.S. territories is rationally related to legitimate state interests. These legitimate state interests include the synchronization of Illinois MOVE with applicable federal overseas and absentee voting laws such as the UOCAVA's predecessor statute, the Overseas Citizens Voting Rights Act ("OCVRA"). In arriving at this conclusion, the court rejects the plaintiffs' request for strict scrutiny review of Illinois MOVE and applies instead the more lenient rational basis review.

The plaintiffs' briefs focus extensively on the fact that Illinois MOVE tracks the language of the UOCAVA's predecessor statute, the OCVRA, instead of the more recent UOCAVA. However, the court notes that the practical effect of Illinois MOVE's alleged "outdatedness" is the enfranchisement of *more* former Illinois citizens living in U.S. territories than federal law currently provides. This consequence of enhanced absentee voting rights does not create a constitutional inequality because Congress specifically has authorized the states to provide more generous voting rights than those provided by the UOCAVA.

The court also rejects the plaintiffs' argument that Illinois MOVE and the UOCAVA unconstitutionally burden their right to interstate travel. The plaintiffs' inability to vote in federal elections by absentee ballot in their respective territories stems not from a violation of their right to travel, but from the constitutional status of Puerto Rico, Guam, and the USVI.

Thus, the court denies the plaintiffs' second motion for summary judgment and grants the federal defendants' cross-motion for summary judgment.

I. LEGAL ARGUMENT

A. RELEVANT STATUTES: the OCVRA, the UOCAVA, and Illinois MOVE

Before turning to the parties' summary judgment arguments, the court first identifies the three statutes involved in the court's ruling and the key definitions of each:

The Overseas Citizens Voting Rights Act (OCVRA), Pub. L. 94-203, 89 Stat. 1142, was enacted in 1976 and provided uniform procedures for absentee voting in federal elections. This federal statute imposed a range of responsibilities on the states, including Illinois, relating to absentee voting by citizens of the United States residing overseas, as those terms are defined in the statute. It has now been repealed but nevertheless is relevant in this case. It contained the following definitions:

- "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands. 42 U.S.C. § 1973dd(2).

- "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands, but does not include American Samoa, the Canal Zone, the Trust Territory of the Pacific Islands, or any other territory or possession of the United States. 42 U.S.C. § 1973dd(3).

The Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), 52 U.S.C. § 20302, replaced the OCVRA in 1986. It also imposes a range of responsibilities on the states, including Illinois, relating to absentee voting in federal elections by uniformed service members or overseas voters, as those terms are defined in the statute. It contains the following definitions:

- "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa. 52 U.S.C. § 20310(6).

- "United States," where used in the territorial sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa. 52 U.S.C. § 20310(8).

Illinois MOVE, 10 Ill. Comp. Stat. § 5/20-1 et seq., likewise addresses absentee voting for Illinois residents who live overseas. It contains the following relevant definition:

- "Territorial limits of the United States" means each of the several States of the United States and includes the District of Columbia, the Commonwealth of Puerto Rico, Guam and the Virgin Islands; but does not include American Samoa, the Canal Zone, the Trust Territory of the Pacific Islands or any other territory or possession of the United States. 10 Ill. Comp. Stat. § 5/20-1(1).

Putting these three statutes together, the following result occurs: under the now repealed OCVRA, former Illinois residents living in Puerto Rico, Guam, and the USVI were not eligible to vote by absentee ballot because they were included within the statute's definitions of "State" and the "United States." Former Illinois residents living in the NMI and American Samoa were not similarly included in these definitions and thus could vote absentee. Under the UOCAVA, the same result occurred *except* that American Samoa also was included within the definition of "State" and "United States" so former Illinois residents living in American Samoa lost the ability to vote by absentee ballot. Under Illinois MOVE, which tracks the language of the OCVRA (the reason for this will be discussed at length below), American Samoa and the NMI are not included within the definition of the "[t]erritorial limits of the United States" and thus former Illinois residents living in either American Samoa or the NMI retain the right to vote by absentee ballot, although former Illinois residents living in Puerto Rico, Guam, and the USVI are not afforded this right.[1]

Illinois MOVE's tracking of the OCVRA instead of the UOCAVA creates a difference in treatment as to American Samoa that goes to the heart of the plaintiffs' equal protection

[1] A more detailed description of the interaction between the UOCAVA and Illinois MOVE is contained in the court's prior order. *See* Dkt. 63, at 8-10.

argument: under Illinois MOVE, former Illinois residents living in American Samoa may vote by absentee ballot. Had Illinois updated its election laws following the OCVRA's repeal in 1986 to mirror the newly enacted UOCAVA, these residents of American Samoa would have lost their right to absentee vote.

B. EQUAL PROTECTION UNDER ILLINOIS MOVE

Having identified the operative statutes and their effect upon territorial residents, the court moves to the plaintiffs' first argument: that Illinois MOVE violates their right to equal protection under the 14th Amendment of the Constitution because they (residents of Puerto Rico, Guam, and the USVI who were formerly registered to vote in Illinois) are denied the right to vote absentee in federal elections while former Illinois citizens living in American Samoa and the NMI are afforded this right. The plaintiffs also focus upon the fact that Illinois MOVE tracks the language of the repealed OCVRA and thus treats American Samoa differently from the more recent UOCAVA. This, they contend, is arbitrary and violates their right to equal protection. The plaintiffs maintain that Illinois MOVE's disparate treatment of former Illinois residents living in various U.S. territories violates the Equal Protection Clause under any level of scrutiny, but they seek the application of a strict scrutiny standard of review.[2]

[2] The court limits its analysis of Illinois MOVE to American Samoa only. The plaintiffs allege that Illinois MOVE is arbitrary because it treats former Illinois residents now living in American Samoa **and the NMI** differently from similarly situated person livings in Puerto Rico, Guam, and the USVI. However, in its prior order, the court discussed at great length the NMI's unique historical relationship with the United States and expressly found that the UOCAVA's treatment of the NMI survives rational review scrutiny. Illinois MOVE and the UOCAVA treat the NMI identically: under both statutes, former Illinois residents living in the NMI may vote by absentee ballot. The court applies to Illinois MOVE the rational basis arguments contained in its prior order and finds that Illinois MOVE's treatment of the NMI—which mirrors that of the UOCAVA—is rationally based. There is no reason to recreate the wheel with respect to the NMI where there are no relevant differences between the two statutes and where it is clear that the federal government's treatment of the territories informs the states' voting laws, regardless of whether the states retain control over the mechanics of voting. The court therefore rejects the plaintiffs' argument that "Illinois has no comparable 'unique relationship' with the NMI . . .[and thus] the [c]ourt's grounds for sustaining UOCAVA do not apply to [Illinois] MOVE." Pls.' Mot., Dkt. 71, at 5.

A. Standard of Review

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Amend. XIV, § 1. "The guarantee of equal protection coexists, of course, with the reality that most legislation must classify for some purpose or another." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010). When evaluating an equal protection claim, the court must first determine the appropriate standard of review, whether "strict scrutiny" or "rational basis." *See City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 452 (1985); *Sweeney v. Pence*, 767 F.3d 654, 668 (7th Cir. 2014) (noting that "[i]f either a suspect class or fundamental right is implicated, 'the government's justification for the regulation must satisfy the strict scrutiny test to pass muster under the Equal Protection Clause.' But if neither condition is present, the proper standard of review is rational basis") (citations omitted).

The plaintiffs argue that they comprise a suspect class, thereby giving rise to strict scrutiny, because "historical experience has shown that Territorial residents have been effectively locked out of the political process." Pls.' Mot., Dkt. 71, at 6.[3] Alternatively, the plaintiffs argue that rational basis review is applicable. The court examines each standard of review to determine which is applicable.

[3] In its first motion for summary judgment, the plaintiffs did not advance a suspect class theory but instead sought to establish an equal protection violation based upon the existence of a fundamental right. This was unsuccessful. In its prior order, the court concluded, as have many other courts, that citizens residing in territories do not have a constitutional right to vote in federal elections in the same manner as citizens of the 50 states, and, further, that in the absence of a constitutional right to vote, there can be no violation of a fundamental right giving rise to strict scrutiny review. *See* Prior Order, Dkt. 63, at 24; *see also Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2008) ("Citizens . . . living in U.S. territories possess more limited voting rights than U.S. citizens living in a State."). Stripped of their ability to make a "fundamental right" argument based on their right to vote, the plaintiffs now alight upon the "suspect class" language as a new approach to defeating rational basis review in favor of strict scrutiny review.

1. Strict Scrutiny Based on a Suspect Class

Classifications based on sex, race, alienage, and nationality are inherently suspect. *See Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality). The Supreme Court first articulated the term "suspect class," along with its corresponding indicia of "suspectness," in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), where the Court addressed whether poor school districts in Texas comprised a suspect class. Answering in the negative, the Court noted that: "[t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id*. at 28; *see also Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 128 S. Ct. 2146, 2147 (2008) ("equal protection jurisprudence has typically been concerned with governmental classifications that 'affect some groups of citizens differently than others'") (citation omitted); *McCauley v. City of Chicago*, No. 09 C 2604, 2009 WL 3055312, at *3 (N.D. Ill. Sept. 18, 2009), *aff'd on other grounds*, 671 F.3d 611 (7th Cir. 2011).

The plaintiffs' argument that they are a suspect class is unpersuasive for a number of reasons. First, the plaintiffs have not provided the court with any authority supporting their contention that they comprise a suspect class based on their political powerlessness. The plaintiffs' discussion of cases where strict scrutiny has been applied to various statutes based on a suspect class do not involve U.S. territories or voting rights, and the plaintiffs have not drawn the court's attention to any aspects of these cases that are relevant or compelling to the issues presented here. *See, e.g.*, *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012) (finding a suspect class and applying heightened scrutiny to a statute that prohibited legally admitted aliens from

working as pharmacists in New York); *Adusumelli v. Steiner*, 740 F. Supp. 2d 582 (S.D.N.Y. 2010) (finding a suspect class and applying strict scrutiny to a statute preventing nonimmigrant aliens on temporary work visas from working as pharmacists in New York). It appears that some of the cases the plaintiffs cite were chosen because the statutes in those cases created improper classifications based on alienage, but it is settled law that Congress, and the states when implementing federal law, may continue to treat residents of territories differently from residents of the 50 states. *See Igartua v. U.S.* , 86 F. Supp. 3d 50, 55-56 (D. Puerto Rico 2015) (U.S. territories cannot be defined as "States" for purpose of Articles I and II of the Constitution); *Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) (citizens living in territories possess more limited voting rights than citizens living in a State). It has been long established that residents of U.S. territories "lack equal access to channels of political power." *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991). However, this lack of political power is consistent with Congress's right under the Territory Clause of the Constitution, U.S. Const. Art. IV, § 3, cl. 2 (the "Territory Clause"), to treat the U.S. territories differently, including the manner in which residents of the territories are, or are not, enfranchised with the right to vote in federal elections. The plaintiffs certainly are unhappy with their lack of political influence, but their attempt to create a suspect class based on this reality is not supported by legal precedent.

Furthermore, numerous other courts have held that Congress's power to make laws regarding the territories is subject to rational basis review. *See, e.g.*, *Harris v. Rosario*, 446 U.S. 651, 651 (1980) (applying rational basis review to federal statute providing less federal financial assistance to Puerto Rican families than families living in the 50 states); *Besinga v. U.S.*, 14 F.3d 1356, 1360 (1994) (holding that "[b]ecause the Philippines was a territory of the United States at the relevant time, this dispute implicates Congress' power to regulate territorial affairs under the

Territory Clause. Controlling precedent dictates rational basis review); *Romeu v. Rossello*, 121 F. Supp. 2d 264, 282 (S.D.N.Y. 2000) (declining to find Puerto Ricans a suspect class for purposes of the Equal Protection Clause and applying rational review to provisions of the UOCAVA and New York election law). The court joins in this conclusion.

Additionally, the court finds without merit the plaintiffs' argument that because the Constitution includes no provision granting the 50 states the authority to treat residents of the territories differently, Illinois MOVE's disparate treatment of territorial residents should be reviewed under a heightened level of scrutiny. This unavailing argument collapses the separation of powers inherent in our system of federalism. Only Congress "shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. The states' power, meanwhile, is established by the Tenth Amendment to the Constitution, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X. It is well-established that the states retain the power to conduct elections, but this power is informed by the federal government's equally well-established ability to treat the territories differently from the 50 states pursuant to the Territory Clause. *See Iguarta-De La Rosa v. U.S.*, 417 F.3d 145, 147 (1st Cir. 2005) (the territories are not considered "states" within the meaning of the Constitution). The plaintiffs' attempt to meld the distinct powers of the federal and state governments into one pot by arguing that the states have no broad authority to treat residents of the territories differently, thus triggering strict scrutiny review of a statute that does so (*see* Pls.' Mot., Dkt. 71, at 10), is without merit.

For these reasons, the court finds that former Illinois residents currently living in U.S. territories who may not vote by absentee ballot in federal elections do not constitute a suspect class. The plaintiffs' desire to participate in the federal election process is understandable, but the plaintiffs have not persuaded the court that they constitute a suspect class for purposes of engendering strict scrutiny of Illinois MOVE. Rational basis review is appropriate.[4]

2. Rational Basis Review as Applied to Illinois MOVE

On rational basis review, a classification in a statute enjoys a strong presumption of validity. *See Lyng v. Automobile Workers*, 485 U.S. 360, 370 (1988). "[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *F.C.C. v. Beach Commc'n*, 508 U.S. 307, 314-15 (1993) (citations omitted). Additionally, because a legislature is not required to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id*. at 315; *see also Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification"). As long as there is "a rational relationship between the disparity of treatment and some legitimate governmental purpose," the statute survives rational basis scrutiny. *City of Chicago v. Shalala*, 189 F.3d 598, 605 (7th Cir. 1999)

[4] The court also notes another problem with the plaintiffs' attempt to characterize themselves as a suspect class: doing so raises potential equal protection issues as to all other persons residing in U.S. territories who were not once Illinois residents. As noted in *Romeu*, "extend[ing] 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 . . . would have created a distinction of questionable fairness among Puerto Rican U.S. Citizens." 265 F.3d at 125. Similarly here, and as this court noted in its prior order, the plaintiffs' requested relief "would not result in a universally applicable rule that permits all United States citizens in Puerto Rico, Guam, and the U.S. Virgin Islands to vote in federal elections." *See* Prior Order, Dkt. 63, at 40 & n.8.

(citations omitted). With these guidelines in mind, the court turns to the language of Illinois MOVE and the parties' arguments.

Illinois MOVE prevents former Illinois citizens living in Puerto Rico, Guam and the USVI from voting absentee in federal elections. But it grants this right to similarly situated persons living in American Samoa (and the NMI). Illinois MOVE is more expansive than the UOCAVA with respect to American Samoa. The plaintiffs maintain that Illinois MOVE's failure to mirror the UOCAVA as to American Samoa lacks a rational basis and is arbitrary.

Defendants the Board of Election Commissioners for the City of Chicago and Marisel Hernandez respond that a rational basis exists for the disparate treatment under Illinois MOVE of former Illinois residents living in the various territories. They explain that in 1979, the State of Illinois amended its election laws to define the territorial limits of the United States in such a way as to track precisely the language and provisions of the OCVRA. The State of Illinois did not similarly amend its election laws following the OCVRA's repeal and the UOCAVA's enactment. These state defendants do not provide any explanation for this inaction other than to say it was a "product of historical timing." Defs.' Mem., Dkt. 74, at 8-11.

Any rational justification of an embattled statute will overcome an equal protection challenge. The state defendants posit that Illinois MOVE mirrored the OCVRA beginning in 1979 to stay in compliance with federal law, and that this mirrored language simply remained in place even after the OCVRA was repealed in 1986. The court accepts this explanation and finds that Illinois had (and has) a legitimate state interest in staying abreast of federal voting rights laws. The adoption of language into Illinois MOVE that mirrored federal statutes such as the OCVRA legitimately achieved this purpose.

The court also finds that Illinois—certainly at least until 1986—had a legitimate state interest in treating American Samoa differently from Puerto Rico, Guam, and the USVI. American Samoa became a United States territory in 1900, "when the traditional leaders of the Samoan Islands of Tutuila and Aunu'u voluntarily ceded their sovereign authority to the United States Government." *Tuaua v. U.S.*, 788 F.3d 300, 302 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016); *see also* Hon. Fofo I.F. Sunia of American Samoa, Address at the University of San Diego (May 14, 1986), 132 Cong. Rec. E1664-01, 1986 WL 791182. However, in 1949, this nation of islands and coral atolls rebuffed the Department of the Interior's attempt to introduce Organic Act 4500, which sought to incorporate American Samoa into the United States in the same fashion as already had been achieved in Puerto Rico and the USVI, and soon would be achieved in Guam. *See* http://www.newworldencyclopedia.org/entry/American_Samoa (last visited Oct. 27, 2015).[5]

American Samoa strives to preserve its traditional way of life, called *fa'a Samoa*, notwithstanding its growing ties with the United States. *See* U.S. Gov't Accountability Office, GAO-08-1124T (Sept. 18, 2008), at 6 (hereinafter "GAO Report"). American Samoa's constitution protects the Samoan tradition of communal ownership of ancestral lands by large, extended families, and "American Samoans take pride in their unique political and cultural practices, and . . .[their] history free from conquest or involuntary annexation by foreign powers." *Tuaua v. U.S.*, 951 F. Supp. 2d 88, 91 (D.D.C. 2013).

Federal law classifies American Samoa as an "outlying possession" of the United States. *See* Immigration and Naturalization Act ("INA") § 101(a)(29), 8 U.S.C. § 1101(a)(29). People

[5] An Organic Act is an act of Congress establishing a territory of the United States. The U.S. entered into an Organic Act with Puerto Rico in 1900, with the USVI in 1936 (repealed and replaced in 1954), and with Guam in 1950. *See* Pub. L. 56–191, 31 Stat. 77 (Puerto Rico); Pub. L. 64–389, 39 Stat. 1132 (USVI); (Pub. L. 83–517, 68 Stat. 497) (USVI); and 48 U.S.C. § 1421 et seq.) (Guam). In the absence of an Organic Act, a territory is classified as "unorganized."

born in American Samoa are U.S. nationals but not U.S. citizens at birth. *See* INA § 308(1), 8 U.S.C. § 1408(1). The State Department's Foreign Affairs Manual ("FAM") categorizes American Samoa as an unincorporated territory and states that "the citizenship provisions of the Constitution do not apply to persons born there." 7 FAM § 1125.1(b).

This basic understanding of the history of American Samoa—which illustrates that American Samoa has not followed the same path as Puerto Rico, Guam, and the USVI as concerns incorporation, citizenship, and cultural practices—leads the court to conclude that a rational basis supported Illinois' decision with respect to Illinois MOVE to track the language of the OCVRA and to exclude American Samoa from its definition of "[t]erritorial limits of the United States." At the time of the OCVRA's enactment, the federal government viewed American Samoa more like a foreign country than as part of the United States' territorial limits.

But what of the fact, as the Plaintiffs repeatedly point out, that Illinois neglected to update Illinois MOVE following the OCVRA's repeal and the UOCAVA's enactment? The plaintiffs maintain that Illinois' failure to update Illinois MOVE is an irrational act that creates an unconstitutional disparity among former Illinois residents living in the various territories. Again, the court disagrees. While it is true that Illinois MOVE remains predicated on an approach to American Samoa that was informed by the historical context of the 1970s and does not reflect the current treatment of American Samoa under the UOCAVA, the practical effect of Illinois MOVE's outdatedness is that it provides *more generous* voting rights to former Illinois residents than would exist had Illinois updated its laws to mirror the UOCAVA. And, critically, this state-based electoral generousness is clearly permitted under the OACAVA. An examination of the legislative history of the UOCAVA indicates a clear intention to preserve the ability of states to extend voting rights to individuals disenfranchised by the UOCAVA. *See* H.

R. Rep. No. 99-765, at 19, 1986 WL 31901, at *19 (deeming unnecessary for inclusion in the UOCAVA any language contained in the OCVRA stating that "this Act will not be deemed to require registration in any State in which registration is not required as a precondition to voting in a Federal election *nor will it prevent any State from adopting any voting practice which is less restrictive than the practices prescribed by this Act*" because the UOCAVA would not impinge on either activity) (emphasis added). The UOCAVA provides the voting practices floor upon which Illinois must stand, but at the same time it grants Illinois the right to expand upon these practices. The UOCAVA essentially provides a built-in rational basis explanation for states that failed to implement any narrowing of voting rights engendered by the UOCAVA.

In sum, the court denies the plaintiffs' equal protection challenge as to Illinois MOVE. It is true that Illinois MOVE is premised upon a repealed statute, but Illinois' failure to amend its election laws after the UOCAVA's passage resulted only in the ability of former Illinois residents living in American Samoa to retain their right to cast absentee ballots in federal elections. Any disparity created by Illinois MOVE's outdatedness is cured by the UOCAVA's express endorsement of the states' ability to provide greater voting rights than those provided in the UOCAVA. Additionally, the court finds that American Samoa's unique relationship with the United States rationally supports Illinois' decision to track the language of the OCVRA back in 1979. It matters not that Illinois continues to do so almost 40 years later.

The plaintiffs' attempt in this second round of summary judgment motions to pit federal and state voting statutes against each in an effort to find irrationalities that may further their goal of federal election enfranchisement cannot succeed. The underlying reality in this case is that Congress retains the right to dictate the terms of its relationship with the U.S. territories, and these terms sometimes shift and change depending on the individual territory and the historical

context informing each relationship. But even in the face of these shifts and changes, the federal statutes are not so rigid as to deprive the states of their ability to provide greater voting rights than those enumerated under federal law. The court's ruling today—which finds no unconstitutionality with regards to Illinois MOVE's treatment of American Samoa in a fashion that differs from the UOCAVA, or of its treatment of American Samoa and the NMI in a manner that is different from Puerto Rico, Guam, and the USVI—is grounded in large measure on the fact that Illinois retains the right to enfranchise persons disenfranchised by the UOCAVA and by the fact that Illinois' absentee and overseas voting laws are informed by rationally-based federal statutes constitutionally curtailing the federal election absentee voting rights of residents of United States territories.

C. Right to Interstate Travel

The court now addresses the plaintiffs' second argument: that the UOCAVA and Illinois MOVE violate their "fundamental right to interstate travel, which is protected by the substantive component of due process." Pls.' Mot., Dkt. 71, at 2.

"The right to travel interstate, although nowhere expressed in the Constitution, has long been recognized as a basic fundamental right." *Andre v. Bd. of Trs. of Village of Maywood*, 561 F.2d 48, 52 (7th Cir. 1977) (citation omitted); *see also Perez v. Personnel Bd. of City of Chicago*, 690 F. Supp. 670, 673 (N.D. Ill. 1988) (noting that "[t]he right to interstate travel lacks any precise textual source but is considered fundamental to our federal system"). As noted in *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled on other grounds by Edelman v. Jordan*, 94 S. Ct. 1347 (1974):

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

The right to travel encompasses three different components: "the right of a citizen of one State to enter and leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). That being said, as the plaintiffs concede, it has not been determined conclusively whether the right to travel applies to travel between the 50 states and the U.S. territories. *See* Pls.' Mot., Dkt. 71, at 11 n.8.

If anything, the plaintiffs' arguments come closest to invoking the first prong of the three-part test—the right to leave one state and enter another. But neither the UOCAVA nor Illinois MOVE infringe upon the plaintiffs' right to leave Illinois and travel to a U.S. territory. They are free to come and go as they please, although their decisions to relocate to Puerto Rico, Guam, or the USVI have come at a cost. They moved outside of the State of Illinois and became residents of U.S. territories "in a constitutional scheme that allocates the right to appoint electors to States but not territories." *Romeu*, 265 F.3d at 126. As further noted in *Romeu*:

> A citizen's decision to move away from her State of residence will inevitably involve certain losses. She will lose the right to participate in that State's local elections, as well as its federal elections, the right to receive that State's police protection at her place of residence, the right to benefit from the State's welfare programs, and the right to the full benefits of the State's public education system. Such consequences of the citizen's choice do not constitute an unconstitutional interference with the right to travel.

Id. at 126-27. By moving to their respective territories, the plaintiffs gained the rights and privileges of citizens of their new residence. Their loss of the right to vote in federal elections was not caused by the UCOAVA or Illinois MOVE, but by their own decision to relocate. *See* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 Brook. L. Rev. 466 (2016)

(opining that "the right to travel does not give citizens an unconditional right to emigrate without cost or consequence").

Nor do the plaintiffs' arguments successfully invoke the second and third prongs of the right to travel analysis. Neither the UOCAVA nor Illinois MOVE infringe upon the plaintiffs' right to be treated as welcome visitors in their respective territories or infringe upon their right to be treated like other citizens of their respective territories. *See Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 261 (1974) ("The right of interstate travel must be seen as insuring new residents the same right to vital governmental benefits and privileges in the States to which they migrate as are enjoyed by other residents."). Indeed, it is the very fact that the plaintiffs are treated the same as the other citizens of Puerto Rico, Guam, and the USVI that the plaintiffs find so unappealing. In truth, it is the denial of special treatment—the ability to vote by absentee ballot in federal elections (because of their former nexus to Illinois) despite the fact that citizens of Puerto Rico, Guam, and the USVI do not have the right to vote in federal elections—that the plaintiffs now try to convert into a due process violation based on their right to travel. But again, the denial of special treatment does not equate with an unconstitutional violation of the right to travel. *See Romeu*, 265 F.3d at 127. The plaintiffs' inability to vote by absentee ballot in their respective territories stems not from a violation of their right to travel, but from the constitutional status of Puerto Rico, Guam, and the USVI. *See Romeu*, 121 F. Supp. 2d at 278.

In *Califano v. Gautier Torres*, 435 U.S. 1 (1978), the Court addressed whether the Social Security Act's exclusion of Puerto Rico from Supplemental Security Income ("SSI") benefits constituted an interference with the plaintiff's constitutional right.[6] In that situation, the plaintiff

[6] The Social Security Act's 1972 amendment defined eligible individuals for SSI benefits as only those persons living within the 50 states and the District of Columbia. 42 U.S.C. § 1382c(e). However, as noted in *Califano*, 435 U.S. at 2, persons in Puerto Rico not eligible to receive SSI benefits were still eligible to receive benefits under pre-existing programs.

was a former resident of Connecticut who had moved to Puerto Rico. While noting that "laws prohibiting newly arrived residents in a State or county from receiving the same vital benefits as other residents unconstitutionally burdened the right of interstate travel," the Court refused to extend that doctrine to the premise that "a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came." *Id.* at 4. The Court added that "[i]f there ever could be a case where a person who has moved from one State to another might be entitled to invoke the law of the State from which he came as a corollary of his constitutional right to travel, this is surely not it." *Id.* at 5.

Nor does the court find that this is such a case. The court already has rejected the plaintiffs' attempts to find Illinois MOVE and the UOCAVA unconstitutional. The court can find no way to allow the plaintiffs to create a right to travel violation premised upon these constitutional statutes.

II. CONCLUSION

For the reasons set forth above, the court denies the plaintiffs' second summary judgment motion [70] and grants the federal defendants' cross-motion for summary judgment [77]. The clerk is directed to enter final judgment accordingly.

Date: October 28, 2016

/s/

Joan B. Gottschall
United States District Judge

Pidot v. New York State Bd. of Elections

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

PHILIP PIDOT, NANCY HAWKINS and STEVEN AXELMAN, individually and as representatives of eligible Republican Party voters in Suffolk, Nassau and Queens Counties within New York's Third Congressional District,

Plaintiffs,

v.

NEW YORK STATE BOARD OF ELECTIONS; SUFFOLK COUNTY BOARD OF ELECTIONS; NASSAU COUNTY BOARD OF ELECTIONS; BOARD OF ELECTIONS IN THE CITY OF NEW YORK; PETER KOSINSKI and DOUGLAS KELLNER, in their official capacities as Commissioners and Co-Chairs of the New York State Board of Elections; ANDREW J. SPANO and GREGORY P. PETERSON, in their official capacities as Commissioners of the New York State Board of Elections; TODD D. VALENTINE and ROBERT A. BREHM, in their official capacities as Co-Executive Directors of the New York State Board of Elections; and JACK MARTINS,

Defendants.

Civil Action No.
1:16-CV-00859-FJS-CFH

STATEMENT OF INTEREST OF THE UNITED STATES

The United States of America ("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 any pending lawsuit. As pled, this matter may implicate the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. §§ 20301 *et seq.*, as amended by the Military and Overseas Voter Empowerment Act,

Pub L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) ("MOVE Act"). Congress has accorded the Attorney General broad enforcement authority over UOCAVA, 52 U.S.C. § 20307(a), and the United States has a substantial interest in defending UOCAVA's constitutionality.

The United States files this Statement for the limited purpose of explaining why the Court need not address Plaintiffs' constitutional challenge to UOCAVA to resolve this matter. The United States takes no position on any other issue at this time. However, should the Court conclude it must resolve Plaintiff's constitutional challenge, the United States respectfully notes its intent to intervene promptly to defend UOCAVA's constitutionality and to address other matters as appropriate, pursuant to Rule 5.1(c) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2403(a).[1]

I. BACKGROUND

Plaintiffs ask the Court to order Defendants to hold a new Republican federal primary election for New York's Third Congressional District ("primary election") with Plaintiff Philip Pidot and Defendant Jack Martins on the ballot. *See* Compl. ¶ 48. Absent relief, they argue, their First Amendment associational rights, Fourteenth Amendment equal protection rights, and, perhaps, rights under UOCAVA will be violated. *Id.* ¶¶ 54-69. As to the latter point, Plaintiffs contend that UOCAVA is unconstitutional if and only if the Court finds that a new primary election is warranted, but that UOCAVA's 45-day advance transmission requirement for mailing ballots to military and overseas voters bars that relief. *See id.* ¶¶ 47-53; 52 U.S.C.

[1] The United States calculates the deadline for seeking intervention to be September 12, 2016. FED. R. CIV. P. 5.1(c); 28 U.S.C. § 2403(a). The United States will, however, promptly comply with any order necessitating it to intervene prior to the statutory deadline.

§ 20302(a)(8)(A). But UOCAVA is neither the source of Plaintiffs' injury nor a bar to the relief Plaintiffs seek here. Accordingly, and consistent with constitutional avoidance principles, this Court need not address Plaintiffs' constitutional challenge to UOCAVA.

A. Statutory Background

UOCAVA, as amended by the MOVE Act, constitutes "a comprehensive series of requirements aimed at ending the widespread disenfranchisement of military voters stationed overseas." *United States v. Alabama*, 778 F.3d 926, 928 (11th Cir. 2015). UOCAVA thus requires that states permit absent uniformed services voters and overseas voters ("UOCAVA voters") "to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 52 U.S.C. § 20302(a)(1).[2] As relevant here, UOCAVA requires 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 (the "45-day advance transmission requirement"). *Id.* § 20302(a)(8)(A).

[2] UOCAVA defines "absent uniformed services voter" to include: (1) "a member of a uniformed service on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote"; (2) "a member of the merchant marine who, by reason of service in the merchant marine, is absent from the place of residence where the member is otherwise qualified to vote"; and (3) "a spouse or dependent of a [member of a uniformed service or the merchant marine] who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote." 52 U.S.C. § 20310(1). UOCAVA defines "overseas voter" to include: (1) "an absent uniformed services voter who, by reason of active duty or service is absent from the United States on the date of the election involved"; (2) "a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States"; and (3) "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." 52 U.S.C. § 20310(5).

As a failsafe, UOCAVA authorizes Chief State Election Officials to request waivers from the Department of Defense ("DOD")[3] if they cannot comply with UOCAVA's 45-day advance transmission requirement due to an undue hardship. *Id.* § 20302(g)(1). The DOD may grant a waiver in several enumerated circumstances, including where "[t]he State has suffered a delay in generating ballots due to a legal contest," and such an issue "creates an undue hardship for the State."[4] *Id.* § 20302(g)(2)(B).

In addition, absent hardship waivers, courts have ordered into effect remedial plans to vindicate UOCAVA voters' rights when UOCAVA voters would otherwise have been left without ample time to cast their ballots. *See* Consent Decree, *United States v. West Virginia*, No. 2:14-cv-27465 (S.D. W.Va. Nov. 3, 2014), ECF No. 5 at 4-5 (adopting a remedial plan to protect UOCAVA voters where an undue hardship waiver was rejected), *available at*

[3] UOCAVA requires the President to designate an executive department head to have primary responsibility for federal functions under UOCAVA. 52 U.S.C. § 20301. The Secretary of Defense was designated the Presidential designee by Executive Order 12642, 53 Fed. Reg. 21975 (June 8, 1988). The Secretary of Defense has delegated this authority to the Under Secretary of Defense (Personnel & Readiness) through DOD Directive 1004.04.

[4] State waiver applications must "explain the hardship preventing the state from complying with the forty-five day rule *and* propose a substitute timeline specifying how many days before the election UOCAVA voters will receive their ballots." *Alabama*, 778 F.3d at 930 (citing 52 U.S.C. § 20302(g)(1)(B)-(C)). Along with the substitute timeline, the application must articulate a "comprehensive plan to ensure that [UOCAVA] voters are able to receive absentee ballots which they have requested and submit marked absentee ballots to the appropriate State election official in time to have that ballot counted in the election for Federal office[.]" 52 U.S.C. § 20302(g)(1)(D). The Under Secretary of Defense for Personnel and Readiness reviews States' waiver applications, consults with the Department of Justice, and decides whether the applications do or do not meet the requirements for a one-time undue hardship waiver. *See* Decl. of David V. Simunovich in Supp. of Order to Show Cause, Ex. 8 (Federal Voting Assistance Program, Guidance on *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)* Ballot Delivery Waivers), ECF No. 22-8 at 9. For waivers sought on the basis of a delay due to a legal contest, the Presidential designee is required to respond within five business days of receipt. 52 U.S.C. § 20302(g)(3)(B).

https://www.justice.gov/crt/about/vot/misc/wv_uocava_cd.pdf (last visited Aug. 16, 2016); Memorandum-Decision and Order, *United States v. New York*, 1:10-cv-1214, ECF No. 59 at 2 (N.D.N.Y. Jan. 27, 2012) (ordering a UOCAVA-compliant primary date after hardship waivers granted for prior elections had proven inadequate), *available at* https://www.justice.gov/crt/about/vot/misc/ny_uocava_order.pdf (last visited Aug. 16, 2016). These plans typically involve extending the ballot receipt deadline for UOCAVA voters to afford these voters a full 45-day period in which to receive, mark, and return their ballots. *See, e.g.*, Consent Decree, *United States v. New York*, No. 1:10-cv-1214 (N.D.N.Y. Oct. 19, 2010), ECF No. 9 at 6-7, *available at* https://www.justice.gov/crt/about/vot/misc/ny_uocava10_cd.pdf (last visited Aug. 16, 2016); Settlement Agreement and Stipulated Motion for Entry of Order, *United States v. Vermont*, No. 5:12-cv-236 (D. Vt. Oct. 22, 2012), ECF No. 10 at 3, *available at* https://www.justice.gov/crt/about/vot/misc/vt_uocava_settlement12.pdf (last visited Aug. 16, 2016). Remedial court orders may also provide for alternative means of transmission and receipt of UOCAVA voters' ballots, allowing these voters to receive and return their ballots on an expedited basis via pre-paid express mail or electronic transmission. *See, e.g.*, Consent Decree, *United States v. Virgin Islands*, No. 3:12-cv-00069 (D.V.I. Sept. 7, 2012), ECF No. 10 at 8, *available at* https://www.justice.gov/crt/about/vot/misc/vi_cd.pdf (last visited Aug. 16, 2016). Through such remedial court orders, federal courts have ensured that UOCAVA voters' rights are protected to the extent possible. *See* Memorandum-Decision and Order, *United States v. New York*, 1:10-cv-1214, ECF No. 59 at 2 (N.D.N.Y. Jan. 27, 2012) (Sharpe, *J.*) ("It is unconscionable to send men and women overseas to preserve our democracy while simultaneously disenfranchising them while they are gone.").

B. Factual Background

On April 14, 2016, Plaintiff Pidot filed a designating petition with Defendant New York State Board of Elections ("SBOE") seeking to have his name placed on the ballot for the Republican nomination for New York's Third Congressional District. Compl. ¶¶ 22-23. Under an existing consent decree between New York and the United States entered by this Court, the Republican primary election for the Third Congressional District was scheduled to take place on June 28, 2016. *See* Compl., Ex. 1, ECF No. 1-1 at 1-2; *see also* Supplemental Remedial Order, *United States v. New York*, No. 1:10-cv-1214 (N.D.N.Y. Oct. 29, 2015), ECF No. 88, Decl. of Ernest A. McFarland in Supp. of Statement of Interest of the United States, Ex. A. UOCAVA's 45-day advance transmission deadline for that election fell on May 14, 2016.

On April 27, 2016, objectors to Pidot's petition commenced a special proceeding in New York State Supreme Court, Nassau County, seeking to invalidate Pidot's designating petition. Compl. ¶ 24. On May 4, 2016, in response to this invalidation proceeding, Defendant SBOE determined that Pidot's designating petition contained too few valid signatures to qualify for inclusion on the primary election ballot. *Id.* ¶ 25.

On May 6, 2016, Pidot commenced a special proceeding under Article 16 of New York State Election Law in New York State Supreme Court, Nassau County, to dispute the rejection of his designating petition. *Id.* ¶ 26. The court dismissed Pidot's suit on May 11, 2016 for failure to effect proper service of process. *Id.* ¶ 28. That decision came three days before the May 14, 2016, 45-day advance transmission deadline for UOCAVA ballots.

On May 18, 2016, Pidot moved to vacate the trial court's order dismissing his petition. *Id.* ¶ 30. The Supreme Court, Nassau County denied this motion on June 7, 2016, and Pidot

appealed to the Appellate Division, Second Department. *Id.* ¶¶ 30-31. On June 17, 2016, that court reversed the trial court's dismissal order and remanded for a determination of the merits of Pidot's petition. *Id.* ¶ 31.

The state trial court held a three-day hearing and, on June 24, 2016, ruled that Pidot's petition contained enough valid signatures to place his name on the ballot. *Id.* ¶¶ 36, 39. But, given that the primary election remained scheduled for June 28, 2016, Pidot's counsel conceded that adding Pidot's name to the ballot for the June 28, 2016 primary election was infeasible. Compl., Ex. 2, ECF No. 1-2 at 2. The trial court agreed, noting multiple reasons preventing Pidot's addition to the ballot in the short period of time remaining, including the long-passed deadline for transmitting UOCAVA ballots. *Id.*

Although conceding that Pidot's name could not be added to the June 28, 2016 ballot, Pidot's counsel sought alternative relief in the form of a new primary election date. *Id.* at 2-3. The state trial court denied this relief, however, explicitly noting the state court defendants' arguments that new elections are rarely granted under New York State law. *Id.* at 3. The trial court did not cite UOCAVA as an additional reason for denying Pidot's request for a new election. Nor would UOCAVA have in any way limited the grant of a new primary election set for a date allowing timely transit of ballots to UOCAVA voters.

On July 7, 2016, represented by new counsel, Pidot appealed from the state trial court's order denying him relief. *See* Decl. of David V. Simunovich in Supp. of Order to Show Cause, Ex. 7, ECF No. 22-7 at 10, 25. On July 21, 2016, the Appellate Division affirmed the trial court decision in all respects. *Id.*, Ex. 9, ECF No. 22-9 at 1. As to Pidot's request to be placed on the June 28, 2016 ballot, the appellate court found that "[t]he Supreme Court properly concluded

based, inter alia, on the concession of Pidot's counsel, that it would be impossible to grant Pidot the relief he specifically requested in his petition, namely, to include his name on the June 28, 2016, primary ballot." *Id.* at 2 (internal citation omitted). The appellate court similarly rejected Pidot's request for a rescheduled primary election, noting that this relief had not been requested in Pidot's petition and had only been sought orally by his counsel on the last day of the trial court hearing. *Id.* The Appellate Division's decision does not mention UOCAVA or cite it as a reason for not ordering a new election.

C. Procedural History

On July 13, 2016, Plaintiffs Pidot, Nancy Hawkins, and Steven Axelman filed this action.[5] All three Plaintiffs, as purported voters in the Third Congressional District, along with Pidot, as a candidate seeking election from this district, argue that their First and Fourteenth Amendment rights, and possibly their rights under UOCAVA, have been violated by the failure to hold a new primary election. Compl. ¶¶ 47-69. Seeking a Court-ordered primary election as a remedy, they argue that, to the extent such an election conflicts with UOCAVA's 45-day advance transmission requirement, this Court should require Defendant SBOE to seek a hardship exemption under UOCAVA. *Id.* at 17. Should a UOCAVA exemption be unavailable or infeasible, Plaintiffs alternatively seek a declaration that UOCAVA's 45-day advance transmission requirement is unconstitutional as applied here. *Id.*

When filing their Complaint, Plaintiffs requested that this case be designated as related to

[5] On June 27, 2016, following the state trial court's decision, Pidot and Hawkins filed a *pro se* complaint in the United States District Court for the Eastern District of New York. Compl. ¶ 40. On July 5, 2016, Plaintiffs' present counsel entered an appearance in the action and voluntarily dismissed it without prejudice pursuant to Federal Rule of Civil Procedure 41(a). *Id.* ¶ 41.

United States v. New York, No. 10-cv-1214 (N.D.N.Y. filed Oct. 12, 2010), a separate case in which this Court set the primary election calendar for federal Congressional elections throughout New York. *See* Notice of Related Cases, ECF No. 6. On July 18, 2016, the Honorable Gary L. Sharpe, who presided over the previous matter, denied Plaintiffs' request. *See* Order, July 18, 2016, ECF No. 11.

Along with their Complaint, Plaintiffs also filed notice that this action involves a challenge to the constitutionality of UOCAVA, pursuant to Federal Rule of Civil Procedure 5.1(a)(1)(A). *See* Notice to Court that Action Involves Challenge to Constitutionality of Federal Statute, ECF No. 2. On July 19, 2016, this Court ordered that the question of UOCAVA's constitutionality be certified to the United States Attorney General, pursuant to Rule 5.1(b) and 28 U.S.C. § 2403. *See* Order, July 19, 2016, ECF No. 16. Under Rule 5.1(c), the United States has 60 days from the filing of Plaintiffs' notice to intervene in this litigation (i.e., September 12, 2016). FED. R. CIV. P. 5.1(c). In the interim, this Court may reject Plaintiffs' constitutional challenge, but it may not enter a final judgment holding UOCAVA unconstitutional before the time to intervene expires. *Id.*

II. ARGUMENT

This Court need not reach Plaintiffs' potential claim regarding UOCAVA's constitutionality to resolve this matter. That is because the state courts' refusals to order a new election for New York's Third Congressional District were premised on state law grounds only. UOCAVA played no role. Plaintiffs' alleged harms, therefore, if any, resulted solely from state courts applying state law -- and not from any barrier imposed by UOCAVA.

Nor does UOCAVA present any barrier to relief now. To the extent the Court believes it appropriate to order a new election, that election can be conducted in a manner that fully protects UOCAVA voters' rights. Accordingly, because UOCAVA imposed no harm below, and because it presents no barrier to relief here, its constitutionality is not implicated by this case.[6]

A. UOCAVA Played No Role In Causing The Harms Alleged Here.

Plaintiffs ask this Court to order what New York State courts applying state law have already declined to grant -- a new federal primary election. They also ask this Court to declare UOCAVA's 45-day advance transmission requirement unconstitutional to the extent that it bars that requested relief. But because UOCAVA played no role in blocking the relief Plaintiffs seek here, its constitutionality is not at issue.

In state Supreme Court, Plaintiff Pidot initially requested that his name be placed on the ballot for the then-pending June 28, 2016 Republican primary election. The court denied that request, after Pidot conceded there was not enough time to grant this relief. Compl., Ex. 2, ECF No. 1-2 at 2. Although the state trial court cited UOCAVA as one of several reasons for not placing Pidot on the ballot for the scheduled primary election, UOCAVA appeared to play no role whatsoever in the court's rejecting Pidot's eleventh hour alternate request *for a new election* (the relief Pidot seeks here). *Id.* at 2-3. On the latter point, the trial court noted only New York's argument that ordering a new election lacked precedent under state law absent evidence of fraud. *Id.* at 3.

[6] As noted, should the Court disagree and find that an analysis of UOCAVA's constitutionality is unavoidable under the circumstances, the United States would expect to intervene in this action to defend UOCAVA's constitutionality on or before September 12, 2016 (or as ordered by the Court). FED. R. CIV. P. 5.1(c); 28 U.S.C. § 2403(a).

The state trial court's failure to cite UOCAVA in denying Pidot's request for a new election was not likely an oversight. At the time of the trial court's decision on June 24, 2016, more than four months remained before the general election, and UOCAVA's 45-day advance transmission requirement posed no bar whatsoever to a rescheduled primary election. Ample time remained to schedule a new UOCAVA-compliant primary election without affecting preparation for the general election.

Nor did UOCAVA play any role in the Appellate Division's refusal to order a new election. Its decision notes only that Pidot's request for a new election was procedurally defective, having been raised for the first time during the state trial court hearing. Decl. of David V. Simunovich in Supp. of Order to Show Cause, Ex. 9, ECF No. 22-9 at 2. As with the trial court ruling, UOCAVA was not and could not have been the basis for the Appellate Division's refusal to order a new election. At the time of the Appellate Division's decision, sufficient time existed to schedule a new primary election that complied fully with UOCAVA's 45-day advance transmission requirement.

Thus, because UOCAVA played no role whatsoever in the decisions by New York State courts to deny Pidot's request for a new election, UOCAVA could not have caused any of the harms alleged here.[7]

[7] Plaintiffs allege that New York's failure to seek a hardship waiver exemption violated UOCAVA. Pls.' Mem. of Law in Supp. of Their Request to Proceed by Order to Show Cause and For a New Election, ECF No. 20 at 12-13. To remedy this alleged violation, they ask the Court to order the state to seek a "hardship exemption" from DOD -- but only "if it is determined that a Republican primary election for the Third Congressional District cannot be held in compliance with UOCAVA's 45-day requirement[.]" *Id.* at 14. Yet, under the circumstances of this case, it is unclear what harm, if any, flowed from the State's alleged failure to seek a hardship exemption. The state courts noted several logistical impediments to adding Pidot's name to the June 28, 2016 primary election ballot, notwithstanding the absence of a "hardship waiver." Compl., Ex. 2, ECF

B. UOCAVA Is No Bar to a New Election Should This Court Order One.

Should this Court conclude that a new election is an appropriate remedy for the First and Fourteenth Amendment harms alleged here, it still need not consider UOCAVA's constitutionality. That is because UOCAVA is no bar to a new election. Indeed, if a new election is deemed appropriate and if that new election were required to be held without sufficient time to transmit ballots 45 days before the required election day, then -- consistent with prior cases where compliance with UOCAVA's 45-day advance transmission requirement has proven impossible (and absent a waiver) -- this Court may require Defendants, in consultation with the United States, to implement that primary election on a schedule that ensures the rights of UOCAVA voters. This course would serve the Plaintiffs' interests, vindicate the rights of the state's military and overseas voters, and honor principles of constitutional avoidance.

1. New York Can Develop an Election Calendar to Remedy Any Imminent UOCAVA Violation.

Nothing bars this Court from ordering UOCAVA-compliant relief. Indeed, in other cases, including those originating in this court, courts have fashioned relief even where strict compliance with UOCAVA's 45-day advance transmission deadline has not been possible because of time constraints. *See, e.g.*, Consent Decree, *United States v. New York*, No. 1:10-cv-1214 (N.D.N.Y.

No. 1-2 at 2. Even if a state court had ordered a new election (which, of course, did not happen), and even if a UOCAVA waiver had been granted in the days before June 28, 2016, *see* Pls.' Mem. of Law in Supp. of Their Request to Proceed by Order to Show Cause and For a New Election, ECF No. 20 at 13 (arguing that Defendant SBOE "should have sought a waiver no later than June 17, 2016" (emphasis omitted)), these other logistical challenges would still have prevented Pidot's placement on the ballot. Moreover, it is unclear whether a private right of action exists to force states to seek hardship waiver exemptions. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (noting that "private rights of action to enforce federal law must be created by Congress.") Accordingly, Plaintiffs' allegations regarding the state's failure to seek a hardship waiver exemption are inapt.

Oct. 19, 2010), ECF No. 9 at 7 (remedial order adopted "[t]o ensure that New York's UOCAVA voters will have sufficient opportunity under Federal law to receive absentee ballots they have requested and submit marked absentee ballots in time to be counted"); Consent Decree, *United States v. Illinois*, No. 1:13-cv-00189 (N.D. Ill. Jan 11, 2013), ECF No. 9 at 1 ("[T]he State will not be able to transmit ballots to UOCAVA voters 45 days prior to the scheduled February 26, 2013 special primary election . . . ."), *available at* https://www.justice.gov/crt/about/vot/misc/il_uocava_cd13.pdf (last visited Aug. 16, 2016). In such cases, UOCAVA's protections for military and overseas voters are not ignored or discarded as barriers standing in the way of the constitutional rights of candidates and voters. Rather, even absent an undue hardship exemption, courts have remedied imminent or actual UOCAVA violations and provided military and overseas voters constructive relief. *See* Supplemental Consent Decree, *United States v. Illinois*, No. 1:13-cv-00189 (N.D. Ill. Oct. 31, 2013), ECF No. 11 at 1 (explaining that the Consent Decree "order[ed] the State to take certain actions as an appropriate remedy" for its UOCAVA violations), *available at* https://www.justice.gov/crt/about/vot/misc/il_uocava_cd13_supp.pdf (last visited Aug. 16, 2016).

Such remedies are designed to ensure that UOCAVA voters enjoy sufficient time to receive, mark, and return their ballot, consistent with the purpose of UOCAVA's 45-day advance transmission requirement. For example, jurisdictions can extend the deadline for receipt of ballots from UOCAVA voters, provide notice to these voters of such extension, and offer

alternative means of expedited transmission and receipt of ballots.[8] *See, e.g.*, Settlement Agreement and Stipulated Motion for Entry of Order, *Vermont*, ECF No. 10 at 3-4 (providing additional time for receipt of absentee ballots from eligible UOCAVA voters whose ballots were sent late, as well as individual notice to each affected voter); Consent Decree, *Virgin Islands*, ECF No. 10 at 6-8 (extending the ballot return deadline for UOCAVA ballots, and utilizing express mail, fax and e-mail options for the delivery and return of UOCAVA ballots).

Indeed, this Court has entered several orders to address imminent or actual UOCAVA violations, including where New York had missed deadlines under an existing UOCAVA waiver or scheduled special elections on short notice. *See* Consent Decree, *United States v. New York*, No. 1:10-cv-1214 (N.D.N.Y. Oct. 19, 2010), ECF No. 9 at 6-7 (providing extra time for the receipt and counting of ballots, along with additional transmission methods, where ballots were sent with insufficient time to permit timely return) "); Consent Decree, *United States v. New York*, No. 1:09-cv-335 (N.D.N.Y. Mar. 26, 2009), ECF No. 6 at 4-6 (providing additional time for the receipt and counting of ballots where a special election was scheduled with insufficient time for UOCAVA voters to receive and return ballots), *available at* https://www.justice.gov/crt/about/vot/misc/ny_uocava09_cd.pdf (last visited Aug. 16, 2016); *see also* Memorandum-Decision and Order, *United States v. New York*, 1:10-cv-1214, ECF No. 59 at

[8] Additionally, such a remedy may provide that, where the existing vote margin exceeds the number of outstanding UOCAVA ballots, states with an extended deadline for receipt of ballots can certify election results prior to expiration of the receipt deadline. *See* Consent Decree, *United States v. Wisconsin*, No. 3:12-cv-197 (W.D. Wis. Mar. 23, 2012), ECF No. 6 at 7 (explaining that election results "may be formally certified by late-transmittal municipalities if the number of outstanding absentee ballots from UOCAVA voters could not mathematically alter the outcome of the election, subject to amendment or re-certification to add any votes from any ballots returned by the extended receipt deadline."), *available at* https://www.justice.gov/crt/about/vot/misc/wi_uocava_cd12.pdf (last visited Aug. 16, 2016).

2 (N.D.N.Y. Jan. 27, 2012) (ordering an earlier primary date to prevent upcoming UOCAVA violations). [9]

Accordingly, if the Court decides that a new election is necessary here, it need not undertake an inquiry implicating the constitutionality of UOCAVA, as applied or otherwise. Rather, as in past cases where transmitting ballots to UOCAVA voters 45 days prior to an election is not possible, the Court should order New York, in consultation with the United States, to develop a primary election calendar that protects the rights of UOCAVA voters. New York is best suited to determine the timing and manner for scheduling and conducting a new UOCAVA-compliant election. The Defendants, in consultation with the United States, can likely adopt a calendar that allows sufficient time for UOCAVA voters to receive, mark, and return their ballots both in any newly scheduled primary election and in a subsequent federal general election. This calendar can account for practical concerns involved in scheduling a new primary election, including the truncated time needed to prepare and certify ballots, and the availability of polling places, voting machines, and poll workers.

2. Constitutional Avoidance Counsels Against Ruling On UOCAVA's Constitutionality.

In the event a new election is deemed appropriate, requiring New York to develop an emergency compliance plan here would serve principles of constitutional avoidance. *See Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) ("[J]udging the constitutionality of an Act of Congress is the gravest and most delicate duty that this Court is

[9] If the court decides that a new primary election is warranted in the Third Congressional District, among the various options that would be available is for the primary election to be held in that congressional district on the date of the November general election, and for a special general election to be held in that district thereafter. This would be another way to meet all of the interests involved, including those of UOCAVA voters.

called on to perform." (internal quotation marks omitted)). Plaintiffs explicitly frame their claim that UOCAVA is unconstitutional as a solution of last resort, to be used if no other course is available to grant relief. *See* Compl. at 17. They are correct. "It is a well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984). Rather than undertake an expedited analysis of UOCAVA's constitutionality, this Court can simply require New York to follow past remedial practices in similar cases. *See Horne v. Coughlin*, 191 F.3d 244, 246 (2d Cir. 1999) ("Under our system of constitutional government, we generally prefer some prolongation of uncertainty over unnecessary, hasty resolution of constitutional questions."). Indeed, if necessary here, this Court may, consistent with its role in other UOCAVA cases, enter an order that ensures that UOCAVA's 45-day advance transmission requirement will not conflict with any purported constitutional interest. This course is preferred because it allows New York to resolve any difficulties posed by scheduling a new primary election without requiring the Court to undertake a disfavored and unnecessary analysis of UOCAVA's constitutionality. *See Branch v. Smith*, 538 U.S. 254, 272 (2003) ("Only when it is utterly unavoidable should we interpret a statute to require an unconstitutional result – and that is far from the situation here.").

CONCLUSION

For the foregoing reasons, this Court should resolve this litigation without addressing the merits of Plaintiffs' as applied constitutional challenge to UOCAVA.

Respectfully submitted,

DATED: August 16, 2016

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Northern District of New York

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2016, I served the foregoing on all counsel of record via the Court's ECF Filing System. In addition, I hereby certify that on August 16, 2016, I served the foregoing via United States Postal Service first-class mail on the following counsel:

Steven H. Richman
General Counsel
Board of Elections in the City of New York
Executive Office
32 - 42 Broadway, 7 Floor
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/s/ Ernest A.McFarland
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

PHILIP PIDOT, NANCY HAWKINS and STEVEN AXELMAN,

Plaintiffs,

v.

CASE NUMBER: 1:16-CV-859 (FJS/CFH)

NEW YORK STATE BOARD OF ELECTIONS, SUFFOLK COUNTY BOARD OF ELECTIONS, NASSAU COUNTY BOARD OF ELECTIONS, BOARD OF ELECTIONS IN THE CITY OF NEW YORK, PETER KOSINSKI, DOUGLAS KELLNER, ANDREW J. SPANO, GREGORY P. PETERSON, TODD D. VALENTINE and ROBERT A. BREHM,

Defendants,

v.

JACK MARTINS,

Intervener Defendant.

Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Plaintiffs' # [19] motion is GRANTED. The Court ORDERS that Defendants shall hold a Republican primary election for New York's Third Congressional District with a ballot that names both Jack Martins and Philip Pidot as candidates on October 6, 2016. The Court further ORDERS that the State Defendants shall seek a "hardship exemption" pursuant to 52 U.S.C. § 20302(g)(2)(B)(ii) from UOCAVA's 45-day requirement with regard to the November 2016 general election. The Court further ORDERS that Defendant Martins' # 49 cross-motion for judgment on the pleadings is DENIED as moot. Judgment is entered in favor of Plaintiffs.

All of the above pursuant to the oral order of the Honorable Judge Frederick J. Scullin, Jr., rendered on the 17th day of August, 2016.

DATED: August 17, 2016

Lawrence K. Baerman
Clerk of Court

Nicole Eallonardo
Deputy Clerk

Federal Rules of Appellate Procedure
Rule 4. Appeal as of Right

(a) Appeal in a Civil Case.

1. (1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;
(ii) a United States agency;
(iii) a United States officer or employee sued in an official capacity; or
(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

PERSONNEL AND
READINESS

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

AUG 29 2016

Executive Director Robert A. Brehm
Executive Director Todd D. Valentine
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207-2729

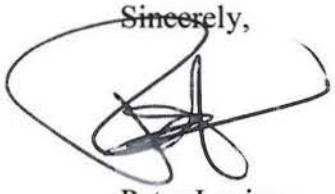
Dear Executive Directors Brehm and Valentine:

On August 22, 2016, the Department of Defense received from New York State an application dated August 22, 2016, for an undue hardship waiver under the *Uniformed and Overseas Citizens Absentee Voting Act* (*UOCAVA*) for the November 8, 2016, New York Third Congressional District general election.

Under delegated authority from the Secretary of Defense as the Presidential Designee for *UOCAVA*, I have reviewed the State's application, and after consultation with the representative of the Attorney General, find that it meets the requirements for an undue hardship waiver under 52 U.S.C. § 20302 (g)(2). Accordingly, I approve the State of New York's request to waive the application of 52 U.S.C. § 20302 (a)(8)(A) for the November 8, 2016, general 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 Memorandum attached to this letter. This waiver is based on the understanding that the State of New York will comply with all commitments described herein, including that New York will seek a court order for an eight-day extension of its ballot receipt deadline for the November 8, 2016, general election in the Third Congressional District. Based on those assertions and the attached memorandum, I have determined the following: the State faces an undue hardship, and the State's proposed comprehensive plan for this election provides sufficient time for *UOCAVA* voters to vote and have their ballots counted as a substitute for the requirement that timely-requested absentee ballots be transmitted to all *UOCAVA* voters at least 45 days prior to Election Day.

Sincerely,



Peter Levine
Acting

Enclosure:
As stated

MEMORANDUM

Approval of the State of New York's Waiver Request
under 52 U.S.C. § 20302 (g)(2)
for the November 8, 2016, NY Third Congressional District General Election

The Federal Voting Assistance Program (FVAP) of the Department of Defense received the application of the State of New York (the State), dated August 22, 2016, for an undue hardship waiver for the November 8, 2016, Third Congressional District general election, as provided by the *Uniformed and Overseas Citizens Absentee Voting Act* (*UOCAVA*).[1] Approval of the waiver request and this memorandum rely on the statements made by the State in support of its August 22, 2016, official waiver request and subsequent supplementary information provided during the August 23, 2016, conference call between the State, FVAP, and the United States Department of Justice.

Under delegated authority from the Secretary of Defense as the Presidential Designee for *UOCAVA*,[2] the Acting Under Secretary of Defense for Personnel and Readiness has reviewed New York's application, consulted with the representative of the Attorney General, and finds the State's application meets the requirements for a one-time undue hardship waiver under 52 U.S.C. § 20302 (g)(2)(A),[3] and approves New York's waiver request under 52 U.S.C. § 20302 (a)(8)(A)[4] for the November 8, 2016, Federal general election in New York's Third Congressional District. For purposes of this Memorandum, the term "Presidential Designee" includes those officials exercising authority delegated by the Presidential Designee.

I. Background and Initial Findings

UOCAVA authorizes the Presidential Designee to grant a waiver only to those States whose reason for a waiver corresponds with one of the following situations:

1. The State's primary election date prohibits the State from complying with subsection (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 such Section.[5]

On August 17, 2016, the United States District Court for the Northern District of New York ordered the State to hold a Republican primary election for New York's Third Congressional District on October 6, 2016. The court further ordered that the State seek a hardship exemption

[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] The Secretary of Defense was designated the Presidential Designee by Executive Order 12642 (June 8, 1988), 53 CFR § 21975. The Secretary of Defense has delegated this authority to the Under Secretary of Defense (Personnel & Readiness) through DOD Directive 5124.02.

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

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

[5] 52 U.S.C. § 20302 (g)(2)(B) (*formerly* 42 U.S.C. § 1973ff-1(g)(2)(B)).

pursuant to 52 U.S.C. § 20302(g)(2)(B)(II) from *UOCAVA*'s 45-day advance transmission requirement with regard to the November 8, 2016, Federal general election in that district. As the court-ordered primary election will occur after the 45-day deadline for transmitting *UOCAVA* ballots for the November 8, 2016, general election, and the State will be unable to transmit ballots for the Third Congressional District until the Republican primary election results are known, the State is unable to comply with 52 U.S.C. § 20302 (a)(8)(A).[6]

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 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 for each of these requirements are addressed separately below.

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

> 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.[7]

The comprehensive plan proposed by New York addressed the following requirements set forth in *UOCAVA*:

[6] *Formerly* 42 U.S.C. § 1973ff-1(a)(8)(A)); *see also* 52 U.S.C. § 20302 (g)(2)(B)(i) (*formerly* 42 U.S.C. § 1973ff-1 (g)(2)(B)(i)).

[7] 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.

> (i) 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;
> (ii) why the plan provides *UOCAVA* voters sufficient time to vote as a substitute for the requirements of the *UOCAVA*; and
> (iii) the underlying factual information which explains how the plan provides such sufficient time to vote as a substitute for such requirements.[8]

Further, as required by 52 U.S.C. § 20302 (g)(1)(A),[9] New York's application recognizes that the purpose of the Act's 45-day advance transmission requirement is to allow *UOCAVA* voters enough time to vote and 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 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, using the voter's choice of either postal mail or electronic transmission method.

The State's comprehensive plan was evaluated against several criteria; the analysis as to whether the comprehensive plan provides sufficient time was examined by considering the totality of circumstances presented. Among the issues considered was the total time a voter has to receive, mark, return the ballot, and have it counted (including the number of days before and after Election Day). Also among the issues considered was the cumulative number and accessibility of alternative methods of ballot transmission, and, if applicable, ballot return, as additional alternative methods provide more *UOCAVA* voters with the likelihood they 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 that improved the likelihood a *UOCAVA* voter would be able to receive, vote, return the ballot, and have it count.

II. The State Has Shown Undue Hardship

New York states that the court has ordered it to hold a Republican primary election on October 6, 2016, for New York's Third Congressional District. The October 6, 2016, date for that court-ordered primary election falls after the September 24, 2016, 45-day deadline for transmitting *UOCAVA* ballots for the November 8, 2016, general election. Due to New York's inability to transmit the general election ballot for the Third Congressional District until after a winner of the Republican primary election is determined, the court further ordered the State to seek a hardship exemption pursuant to 52 U.S.C. § 20302(g)(2)(B)(II) from *UOCAVA*'s 45-day requirement with regard to the November 8, 2016, general election.

For this reason, the State's waiver application has demonstrated an undue hardship.

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

III. The State's Comprehensive Plan Provides Time for *UOCAVA* Voters To Vote and Have Those Votes Counted

Once the State has shown that it has suffered an undue hardship, as it has in this case, the State must show that its comprehensive plan provides "sufficient time for *UOCAVA* voters to receive, mark, and return the ballot in time to be counted."[10] In this case, the only *UOCAVA* voters affected are those *UOCAVA* voters in New York's Third Congressional District. 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 are the time voters have to receive, mark, 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.

New York's comprehensive plan to provide sufficient time to vote as a substitute for *UOCAVA*'s 45-day advance transmission requirement is as follows:

- As soon as practicable, each county board will transmit to its affected *UOCAVA* voters, in the manner of transmission stated on each voter's application, a communication providing a clear and concise summary of the court-ordered primary and how it will impact the number and timing of ballots they will receive. The communication will also include the various deadlines and methods of return of each ballot to be received.

- For those voters who have requested to receive their voting materials by postal mail, but have not previously provided an email address, additional language will be included in their September 24, 2016, mailing of the November General Election ballots communication encouraging them to submit a revised Federal Post Card Application for the purposes of establishing an email address of record and to facilitate a change in their transmission preference, if they choose, to "Email/Online" to allow for the expeditious delivery of all future voting materials. New York will work with FVAP to identify and seek assistance from the Department in communicating to these voters at any official Department sponsored email address.

- A communication will be included with the September 24, 2016, voting materials explaining to each voter that a general election ballot for the Third Congressional District will not be transmitted until after the results of the October 6, 2016, primary election are known. At this time, voters will be informed of their option to use an enclosed Federal Write-In Absentee Ballot for the purpose of voting in the Third Congressional District in advance of them receiving their official ballots, along with information on how to obtain the results of the October 6, 2016, primary election.

A separate ballot, containing only the Third Congressional District contest will be transmitted once the results from the October 6, 2016, Republican primary election are certified. This

[10] 52 U.S.C. § 20302 (g)(2)(A) (*formerly* 42 U.S.C. § 1973ff-1(g)(2)(A)).

certification date is dependent on whether an "unambiguous winner"[11] can be determined by the polls closing on October 6, 2016. Should an "unambiguous winner" be determined on October 6, 2016, each county board of elections will issue a provisional certification of the results by October 7, 2016, which will allow the State to certify the general election ballot on the same day. Should all of these criteria be met in the timeline specified, the counties will transmit the Third Congressional District ballots on October 8, 2016, or 31 days before to the November 8, 2016, general election.

- If an "unambiguous winner" cannot be determined based on Election Day returns, then each affected county election board will enter an expedited post-primary certification process with the intended completion date of not later than seven days after the election. Under this revised timeframe, the State will transmit Third Congressional District general election ballots by October 15, 2016, or 24 days before the general election.

- The State will coordinate county voter registration systems with the State's voter list and its online ballot delivery portal. For voters who have requested their voting materials be transmitted by postal mail, the Third Congressional District ballot will be sent by an unspecified expedited mail service. Voters will also be provided a return envelope allowing them to use the same expedited service to return their ballot at no expense to the voter.

- New York will seek a court order for an eight-day extension of their ballot receipt deadline until November 29, 2016.

- All communications to voters will include a point of contact at their respective county board for assistance in the process.

- The State will provide sample language to all county boards to use for each communication to ensure uniform language is being used for all affected voters.

Absent a waiver request, States are specifically required to transmit timely-requested absentee ballots 45 days prior to Election Day. A waiver request becomes necessary when a State is no longer able to meet this requirement. In this case, it is impossible for New York to transmit timely-requested ballots 45 days prior to Election Day. Under the potential scenario in which there is not a "unambiguous" primary election winner on October 6, 2016, voters will have 24 days from the time ballots are transmitted to the postmark deadline of November 7, 2016. This is 21 days fewer than *UOCAVA* voters are provided under 52 U.S.C. § 20302 (a)(8)(A).

A State's comprehensive plan submitted as a part of a waiver request must provide remedies for affected voters that will allow them sufficient time to receive, mark, and return their ballot. To help ensure sufficient time for voters to receive, mark, and return their ballot in time to be counted, New York's proposed remedy is to take immediate steps to communicate directly with affected voters regarding when and how they will receive and return their ballots, to provide for

[11] New York defines an "unambiguous winner" as "when the margin of victory is greater than the total number of outstanding absentee and affidavit ballots such that the uncanvassed ballots cannot change the winner of the election."

expedited mailing of ballots to those who have requested their materials by mail, and to provide those voters with an expedited cost-free method of return. Voters who have requested their materials be provided electronically will receive their ballots on the day of transmittal.

New York also proposes an extension of the ballot return deadline by eight days and has committed to seeking a Federal court order approving such extension. Although the number of days ballots are transmitted before an election are qualitatively superior to days after Election Day, because voters must have time to receive and mark them by the state's deadline for casting or postmarking the ballot, the Department considered not only the overall timing, but the nature of the State's comprehensive approach to offset this timeline with direct voter communications and express delivery of the ballots to voters who request postal mail delivery. FVAP reviewed New York's plan pursuant to its published waiver guidance and provided a set of formal clarifying questions during the course of its deliberation. The original questions and corresponding responses are included in Appendix A.

FVAP recognizes the unique legal contest situation presented in this hardship waiver request. Given the court's order, compliance with the 45-day prior requirement, 52 U.S.C. § 20302 (a)(8)(A), is impossible. Therefore, based on the totality of the circumstances in this case, as well as the commitments made by the State in its comprehensive plan, especially its stated intent to seek Federal court approval of its proposed calendar, the Presidential Designee finds that New York's comprehensive plan provides *UOCAVA* voters with sufficient time to receive, mark, and return their ballots in time to be counted.

IV. Conclusion

The Presidential Designee has determined that, given the totality of circumstances, New York's comprehensive plan provides absent *UOCAVA* voters sufficient time to receive and submit absentee ballots they have requested in time to be counted in the November 8, 2016, election. Accordingly, the plan in this specific circumstance is a sufficient substitute for 52 U.S.C. § 20302 (a)(8)(A)'s[12] requirement to transmit timely-requested ballots 45 days in advance of Election Day in Federal elections, and thus serves as the basis for granting a hardship waiver under 52 U.S.C. § 20302 (g)(2).[13]

A. Post-Election Evaluation

Because a waiver plan must provide *UOCAVA* voters sufficient time to vote, an important component of the approved comprehensive plan is a post-election evaluation of the comprehensive plan, provided to FVAP by January 6, 2017, which must include the following:

- Written certification that ballots were transmitted to *UOCAVA* voters on the date and in the manner described in the waiver application;
- The numbers of ballots sent to absent uniformed services voters to APO and FPO addresses, the number of ballots sent to uniformed services voters at a street

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

address within the United States, and the number of ballots sent to overseas civilian voters;

- The number of ballots from each of these groups returned in time to be counted;
- The number of ballots from each of these groups returned too late to be counted;
- If possible, a breakdown of further details about each of the above categories between ballots faxed, emailed, downloaded from the online ballot delivery and ballot marking system and sent by postal mail;
- Any feedback, whether positive or negative, received from voters about any elements of the State's waiver plan; and
- Any additional information relevant to the effectiveness of the comprehensive plan, including information to show measured results of the comprehensive plan, and how the plan provided *UOCAVA* voters sufficient opportunity to receive, vote, and return their ballots.

B. Reporting

As part of its comprehensive plan, New York officials agreed to keep FVAP and DOJ/ Voting appraised of any subsequent problems in implementing the comprehensive plan as proposed, including but not limited to any failures of local election officials to transmit absentee ballots in accordance with the timeframe specified by the State’s comprehensive plan.

If you have any questions or concerns, please contact Nate Bacchus, FVAP State Affairs Specialist for New York State, at 571-372-0739, or nate.a.bacchus@fvap.gov.

Appendix A: New York State Board of Elections Responses to Questions

1. Can you please verify that all three affected counties sent ballots for the Primary by the 45 day deadline (yesterday)?

All counties have verified to the State Board that all ballots were transmitted to voters in the manner in which they requested it by the August 22nd deadline.

2. Please provide data on the # of voters who have overseas and APO/FPO addresses who have requested postal ballots and have not provided an email address.

For the General Election in the 3rd Congressional District, there is a slight revision to the numbers of voters who have requested their balloting materials by postal mail, but for whom an email address is on file. Of the 349 voters cited in the waiver request, there are actually 266 (not 221) who have also provided an email address (76%). Of the remaining 83 voters who have requested to receive their balloting materials by postal mail, and for whom no email address is on file, 67 are located overseas and 16 are domestic. The county breakdown of these voters is as follows: Nassau – 42 overseas / 9 domestic; Suffolk – 12 overseas / 6 domestic; Queens – 13 overseas / 1 domestic. For those voters overseas, the following table shows a breakdown of the countries in which these voters are located.

Nassau	
Country	#
Aruba	1
Australia	1
Austria	1
Canada	8
China	1
France	5
Germany	5
Holland	1
Hungary	1
Ireland	1
Israel	5
Italy	2
Netherlands	1
Norway	1
Republic of	1

Suffolk	
Country	#
Canada	3
France	2
Germany	1
Ireland	1
Israel	1
Japan	1
Netherlands	1
Spain	1
United Kingdom	1

Queens	
Country	#
Argentina	1
Canada	1
Germany	1
Greece	4
Israel	4
Switzerland	1
United Kingdom	1

Korea	
Serbia	1
Spain	1
Sweden	2
Switzerland	1
United Kingdom	2

3. Can you provide the communication to voters that went out with the August 22nd primary ballots?

The following language was provided to counties to use in their communications to voters and were also instructed to include contact information for their board:

On August 17, 2016 a Federal Judge ordered that a Republican primary in the 3rd Congressional District be held on October 6, 2016. This is your ballot for that election only.

If you have any questions, please contact your local board of elections.

4. Is the State amenable to sending out an expedited communication/mailing to affected voters prior to the September 24th general election ballot transmittal date?

The State Board would work with each County Board to facilitate such a communication and ensure it is done in a timely and consistent manner.

5. Is the State amenable to allowing for expedited return for all voters, including those who receive their ballot electronically?

The State has been investigating various commercial vendor offerings that counties could potentially use for allowing those voters who have requested their balloting materials electronically to expedite their ballots' return. However, we have not to date found a process that would make the provision of this service feasible for counties or that would mitigate potential issues with international voters who may have moved from the address originally stated on their application or who have provided an email address without also providing a physical address.

6. Please provide the citation that grants the State the authority over the counties to ensure compliance with the plan.

The following sections of NYS Election Law grant the State the necessary authority.

*** * ***

§ 3–102. State board of elections; general powers and duties

In addition to the enforcement powers and any other powers and duties specified by law, the state board of elections shall have the power and duty to:

1. **issue instructions and promulgate rules and regulations relating to the administration of the election process, election campaign practices and campaign financing practices consistent with the provisions of law;**

*** * ***

§ 10–124. Military voting; state board of elections; regulatory powers

1. **The state board of elections is hereby authorized to take such steps and do such things as, in its opinion, are necessary to make effective the provisions of any other legislation, in order to utilize fully any federal or other facilities in the distribution of military ballots. The state board of elections shall have power to adopt and promulgate orders or regulations adopting, with respect to the military voters of this state, the provisions of that legislation.**

*** * ***

§ 11–220. Federal voting; applicability of general provisions

The general provisions of this chapter shall apply to this article, except as they are inconsistent herewith. The provisions of this article shall be liberally construed for the purpose of providing special federal voters the opportunity to vote. The state board of elections shall have power to adopt and promulgate regulations to effectuate the provisions of this article.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

PHILIP PIDOT, NANCY HAWKINS and STEVEN AXELMAN, individually and as representatives of eligible Republican Party voters in Suffolk, Nassau and Queens Counties within New York's Third Congressional District,

Plaintiffs,

v.

NEW YORK STATE BOARD OF ELECTIONS; SUFFOLK COUNTY BOARD OF ELECTIONS; NASSAU COUNTY BOARD OF ELECTIONS; BOARD OF ELECTIONS IN THE CITY OF NEW YORK; PETER KOSINSKI and DOUGLAS KELLNER, in their official capacities as Commissioners and Co-Chairs of the New York State Board of Elections; ANDREW J. SPANO and GREGORY P. PETERSON, in their official capacities as Commissioners of the New York State Board of Elections; TODD D. VALENTINE and ROBERT A. BREHM, in their official capacities as Co-Executive Directors of the New York State Board of Elections,

Defendants,

JACK MARTINS,

Intervenor-Defendant,

TOM SUOZZI,

Intervenor.

Civil Action No.
1:16-CV-00859-FJS-CFH

SUPPLEMENTAL STATEMENT OF INTEREST OF THE UNITED STATES

The United States of America ("United States") respectfully submits this Supplemental 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 any pending lawsuit. This matter continues to implicate the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. §§ 20301 *et seq.*, as amended by the Military and Overseas Voter Empowerment Act, Pub L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009), a statute over which Congress accorded the Attorney General broad enforcement authority. *See* 52 U.S.C. § 20307(a).

This Court's August 17, 2016, judgment required Defendants to conduct a Republican primary election for New York's Third Congressional District on October 6, 2016. *See* Judgment, Aug. 17, 2016, ECF No. 66. Because that date impacts New York's ability to comply with UOCAVA's 45-day advance ballot transmission requirement for the November 8, 2016, federal general election, this Court further required New York to seek a waiver from the Department of Defense ("DOD"), pursuant to 52 U.S.C. § 20302(g)(2)(B)(ii), from that advance transmission requirement.[1] *Id.*

Pursuant to the Court's order, New York applied to the DOD for an undue hardship waiver from UOCAVA's 45-day advance transmission requirement for the November 8, 2016, federal general election in New York's Third Congressional District. *See* Decl. of Robert A. Brehm, Ex. D, ECF No. 89-6 at 1. As required by UOCAVA, New York's waiver application proposed a comprehensive plan for providing UOCAVA voters sufficient time, given the circumstances, to receive, cast, and return their ballots in time to be counted. 52 U.S.C.

[1] The 45th day before the November 8, 2016, federal general election is September 24, 2016.

§ 20302(g)(1)(D). That plan included a proposed extension of the state law deadline for receiving timely cast ballots by UOCAVA voters and New York's promise to seek ratification of that extension by this Court. *See* Decl. of Robert A. Brehm, Ex. D, ECF No. 89-6 at 9. On August 29, 2016, the DOD granted the State's hardship waiver request. *See* Letter of New York State Board of Elections, ECF No. 99.

On August 31, 2016, and in conformity with the State's comprehensive plan, Defendant New York State Board of Elections moved this Court for an order extending by eight days the state law deadline for receiving timely cast and timely postmarked UOCAVA ballots for the November 8, 2016, federal general election for New York's Third Congressional District. *See* Letter Motion of New York State Board of Elections, ECF No. 106.

In light of this Court's August 17, 2016, judgment, and the DOD's August 29, 2016, grant of New York's undue hardship waiver application, the United States respectfully informs the Court that it does not oppose New York's motion.

The United States also respectfully notes that New York's motion appears to implicate this Court's Supplemental Remedial Order in *United States v. New York*, No. 1:10-cv-1214 (N.D.N.Y. Oct. 29, 2015), which incorporates a calendar for the November 8, 2016, federal general election in New York State. *See* Supplemental Remedial Order, *United States v. New York*, No. 1:10-cv-1214 (N.D.N.Y. Oct. 29, 2015), ECF No. 88 at 6 (Sharpe, *J.*) (noting that "portions of the Calendar could change as a result of future legislative enactment or court orders"); *see also* Decl. of Ernest A. McFarland, Ex. A, ECF No. 64-2 (same).

Respectfully submitted,

DATED: September 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2016, I served the foregoing on all counsel of record via the Court's ECF Filing System.

/s/ Ernest A.McFarland
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16-3028
Martins v. Pidot et. al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of September, two thousand sixteen.

PRESENT: DENNIS JACOBS,
BARRINGTON D. PARKER,
DEBRA A. LIVINGSTON,
Circuit Judges.

- -X
JACK MARTINS,
Defendant-Intervenor-
Appellant,

-v.- 16-3028

PHILIP PIDOT, NANCY HAWKINS, STEVEN AXELMAN,
PlaintiffS-Appellees,

AND

NEW YORK STATE BOARD OF ELECTIONS, SUFFOLK COUNTY BOARD OF ELECTIONS, NASSAU COUNTY BOARD OF ELECTIONS, BOARD OF ELECTIONS IN THE CITY OF NEW YORK, PETER KOSINSKI, DOUGLAS

KELLNER, ANDREW J. SPANO, GREGORY P. PETERSON, TODD D. VALENTINE, ROBERT A. BREHM, IN THEIR OFFICIAL CAPACITIES AS BOARD MEMBERS, COMMISSIONERS, AND EXECUTIVE DIRECTORS OF THE NEW YORK STATE BOARD OF ELECTIONS,
Defendants-Appellees

AND

TOM SUOZZI
Intervenor-Appellee*

- -X

FOR APPELLANT JACK MARTINS: JASON TORCHINSKY, SHAWN TOOMEY, STEVE ROBERTS, Holtzman Vogel Joesefiak Torchinsky PLLC, Warrenton, Virginia

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FOR APPELLEES PHILLIP PIDOT, NANCY HAWKINS, STEVEN AXELMAN: JERRY H. GOLDFEDER, DAVID V. SIMUNOVICH, Stroock,& Stroock & Lavan LLP, New York, New York

FOR APPELLEE BOARD OF ELECTIONS IN THE CITY OF NEW YORK: JANET L. ZALEON, *for Zachary W. Carter*, Corporation Counsel of the City of New York, New York, New York (Susan Greenberg, on the brief)

*The Clerk of Court is directed to amend the caption as set forth above.

FOR APPELLEES NEW YORK STATE BOARD OF ELECTIONS, PETER KOSINSKI, DOUGLAS KELLNER, ANDREW J. SPANO, GREGORY P. PETERSON, TODD D. VALENTINE, ROBERT A. BREHM, IN THEIR OFFICIAL CAPACITIES AS BOARD MEMBERS, COMMISSIONERS, AND EXECUTIVE DIRECTORS OF THE NEW YORK STATE BOARD OF ELECTIONS:

BRIAN QUAIL, WILLIAM MCCANN, JR, New York, New York

FOR APPELLEE TOM SUOZZI:

ABHA KHANNA, MARTIN E. GILMORE, Perkins Coie LLP, New York, New York

Appeal from judgment of the United States District Court for the Northern District of New York (Scullin, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the injunction of the district court be **VACATED**, and that the case is remanded with direction to dismiss.

This appeal, heard on an expedited basis, is taken from an injunction that directs a special election for the Republican nomination to stand for Congress in the Third Congressional District of New York. Appellant Jack Martins stood unopposed in the Republican general primary on June 28 while litigation was ongoing in the New York state courts as to whether a potential opponent for the Republican nomination, Phillip Pidot, had submitted sufficient signatures to get on the ballot. The signatures on Pidot's

petition were validated by the state court four days before the primary, by which point it was found to be impossible to make the arrangements for Pidot to appear on the ballot and to arrange compliance with the other requirements of state and federal law. After the original primary date, the United States District Court for the Northern District of New York (Scullin, J.) issued an injunction requiring that the primary election, with Pidot now on the ballot, be conducted on October 6.

Appellant Martins challenges the injunction on several grounds, including voter confusion, the burden holding an election would place on the local boards of election, and the brevity of the interval between the new primary and the general election.

We conclude that Martins has standing to appeal the district court's order; that the Rooker-Feldman doctrine does not apply because Pidot was a state court *winner*, and, in any event, did not invite review of the state court's legal judgment; that collateral estoppel is not a bar to this suit, in part because the district court found no privity between Pidot and the voter plaintiffs and in part because the issues involved in the federal action–-i.e. UOCAVA and the First Amendment–-were neither actually litigated nor necessarily decided in the state action; and

that Pidot has not precipitated delays sufficient to entail the application of the doctrine of laches. We assume arguendo that Pidot's suit is not barred by res judicata.

Our review of the record indicates that the district court's resolution of Pidot's application for an injunction failed to address the applicable injunction standards.

A party seeking a preliminary injunction must ordinarily establish (1) irreparable harm, (2) a likelihood of success on the merits, and (3) that issuance of an injunction is in the public interest. See New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015). The district court's decision here to order a special primary is a form of permanent injunction. See Pope v. County of Albany, 687 F.3d 565, 569-70 (2d Cir. 2012). "The requirements for a permanent injunction are essentially the same as for a preliminary injunction, except that the moving party must demonstrate actual success on the merits." New York Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286, 294 (2d Cir. 2011). We properly reverse an order of a permanent injunction where the district court decision rests on an error of law. Pope, 687 F.3d at 570-71.

Our decision in Rivera-Powell v. New York City Board of Elections, 470 F.3d 458 (2d Cir. 2006), forecloses Pidot's

claim. After review, we conclude that Martins did not waive his Rivera-Powell argument in the district court, and that we can construe Pidot's First Amendment claim in this case as analogous to a due process claim, as was done in Rivera-Powell itself. Id. at 469. Under Rivera-Powell, "when a candidate raises a First Amendment challenge to his or her removal from the ballot based on the allegedly unauthorized *application* of an admittedly valid restriction," such as here, "the state has satisfied the First Amendment if it has provided due process." Id. at 469-70. Pidot does not allege that the state failed to afford him due process. We therefore vacate the injunction on that ground.

Further, Pidot failed to establish--and the district court failed to find--that the balance of equities tipped in his favor or that the injunction would be in the public interest. Accordingly, Pidot is not entitled to the injunctive relief which he seeks.

For the foregoing reasons, and finding no merit in Pidot's other arguments, we hereby **VACATE** the order of the district court and direct the court to enter judgment in favor of the defendants.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: September 16, 2016
Docket #: 16-3028cv
Short Title: Pidot v. New York State Board of Electi

DC Docket #: 16-cv-859
DC Court: NDNY (SYRACUSE)
DC Judge: Scullin
DC Judge: Hummel

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: September 16, 2016
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DC Docket #: 16-cv-859
DC Court: NDNY (SYRACUSE)
DC Judge: Scullin
DC Judge: Hummel

VERIFIED ITEMIZED BILL OF COSTS

Counsel for
_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the
_____

and in favor of
_____

for insertion in the mandate.

Docketing Fee _____

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Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

I. Enforcement Activity by the Attorney General in 2016

B. Activity in Other Litigation by the Attorney General under UOCAVA

United States v. Alabama

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	2:12-cv-00179-MHT-WC
	)	
STATE OF ALABAMA and	)	
HONORABLE JOHN H. MERRILL,	)	
Secretary of State, in his official capacity,	)	
	)	
Defendants.	)	

STATE'S NOTICE OF FILING FINAL REGULATIONS

The State of Alabama and the Alabama Secretary of State, defendants in this action, hereby respectfully file with this court notice of the finality of Ala. Admin. Code § 820-2-10-.18, which implements the State's new ranked choice balloting process for UOCAVA voters, as follows:

1. This court previously authorized the State of Alabama to implement Act No. 2015-518. Doc. 164 at 2. In so doing, the court required that the State and the United States "notify the court of their agreement or their respective positions as to the United States' request for . . . the filing of regulations with this court." Doc. 164 at 4.

2. In compliance therewith, the State filed a notice that discussed, *inter alia*, both emergency regulations and non-emergency regulations.[1] Doc. 165.

3. Thereafter, the State filed emergency regulations, doc. 169-1, and amended emergency regulations, doc. 174-1, with the court.

4. The State also filed with the court its Notice of Intended Action for the non-emergency regulations, doc. 174-2, and explained that these regulations are subject to a comment period under State law, and thus did not take effect immediately, doc. 174 at 2.

5. Thereafter, the Secretary of State filed with the Legislative Reference Service a Certification of Administrative Rules, which is filed once the public comment period has ended. That Certification was filed on February 5, 2016, and the undersigned emailed a copy of it to counsel for the United States on February 18, 2016. The email noted that a change had been made to the regulations and further that a 45-day window for legislative action remained.

6. That window has now closed. Ala. Admin. Code § 820-2-10-.18 is final under State law and is in effect. A copy is attached hereto beginning at page 11 of Exhibit A.

7. Consistent with the agreement of the parties, as reflected in the State's Notice Concerning Federal Runoff Potential, Training, and Regulations,

[1] Emergency regulations take effect immediately under State law, but they also expire.

doc. 165, the obligation of the State and Secretary of State to file any regulations with this court terminates with the Remedial Order on December 31, 2016. Thereafter, the State will be free to make changes to its ranked choice ballot regulations over the years, including the possibility of drafting entirely new regulations and repealing some or all of the original regulations, all without any obligation to continue notifying the court of those changes. Any such changes must comply with UOCAVA.

Respectfully submitted,

LUTHER STRANGE (ASB-0036-G42L)
Attorney General

BY:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of March, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

Victor J. Williamson
Amanda Hine
Anna Baldwin
Elizabeth M. Ryan
Ernest McFarland
Richard Dellheim
Stephen M. Doyle
T. Christian Herren, Jr.
for the United States

J. Cecil Gardner
Robert D. Segall
Sam Heldman
Edward Still
for the amicus

s/ Misty S. Fairbanks Messick
Of Counsel

Exhibit A

STATE OF ALABAMA
OFFICE OF THE SECRETARY OF STATE
ADMINISTRATIVE CODE

CHAPTER 820-2-10
PROCEDURES FOR IMPLEMENTING THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT ("UOCAVA")

TABLE OF CONTENTS

820-2-10-.01 Purpose. The purpose of this chapter is to provide for implementation of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. §1973FF *et seq.*, as Amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§575-589, 123 Stat. 2190, 2318-2355 (2009)("MOVE Act") and Act of Alabama 2011-619, for those qualified individuals requesting to vote by absentee ballot pursuant to the Federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). The procedures in this chapter are promulgated under authority granted the Secretary of State as Chief Elections Official pursuant to the UOCAVA and Code of Ala. 1975, sections 17-11-42 and 17-1-3(a).
Author: Edward Packard; Jean Brown; William Sutton
Statutory Authority: Code of Ala. 1975, §§17-11-40 *et seq.*, 17-1-3(a), 17-11-4, 17-11-5(d), 17-11-9.

History: New Rule: Filed March 28, 2014; effective May 2, 2014.

820-2-10-.02 Applicability. This chapter applies to absentee balloting for all elections for individuals eligible to vote by absentee ballot pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).
Author: Edward Packard; Jean Brown; William Sutton
Statutory Authority: Code of Ala. 1975, §§17-11-40 *et seq.*, 17-1-3(a), 17-11-4, 17-11-5(d), 17-11-9.
History: New Rule: Filed March 28, 2014; effective May 2, 2014.

820-2-10-.03 Application And Procedures For Issuance Of Absentee Ballot.

(1) Individuals voting by absentee ballot pursuant to UOCAVA may apply for an absentee ballot by utilizing an application adopted by the State of Alabama pursuant to §§17-11-4 or 17-11-5(d) or by utilizing the Federal Postcard Application provided for by UOCAVA. The application must be submitted by the voter by U.S. mail or hand-delivery to the absentee election manager in the county in which the prospective absentee voter is registered to vote. The application prescribed by the Secretary of State pursuant to §17-11-5(d) shall provide the UOCAVA applicant the means to request delivery of the blank absentee ballot by U.S. mail, by hand-delivery or by electronic transmission.

(2) A voter who chooses to have the blank absentee ballot transmitted to him or her electronically must designate that choice on the Federal Postcard Application or on the state-prescribed absentee ballot application prescribed pursuant to §17-11-5(d). If the voter does not make such designation, the blank absentee ballot shall be delivered to the voter by U.S. mail or hand-delivery.

(3) If the voter requests to have the blank absentee ballot transmitted electronically, the absentee election manager shall:

(a) verify the voter registration status of the applicant;

(b) record in the Alabama Voter Registration and Election Management System the request for the absentee ballot;

(c) deliver to the voter the blank absentee ballot by electronic transmission utilizing the electronic blank ballot transmission developed by the Secretary of State;

(d) shall notify the voter that to be properly cast and counted, the voted absentee ballot must be returned to the appropriate absentee election manager by the date specified in state law and provide the voter said date;

(4) Each absentee ballot delivered to a voter pursuant to UOCAVA shall include a "UOCAVA Affidavit" which shall read as prescribed in §17-11-7, Code of Ala. 1975, except:

(a) the instructions to the voter regarding signing and witnessing of the affidavit shall not include any reference to notarization and shall read "IF YOUR AFFIDAVIT IS NOT SIGNED (OR MARKED), AND IF YOUR AFFIDAVIT IS NOT WITNESSED BY TWO WITNESSES 18 YEARS OF AGE OR OLDER, PRIOR TO BEING DELIVERED OR MAILED TO THE ABSENTEE ELECTION MANAGER, YOUR BALLOT WILL NOT BE COUNTED.", and

(b) the affidavit shall not include a section for completion by a notary public.

(c) item (5) in paragraph (b) of §17-11-7 shall read "(5) I am entitled to vote an absentee ballot because I am a member of or a spouse or dependent of a member of the Armed Forces of the United States or am otherwise entitled to vote pursuant to the federal Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff."

(5) For voters requesting electronic transmission of the absentee ballot, the "UOCAVA Affidavit" shall be provided in electronic format to the voter; otherwise the "UOCAVA Affidavit" shall be provided printed on the ballot return envelope.

(6) For purposes of the MOVE Act and Section 104 of the Uniformed and Overseas Citizens Absentee Voting Act, the Federal Postcard Application (FPCA) for absentee balloting provided for by Section 101(b)(2), of the Uniformed and Overseas Citizens Absentee Voting Act shall be processed as follows:

(a) An FPCA marked to request delivery of the absentee ballot by e-mail shall be processed as a request for electronic delivery of the blank absentee ballot.

(b) An FPCA marked to request delivery of the absentee ballot by fax shall be processed as a request for delivery by U.S. mail of the blank absentee ballot.
Author: Edward Packard; Jean Brown; William Sutton
Statutory Authority: Code of Ala. 1975, §§17-11-40 *et seq.*, 17-1-3(a), 17-11-4, 17-11-5(d), 17-11-9.
History: **New Rule:** Filed March 28, 2014; effective May 2, 2014.

820-2-10-.04 Return Of Absentee Ballots.

(1) After the voter marks his or her choices on the ballot, the voter shall:

(a) complete the "UOCAVA Affidavit", including the section for two witnesses as required by §17-11-7, Code of Ala. 1975;

(b) when the voter has requested electronic transmission of the blank absentee ballot, insert and seal the ballot in a blank envelope for secrecy and not write any personally identifying information on the envelope and then insert and seal the blank envelope (which contains the voted ballot) and the completed UOCAVA Affidavit into a second envelope to be used for returning the absentee ballot to the appropriate absentee election manager by hand-delivery, U.S. mail, or commercial air or ground carrier;

(c) when the voter has requested that the absentee ballot be delivered by U.S. Mail or hand-delivery, insert and seal the voted ballot into the secrecy envelope and then insert and seal the secrecy envelope into the envelope on which is printed the "UOCAVA Affidavit" and which is used as the return envelope for delivering the ballot to the absentee election manager by hand-delivery, U.S. mail, or commercial air or ground carrier; and

(d) return the absentee ballot by hand-delivery, U.S. mail, or commercial air or ground carrier, to the appropriate absentee election manager using the address information provided by the absentee election manager.

(2) In the event a voter does not place the absentee ballot inside a secrecy envelope, the absentee election manager shall immediately upon discovery insert and seal the voter's ballot into a secrecy envelope and place inside an envelope of sufficient size the secrecy envelope, the UOCAVA Affidavit, and the envelope used by the voter to deliver the ballot.
Author: Edward Packard; Jean Brown; William Sutton
Statutory Authority: Code of Ala. 1975, §§17-11-40 *et seq.*, 17-1-3(a), 17-11-4, 17-11-5(d), 17-11-9.
History: **New Rule:** Filed March 28, 2014; effective May 2, 2014.

820-2-10-.05 Counting Of Absentee Ballots.

(1) As provided in §17-11-10, no poll worker or other election official shall count an absentee ballot unless the appropriate affidavit has been properly completed by the voter.

(2) An affidavit is properly completed if the voter has complied with the provisions of §17-11-7, Code of Ala. 1975, including the requirement for witnessing, except that the affidavit is not required to be notarized.
Author: Edward Packard; Jean Brown; William Sutton
Statutory Authority: Code of Ala. 1975, §§17-11-40 *et seq.*, 17-1-3(a), 17-11-4, 17-11-5(d), 17-11-9.
History: **New Rule:** Filed March 28, 2014; effective May 2, 2014.

820-2-10-.06 Minimum Criteria To Ensure Secure Remote Electronic Transmission Of Blank Absentee Ballots. The minimum criteria to ensure the secure electronic transmission of blank absentee ballots shall include the following:

(1) The capability for secure access by the overseas voter to the electronic ballot transmission server.

(2) The capability to verify the identity of the overseas voter before granting access to the electronic ballot transmission server.
Author: Edward Packard; Jean Brown; William Sutton
Statutory Authority: Code of Ala. 1975, §§17-11-40 *et seq.*

History: New Rule: Filed March 28, 2014; effective May 2, 2014.

820-2-10-.07 Application Of Postmark Deadline To Delivery Of Ballots By Commercial Carriers. For the purpose of delivering an absentee ballot to a county absentee election manager by commercial ground or air carrier, the postmark requirement specified in §17-11-18 shall refer to the date on which the absentee ballot is tendered to the commercial carrier for delivery.
Author: Edward Packard; Jean Brown; William Sutton
Statutory Authority: Code of Ala. 1975, §§17-11-40 *et seq.*
History: New Rule: Filed March 28, 2014; effective May 2, 2014.

820-2-10-.08 Delivery Of Printed Ballots And Preparation Of Electronic Ballot Transmission System.

(1) The Judge of Probate in each county shall prepare the absentee ballots for UOCAVA voters.

(2) Pursuant to Code of Ala. 1975, Section 17-11-12 (2014), the Judge of Probate shall deliver the absentee ballots to the absentee election manager not later than 55 days prior to the primary and general election.

(3) Pursuant to Code of Ala. 1975, Section 17-11-12 (2014), the Judge of Probate shall provide to the Secretary of State as soon as practicable, but in no case later than the 68th day prior to the primary and general election, the absentee ballots in electronic format or as electronic ballot definition files for use in the blank electronic ballot transmission system developed by the Secretary of State.
Author: Edward Packard, Jean Brown, William Sutton
Statutory Authority: Uniformed and Overseas Citizens Absentee Voting Act, 42 USC §1973 ff et seq., as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§575-589, 123 Stat. 2190, 2318-2335 (2009); Code of Ala. 1975, §§17-11-40 *et seq.*, 17-1-3(a), 17-11-12.
History: New Rule: Filed October 9, 2014; effective November 13, 2014.

820-2-10-.17 Counting Of Votes.

(1) An elector's ballot shall be counted for each office to be filled except for each office where it is impossible to determine the elector's choice for that office. The inability to determine the elector's choice for any particular office to be filled shall not cause the rejection of votes for other offices where the elector's choice can be determined. No ballot shall be rejected for any technical error which does not make it impossible to determine the elector's choices.

(2)(a) In precincts utilizing precinct ballot counters, if the elector has overvoted his or her ballot in in one or more contests, the counters shall be programmed to permit the elector to choose whether to 1) review and correct his or her ballot or 2) have the counter tabulate all votes on the ballot except in any contest where the elector has overvoted the ballot.

(b) If the elector chooses to correct the ballot, the original ballot shall be spoiled by a poll worker and the elector shall be issued a new, blank ballot.

(c) If the elector chooses not to correct the ballot, the elector shall be permitted to have the counter tabulate all votes on the ballot except in any contest where the elector has overvoted the ballot.

(3) In counties utilizing central ballot counters, the counters shall be programmed to permit the ballot to be tabulated by the counter if the elector has overvoted his or her ballot in any contest. The counter shall be programmed to tabulate all votes on the ballot except in any contest where the elector has overvoted the ballot.

(4)(a) In precincts utilizing precinct ballot counters, if the ballot counter detects a blank ballot, that is, a ballot where the elector has not marked any choices in accordance with the instructions for properly marking his or her choices, the ballot counter shall be programmed to return the ballot to the elector. The elector shall be permitted the opportunity to mark his or her choices on the original ballot or a replacement ballot according to the instructions for properly marking the ballot. The ballot may then be tabulated by the ballot counter. The ballot counter shall be programmed to accept a blank ballot

in those circumstances where the elector chooses to not remedy his or her blank ballot.

(b) In counties utilizing central ballot counters, if the ballot counter detects a blank ballot, that is, a ballot where the elector has not marked any choices in accordance with the instructions for properly marking his or her choices, the ballot counter shall be programmed to return the ballot or otherwise divert the ballot to be reviewed by the attending poll workers. The poll workers shall review the ballot to determine if the elector has marked no choices on the ballot or if the elector has marked choices on the ballot inconsistent with the instructions for properly marking the ballot. If the elector has marked choices on the ballot inconsistent with the instructions for properly marking the ballot, the ballot shall be counted by hand as described in paragraphs (1) and (5) of this rule. If the elector has marked no choices on the ballot, the ballot shall be set aside to be sealed with all other ballots in the ballot box after all ballots have been tabulated.

(5) When ballots are to be counted by hand, polling officials shall determine the elector's choice by considering the ballot as a whole and determining the manner in which the elector marked his or her choices on the ballot. Only those choices marked consistently in this manner shall be counted for each office to be filled. As used herein, "marked consistently" pertains to the manner in which the elector expresses his or her choice and not the pattern of candidates selected as between political parties on the ballot. If the polling officials are unable to determine the manner in which an elector marked his or her choices, the ballot shall be rejected in its entirety.

(6)(a) If a precinct ballot counter should malfunction, the poll shall remain open and voters shall deposit their ballots in a ballot box or other suitable container. The inspector shall notify the custodian, who shall attempt to repair or replace the equipment, and the probate judge, who shall maintain a public list of all precincts in which equipment failure has occurred.

(b) If the precinct ballot counter cannot be repaired, after the polls close the ballot box shall be opened and the ballots counted either by hand as described in paragraphs (1) and (4) of this rule or by feeding the ballots into an operable precinct ballot counter. If counted by hand, the determination of the elector's choice shall be governed by paragraph (4) of this rule. Poll watchers of opposing interests

and members of the media, if any are present, shall be permitted to witness this process. The results of this hand count shall be added to the official results, and the ballots shall be bound separately and returned with the other ballots.

(c) In counties utilizing precinct ballot counters, any ballot returned by the machine in a post-election recount must be counted by hand following the rules for central ballot counters as provided in paragraphs (1) and (4) of this rule. The results of this hand count shall be added to the official results, and the ballots shall be bound separately and returned with the other ballots.

(7) If a central ballot counter should malfunction, the count shall be suspended until the equipment is repaired or replaced or the ballots are counted by hand as described in paragraphs (1) and (4) of this rule. If counted by hand, the determination of the elector's choice shall be governed by paragraph (4) of this rule. Poll watchers of opposing interests and members of the media, if any are present, shall be permitted to witness this process. The results of this hand count shall be added to the official results, and the ballots shall be bound separately and returned with the other ballots.

(8)(a) In counties utilizing precinct ballot counters, if a ballot is defective and the counter is unable to accept or read the ballot, 1) the ballot shall be spoiled and the elector shall be issued a new ballot or 2) if the elector does not choose to mark a new ballot, the elector's original ballot shall be counted by hand as described in paragraphs (1) and (4) of this rule. The results of this hand count shall be added to the official results, and the ballots shall be bound separately and returned with the other ballots.

(b) In counties utilizing central ballot counters, if a ballot is defective and the counter is unable to accept or read the ballot, the ballot shall be counted by hand as described in paragraphs (1) and (4) of this rule. If counted by hand, the determination of the elector's choice shall be governed by paragraph (4) of this rule. Poll watchers of opposing interests and members of the media, if any are present, shall be permitted to witness this process. The results of this hand count shall be added to the official results, and the ballots shall be bound separately and returned with the other ballots.

Authors: Edward Packard; Jean Brown

Statutory Authority: Code of Ala. 1975, §17-7-25 (formerly §17-24-7(b)).
History: **New Rule:** Filed February 10, 1998; effective March 7, 1998. **Amended:** Filed February 7, 2002; effective March 14, 2002. **Amended:** Filed October 9, 2014; effective November 13, 2014.

820-2-10-.18 UOCAVA State Written Plan For Federal Primary Runoff Election.

(1) Pursuant to 52 U.S.C. Section 20302(a)(9), these rules provide the state written plan for any Federal primary runoff election.

(a) Federal law provides that, when a UOCAVA voter has requested a ballot for a federal election by the 45th day before that election, the State must transmit the ballot to that voter by the 45th day before the election. 52 U.S.C. Section 20302(a)(8)(A). The U.S. District Court for the Middle District of Alabama and the Eleventh Circuit Court of Appeals have held that this provision applies to federal runoff elections.

Thus, when a UOCAVA voter requests to vote in a federal primary runoff election on or before the 45th day before such election, the ballot must be transmitted to the voter on or before the 45th day before the primary runoff election by the method of transmission requested by the voter.

For a variety of reasons, it has long been Alabama's preference to hold any runoff elections, also known as second primary elections, less than 45 days after the first primary election. Separating the elections sufficiently to allow for the determination of the primary election results and the printing and transmission of the primary runoff ballots would mean more than two months between the two elections. Accordingly, the State recently implemented instant runoff ballots for UOCAVA voters in order to address the State's concerns about the primary schedule while protecting the rights of UOCAVA voters to participate in federal elections and ensuring the State's compliance with federal law.

This chapter applies only to UOCAVA voters in the circumstances described below. It provides procedures for election officials to follow when there is a federal primary election in a county or portion of a county where three or more candidates have

qualified with the same political party to run for the same federal office (other than the office of President).

These rules do not alter in any way the current election cycle.

Instant runoff ballots are not needed for a Presidential race, regardless of the number of candidates qualifying for that office, because Alabama does not hold a second primary election in that race.

(b) To facilitate the participation of UOCAVA voters in Alabama's federal second primary elections, ballot preparation under the UOCAVA State Written Plan for Federal Primary Runoff Election shall be as follows.

1. When three or more candidates have qualified with the same political party to run for the same federal office (other than the office of President), the probate judge shall prepare both a special federal ballot and a special state ballot for the primary election. The special federal ballot materials shall include instructions prepared by the Secretary of State. These instructions shall explain how a UOCAVA voter casts his or her vote using the special federal instant runoff primary ballot.

2. If necessary, the probate judge shall prepare a special state ballot for a second primary election.

(c) The content of special federal and special state ballots shall be as follows.

1. A special federal ballot shall be used in a federal instant runoff primary election. The special federal ballot shall contain a list of all federal offices (other than the office of President) for which three or more candidates have qualified with the same political party to run for the same federal office and said candidates' names. The special federal ballot shall permit the UOCAVA voter to cast a ballot in a federal instant runoff primary election by indicating his or her order of preference for each candidate for each federal office listed on the ballot. UOCAVA voters may also use this ballot to participate in the second federal primary election alone, in which case it shall be specifically labeled "Runoff Only." The labeling may be done in the ballot preparation or manually prior to its transmission to the UOCAVA voter.

2. A special state ballot shall be used when there is the possibility of a federal primary runoff election. This ballot shall contain the office of President in presidential election years, any federal offices for which only two candidates have qualified with the same political party to run for the same office and said candidates' names, all state and county offices and said candidates' names, and any referenda to be voted on in the primary election.

3. If necessary, a special state ballot for a second primary election shall be used. This ballot shall contain any state or county offices for which a second primary election is required, the names of the candidates who have qualified for said offices, and any referenda to be voted on in a second primary election.

(d) Except with respect to cross-over voting, which is addressed below, issuance and transmission of ballots shall be as follows.

1. When a UOCAVA voter requests an absentee ballot and votes in a precinct where a federal race with the potential for a runoff is on the ballot, the absentee election manager shall initially issue both a special federal ballot and a special state ballot.

2. The ballots shall be transmitted together, with provisions made for both ballots to be returned together.

3. If the UOCAVA voter has requested a runoff ballot, and there is the potential for a runoff in a non-federal race, or if any referenda are contained on a special state second primary election ballot, the absentee election manager shall issue the special state second primary election ballot to the voter when it is ready.

(e) In the event of authorized cross-over voting, issuance and transmission of ballots shall be as follows.

1. Alabama law authorizes the political parties holding a primary election to permit or prohibit cross-over voting. Code of Ala. 1975, Section 17-3-7. Because the instant runoff legislation does not explicitly prohibit UOCAVA voters from taking advantage of any political party's decision to allow voters to cross-over, and because federal law is designed to enable UOCAVA voters to have the same electoral opportunities as

Alabama's non-UOCAVA voters, these rules provide for cross-over voting for UOCAVA voters.

2. When a UOCAVA voter applies to participate in the primary election of one political party and the primary runoff election of a second political party, and that second political party allows for cross-over voting, the absentee election manager shall initially issue the requested primary election ballot and the federal instant runoff primary election ballot (which shall be labeled "Runoff Only"). If the requested first primary ballot is also a special federal instant runoff primary election ballot – and thus only contains federal races – then the absentee election manager shall also issue the special state ballot.

3. The ballots shall be transmitted together, with provisions made for both ballots to be returned together.

4. If the UOCAVA voter has requested a runoff ballot, and there is the potential for a runoff in a non-federal race, or if any referenda are contained on a special state second primary election ballot, the absentee election manager shall issue the special state second primary election ballot to the voter when it is ready.

(f) UOCAVA voters may participate in Alabama's federal primary election and any second federal primary elections using the Federal Write-In Absentee Ballot ("FWAB").

1. UOCAVA voters who vote using a Federal Write-In Absentee Ballot ("FWAB") in a federal primary election in which three or more candidates have qualified with the same political party to run for the same federal office may rank their choices for such candidates on the FWAB in the same manner provided for in Code of Ala. 1975, Section 17-13-8.1(c)(2).

2. UOCAVA voters participating in the primary election of one political party and the primary runoff election of a second political party, when that second political party allows for cross-over voting, may specify their choice for the primary election and may then rank their choices for the federal runoff election candidates on the FWAB in the same manner provided for in Code of Ala. 1975, Section 17-13-8.1(c)(2).

3. The rules contained in the UOCAVA State Written Plan for Federal Primary Runoff Election shall govern the receipt, counting, canvassing, storage, and reporting of FWAB

ranked ballots cast in the first federal primary election, and second federal primary election, if necessary.

(g) The deadline for receipt of ballots shall be as follows.

1. Special Federal Ballot, FWAB, or Special State Ballot for Primary Election.

(i) If received by mail, no special federal ballot, FWAB, or special state primary ballot shall be opened or counted in the first federal primary election unless the absentee ballot is postmarked as of the date of the first primary election and received by the absentee election manager no later than noon seven days after the first primary election.

(ii) If received electronically, no special federal ballot or special state primary ballot shall be opened or counted in the first federal primary election unless the absentee ballot is received by midnight on the date of the first primary election.

2. Special Federal Ballot, FWAB, or Special State Ballot for Second Primary Election.

(i) If received by mail, no special federal ballot, FWAB, or special state ballot for a second primary election shall be opened or counted unless the absentee ballot is postmarked as of the date of the second primary election and received by the absentee election manager no later than noon seven days after the second primary election.

(ii) If received electronically, no special federal ballot or special state ballot for a second primary election shall be opened or counted unless the absentee ballot is received by midnight on the night of the federal primary runoff election.

(h) The determination as to whether the special federal ballot is entitled to be counted shall be as follows.

1. For a federal primary election in which three or more candidates have qualified with a single political party to run for the same federal office (other than the office of President), where the voter is required to complete an absentee ballot affidavit, the absentee election poll officials provided for in Code of Ala. 1975, Section 17-11-11 shall follow the

procedures set forth in Code of Ala. 1975, Section 17-11-10 to determine whether the UOCAVA absentee ballot affidavit establishes that the UOCAVA voter is entitled to vote by absentee ballot. Where the voter is required to complete an overseas voter certificate in accordance with Code of Ala. 1975, Section 17-11-46, the absentee election manager shall determine whether the overseas voter certificate establishes that the UOCAVA voter is entitled to vote by absentee ballot.

2. The determination in paragraph (1) governs all ballots submitted together, including for any second federal primary election, such that no new determination as to the adequacy of the same absentee ballot affidavit, or overseas voter certificate, as applicable, need be made.

3. For any ballots submitted separately, such as stand-alone runoff ballots or a special state ballot for a second primary election, where the voter is required to complete an absentee ballot affidavit, the absentee election poll officials provided for in Code of Ala. 1975, Section 17-11-11 shall follow the procedures set forth in Code of Ala. 1975, Section 17-11-10 to determine whether the UOCAVA absentee ballot affidavit establishes that the UOCAVA voter is entitled to vote by absentee ballot. Where the voter is required to complete an overseas voter certificate in accordance with Code of Ala. 1975, Section 17-11-46, the absentee election manager shall determine whether the overseas voter certificate establishes that the UOCAVA voter is entitled to vote by absentee ballot.

4. If the absentee election poll officials or absentee election manager, as applicable, determine(s) that the UOCAVA absentee ballot is entitled to be counted, upon the closing of the polls, the ballot shall be counted in accordance with state law.

5. If the absentee election poll officials determine that an absentee ballot affidavit is insufficient and therefore the UOCAVA absentee ballot is not entitled to be counted, a record shall be made as to the reason for rejection of the ballot and said record of the reason for rejection of any ballot shall be provided to the absentee election manager. If the absentee election manager determines that an overseas voter certificate is insufficient and therefore the UOCAVA absentee ballot is not entitled to be counted, a record shall be made and maintained as to the reason for rejection of the ballot. The absentee election manager shall thereafter record in the

statewide election management system which absentee ballots have been accepted or rejected and if rejected, the reason therefor.

(i) The method for counting the special federal ballot and FWAB and securing same shall be as follows.

1. In a federal primary election in which the special federal ballot or FWAB is used, the first choice preference of each voter shall be the vote counted as cast by the voter. Only the first choice preference votes of the voters shall be counted or divulged during the count or upon the conclusion of the primary election. The total count of first choice preference votes received by each federal candidate shall be added to the count of votes produced for candidates pursuant to Section 17-13-13.

2. Upon the conclusion of this count, the special federal ballots or FWABs shall be returned to the absentee election manager, who shall secure and maintain the ballots until the time for counting the ballots for any second primary election. Any FWAB on which the UOCAVA voter has written in a single choice in the federal Congressional races, without crossing-over for the runoff, and where the voter's single choice is facing only one opponent is a FWAB which has not registered a vote for any potential federal runoff election, and it may be returned to the absentee election manager or secured along with the traditional ballots pursuant to governing state law.

3. If a federal second primary election is necessary, the vote to be counted as cast by each voter shall be the highest designated choice of the voter of the two candidates participating in the contest. In the event that the voter has only ranked one choice, the vote will be counted for that candidate if he or she is a candidate in the federal runoff election. The total count of the votes received by each candidate shall be added to the count of votes pursuant to Section 17-13-18.

4. If, on the special federal ballot, the voter marks an "X" or places a check mark by only one candidate's name, circles only one candidate's name, or otherwise clearly designates his or her choice for only one candidate, that candidate shall be counted as the voter's first choice candidate.

5. The votes for any office listed on the special federal ballot or FWAB shall be canvassed, certified, and announced in the manner provided for in Section 17-13-17 and Section 17-13-18.

6. Upon the conclusion of the first federal primary election, and the second federal primary election, if necessary, the special federal ballots and FWABs shall be stored with the records of election as required by state law, but shall be segregated from regular absentee ballots and labeled.

(j) The method for counting the special state ballot shall be as follows.

1. The special state ballot shall be counted in the manner provided for in Section 17-13-13 or Section 17-13-18, as applicable to a primary election or second primary election.

2. The votes for any office listed on the special state ballot shall be canvassed, certified, and announced in the manner provided for in Section 17-13-17 and Section 17-13-18.

3. If the absentee election officials determine that an absentee ballot affidavit is insufficient and therefore the UOCAVA absentee ballot is not entitled to be counted, a record shall be made as to the reason for rejection of the ballot and said record of the reason for rejection of any ballot shall be provided to the absentee election manager. If the absentee election manager determines that an overseas voter certificate is insufficient and therefore the UOCAVA absentee ballot is not entitled to be counted, a record shall be made and maintained as to the reason for rejection of the ballot. The absentee election manager shall thereafter record in the statewide election management system which absentee ballots have been accepted or rejected and if rejected, the reason therefor.

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Authority: 52 U.S.C. Section 20302(a)(9); Code of Ala. 1975, Section 17-13-8.1 (2015).

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