No. 17-1463

In the Supreme Court of the United States

LUIS SEGOVIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether residents of Puerto Rico, Guam, and the U.S. Virgin Islands who previously lived in Illinois and seek to vote absentee in federal elections in Illinois have standing to challenge the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. 20301 *et seq.*, on the ground that the Act fails to force Illinois to permit them to vote absentee.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is published at 880 F.3d 384. The opinions of the district court (Pet. App. 15a-69a, 70a-94a) are published at 201 F. Supp. 3d 924 and 218 F. Supp. 3d 643.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2018 (Pet. App. 95a-96a). The petition for a writ of certiorari was filed on April 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. 20301 *et seq.* (Supp. IV 2016), among other reasons, "to protect the voting rights of United States citizens who move overseas but retain their American citizenship." Pet. App. 2a. UOCAVA directs 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) (Supp. IV 2016). The statute defines an "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) (Supp. IV 2016). "Federal office" is defined under UOCAVA to mean "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) (Supp. IV 2016). The statute 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." 52 U.S.C. 20310(6) (Supp. IV 2016). 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." 52 U.S.C. 20310(8) (Supp. IV 2016).

Consistent with UOCAVA, Illinois allows certain "non-resident civilian citizen[s]" to vote absentee in federal elections. 10 Ill. Comp. Stat. Ann. 5/20-2.2 (West

Supp. 2018). To qualify as a "non-resident civilian citizen" under Illinois law, a non-military U.S. citizen must "reside outside the territorial limits of the United States," *id.* 5/20-1(4)(a) (West 2015); have resided in Illinois immediately before moving overseas, *id.* 5/20-1(4)(b); and not "maintain a residence" or be "registered to vote in any other State," *id.* 5/20-1(4)(c). The law defines the "[t]erritorial limits of the United States" to include "each of the several States of the United States," as well as "the District of Columbia, the Commonwealth of Puerto Rico, Guam and the Virgin Islands; but * * * not [to] include American Samoa, the Canal Zone, the Trust Territory of the Pacific Islands or any other territory or possession of the United States." *Id.* 5/20-1(1).

2. Petitioners are residents of Puerto Rico, Guam, and the U.S. Virgin Islands who formerly resided in Illinois, along with two organizations whose members include residents of those same territories who formerly resided in Illinois. Pet. 7. Petitioners filed suit against various federal, state, and local entities and officials alleging that UOCAVA and Illinois law violate their right to equal protection and their due process right to travel. Pet. App. 2a. Petitioners based their equal protection argument on the ground that Illinois authorizes absentee voting by citizens who move from Illinois to the Northern Mariana Islands or American Samoa, but not by citizens who move to Puerto Rico, Guam, or the U.S. Virgin Islands. *Id.* at 1a-2a.

a. The district court granted summary judgment in favor of the federal respondents on petitioners' equal protection challenge to UOCAVA. Pet. App. 15a-69a. With respect to standing, the court held that petitioners had alleged an injury that was traceable to those respondents. *Id.* at 30a-37a. The court acknowledged that

"the federal [respondents] have no role in accepting or rejecting Illinois absentee ballots." *Id.* at 36a. The court nevertheless concluded that the federal respondents "are responsible for the terms of the UOCAVA," and "Illinois' ability to provide redress" for petitioners' alleged injury "does not insulate the federal [respondents] from liability." *Ibid.*

On the merits, the district court rejected petitioners' equal protection claim. Pet. App. 37a-68a. Because "[c]itizens residing in territories do not have a constitutional right to vote as citizens of a state do," the court explained, petitioners had not identified any fundamental right of which they had been deprived. *Id.* at 44a. The court accordingly declined to apply strict scrutiny, finding rational basis review to be the appropriate standard. See *id.* at 47a ("[W]here there is no constitutionally protected right to vote, a state's law extending the right to vote to some non-residents does not implicate strict scrutiny.") (brackets, citation, and internal quotation marks omitted).

Applying such review to petitioners' equal protection claim, the district court concluded that UOCAVA's extension of absentee-voting rights to the residents of some but not other federal territories was supported by an adequate "rational reason." Pet. App. 57a-58a. Among other things, the court pointed to the unique "historical relationship with the United States" that differentiates some territories from others. *Id.* at 54a; see *id.* at 54a-65a (contrasting political history of the Northern Mariana Islands with that of Puerto Rico, Guam, and the U.S. Virgin Islands). The court explained that "Congress could have reasonably concluded," based on that history, that the territories treated as foreign under the statute were "more analogous to a foreign country"

than were the territories in which petitioners reside. *Id.* at 62a. Finally, the court emphasized that the relief requested by petitioners—an order granting absentee-voting rights to residents of Puerto Rico, Guam, and the U.S. Virgin Islands who previously had lived in Illinois—would itself create a "'distinction of questionable fairness,'" because it would "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." *Id.* at 66a-67a (quoting *Romeu* v. *Cohen*, 265 F.3d 118, 125 (2d Cir. 2001)).

b. In a separate decision, the district court granted judgment against petitioners on their remaining claims. Pet. App. 70a-94a. Applying rational basis review to petitioners' equal protection challenge against Illinois law, the court concluded that Illinois "had a legitimate state interest" in treating residents of American Samoa and the Northern Mariana Islands differently from residents of Puerto Rico, Guam, and the U.S. Virgin Islands. *Id.* at 84a; see *id.* at 83a-89a. The court also rejected petitioners' claim that UOCAVA and Illinois law violated petitioners' "fundamental right to interstate travel," as protected by "the substantive component of due process." *Id.* at 89a (citation omitted); see *id.* at 89a-93a.

3. The court of appeals vacated and remanded in part, and affirmed in part. Pet. App. 1a-14a. As relevant here, the court first held that petitioners lacked standing to challenge UOCAVA on equal protection grounds because their injuries were not traceable to the federal law, which simply sets minimum requirements for state absentee-voting provisions and does not prevent Illinois from accepting petitioners' absentee ballots. *Id.* at 5a-8a. Under Article III, the court explained, "a federal court [can] act only to redress injury

that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 6a (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). In this case, the court observed, "the reason [petitioners] cannot vote in federal elections in Illinois is not the UOCAVA, but Illinois' own election law." *Id.* at 5a-6a; see *id.* at 2a ("To the extent [petitioners] are injured, it is because they are not entitled to ballots under state law."). The court therefore vacated the district court's decision insofar as it ruled for the federal respondents on the merits of petitioners' equal protection claim and remanded with instructions to dismiss the claim "for want of jurisdiction." *Id.* at 14a.

With respect to the state defendants, the court of appeals rejected petitioners' equal protection challenge to the Illinois election law. Pet. App. 9a-13a. The court declined to apply strict scrutiny to petitioners' claim, explaining that residents of the territories do not have a fundamental right to vote in federal elections, and that petitioners "have no special right [to do so] simply because they *used to* live in a state." *Id.* at 10a. Applying rational basis review, the court agreed with the district court's conclusion that Illinois had a rational basis for declining to permit petitioners to vote absentee. When Illinois enacted its statutory definition of "the United States" in 1979, the court of appeals observed, "the Northern Mariana Islands were a Trust Territory, rather than a fully incorporated U.S. territory." *Id.* at 11a. American Samoa, moreover, was and "is still defined as an 'outlying possession' under federal law, and persons born there are American nationals, but not citizens." *Ibid.* Accordingly, the court explained, "[o]ne

could rationally conclude that these two territories were in 1979 more similar to foreign nations than were the incorporated territories where [petitioners] reside." *Ibid.*

The court of appeals further concluded that, "[i]n the special context of this case," it was "rational for Illinois to retain the same definition it enacted nearly 40 years ago," particularly since changing its definition to account for the increased integration into the United States of the Northern Mariana Islands and American Samoa would have the "perverse" effect of "*contract[ing]* voting rights for residents in the excluded territories." Pet. App. 11a-12a. The court also echoed the district court's concern that requiring Illinois to grant overseas voting rights to all former state residents living in the territories would promote "a distinction of questionable fairness," by favoring territorial residents who had previously lived in a state over territorial residents who had not. *Id.* at 12a (citation omitted).

ARGUMENT

Petitioners argue (Pet. 14-23) that the court of appeals erred in holding that petitioners lack standing to challenge UOCAVA. Contrary to petitioners' characterization, however, the court did not hold that an injury "is not fairly traceable to a federal government action so long as some *other* government body retains the ability to remedy the injury inflicted." Pet. 14. Rather, the court held simply that UOCAVA was not the source of petitioners' injury because petitioners' lack of voting eligibility is due to state, rather than federal, law. That decision is correct and does not conflict with any decision of this Court or another court of appeals. In any event, petitioners' equal protection challenge to UOCAVA is without merit, as all other courts of appeals to consider similar challenges have held.

1. A plaintiff who seeks to establish standing "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016). To satisfy the second requirement of traceability, the plaintiff need not establish that "the defendant's actions [we]re the very last step in the chain of causation"; it may suffice that the defendant exerted "determinative or coercive effect upon the action of someone else." *Bennett* v. *Spear*, 520 U.S. 154, 169 (1997). But the plaintiff must seek to "redress [an] injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

In this case, petitioners "desire to have a vote in" federal elections in Illinois and allege that, as a result of UOCAVA, they have been illegally "exclu[ded] from the basic right to participate in [those] elections." Pet. 2; see Pet. App. 16a (petitioners allege that UOCAVA "violates their equal protection and due process rights by barring them from casting absentee ballots in Illinois"). As the court of appeals explained, however, "the reason [petitioners] cannot vote in federal elections in Illinois is not the UOCAVA, but Illinois' own election law." Pet. App. 5a-6a. UOCAVA "*requires* Illinois to provide absentee ballots for its former residents living in the Northern Mariana Islands, but it does not *prohibit* Illinois from providing such ballots to former residents in Guam, Puerto Rico, and the Virgin Islands." *Id.* at 5a. If Congress repealed UOCAVA tomorrow, petitioners would not gain the right they seek to participate in fed-

eral elections. Petitioners' alleged injury—their inability to vote absentee in federal elections in Illinois—thus is not "fairly traceable to the challenged conduct of" the federal respondents. *Spokeo*, 136 S. Ct. at 1547.

Even assuming that petitioners' injury could instead be characterized as abstract harm from the "differential treatment" afforded to citizens in the Northern Mariana Islands (Pet. 6), that harm would still not be attributable to UOCAVA. Federal law does not require such differential treatment; Illinois law does. Illinois has chosen, for instance, to afford absentee voting rights to former residents who move to American Samoa. Pet. App. 5a. Illinois could have, but has not, chosen to extend the same absentee voting rights to former residents who move to other territories. As the court of appeals correctly concluded, nothing in federal law prevents Illinois from affording absentee voting rights "to former residents in Guam, Puerto Rico, and the Virgin Islands. * * * [I]t simply doesn't." *Ibid.*

2. Petitioners argue (Pet. 15-22) that the decision below conflicts with this Court's decisions and with decisions of other courts of appeals. The premise of petitioners' entire argument is mistaken. The Seventh Circuit did not hold "that a plaintiff lacks standing to sue the federal government regarding an unconstitutional federal statute whenever an 'independent party' has 'discretion' to counteract the federal defendant's unlawful action." Pet. 15. The Seventh Circuit thus did not hold that petitioners lack standing to challenge UOCAVA because Illinois has the "discretion" to "counteract" any harm caused to them by federal law. *Ibid.* Rather, the court held that petitioners lack standing because federal law has not harmed them: "Illinois has discretion to determine eligibility for absentee ballots under its

election laws," and "so, UOCAVA or not, whether the plaintiffs can obtain absentee ballots is entirely up to Illinois" and "the federal government cannot be the cause of their injuries." Pet. App. 7a.

Petitioners cite (Pet. 16) various decisions in which this Court has purportedly "recognize[d] plaintiffs' standing to challenge government action that authorizes or fails to prevent injurious third-party actions." But the decisions cited by petitioners do not directly address the Article III traceability requirement at all. See *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (rejecting the Secretary of Commerce's argument "that no private cause of action [wa]s available to" the plaintiffs, because a right of action was "expressly created by the Administrative Procedure Act," and the plaintiffs' claimed injury was "within the 'zone of interests' protected by" the statute invoked); *Barlow* v. *Collins*, 397 U.S. 159, 164 (1970) (holding that plaintiffs "have the personal stake and interest that impart the concrete adverseness required by Article III"); *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152-153 (1970) (*Camp*) (concluding that the plaintiffs had adequately "allege[d] that the challenged action has caused [them] injury in fact," and that "the interest sought to be protected by the [petitioners wa]s arguably within the zone of interests to be protected or regulated").

The federal actions challenged in those cases, moreover, had the legal effect of "authoriz[ing]" (Pet. 16) third parties to injure the plaintiffs. See *Japan Whaling Ass'n*, 478 U.S. at 226-229 (Secretary of Commerce declined to certify Japan's fishing in excess of treaty quotas, where certification would have "require[d] the imposition of sanctions" under federal law); *Barlow*,

397 U.S. at 160-163 (Secretary of Agriculture promulgated regulation authorizing landlords to seek certain payments from tenants under Food and Agriculture Act); *Camp*, 397 U.S. at 151 (Comptroller of the Currency issued ruling authorizing national banks to "make data processing services available to other banks and to bank customers"). UOCAVA has no similar "authorizing" effect here: Wholly irrespective of any federal requirement, Illinois "law could provide [petitioners] the ballots they seek; it simply doesn't." Pet. App. 5a.

Petitioners are also incorrect in arguing (Pet. 18-22) that the decision below conflicts with decisions from other courts of appeals. Petitioners note that two courts of appeals have addressed the merits of equal protection challenges to UOCAVA—and both rejected them. Pet. 18 (citing *Romeu* v. *Cohen*, 265 F.3d 118 (2d Cir. 2001); *Igartua de la Rosa* v. *United States*, 32 F.3d 8 (1st Cir. 1994) (per curiam), cert. denied, 514 U.S. 1049 (1995)). Yet neither of those decisions discussed or ruled on the plaintiffs' standing. This Court has cautioned that its own "'drive-by jurisdictional rulings' * * * should be accorded 'no precedential effect.'" *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). The same is true *a fortiori* for drive-by jurisdictional rulings by the courts of appeals, especially since, as petitioners acknowledge (Pet. 19 n.4), the plaintiffs in those cases alleged a somewhat different type of injury than petitioners allege here.

The decision below likewise does not conflict, as petitioners claim (Pet. 19), with "other federal appellate decisions that have repeatedly recognized standing in circumstances of multiple or concurrent causation." The court of appeals did not reject the possibility of standing

to sue a defendant who, in conjunction with others, causes the plaintiff's alleged injury. Rather, it held on the facts of this case that petitioners' injury was not caused by UOCAVA. See pp. 8-10, *supra*. For that reason, there is also no conflict (Pet. 19-20) with decisions in which a federal actor was found to have caused harm in combination with, or in addition to, harm caused by a state actor. See, *e.g.*, *Khodara Envtl., Inc.* v. *Blakey*, 376 F.3d 187, 195 (3d Cir. 2004) (Alito, J.) (plaintiff's alleged harm was caused by "two obstacles," one imposed by the federal government and one by the State).

Nor does UOCAVA have the effect of exempting the States from any federal requirement, see *National Parks Conservation Ass'n* v. *Manson*, 414 F.3d 1, 3-4 (D.C. Cir. 2005) (Department of Interior issued letter that had legal effect of authorizing Montana to issue permit without satisfying additional federal requirements), or of authorizing the States to take an injurious action that otherwise would have been forbidden by federal law, see *Scenic Am., Inc.* v. *United States Dep't of Transp.*, 836 F.3d 42, 46-47 (D.C. Cir. 2016) (Federal Highway Administration issued guidance "permitting" States to put up digital billboards that otherwise would have been forbidden by Highway Beautification Act) (citation omitted), cert. denied, 138 S. Ct. 2 (2017). Petitioners identify no decision in which plaintiffs were found to have standing to challenge a federal law even though, as here, "there [wa]s *nothing* other than [state] law preventing the plaintiffs from receiving" their desired remedy. Pet. App. 7a.

3. In any event, review of the court of appeals' standing analysis would have no effect on the outcome of this case because UOCAVA is constitutional, as both courts of appeals to address challenges to the law on the

merits have held. See *Romeu*, 265 F.3d at 124-125 (rejecting equal protection challenge); *Igartua de la Rosa*, 32 F.3d. at 10-11 (similar); see also Pet. App. 37a-68a (district court decision rejecting petitioners' equal protection claim). Petitioners do not directly raise UOCAVA's merits. They argue instead that the court of appeals erred in holding that "UOCAVA * * * need only satisfy rational-basis review." Pet. 24; see Pet. 25. But the court applied rational basis review to *state election law*, not UOCAVA. See Pet. App. 10a ("Because the Illinois law does not affect a fundamental right or a suspect class, it need only satisfy rational-basis review."). Because the court rejected petitioners' equal protection challenge to UOCAVA for lack of standing, it vacated the district court's merits ruling and remanded with instructions to dismiss the claim "for want of jurisdiction." *Id.* at 14a. Accordingly, this case does not present any question regarding the proper standard for reviewing such a claim on the merits.

Even if the court below had applied rational basis review to petitioners' equal protection challenge to UOCAVA, that ruling would not have created any conflict regarding the proper standard for reviewing such challenges. See *Romeu*, 265 F.3d at 124 (finding no merit in plaintiff's equal protection claim "regardless whether [UOCAVA] 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"); *Igartua de la Rosa*, 32 F.3d at 10 (determining that UOCAVA "need only have a rational basis to pass constitutional muster"). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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