No. 17-___

In the Supreme Court of the United States

LUIS SEGOVIA, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff has standing to challenge an unconstitutional federal statute even though a State could take action to remedy the unconstitutional treatment prescribed by federal law.

2. Whether the right to vote in federal elections is fundamental, warranting heightened scrutiny of discriminatory eligibility criteria, even if the right to vote in those federal elections is not expressly guaranteed in the Constitution.

3. Whether a law fails to survive rational-basis review when the sole proffered government basis for rationality is an untenable post hoc justification and rests on facts that have not existed for decades.

PARTIES TO THE PROCEEDING

Petitioners in this Court, who were plaintiffs in the United States District Court for the Northern District of Illinois and appellants in the United States Court of Appeals for the Seventh Circuit, are the following: 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.

Respondents in this Court are the following: the United States of America; James N. Mattis, in his official capacity as the Secretary of Defense; the Federal Voting Assistance Program; David Beirne, in his official capacity as Acting Director of the Federal Voting Assistance Program; the Board of Election Commissioners for the City of Chicago; Marisel A. Hernandez, in her official capacity as Chair of the Board of Elections Commissioners for the City of Chicago; and Karen Kinney, in her official capacity as Rock Island County Clerk. Respondents were defendants in the district court and appellees in the court of appeals, except with respect to James N. Mattis and David Beirne. At the time suit was brought, Ashton Carter was named defendant in his official capacity as the Secretary of Defense, and Matt Boehmer was named defendant in his official capacity as Director of the Federal Voting Assistance Program.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 29.6, petitioners state that petitioners Iraq Afghanistan and Persian Gulf Veterans of the Pacific and League of Women Voters of the Virgin Islands have no parent corporations, and no publicly held company owns 10% or more of either entity.

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit was entered on January 18, 2018, and is reported at 880 F.3d 384. App. 1a–14a. Judgment was entered on January 22, 2018. App. 95a–96a. The orders of the district court are reported at 201 F. Supp. 3d 924, App. 15a–69a, and 218 F. Supp. 3d 643, App. 70a–94a.

JURISDICTION

The Seventh Circuit entered a final judgment on January 22, 2018. App. 95a–96a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes, the text of which are set forth in the appendix, 97a–124a: the Fifth and Fourteenth Amendments of the U.S. Constitution; certain sections of the Uniformed and Overseas Citizens Absentee Voting Act, viz. 52 U.S.C. §§ 20301, 20302, and 20310; and certain sections of the Illinois Election Code, viz. 10 Ill. Complied Stat. Ann. §§ 20-1 through 20-2.2.

INTRODUCTION AND STATEMENT OF THE CASE

This case concerns federal and state absentee voting laws that protect former Illinois citizens' right to vote when they move to any U.S. Territory or any foreign country unless they move to three disfavored U.S. Territories: Guam, Puerto Rico, and the U.S. Virgin Islands.

Petitioners include former Illinois residents who moved to these disfavored Territories. Some of them – Luis Segovia, Jose Antonio Torres, Tomas Ares, and Anthony Bunten – have served in the U.S. Armed Forces, including in or during the wars in Iraq, Afghanistan, and Vietnam. Mr. Torres also moved from Illinois to Puerto Rico to keep his job as a federal employee of the U.S. Postal Service. Another petitioner – Pamela Lynn Colon – served as a federal public defender in the U.S. Virgin Islands. All of the individual petitioners desire to have a vote in the federal government that rules over them from a distance – a vote that they would enjoy if they instead had moved to certain favored U.S. Territories (the Northern Mariana Islands, American Samoa, and nine smaller Territories) or a foreign country.

Petitioners' exclusion from the basic right to participate in federal elections is especially injurious because there is no apparent rationale for it. The laws provide no justification for extending voting rights to former state citizens residing in favored Territories or foreign countries while withholding the same rights from those who move to Guam, Puerto Rico, or the U.S. Virgin Islands. And although respondents have speculated as to possible reasons for this bizarre arrangement, all of those reasons relate

to conditions that no longer exist – and in any event could never have justified the disparate treatment.

Notwithstanding this arbitrary discrimination concerning the fundamental right to vote, the U.S. Court of Appeals for the Seventh Circuit rejected petitioners' equal-protection claims – and even held that petitioners lacked standing to challenge the federal law because Illinois could have chosen to rectify the discrimination federal law imposes.

In so holding, the Seventh Circuit created a split in federal authority over basic standing principles. No other federal court has held that a plaintiff lacks standing to challenge discriminatory federal law merely because the states or some other third party theoretically could – but did not – level the playing field. And other federal courts of appeals have allowed similar challenges to the same federal voting law without finding a lack of standing.

The Seventh Circuit's equal-protection holdings also conflict with those of other federal courts and this Court. The Seventh Circuit concluded that the rights extended under the federal and state laws at issue were not fundamental – and thus not protected by heightened judicial review – because residents of the Territories have no express grant of voting rights in the Constitution. That holding is irreconcilable with this Court's precedents establishing that statutorily created voting rights in matters ranging from presidential elections to school-board elections are fundamental under equal-protection principles even when there is no express underlying constitutional voting right. It also is irreconcilable with federal decisions on a range of other voting rights not mentioned in the Constitution.

Finally, the Seventh Circuit's application of rational-basis review to the classification at issue contravenes this Court's precedent and deepens a split with other courts of appeals. The court below upheld the discriminatory classification on the basis of decades-old historical conditions. It concluded that whether the classification is irrational today has no bearing on the rational-basis inquiry – as long as a rational justification existed at the time of enactment. But this Court's precedent and the decision of at least one other court of appeals demand that rational-basis review take account of changed circumstances.

1. *The statutory framework.*

a. *The Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA").* — Congress enacted UOCAVA in 1986 to reaffirm and strengthen the right to vote for U.S. citizens living outside the 50 states. UOCAVA extended absentee-voting rights to U.S. citizens living overseas who would otherwise be denied the right to vote for President or to have voting representation in Congress. H.R. Rep. No. 99-765, at 6–7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2010–11. As Rep. Al Swift described it, UOCAVA would "protect a fundamental right" retained by American citizens, "wherever in the world they might be." 132 Cong. Rec. 20,976 (1986).

UOCAVA built on its predecessor law, the Overseas Citizens Voting Rights Act of 1975, which Congress enacted to remediate the "highly discriminatory" practice in the States that protected the right of military personnel and federal employees residing overseas to vote but failed to provide comparable protections to similarly situated "private citizen[s]," which Congress viewed as suspect under equal-

protection principles *See* H.R. Rep. No. 94-649, pt. 1, at 1, 3 (1975), *reprinted in* 1975 U.S.C.C.A.N. 2358, 2359–60.

In pertinent part, UOCAVA provides that "[e]ach State shall — permit . . . 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)(3) (App. 103a).

An "overseas voter" is defined to include, as relevant here, "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." *Id.* § 20310(5) (App. 119a).

The term "'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," *id.* § 20310(8) (App. 119a) – but *not* the other U.S. Territories, including the Northern Mariana Islands and nine smaller territories.[1]

UOCAVA thus draws a distinction between former state residents living abroad and those living inside the "United States" as defined by the statute. In so doing, the statute treats the Northern Mariana Islands and nine smaller territories – but not Guam, Puerto Rico, the U.S. Virgin Islands, and American Samoa – as falling outside the "United States." The

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[1] The nine smaller Territories are described in U.S. Gov't Accountability Office, GAO-08-751, "*U.S. Insular Areas: Application of the U.S. Constitution*" 9 (1997), *available at* https://www.gao.gov/archive/1998/og98005.pdf.

effect of this language is to require States to provide for absentee voting by former residents who move to some Territories or to a foreign country – but not by those who move to Guam, Puerto Rico, the U.S. Virgin Islands, or American Samoa.

Neither the law nor its legislative history sets forth any government interest ostensibly served by this differential treatment.

b. *Illinois's Military and Overseas Voter Empowerment Act ("MOVE").* — In Illinois, UOCAVA's requirements are implemented through MOVE, which provides that former Illinois citizens residing indefinitely "outside the territorial limits of the United States" can vote in federal elections in Illinois. 10 Ill. Comp. Stat. § 5/20-1(4), *id.* § 5/20-2.2 (App. 120a, 124a).

The law defines the "territorial limits of the United States" as a state, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. *Id.* § 20-1(1) (App. 120a). Accordingly, former Illinois residents who presently reside in certain Territories (the Northern Mariana Islands, American Samoa, or nine smaller Territories) or a foreign country are eligible for a federal absentee ballot in Illinois, while those who presently reside in Guam, Puerto Rico, or the U.S. Virgin Islands are not. Thus, MOVE is more expansive than UOCAVA because it also allows former state residents living in American Samoa to vote for President and voting representation in Congress, in addition to those living in the Northern Mariana Islands, nine smaller Territories, or a foreign country.

The Illinois legislature offered no justification for its distinction between former Illinois residents living

in Guam, Puerto Rico, or the U.S. Virgin Islands and those living in any other Territory or a foreign country.

2. *Petitioners' lawsuit.* — Petitioners are six individuals who were once citizens of Illinois but who now reside in Guam, Puerto Rico, and the U.S. Virgin Islands, and two organizations that operate in these Territories and count former Illinois residents among their members.

As a result of the laws summarized above, former state residents living almost anywhere outside the 50 states – including the Northern Mariana Islands, American Samoa, and nine smaller Territories – continue to enjoy their right to vote for President and voting representation in Congress, while individual petitioners – who live in Guam, Puerto Rico, and the U.S. Virgin Islands – are denied this basic democratic participation.

Seeking to remedy this discriminatory treatment and their exclusion from the most basic form of participation in our democratic institutions, petitioners brought suit against respondents in the U.S. District Court for the Northern District of Illinois. They alleged violation of their equal-protection and due-process rights under the Fifth and Fourteenth Amendments to the Constitution. They sought relief in the form of an order enjoining respondents from denying them the right to vote absentee in federal elections in Illinois.

Petitioners have recognized throughout this litigation that the Constitution does not grant them an underlying right to federal representation. While petitioners would prefer that the Territories have their

own voting representation, their claim here is limited to seeking equal treatment under the statutory framework established by UOCAVA and MOVE.

3. *Proceedings below.*

a. *District Court.* — The District Court granted summary judgment against petitioners in two orders. The first addressed cross-motions filed by petitioners for summary judgment and by the federal respondents for dismissal with respect to petitioners' equal-protection claims. At the threshold, the court rejected the federal respondents' contention that petitioners lacked standing to sue them because their injury ostensibly resulted from state rather than federal law. According to the federal respondents, because States were free to expand the absentee voting rights beyond the "floor" established by UOCAVA, the federal law was not the source of petitioners' injury. The court disagreed, reasoning that it makes no sense that a State's failure to act to remedy a discriminatory distinction set as a "floor" in federal law could "insulate[]" the federal government from liability for a distinction it created. The court also noted that UOCAVA provides certain protections that would not be available, even if a State were to extend absentee voting rights to former state citizens in Guam, Puerto Rico, the U.S. Virgin Islands, and American Samoa. App. 27a–37a.

The District Court next concluded that UOCAVA was subject to rational-basis review because, although the law involved the right to vote, territorial residents generally do not have a right to participation in federal elections, citing this Court's decisions in the *Insular Cases*. App. 37a–54a. And the District Court concluded that UOCAVA's preferential treat-

ment of former state citizens in the Northern Mariana Islands was justified based on its conclusion that the Territory was "more analogous to a foreign country" at the time UOCAVA was enacted, App. 54a–68a – even though the Northern Mariana Islands was months away from finalizing a decade-long transition to territorial status at that time and has now been a U.S. Territory for more than 30 years.

The District Court's subsequent order granted summary judgment to respondents on petitioners' remaining claims – including their equal-protection claim against the state respondents.[2] The District Court again concluded that the law was subject only to rational-basis review. App. 77a–82a. And it concluded that Illinois law survived such review because it was modeled after a federal law that likewise provided for distinct treatment of the Northern Mariana Islands (then part of the Trust Territory of the Pacific Islands) and American Samoa at the time it was enacted, App. 83a–89a – even though the federal law on which it was modeled was subsequently revised, leaving MOVE out of sync with that law for over three decades. Petitioners appealed.

b. *Court of Appeals.* — On appeal, the Seventh Circuit vacated the judgment as to the federal respondents, ruling that the District Court erred in holding petitioners had standing to sue them, and it affirmed the ruling on the merits as to the state respondents.

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[2] The District Court also rejected a right-to-travel claim asserted against all respondents, which the Seventh Circuit affirmed on appeal. Petitioners do not seek review of that issue here.

On standing, the Court of Appeals found it decisive that UOCAVA "does not *prohibit* Illinois from providing [absentee] ballots to former residents in Guam, Puerto Rico, and the Virgin Islands." App. 5a. According to the court, where an "independent actor" has "discretion" to make a decision that will determine whether the plaintiff's injury occurs, any resulting injury is not traceable to the defendant, even where the defendant forces the injury-causing choice on the "independent actor." App. 6a–7a.

In a footnote, the Seventh Circuit also referred to a possible "additional standing problem" it found with petitioners' equal-protection argument: its "serious doubts" that petitioners' injury could be "redressed by a favorable judicial decision." App. 8a n.1. Specifically, the court suggested that the proper remedy in the event that petitioners prevailed on their equal-protection claim might be to extend absentee voting rights "to none of the territories" rather than expanding such rights to all of them. *Id.*

The court next turned to petitioners' equal-protection claim against the state respondents. It began with the proposition that "residents of the territories have no fundamental right to vote in federal elections" because they "send no electors to vote for president or vice president and have no voting members in the United States Congress." App. 9a. For this reason, the court concluded "the Illinois law does not affect a fundamental right" and "need only satisfy rational-basis review." App. 10a.

The Seventh Circuit held that MOVE survived such review. It acknowledged that while "the distinction among United States territories may seem strange to an observer today, it made more sense

when Illinois enacted the challenged definition" – in 1979. App. 11a. The court asserted that, at that time, nearly four decades ago, "the Northern Mariana Islands were a Trust Territory, rather than a fully incorporated U.S. territory." *Id.* The court also noted that American Samoa "is still defined as an 'outlying possession' under federal law, and persons born there are American nationals, but not citizens." *Id.* "[A]t least at the time" MOVE was enacted, the court held one "could rationally conclude that these two territories were . . . more similar to foreign nations than the incorporated [sic] territories where the plaintiffs reside." *Id.* The Seventh Circuit thus upheld the constitutionality of MOVE regardless whether the statute "at some point became irrational as the Northern Marianas and American Samoa became more integrated into the United States." *Id.*

The Seventh Circuit further concluded that it "would be perverse" to hold that MOVE failed rational-basis review because "the remedy [would be] to *contract* voting rights for residents in the excluded territories (which it couldn't do anyway because the Northern Marianas are treated as overseas under the UOCAVA)." App. 11a. The court thus affirmed the portion of the District Court's decision ruling for the state respondents on the merits and entered judgment on January 22, 2018. App. 95a.

REASONS FOR GRANTING THE WRIT

The Court should grant review to resolve important and recurring disagreements among the federal courts of appeals concerning standing, the fundamental right to vote, and the scope of rational-basis review.

The Seventh Circuit's standing decision adopts a sweeping rule that a plaintiff's constitutional injury is not fairly traceable to the federal government's unlawful action any time there is a third party who could, but does not, act to prevent the plaintiff's injury. That broad rule severely restricts plaintiffs' ability to sue, contravenes and misconstrues this Court's precedents, and departs from the decisions of other courts of appeals – including two federal appellate decisions that entertained the merits of similar challenges to UOCAVA. These approaches cannot be reconciled, and the Court should grant review and hold that the injury here is fairly traceable to both state *and* federal law – and that federal defendants are not immune from suit simply because federal law leaves open the possibility of relief from the States.

The Court should also grant review of the Seventh Circuit's equal-protection ruling because it proceeds from the deeply flawed premise that voting rights are fundamental only when they are based on an underlying right that is expressly established in the Constitution. This holding likewise contravenes this Court's precedents, which have repeatedly recognized the fundamental nature of statutorily created voting rights, whether for local school board, utility bonds, or President and Vice President of the United States. It also sharpens a split among the federal circuits, which have struggled over when voting rights are fundamental notwithstanding this Court's prior guidance. Given the importance of the rights at issue and the inescapable implication of the Seventh Circuit's decision that long-established statutory voting rights such as that to vote for President are *not* fundamental, the Court should grant review and hold that the voting rights here – once extended statutori-

ly – are fundamental in character and subject to heightened scrutiny.

Even setting aside the fundamental-right issue, the Court should grant review of the Seventh Circuit's rational-basis decision because it contravenes this Court's precedent and solidifies a circuit split over whether a court must consider changed conditions in evaluating whether an aging law still has a rational justification. This Court expressly stated in its seminal decision, *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 (1938), that a legitimate challenge lies against a law even under rational-basis review where the state of facts supporting a law's enactment have since "ceased to exist." The Seventh Circuit's refusal to consider the fact that the sole justification it cited in support of MOVE's discriminatory treatment has been obsolete for decades cannot be reconciled with *Carolene Products* or other more recent rulings, by this Court and others, that changed circumstances matter in evaluating constitutional challenges to a law, even under rational-basis review. Those precedents are especially apt here, where the ostensible justification was irrational at the outset, and all the more so today.

This case presents an ideal vehicle to resolve these fundamental and recurring constitutional questions. The decision below created – or sharpened – a clear and direct split among the circuits regarding each issue. The merits of each question, moreover, are crisply presented for this Court's review; no procedural or factual disputes cloud their resolution. And each issue is exceptionally important, raising bedrock questions about the ability of citizens to seek redress for discriminatory voting laws and the level

of deference accorded statutes that pick and choose among voters.

I. The Seventh Circuit Created a Circuit Split by Holding That Petitioners Lack Standing to Challenge The Federal Statute Because States Can Remedy the Inequality Prescribed by the Federal Statute.

The Seventh Circuit rejected petitioners' claims against the federal defendants on the basis that UOCAVA purportedly did not cause petitioners' injury because even though the baseline it sets discriminates between former state residents depending on the Territory to which they move, it does not *prohibit* Illinois from acting on its own to remedy that discrimination. App. 5a.

Yet no case cited by the decision below – and no case of which undersigned counsel is aware – actually stands for the proposition that a plaintiff's constitutional 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. Moreover, the Seventh Circuit's decision creates a split with two other circuit courts that have reached the merits of similar challenges to UOCAVA in circumstances where state law likewise could theoretically have remedied the inequalities imposed by federal law.

The Seventh Circuit's novel and unfounded theory of standing has sweeping implications that undermine this Court's precedents and prohibit arbitrarily disfavored individuals from challenging federal action. In particular, the standing framework the Seventh Circuit embraced precludes plaintiffs from

challenging all manner of highly discriminatory statutes – including, for instance, those that expressly exclude and disadvantage members of a particular racial group – so long as a third party like a State or local government theoretically could remedy that discrimination by, for instance, extending the right to the excluded racial group. Analogously here, even if Illinois expanded voting rights pursuant to legislation or as a result of a court order granting plaintiffs their requested relief, the discriminatory classifications of federal law would remain in place.

The Court should grant review to harmonize the divergent approaches of the lower courts and to reverse the Seventh Circuit's sweeping holding 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.

1. It is well-established that plaintiffs have standing as long as their injury is "fairly traceable to the challenged conduct of the defendant." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016). The "fairly traceable" requirement does not demand immediate directness between wrongful conduct and injury. Indeed, this Court has expressly stated that "[p]roximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Intern., Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014). Similarly, the Court has made clear that courts must not "wrongly equate[] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett* v.

Spear, 520 U.S. 154, 168–69 (1997); *see also* 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531.5, at 311–15 (3d ed. 2008) ("It may be enough that the defendant's conduct is one among multiple causes.").

Indeed, decades of Supreme Court precedent recognize plaintiffs' standing to challenge government action that authorizes or fails to prevent injurious third-party actions. *See, e.g.*, *Japan Whaling Ass'n* v. *Am. Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986) (recognizing standing of plaintiffs who claimed injury based on the federal government's failure to adequately regulate whaling activities, even though the claimed injury stemmed from *Japan*'s whaling activity, which plaintiffs alleged the federal government was compelled to condemn under federal law); *Barlow* v. *Collins*, 397 U.S. 159, 162–64 (1970) (recognizing standing of plaintiffs to challenge the validity of federal laws that they contended enabled *a landlord* to make extortionate demands of them); *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 158 (1970) (recognizing standing to challenge a federal law that enabled third party *competitors* to enter the market and thereby cause alleged injury to the plaintiff's business).

2. The panel's decision acknowledged none of this precedent, instead citing this Court's decision in *Simon* v. *E. Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). But this reliance is misplaced. The principal standing issue in *Simon* was the speculative relationship between the conduct challenged as unlawful and the claimed injury of the petitioners. The respondents were low-income individuals and organizations representing the interests of such indi-

viduals, who alleged that the Internal Revenue Service had wrongly provided tax incentives to hospitals for providing only limited services to the poor, when in fact the same hospitals had denied petitioners and their members such services. *Id.* at 28. Respondents brought suit against the Secretary of the Treasury and the Commissioner of Internal Revenue, challenging the tax designation. *Id.* As the Court explained, it was "purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42–43. It was the myriad factors that could influence the decision to provide services – rather than the fact of an intervening party per se – that was dispositive of the standing issue.

The Seventh Circuit panel read *Simon* much more broadly to suggest that the presence of a third party exercising discretion at the end of a causal chain means there can be no standing to sue parties earlier in the chain (even where the defendants are federal officials charged with implementing an unconstitutional federal statute). *See* App. 5a–6a. But *Simon* itself cautioned against such a broad reading of its holding, expressly noting that "indirectness of injury" is "not necessarily fatal to standing." *Simon*, 426 U.S. at 44; *see also Bennett*, 520 U.S. at 168–69 (standing doctrine does not require that a "defendant's actions are the very last step in the chain of causation"). *Simon*, moreover, did not involve a claim that a federal statute was unconstitutional, and the Court did not say that such unconstitutionality cannot be challenged as long as States can remedy the federal constitutional violation.

The Court's admonition should have been heeded here because this case is nothing like *Simon*. Petitioners suffer unequal treatment that UOCAVA imposes directly and by design – and there is no question that judicial action against the federal defendants could remedy that injury fully and immediately.[3] As such, the Seventh Circuit's ruling contravened this Court's precedents.

3. The decision below also conflicts with decisions of other circuits. Most starkly, the court's decision directly conflicts with the decisions of the First and Second Circuits that considered similar constitutional challenges to UOCAVA that, at least for standing purposes, are indistinguishable from this case. *See Romeu* v. *Cohen*, 265 F.3d 118 (CA2 2001); *Igartúa de la Rosa* v. *United States*, 32 F.3d 8 (CA1 1994). The plaintiffs in *Igartúa* and *Romeu* similarly challenged the constitutionality of extending the right to vote to former state citizens residing overseas while withholding the same right from former state citizens living in the Territories. Both decisions necessarily recognized plaintiffs' standing in reaching the merits of their claims. *See Romeu*, 265 F.3d at 127; *Igartúa*, 32 F.3d at 10–11; *see also Romeu* v. *Cohen*, 121 F.

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[3] As noted above, the Seventh Circuit suggested an "additional standing problem" that the remedy for petitioners' equal-protection claim might be to deprive residents of the Northern Mariana Islands of the right to vote in federal elections, rather than to extend the right to former state residents in other Territories. App. 8a n.1. But even if that view were correct on the merits – and it is not – the Court has rejected it as a basis for finding that a plaintiff lacks standing to assert an equal-protection violation. So long as either remedy would eliminate the inequality that is the cause of injury, a plaintiff has standing. *See Orr* v. *Orr*, 440 U.S. 268, 272 (1979).

Supp. 2d 264, 272–74 (S.D.N.Y. 2000) (holding plaintiffs have standing to challenge both UOCAVA and the state law at issue).[4]

Although the First and Second Circuit decisions did not expressly address standing, the fact that the rulings reached the merits is an implicit but unmistakable determination that the plaintiffs had standing to challenge the federal law, even though there, like here, the States theoretically could have extended the right to vote to the plaintiffs in those cases. *Ankenbrandt* v. *Richards*, 504 U.S. 689, 696–97 (1992) (by hearing certain appeals, "this Court implicitly has made clear its understanding that the source of the constraint on jurisdiction . . . was *not* Article III; otherwise the Court itself would have lacked jurisdiction over [the] appeals"); *Raines* v. *Byrd*, 521 U.S. 811, 819–20 (1997) (a court's standing inquiry must be "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional").

More broadly, the decision below conflicts with other federal appellate decisions that have repeatedly recognized standing in circumstances of multiple or concurrent causation. *See, e.g.*, *Libertarian Party of Virginia* v. *Judd*, 718 F.3d 308, 316 (CA4 2013) (concurrent cause is recognized); *Khodara Envtl., Inc.* v. *Blakey*, 376 F.3d 187, 195 (CA3 2004) (Alito, J.) (but-for causation is not always required for standing, es-

[4] The notable difference in these cases, which does not relate to standing, is that the *pro se* plaintiffs in *Igartúa* and *Romeu* did not raise UOCAVA's distinction between favored and disfavored Territories.

pecially "where an effect is 'causally over-determined,' i.e., where there are multiple sufficient causes"). Notably, in *Khodara*, the Third Circuit rejected the argument that "state-law obstacles" must be removed before a plaintiff has standing to challenge an injury attributable to federal law. *Khodara*, 376 F.3d at 195–96; *see also Bryant* v. *New York State Educ. Dep't*, 692 F.3d 202, 212 (CA2 2012) (plaintiff would have standing to challenge provision of New York law even if Massachusetts law would be an additional impediment to relief).

The decision below also is in sharp conflict with case law in the D.C. Circuit, where cases frequently involve complex causation issues involving multiple agencies or government bodies. That court has consistently refused to limit standing along the lines of the decision below. As a recent example, its decision in *Scenic America, Inc.* v. *United States Department of Transportation*, 836 F.3d 42 (CADC 2016), *cert. denied*, 138 S. Ct. 2 (2017), is instructive. The plaintiffs in *Scenic America* challenged federal administrative guidance that did nothing more than "permit state approval" of certain digital billboards, leaving to the States the choice whether to permit the construction of those billboards. *Id.* at 45; *see also Scenic Am., Inc.* v. *United States Dep't of Transp.*, 983 F. Supp. 2d 170, 179 (D.D.C. 2013) ("Of course, as this theory of the case makes clear, it is the *States'* decisions to amend their regulations to permit the construction of digital billboards that causes Scenic America's harm, not the 2007 Guidance that merely allowed them to do so."). Nevertheless, the court held that for purposes of traceability the plaintiffs' injury was "clearly caused by the Guidance," and a judicial decision repudiating the Guidance would redress the

plaintiffs' injury. *Scenic Am.*, 836 F.3d at 55; *see also Americans for Safe Access* v. *Drug Enforcement Admin.*, 706 F.3d 438, 445–49 (CADC 2013) (plaintiff who was injured by Veterans Administration directive forbidding certain medical marijuana services had standing to challenge, as an indirect cause of that injury, the Drug Enforcement Administration's classification of marijuana as a Schedule I drug).

The D.C. Circuit's decision in *National Parks Conservation Ass'n* v. *Manson*, 414 F.3d 1, 6 (CADC 2005), is likewise irreconcilable with the standing doctrine issued by the Seventh Circuit in this case. In *Manson*, environmental organizations sued federal officials who withdrew an adverse impact letter, after which the state – which had discretion to conduct an independent evaluation, but declined to do so – issued a power plant permit. The D.C. Circuit held that the plaintiffs had standing against the federal defendants because, "[h]ad [the U.S. Department of the] Interior not withdrawn its adverse impact report, the Montana [Department of Environmental Quality] would have been bound to consider that report before proceeding with its permitting decision and, crucially, would have been required to justify its decision in writing if it disagreed with the federal report." *Id.* at 6. Because the federal government could "exert[] legal authority over" the State in this manner, the State was "not the sort of truly independent actor who could destroy the causation required for standing" under Supreme Court precedent. *Id.*

Likewise here, the federal government can "exert[] legal authority" over Illinois directly, and with no uncertainty of redress, by simply requiring Illinois to issue the absentee ballots that would remedy peti-

tioners' injury. The Seventh Circuit's decision that petitioners nevertheless lack standing because Illinois could take that action on its own is incompatible with *Manson* and other circuit court decisions and creates an untenable circuit split on standing in cases that involve both state and federal defendants.

4. Review here is important not only to bring the Seventh Circuit into line with this Court's prior precedents and resolve the divergent approaches to the issue among the circuits but also because of the adverse implications of the decision below. Under the Seventh Circuit's reasoning, a federal law that arbitrarily required States to provide absentee ballots to people whose birthdates fall on an odd numbered day, or whose name starts with a vowel – or, more troubling, to members of particular ethnic groups – would be insulated from equal-protection challenge so long as the federal law did not prohibit States from providing absentee ballots to the groups excluded from its provisions. Other claims challenging discrimination by the federal government, or a variety of claims seeking monetary damages, would likewise lack standing under the Seventh Circuit's reasoning if state law could (but does not) provide a remedy. Its reasoning also would encourage governmental buck-passing on issues of standing in lawsuits involving innumerable state-federal cooperative programs.

Relatedly, the Seventh Circuit's standing doctrine has troubling federalism consequences. In our constitutional system, States are separate sovereigns and cannot be forced to finish the federal government's work for it. *Cf. Printz* v. *United States*, 521 U.S. 898, 925–26 (1997). Yet the decision below shields federal defendants from suit for any injury so

long as state law could have prevented it. Such a rule imposes an unfair, unnecessary and impermissible burden on States.

For all of these reasons, the Court should grant the petition.

II. The Seventh Circuit's Holding that Voting Rights Are Not Fundamental Unless the Underlying Right Is Expressly Guaranteed in the Constitution Deepens a Circuit Split and Conflicts with this Court's Precedents.

The Court's review also is needed to resolve a circuit split regarding the extent to which the right to vote is fundamental. Under the logic of the opinion below and that of other courts, voting rights are not fundamental – and a statute selectively distributing them is subject only to rational-basis review – unless the underlying right is expressly provided for by the Constitution.

But that reasoning runs headlong into this Court's precedent and conflicts with the decisions of other circuits. This Court's cases make clear that even if the Constitution does not confer the right to vote in a particular election – whether for local school board or President of the United States – a State's decision to extend that right to eligible voters makes that right fundamental. As a result, statutes that affect the distribution of that right to vote must satisfy heightened scrutiny.

The Seventh Circuit's ruling gives States a deeply troubling and constitutionally problematic degree of discretion to pick and choose among voters by subjecting laws selectively distributing the franchise only to rational-basis review. The Court's review is

essential to protect the sanctity of the right to vote regardless whether the underlying basis for that right is constitutional or statutory.[5]

1. The Seventh Circuit held that UOCAVA and MOVE need only satisfy rational-basis review because "residents of the territories have no fundamental right to vote in federal elections." App. 9a. The linchpin of the court's holding was that a U.S. citizen has a fundamental right to vote only where that right is expressly codified in the Constitution. "[A]bsent a constitutional amendment," according to the Seventh Circuit, "only residents of the 50 States have the right to vote in federal elections." App. 10a (concluding also that "[t]he plaintiffs have no special right simply because they *used* to live in a State").

As a threshold matter, this broad proposition – that a voting right is not fundamental unless the underlying right is expressly provided for by the Constitution – is simply wrong under this Court's precedents. Time and again, this Court has recognized the fundamental nature of voting rights in elections that are entirely creatures of statute with no underlying constitutional basis. *E.g.*, *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (right to vote for school board could not be limited to residents who own or lease taxable real property in district); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) (right to vote for utility revenue bond could not be limited to residents who are property taxpay-

[5] To be clear, petitioners recognize that there is no underlying constitutional right to federal representation in the Territories; their argument is that it is unconstitutional to *extend* voting rights in a discriminatory manner.

ers); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970) (right to vote for general obligation bond could not be limited to residents who are real property taxpayers, even where property taxes were to be levied to service the bonds).

Indeed, even the right to vote for President and Vice President is not guaranteed in the Constitution, which leaves the means by which the States and the District of Columbia determine their votes for those offices to the States and the District themselves. *See* U.S. Const. art. II, § 1; U.S. Const. amends. XII, XXIII; *Bush* v. *Gore*, 531 U.S. 98, 104 (2000) (despite "[h]istory" having "favored the voter," a state still may, "if it so chooses, select the electors" for President "itself."). And "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Id.*

As such, the Seventh Circuit's central premise – that the fundamental nature of the right to vote depends on the recognition of an underlying right in the text of the Constitution – is manifestly contrary to this Court's precedents and would work a sea change in voting rights in this country. On that basis alone the Court should grant review.

2. Despite the clarity of this Court's precedents, there is an existing circuit split over when voting rights are fundamental that was sharpened by the Seventh Circuit's application of rational-basis review to the discriminatory classifications in the federal UOCAVA statute and the state MOVE statute. In addition to the Seventh Circuit, the First Circuit and a district court within the Tenth Circuit have held that the right to vote in a particular election is fun-

damental only when the Constitution expressly provides for that right. *See Igartúa De La Rosa* v. *United States*, 32 F.3d 8, 9–10 (CA1 1994) (applying rational-basis review to classifications in UOCAVA because "residents of Puerto Rico have no constitutional right" to vote for President"); *Igartúa* v. *United States*, 626 F.3d 592, 597–98 (CA1 2010) ("Voting rights for the House of Representatives are limited to the citizens of the states absent constitutional amendment to the contrary."); *Snead* v. *City of Albuquerque*, 663 F. Supp. 1084, 1087 (D.N.M. 1987) (holding that heightened scrutiny applies to a voting law only when the particular right to vote is "guaranteed by the Constitution"), *aff'd*, 841 F.2d 1131 (CA10 1987).

In conflict with those courts, the Sixth and the Ninth Circuits have concluded that a right to vote is fundamental even when not expressly provided for in the Constitution. *See League of Women Voters of Ohio* v. *Brunner*, 548 F.3d 463, 476 (CA6 2008) (citing *Bush*, 531 U.S. at 104, for the proposition that "the right to vote as the legislature has prescribed is fundamental"); *Idaho Coal. United for Bears* v. *Cenarrusa*, 342 F.3d 1073, 1077 n.7 (CA9 2003) (explaining that right to vote is fundamental "when a state chooses to grant the right to vote in a particular form," even if that right is not otherwise guaranteed by the Constitution). Indeed, the Ninth Circuit has expressly extended this rationale to the voting rights of territorial residents. *Charfauros* v. *Bd. of Elections*, 249 F.3d 941, 951 (CA9 2001) (applying strict scrutiny to procedures used in election for board of education representative in Northern Mariana Islands).

Underscoring the confusion among the lower federal courts, the Second Circuit has held that strict scrutiny does not apply when voting rights are not found in the Constitution, but has not ruled out that some form of heightened scrutiny applies in those circumstances. *See Romeu* v. *Cohen*, 265 F.3d 118, 124 (CA2 2001) (declining to decide the "precise standard governing the limits of Congress's authority to confer voting rights in federal elections" because the classification in UOCAVA at issue survives even under "intermediate scrutiny").

The Ninth Circuit's decisions in *Idaho Coalition* and *Charfauros* provide an especially stark contrast with the decision below. In *Idaho Coalition*, the Ninth Circuit affirmed the district court's ruling that an Idaho law regarding direct legislation through ballot initiatives violated the Equal Protection Clause by treating Idaho residents unequally depending on where they lived. 342 F.3d at 1074. Emphasizing that "[v]oting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment," the court held that strict scrutiny applied to the challenged law. *Id.* at 1076. In so doing, the Ninth Circuit expressly rejected the argument that heightened scrutiny should not apply to the Idaho law because "no right to participate in direct legislation is 'explicitly or implicitly guaranteed by the Constitution.'" *Id.* at 1077 n.7. The court explained that "when a state chooses to grant the right to vote in a particular form, it subjects itself to the requirements of the Equal Protection Clause." *Id.* "Thus, while a state may decline to grant a right to legislate through ballot initiatives, it may not grant that right on a discriminatory basis." *Id.* This is

precisely the argument that petitioners make here – and that the Seventh Circuit rejected.

Likewise, the Ninth Circuit in *Charfauros* applied strict scrutiny to procedures on the island of Rota in the Northern Mariana Islands that barred a particular group of voters from voting in an election for a representative of the board of education. 249 F.3d at 951. The court did not hold – as the Seventh Circuit did below – that rational-basis review applied to the procedures because the right to vote for a board of education representative is not guaranteed by the Constitution. Instead, the Ninth Circuit applied the general rule that, "'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.'" *Id.* (quoting *Dunn* v. *Blumstein*, 405 U.S. 330, 337 (1972) (quoting *Kramer*, 395 U.S. at 627)).

The decision below thus has deepened a circuit split and sown greater uncertainty regarding when the right to vote is fundamental and when a statute selectively distributing that right is subject to heightened scrutiny. The Court should grant this petition to resolve that split.

3. Review on this issue is especially important because the split among the circuits demonstrates that, although its precedents already suggest this, the Court needs to make clear that heightened scrutiny applies to any statute that enfranchises *some* voters while continuing to disenfranchise *other* similarly situated voters.

As this Court long has emphasized, "the right of suffrage is a fundamental matter in a free and democratic society" and "preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U.S. 533, 561–62 (1964). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). Put differently, "everyone ha[s] the right to vote and to have his vote counted." *Davis* v. *Bandemer*, 478 U.S. 109, 124 (1986).

In light of the fundamental importance of the right to vote, the Court has applied strict scrutiny to laws selectively distributing the franchise, as adverted to previously. A "careful examination" of such laws "is necessary because statutes distributing the franchise constitute the foundation of our representative society" and "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer*, 395 U.S. at 626; *see also id.* at 626–27 ("Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.").

The need to apply strict scrutiny to laws selectively distributing the right to vote is not affected by whether that particular right to vote is guaranteed by the Constitution or conferred by statute. "[O]nce the States grant the franchise, they must not do so in a discriminatory manner." *McDonald* v. *Bd. of Elec-*

tion Comm'rs of Chi., 394 U.S. 802, 807 (1969); *see also*, *e.g.*, *Lubin* v. *Panish*, 415 U.S. 709, 713 (1974) ("[T]he Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population."); *Harper* v. *Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (explaining that "neither homesite nor occupation affords a permissible basis for distinguishing between qualified voters" (internal quotation marks omitted)). Critically, if any 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.'" *Dunn*, 405 U.S. at 337.

The rule set forth in *Dunn* applies squarely to the discriminatory classifications drawn by UOCAVA and MOVE. Those statutes grant the right to former Illinois residents living in favored Territories (those who live in the Northern Mariana Islands and nine smaller Territories and, under MOVE, American Samoa) while denying that same right to former Illinois residents living in disfavored Territories (those who live in Puerto Rico, Guam, the U.S. Virgin Islands, and, under UOCAVA, American Samoa). Because the statutes plainly "grant[] the right to vote to some citizens and den[y] the franchise to others," their classifications should be invalidated unless they can satisfy heightened scrutiny. *See id.*

The Seventh Circuit sought to limit the holding in *Dunn* to cases where the claimed right to vote is guaranteed by the Constitution. Not only does this proffered distinction conflict with the better-reasoned

opinions of the Ninth Circuit, it also contradicts this Court's precedent. In *Kramer*, for instance, the Court held that "[t]he need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment." 395 U.S. at 628–29. In other words, just because the government need not have granted the franchise to voters in the first instance does not inoculate a statute conferring that franchise on some voters from review under a heightened standard.[6]

The decision below is especially troubling because the inescapable consequence of its holding is that the right to vote for President is not fundamental because the underlying right for individuals to vote for President is not expressly guaranteed by the Constitution. Even though the right to vote for President is rooted in the laws of the States and the District of Columbia, not the Constitution (which merely provides for the selection of electors), that right is no less fundamental: "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamen-

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[6] Nor can the classifications drawn by UOCAVA and MOVE be upheld on the basis that they are mere residency requirements that are valid under this Court's decision in *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60 (1978). *Holt* is inapposite because the plaintiffs in that action argued that "extraterritorial extension of municipal powers requires concomitant extraterritorial extension of the franchise." *Id.* at 68–69. Here, by contrast, petitioners' claim is that, having made the decision to extend the right to vote beyond the borders of Illinois, respondents may not selectively distribute that extended right unless the subject classification survives heightened scrutiny.

tal . . . ." *Bush*, 531 U.S. at 104. The decision below cheapens and diminishes that right. This Court's review is needed to ensure that the long-cherished right to vote is not eroded over time by discriminatory statutes that need only withstand minimal constitutional scrutiny.

III. The Seventh Circuit's Holding that the Laws at Issue Can Be Sustained Under Rational-Basis Review Based on Facts that Have Ceased to Exist Contradicts this Court's Precedents and Deepens a Circuit Split.

Finally, the Court should grant review to clarify that a law cannot survive rational-basis review if the facts proffered to justify the discrimination it imposes no longer exist. The Seventh Circuit concluded that MOVE survived rational-basis review because its discrimination among different Territories was "rational in 1979," even though the court acknowledged the possibility that it later "became irrational as the Northern Marianas and American Samoa became more integrated into the United States." App. 11a.

This reasoning is foreclosed by this Court's precedent. As expressly stated in *Carolene Prods. Co.*, 304 U.S. at 153 (1938), where "the existence of a rational basis for legislation whose constitutionality is attacked" is at issue, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."[7]

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[7] The Court also recognized that a statute may nevertheless survive if some other "state of facts either known or which could reasonably be assumed affords support for it," *Carolene*

The Court has also admonished in recent decisions involving voting rights that "a statute's 'current burdens' must be justified by 'current needs,'" and there is "no valid reason to insulate [the law at issue] from review merely because it was previously enacted 40 years ago." *Shelby Cty., Ala.* v. *Holder*, 133 S. Ct. 2612, 2627–31 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 204 (2009), which made the same observation in answering whether the law at issue was a "rational means to effectuate the constitutional prohibition" imposed by the Fifteenth Amendment).

Nevertheless, despite the clarity of this Court's decision in *Carolene Products*, the lower courts have divided over the question of the effect of changed circumstances on rational-basis review in the ensuing decades. In *Dias* v. *City and Cty. of Denver*, 567 F.3d 1169 (CA10 2009), for example, the Tenth Circuit held that the plaintiffs had pled a colorable substantive-due-process claim that an ordinance banning pit bulls could not survive rational-basis review. *Id.* at 1183. Despite the fact that "pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge," the Tenth Circuit emphasized that "the state of the science in 2009 is such that the bans are no longer rational." *Id.*

By contrast, in *Heffner* v. *Murphy*, 745 F.3d 56 (CA3 2014), the Third Circuit applied rational-basis review and sustained a Pennsylvania statute that barred funeral establishments from serving food or

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Prods. Co., 304 U.S. at 154, but that possibility is not at issue here. The only rational basis posited by the Seventh Circuit's ruling is the status of the Territories in 1979. App. 10a–11a.

intoxicating beverages despite the fact that "the passage of time, and the advanced technology used in modern air conditioning" rendered the concerns leading to the adoption of that law decades earlier obsolete. *Id.* at 86. In that court's view – though in seeming contradiction with this Court's pronouncement in *Carolene Products* – "there is a fundamental difference between legislative enactments that may be archaic and those that are irrational." *Id.*

Notably, this question was presented to the Court in a petition that followed the decision in *Heffner*. The principal argument in opposition was that the question had not been raised or decided below – that instead the argument had been couched and decided only in terms of whether the law at issue sufficiently advanced the proffered state interest. Brief in Opp'n at 9-13, *Heffner* v. *Murphy*, No. 14-53 (U.S. filed Aug. 18, 2014). The opposition also questioned whether the split was sufficiently concrete to justify this Court's review, arguing that the question in prior cases of whether rational-basis review takes account of changed circumstances was not decisive in prior opinions. *Id.* at 13-15.

This petition presents no such doubts. The *sole* ground of the rational-basis decision below was the fact that MOVE ostensibly had rational justifications when enacted in 1979, and the Court necessarily concluded that the fact that the law may be "irrational" today did not affect the analysis.[8] *See* App. 11a. In so holding, the Seventh Circuit rejected petitioners'

[8] The holding that the law was rational in 1979 was in any event erroneous because by that time American Samoa had long been a Territory and the Northern Mariana Islands were committed to a path toward territorial status.

argument that current laws must be justified under current circumstances. As a result, the existence of a concrete split is unmistakable. As noted above, *Dias* was expressly decided by the Tenth Circuit on the ground that the plaintiffs there could succeed in challenging a law under rational-basis review based on an argument that the circumstances justifying laws enacted decades ago had changed in the intervening period.

Because this question is consequential to the outcome of this case, and in order to resolve the divergent approaches of the federal appellate courts and bring them in line with this Court's precedents, the Court should grant review and reverse the Seventh Circuit's holding on this ground as well.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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