No. 17-1463

IN THE

# Supreme Court of the United States

LUIS SEGOVIA, ET AL.,

*Petitioners,*

v.

UNITED STATES OF AMERICA, ET AL.,

*Respondents.*

On Appeal from the United States Court of Appeals for the Seventh Circuit

**BRIEF OF VOTING RIGHTS SCHOLARS AS *AMICUS CURIAE* SUPPORTING PETITIONER**

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## INTEREST OF *AMICI CURIAE*

*Amici* are scholars of election law, political law, and remedies at law schools and universities throughout the United States.[1] *Amici* have a particular interest in the present state of U.S. election law and politics, having conducted significant research on the rights of residents of the territories and various obstacles to the ballot and the right to cast an "equally effective vote." *Amici* write to provide the Court with important context on the voting rights issues and remedies raised by this case.

While *amici* agree with the petition for certiorari that petitioners have standing to challenge UOCAVA, and that the distinctions drawn in the laws challenged here do not survive rational basis scrutiny, *amici* focus in this brief on the second question presented: the appropriate level of scrutiny to apply to enactments like Illinois MOVE and UOCAVA.

The scholars joining this brief are:[2]

- Samuel Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law at New York University School of Law;

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for each party received timely notice of the intent to file the brief and consented to its filing.

[2] All signatories speak for themselves only and not on behalf of their respective institutions. Institutional affiliations are listed for identification purposes only.

- Joshua Douglas, Robert G. Lawson & William H. Fortune Associate Professor of Law at University of Kentucky College of Law;
- Chad Flanders, Professor of Law at Saint Louis University School of Law;
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- Ciara Torres-Spelliscy, L. Leroy Highbaugh Sr. Research Chair and Professor of Law at Stetson University School of Law.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands are U.S. territories organized under the Constitution's Territories Clause, U.S. Const. art. IV § 2.[3] The Federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. § 20310, and the Illinois Military Overseas Voter Empowerment Act (Illinois MOVE Act), 10 ILCS 5/20-1 *et seq.*, each extend the

[3] For a general overview of the legal history of the territories, *see Developments in the Law—U.S. Territories*, 130 Harv. L. Rev. 1617 (2017).

right to vote in Illinois federal elections to Illinois residents who move to the Northern Mariana Islands and a number of smaller, mostly uninhabited U.S. possessions. The Illinois MOVE Act further extends voting rights in Illinois federal elections to ex-Illinoisans in American Samoa. Former Illinoisans lose the right to vote in Illinois federal elections if they move to Puerto Rico, Guam, or the U.S. Virgin Islands.

The Seventh Circuit held that this distinction does not violate the Fourteenth Amendment's Equal Protection Clause because "the residents of the territories have no fundamental right to vote in federal elections." *Segovia v. United States*, 880 F.3d 384, 390 (7th Cir. 2018). In reaching this conclusion, the Seventh Circuit erroneously upheld a law disenfranchising some and not other identically situated citizens (ex-residents of Illinois living in U.S. territories) based solely on their current territory of residence.

Only one aspect of the present case distinguishes it from a run-of-the-mill malapportionment or disenfranchisement case like those this Court has decided in the past: Illinois and Congress could have chosen to exclude all ex-Illinois residents from federal elections in the state. *Carrington v. Rash*, 380 U.S. 89, 91 (1965). Instead, by statute, Illinois and Congress elected to expand the franchise to encompass some ex-residents now residing in U.S. Territories and not others.

*Amici* urge the Court to take this case to make clear to the courts below that this distinction is irrelevant. Once a state legislature or Congress extends the right to vote to one group of people, they cannot

deprive another identically situated group of people of the right to cast a vote purely based on geography.

This case is an appropriate vehicle to resolve several enduring circuit splits over the origins and operation of the right to vote. Because the Seventh Circuit applied the wrong standard of scrutiny to a plainly stated disenfranchisement claim, the Court can readily reverse and remand for consideration of remedy—while making it clear that the "fundamental political right, because preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), is no less fundamental when the citizens in question acquire their right to vote by a state or federal statute.

## ARGUMENT

### I. THE CONSTITUTION PROTECTS AGAINST DEPRIVATION OF THE RIGHT TO VOTE EVEN IF A VOTING ENTITLEMENT ORIGINATED IN A STATUTE

"If a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the[se] exclusions are necessary to promote a compelling state interest." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). UOCAVA and the Illinois MOVE Act grant the vote to some and deny the franchise to others. Instead of applying the heightened scrutiny prescribed by this Court in *Dunn*, the Seventh Circuit applied deferential rational basis scrutiny because, the panel found, there is no federal constitutional right to vote when the federal constitution does not expressly extend that

right to the relevant population. *Segovia*, 880 F.3d at 390.

The Seventh Circuit's rationale does not account for the constitutional structure of voting rights in this country. The original 1789 Constitution, far from guaranteeing a right to vote, expressly delegated the question of voting eligibility to the states. U.S. Const. Art. I § 2 ("the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); *see also Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 17 (2013). Moreover, vestiges of that delegation survive. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States"); *see generally* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014).

Instead, since as early as *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), this Court has taught that the right to vote flows from the obligation, imposed on both the states and the federal government, to extend to all persons within their respective jurisdictions the "equal protection of the laws." U.S. Const. Amend. XVI § 1; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964).

The federal constitutional question at issue in this disenfranchisement case is the same as that in *all* disenfranchisement cases: in granting the right to vote to

some voters, and not others, did the state or Congress violate its constitutional obligation to extend to all persons within their jurisdiction the "equal protection of the laws"? *See generally Dunn*, 405 U.S. at 336; *Carrington*, 380 U.S. at 91; *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964).

In making this determination, this Court has repeatedly held that heightened scrutiny must be applied to laws that affect the right to vote, even if at bottom the right to vote in the election in question springs from a statute. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) is illustrative. *Kramer* considered the constitutional implications of a statute setting voting rights for a school board, N. Y. Educ. Law § 2013 (Supp. 1968); there was, and remains, neither in the state nor federal constitutions a right to vote for school board members, and New York took advantage of this gap in the law to circumscribe participation in school board elections to parents and property holders. *Kramer*, 395 U.S. at 622–626.

Even though there is no fundamental right to vote in school district elections, at least not in the text of either the New York State or Federal Constitutions, this Court nonetheless held that lower courts "must give the statute a close and exacting examination . . . [t]his careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society." *Id*. at 626.

Likewise, in *Bush v. Gore*, 531 U.S. 98, 104 (2000), the Court explained that while "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States . . . [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; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Id.*; *accord Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). The legislature can, of course, abolish the office, or eliminate elections for that office, but what it cannot do is give some citizens and not others the right to vote without at least some degree of heightened judicial scrutiny.

The Court should not permit lower courts to widen the power of the states to manipulate voting rules. Such power risks being used for improper ends. States under uniform control of one party or another are enacting increasingly sweeping laws to diminish or outright remove the voting power of their party opponents. *See generally* Samuel Issacharoff, *Ballot Bedlam*, 64 Duke L.J. 1362 (2015). As the Nation becomes more politically polarized, and more data about voters becomes known incumbents will be tempted to use the state's "qualifications" power to fence out the other party's voters relying on bases *other* than the constitutionally proscribed categories of race, gender, or age over 18.

The stakes in this case, then, reach far beyond this case and the persons affected by the relevant sections of UOCAVA or Illinois MOVE. Consider a state which chooses to enfranchise non-citizens in local elections.[4]

[4] Such regimes are uncommon but not unknown in the United States; San Francisco, Ca., and Takoma Park, Md., for example, have enfranchised non-citizens in certain local elections. *See*

Under the Seventh Circuit's understanding of the Fifth and Fourteenth Amendments, Congress or the states would be able to enfranchise, and disenfranchise, any or all of this group *entirely at whim* provided it does not cross the usual red lines (such as race). Thus, a state could enfranchise noncitizens only in Democratic zip codes, excluding identical noncitizens in Republican zip codes, and be subject only to rational basis scrutiny since non-citizens lack a "fundamental" right to vote as the Seventh Circuit defines the right. The scope of possible abuse is considerable: the United States is home to more than 22 million lawfully resident non-citizens and more than 12 million persons between the ages of 15 and 17.

Fortunately, it requires no extension of principles already relied on by this Court to decisively head off at least one species of partisan effort to undermine the "fundamental political right, because preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Court should reverse the clear error of the courts below and reaffirm 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." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969)).

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Joshua Douglas, *The Right to Vote Under Local Law*, 85 Geo. Wash. L. Rev. 1039, 1062–69 (2017).

## II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT OVER THE STRINGENCY OF JUDICIAL REVIEW NEEDED FOR LAWS WHICH "EXPAND" THE RIGHT TO VOTE TO SOME VOTERS AND NOT OTHERS

This case also presents an appropriate vehicle for the Court to clarify the proper standard of review for selective expansions of the right to vote to non-residents.

It is now settled that states are not required to admit to the franchise persons under 18, non-citizens, and non-residents (or residents of less than 30 days' standing). *See Gaunt v. Brown*, 341 F. Supp. 1187 (S.D. Ohio 1972) (age), *aff'd* 409 U.S. 809 (1972); *Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982) (citizenship); *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972) (30-day residency).

What remains unsettled is the constitutional limitation on selective expansion of enfranchisement *beyond* the minima the Constitution prescribes. This is a particular concern for local government given that school districts and towns occasionally enfranchise some non-residents but not others for various reasons of varying justifiability. *See, e.g.*, *Glisson v. Mayor and Councilmen of Savannah Beach,* 346 F.2d 135 (5th Cir. 1965); *Saphos v. Mayor and Councilmen of Savannah Beach*, 207 F.Supp. 688 (S.D. Ga.), *aff'd*, 371 U.S. 206 (1962).

The principal constitutional difficulty in a law "expanding" voting rights to non-residents is that doing so grants voting rights to some voters (who may now

vote for two different sets of officers rather than one) identically situated to others. It is uncontested that distributing political power based on suspect class status is unconstitutional.[5] *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960). But it is likewise true that, as a practical matter, the ex-Illinoisans excluded from the Illinois MOVE Act have lost their power to cast equal votes with identically situated ex-Illinoisans in other territories without the ability to vote for federal officials in their current place of residence. *C.f. Reynolds*, 377 U.S. at 565.

Many laws enfranchising non-residents are adopted for sensible and appropriate reasons. For example, a school district might rationally enfranchise residents of the neighboring district—and not others—on the theory that the school district's actions significantly affect its neighbors but have only a marginal impact on more remote districts. *See, e.g.*, *Hogencamp v. Lee County Board of Education*, 722 F.2d 720 (11th Cir. 1984); *see generally* Joshua Douglas, *The Right to Vote Under Local Law*, 85 Geo. Wash. L. Rev. 1039, 1088–97 (2017).

The challenge, then, is to set a level of scrutiny for expansions of voting rights that permits beneficially extending the franchise but does not permit arbitrary and unconstitutional lines to be drawn between similarly situated non-resident voters.

As the petition for certiorari notes, this question has already led to splits across the circuits. Petition

[5] *Amici* note that this case presents just such a question, *see Segovia*, 880 F.3d at 390, but do not address this question further in this submission.

for Certiorari at 23–32. However, *amici* submit that there is still another circuit split, concerning the appropriate level of review, that hearing this case would enable the Court to resolve.

One approach, employed by the Fifth, Sixth, Tenth, and Eleventh Circuits, is to apply a "substantial interest" test whereby a state can enfranchise only those non-residents who have a substantial interest in the elected office and, in so doing, exclude only those similarly situated non-residents without such an interest. *See Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012); *Duncan v. Coffee Cty., Tenn.*, 69 F.3d 88 (6th Cir. 1995); *Sutton v. Escambia Cty. Bd. of Educ.*, 809 F.2d 770, 772 (11th Cir. 1987); *Phillips v. Andress*, 634 F.2d 947, 950 (5th Cir. Unit B 1981); *Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976).[6] "Unfortunately, having stated the test, the courts have found it difficult to apply consistently." *Duncan*, 69 F.3d at 95. Nonetheless, this test might be analogized to the shifting scrutiny applied by this Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), where a court looks beyond the stated justifications provided for the enfranchisement to "relevant and legitimate state interests sufficiently weighty to justify the limitation," *id.* at 181, justified, of course, under present conditions. *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 550 (2013). *C.f. Obama for*

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[6] Confusingly, the Circuits have occasionally referred to this test as a "rational basis test." *See, e.g.*, *May v. Town of Mountain Vill.*, 132 F.3d 576, 580 (10th Cir. 1997). However, a close reading of these cases suggests a substantially more stringent scrutiny of the state's proffered justifications for expansion than might be expected from a classical "rational basis" analysis.

*Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (discussing the test in contrast to rational basis and strict scrutiny approaches).

A second approach, employed by the Fourth Circuit, employs strict scrutiny for any expansion of the franchise to non-residents; distinctions between non-residents in the expansion are examined as part of the larger inquiry of whether the expansion is sufficiently fitted to the requisite compelling state interest. *Locklear v. N. Carolina State Bd. of Elections*, 514 F.2d 1152, 1154 (4th Cir. 1975).

The Seventh Circuit has taken a third approach, which we might term "minimal scrutiny," to non-resident selective enfranchisement, reasoning that because non-residents don't have the right to vote outside their area of residence, no constitutional scrutiny need be applied to what amounts to an indulgence from the state legislature. *Segovia*, 880 F.3d at 390; *see Snead v. City of Albuquerque*, 663 F. Supp. 1084, 1087 (D.N.M.), *aff'd per curiam*, 841 F.2d 1131 (10th Cir. 1987); *Brown v. Bd. of Comm'rs of City of Chattanooga, Tenn.*, 722 F. Supp. 380, 398 (E.D. Tenn. 1989); *see also 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").[7]

[7] Note that in neither *Romeu* nor *Igartúa* was the court presented with the precise question of discrimination *between* territories at issue here.

This case provides the Court with an opportunity to resolve both the circuit splits identified in the petition and this circuit split without being drawn into the intricacies of local government. UOCAVA and the Illinois MOVE Act are stark—certain non-residents are fully enfranchised in federal elections; other non-residents are fully disenfranchised. Both statutes draw an arbitrary distinction between the enfranchised and disenfranchised territorial residents, thus presenting the scrutiny question plainly. These questions are ripe for this Court's review.

## III. PETITIONER'S RIGHTS TO EQUAL PROTECTION ARE NOT DIMINISHED BY THEIR PRESENCE IN THE TERRITORIES

This case also provides the Court with an opportunity to reaffirm that U.S. citizens in the territories have the same right to equal protection of the laws as U.S. citizens living in the states. The decision rendered below—which joins similar decisions of the First and Second Circuits—is inexplicable unless one accords second-class status to U.S. citizens resident in the territories. *Segovia*, 880 F.3d at 391; *Igartúa De La Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994); *Romeu v. Cohen*, 265 F.3d 118, 124 (2d Cir. 2001). Indeed, there is considerable treatment of this question in *Romeu*, 265 F.3d at 122 (2d Cir. 2001), and the district court in this case likewise dwelt on the differential status of the territories in denying petitioner's claims in the first instance. *Segovia v. Bd. of Election*

*Commissioners for City of Chicago*, 201 F. Supp. 3d 924, 941 (N.D. Ill. 2016).

While the territorial context makes the decisions below explicable, it does not render them correct. Whether applied to the federal government (in the petitioners' merits challenge to UOCAVA) or the states (such as in the Illinois MOVE Act), that the petitioners reside in the territories does not diminish their constitutional right to equal protection of the laws. It is that right to equal protection, as applied to their entitlement to vote, that is at issue in this case, not the right of territorial residents to vote *ex nihilo*.

Under the Fifth Amendment, the federal government has an equal protection obligation to the territories equivalent to that imposed by the Fourteenth Amendment on the states. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 769–70 (2013); *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991); *United States v. Sperry Corp.*, 493 U.S. 52, 65 (1989); *Bolling*, 347 U.S. at 500.

Even under the *Insular Cases*, "the guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application" in the unincorporated U.S. territories, *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922). The federal government's equal protection obligation flows from the Due Process Clause, *Bolling*, 347 U.S. at 500, and the Due Process Clause applies fully to Puerto Rico. *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, (1976).

If equal protection demands heightened scrutiny of a law that grants persons votes of different value on the basis of where they presently live, *Reynolds*, 377 U.S. at 565–66, and equal protection demands heightened scrutiny of a state practice that counts the ballots of some voters and not others on the basis of where they presently live, *Bush*, 531 U.S. at 107, then it follows that equal protection mandates heightened scrutiny for a law that disables voters from casting a ballot *entirely* because they live in one jurisdiction that is *legally identical* to another jurisdiction. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id*. at 104-105. Whatever Congress's power over the territories, that power cannot be exercised in violation of the subsequent provisions of the Bill of Rights.

Unfortunately, this case has fallen into a pattern reflected in other constitutional cases involving the territories. Purporting to follow the *Insular Cases*, the courts below have become tangled in irrelevancies concerning the status of the territories. *See Segovia v. Bd. of Election Commissioners for City of Chicago*, 201 F. Supp. 3d 924, 941 (N.D. Ill. 2016); *Romeu*, 265 F.3d at 122 (2d Cir. 2001); *see also Tuaua v. United States*, 788 F.3d 300, 306 (D.C. Cir. 2015) (applying the Insular Cases to the citizenship clause). Every time this Court expounds on a constitutional doctrine, subsidiary litigation arises to consider whether that doctrine applies to the territories. Be it gun rights, *Asociacion De Duenos De Armerias De Puerto Rico, Inc. v. Policia De Puerto Rico*, No. K PE2008-0340, 2012 WL 3525661, at *22 (P.R. Cir. June 28, 2012), or

gay rights, *In re Conde Vidal*, 818 F.3d 765, 766 (1st Cir. 2016), courts below have been entreated to deny application of those rights to the territories based on cases discredited by history and subsequent developments in constitutional law. *See generally Igartua-De La Rosa v. United States*, 417 F.3d 145, 172 (1st Cir. 2005) (Torreulla, J., dissenting).

Enough is enough. Whatever the merits of the "inventive statesmanship" facilitated by the *Insular Cases*,[8] there is no merit to the contention that fundamental constitutional rights do not apply to, or in, the territories. This case provides an opportunity for the Court to close an ugly chapter of its history by declaring, very simply, that the right to equal protection of the laws when exercising the right to vote is applied equally in the territories.

## IV. THE COURT SHOULD NOT REACH THE REMEDY QUESTION ON THIS PETITION FOR CERTIORARI

*Amici* note that the Seventh Circuit, in dicta, suggested that even if it was to entertain the various claims put forth by petitioners, it would hold that the appropriate remedy is to deprive former Illinoisans in *all* U.S. territories (but not, presumably, in a foreign

[8] *See* Memorandum from Felix Frankfurter, Law Officer, Dep't. of War, to Henry Stimson, Sec'y. of War (Mar. 11, 1914). Quoted in *Mora v. Torres*, 113 F. Supp. 309, 319 (D.P.R), *aff'd sub nom. Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953). For a discussion of "inventive statesmanship" in light of this court's decisions, *see* Samuel Issacharoff, et al., *What is Puerto Rico?*, 94 Ind. L.J. ____ (forthcoming, 2018), https://ssrn.com/abstract=3103932.

state) from voting absentee. *See Segovia*, 880 F.3d at 389 n. 1, 391. Whatever the merits of this position, this Court need not address the remedy question, for two reasons.

*First*, the Court has a longstanding practice of not reaching the question of remedy when the courts below have not reached that question on a motion for summary judgment. *See, e.g.*, *Reynolds*, 377 U.S. at 585. Since all the claims in *Segovia* were dismissed by the courts below (albeit on different grounds), the same prudential considerations apply here. After all, this is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005). In the specific context of state-sponsored violations of the Equal Protection Clause, just last year this Court explained that "[b]ecause the manner in which a State eliminates discrimination is an issue of state law, upon finding state statutes constitutionally infirm, we have generally remanded to permit state courts to choose between extension and invalidation." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 n. 23 (2017); *c.f.* Illinois Sup. Ct. R. 20 (governing certified questions).

*Second*, while the Seventh Circuit cited to this Court's recent holding in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), explaining that "we must adopt the remedial course Congress likely would have chosen had it been appraised of the constitutional infirmity," *id.* at 389 n. 1 (internal citations omitted), it engaged in almost no examination of either UOCAVA or Illinois MOVE's text, context, history or the "residual policy" of the statute, *c.f. Welsh v. United States*, 398 U.S. 333, 361–67 (1970). Instead, the panel

simply "presumed" that Congress and the Illinois Legislature would excise the territories from absentee voting laws altogether. *Segovia*, 880 F.3d at 389 n. 1. This is a bold presumption. *See Morales-Santana*, 137 S. Ct. at 1699 ("Ordinarily, we have reiterated, extension [of a benefit to the group wrongfully deprived of it], rather than nullification, is the proper course.") (internal citations omitted). Indeed, to hold that the remedy in a voting rights case is proper to *deprive even more* U.S. citizens a right to vote is unprecedented in this Court's history. *C.f. Harlan v. Scholz*, 866 F.3d 754, 761 (7th Cir. 2017) (rejecting district court's preliminary injunction which had the effect of denying same-day registration to the entire state because of problems implementing this same-day registration in certain counties).

In these circumstances, where the court below did not engage in a full analysis of remedy because it dismissed the case on the merits, and where the remedy question is therefore under-analyzed, this Court should consider only the merits questions that were essential to the Seventh Circuit's decision. *C.f. North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017) (remanding in part because "we cannot have confidence that the court adequately grappled with the interests on both sides of the remedial question before us"). If the Court agrees with *amici* and petitioners that the Seventh Circuit reached the wrong conclusion on the merits, the Court should reverse and remand for a fully briefed and considered analysis of the remedies question.

Accordingly, *amici* recommend that the Court grant the petition for certiorari limited to the questions presented without addressing issues of remedy.

## CONCLUSION

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

Respectfully submitted,

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