

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 Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

—◆—
**BRIEF OF THE COMMONWEALTH OF
PUERTO RICO AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

—◆—
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QUESTIONS PRESENTED

This *amicus* brief will address the following two questions:

1. 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.

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

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INTEREST OF THE *AMICUS CURIAE*¹

The Commonwealth of Puerto Rico respectfully submits this brief as *amicus curiae* in support of Petitioners. The United States citizens who reside in Puerto Rico enjoy far lesser rights than those who reside in the States because of Puerto Rico’s status as a territory. It is the goal of the Government of Puerto Rico that its residents attain the same rights and responsibilities as those enjoyed by their fellow United States citizens living in the States. It is also in the interest of Puerto Rico that United States citizens who move to Puerto Rico enjoy the same constitutional rights as those who reside in the States.

As discussed in detail below, the provisions of the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§20301, et seq. (“UOCAVA”), and certain provisions of the Illinois Military and Overseas Voter Empowerment Act (“Illinois Election Code”), which are objects of the Petition for Writ of Certiorari, unconstitutionally deprive the Petitioners of their right to vote by not providing them the same absentee voting rights that are provided to other citizens who are similarly situated. These provisions place Puerto Rico at a substantial disadvantage, since they afford greater

¹ Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the Commonwealth of Puerto Rico’s intention to file this brief at least 10 days prior to its due date. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

electoral rights to United States citizens who move to foreign countries, or certain other territories of the United States, than to those who move to Puerto Rico. There is no legitimate justification for this disparate treatment.



SUMMARY OF THE ARGUMENT

A citizen's right to vote is fundamental, regardless of where he or she happens to live. However, under both UOCAVA and the Illinois Election Code, Petitioners' fundamental right to vote was severely abridged upon moving to certain territories of the United States, including Puerto Rico. The Seventh Circuit determined that the laws causing this deprivation are constitutionally valid.

Review of that decision is warranted. The questions presented are immensely important to Puerto Rico, whose citizens lack full federal representation.² The statutes questioned in this case treat United States citizens who moved to Puerto Rico worse than citizens who moved to the Northern Marianas or to a foreign country. This absurd situation would not matter if Puerto Ricans had full federal voting rights. But they do not, and instead experience a second-class citizenship. The Seventh Circuit decision exacerbates this problem by justifying this second-class status

² Puerto Rico agrees with Petitioners that they have standing to challenge UOCAVA. However, this brief focuses on the merits questions.

under the false premise that ruling for Petitioners would create a new class of “super citizens.”

The Constitution’s guarantee of equal protection rejects the selective extension of absentee voting rights to citizens living in foreign countries and certain U.S. territories, while denying them to similarly situated citizens living in other territories, including Puerto Rico. First, as Petitioners rightfully allege in their Petition, their right to vote in federal elections is a fundamental one; its discriminatory deprivation is subject to strict-scrutiny review under the Equal Protection Clause. The Seventh Circuit’s finding that only rational-basis scrutiny applied is incorrect. Further, even if rational-basis scrutiny applied, the reasons adduced by the Seventh Circuit to sustain the statutes are both immaterial to the constitutional questions and factually wrong. Therefore, even under a rational-basis analysis, the statutes are unconstitutional.

The proper remedy is to require all States, and those territories which, like Puerto Rico, are included in UOCAVA’s definition of “State”, be required to preserve the full federal voting rights that absentee voters have in their respective jurisdictions whenever they move to a jurisdiction in which they would have lesser rights, regardless of whether that jurisdiction is one of the territories included within UOCAVA’s definition of “United States”. This remedy would preserve the fundamental federal voting rights of United States citizens and would avoid the anomalous situation presented by their possessing more rights in a

foreign country or certain U.S. territories than in Puerto Rico.



REASONS FOR GRANTING THE PETITION

I. This Case Presents Issues of Fundamental Importance to Puerto Rico.

Petitioners are United States citizens who, for varying reasons, moved from the State of Illinois to the territories of Puerto Rico, Guam and the U.S. Virgin Islands. They alleged that they have been unconstitutionally deprived of their right to vote as absentee voters in the federal elections to be held in Illinois.

1. Puerto Rico has been a territory of the United States since 1898. *Igartúa de la Rosa v. United States*, 229 F. 3d 80, 85 (1st Cir. 2000) (Torruella, J., concurring). All persons born in Puerto Rico since 1917 are born as citizens of the United States. *Id.*, at 86; see also 8 U.S.C. §1402. But these citizens do not have a right to vote for the President or Vice-President of the United States. *Igartúa de la Rosa v. United States*, 32 F. 3d 8, 9-10 (1st Cir. 1994) (*per curiam*). Nor do they have any voting representation in Congress. Since 1917, Puerto Ricans have been represented by one non-voting delegate in the House of Representatives. 48 U.S.C. §781. As a consequence, the United States citizens who reside in Puerto Rico have little or no political power to participate in and/or influence the decisions taken by the federal government that affect their daily lives.

This inequality affects many aspects of the daily life of Puerto Ricans. For example, United States citizens residing and working in Puerto Rico must pay the same Social Security and Medicare taxes as any other resident of the United States. 26 U.S.C. §§3101, 3121(b)(i) and 3121(e)(1). They are, however, not entitled to participate in the Supplemental Security Income program. 42 U.S.C. §1382c; *Califano v. Gautier-Torres*, 435 U.S. 1 (1978) (upholding constitutionality of this statute under Equal Protection Clause). Another example is that Puerto Rico receives substantially less funds than the States from the Aid to Families with Dependent Children program. 42 U.S.C. §§1308(a)(1) and 1396d(b); *Harris v. Rosario*, 446 U.S. 651, 651-652 (1980) (upholding constitutionality of this statute under the Equal Protection Clause). The fact that Congress treats Puerto Rico that way is directly related to its lack of voting representation.

2. Petitioners' claims should be examined with this background in mind. As residents of Illinois, they enjoyed full representation in Congress, and had a meaningful say in the election of the President and Vice-President of the United States, who are in charge of enforcing the laws approved by Congress.

One such law is UOCAVA. Congress enacted this statute to strengthen and reaffirm the right to vote for United States citizens living overseas, who would otherwise be unable to vote for President or have voting representation in Congress. In this statute, Congress declared its sense of the importance of voting, stating that each person who administers a federal, State or

local election should perform his or her duties with the intent to ensure “that all eligible American voters, regardless of race, ethnicity, disability, the language they speak, or the resources of the community in which they live, should have an equal opportunity to cast a vote, and that vote be counted.” See 52 U.S.C. §20301, notes.

UOCAVA provides that States must “permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.” 52 U.S.C. §20302(a)(1). The definition of “State” includes Puerto Rico, so that it is bound to fulfill the duties of all States under UOCAVA. 52 U.S.C. §20310(6). The definition of “overseas voter” includes, among others, “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)(c). The definition of “United States” includes the several States, Puerto Rico, Guam, the Virgin Islands and American Samoa. 52 U.S.C. §20310(8).

Pursuant to UOCAVA, therefore, Puerto Rico shares with the States the duty to ensure the right to vote of absentee voters. However, although a person who leaves a State such as Illinois to reside in a foreign country or in certain territories of the United States, such as the Northern Marianas, will retain his or her full right to vote for President and voting representation in Congress, persons who leave that State to reside in Puerto Rico will not. Instead, they are only

entitled to vote for Puerto Rico's Resident Commissioner, who (as noted) does not have a vote in the House of Representatives. They lose their right to vote for the President and Vice-President of the United States and for voting representation in Congress.

The Commonwealth of Puerto Rico has consistently sought treatment equal to the States in federal laws. Puerto Rico has no qualms about complying with its duties under UOCAVA as a "State". Further, Puerto Rico has absolutely no desire to be treated separately from the United States. However, it is an unfortunate reality that United States citizens residing in Puerto Rico have far lesser voting rights in federal elections than United States citizens residing in the States. UOCAVA compounds that problem by discriminating against the Commonwealth and thereby depriving Petitioners of their right to vote in federal elections vis-à-vis citizens residing in other territories or foreign countries. Federal courts are fully equipped to address the discrimination faced by Petitioners under UOCAVA.

3. The Seventh Circuit sustained its decision in part based on its concern that recognizing the federal voting rights of Petitioners and similarly placed United States citizens would create a class of "super citizens" within the territories, who would be able to vote for the President and Vice-President and for representatives in Congress, while the other residents cannot. The term "super citizens" is a gross misnomer. Petitioners and others like them presently lose almost entirely their federal right to vote. They go from

electing the President, the Vice-President and voting representatives to the House of Representatives and the Senate to voting for one non-voting delegate to the House. They become second-class citizens, just like other Puerto Rico residents. This is contrary to the fundamental nature of their right to vote and to the sense of Congress on the importance of voting that lies at the heart of UOCAVA. What the Seventh Circuit calls “super citizens” are persons who would merely enjoy the fundamental constitutional right to vote; that is, normal United States citizens.

Puerto Rico is aware that the ultimate solution to the problems presented by its three million citizens’ second-class constitutional rights is outside of the scope of this case. But to convert United States citizens with full rights into second-class citizens by the mere fact that they move to Puerto Rico needlessly exacerbates the problem. Limiting the rights of United States citizens who move to the territories increases the number of disenfranchised citizens and perpetuates this serious problem. This result should not be acceptable in a democratic society.

II. Petitioners have a fundamental right to vote that is severely curtailed by the provisions of UOCAVA and the Illinois Election Code.

This Court has consistently stated that the right to vote is a fundamental right under the Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds*

v. Sims, 377 U.S. 533, 554 (1964); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966). As such, any deprivation of voting rights is subject to strict scrutiny. *Burdick v. Takuchi*, 504 U.S. 428, 433 (1992). The Seventh Circuit therefore erred when it refused to apply strict scrutiny and instead applied the much more deferential rational-basis scrutiny. Pet. App. 9a-11a.

The Seventh Circuit’s key analytic misstep was focusing upon the federal voting rights of residents of the territories, including Puerto Rico, and not upon the electoral rights of Petitioners as former residents of the State of Illinois. Pet. App. 9a-10a. Certainly (and unfortunately) the only voting right that Puerto Rico can protect under UOCAVA in fulfilling its duties as a “State” is the right to elect a non-voting Resident Commissioner to the House of Representatives. Under UOCAVA, the State of Illinois, to the contrary, can, and has a duty to protect, Petitioners’ right to vote for President, Vice-President, and representatives in both the House of Representatives and the Senate. This is, undoubtedly, a fundamental right, as correctly argued by the Petitioners in their Petition for Certiorari.

The challenged provisions of both UOCAVA and the Illinois Election Code utterly fail to protect the fundamental rights of absentee voters. UOCAVA only obligates States to provide federal absentee ballots to those persons who move from the State to a foreign country or any of the territories of the United States not included within the definition of “United States” contained in the Act. And the Illinois Election Code

does not provide such protection to persons who move to the included territories, even though it could have done so. Strict scrutiny requires that the regulation be “narrowly tailored to advance a compelling state interest”, *Burdick v. Takushi*, supra. These regulations do not remotely comply with this standard, particularly in light of Congress’ stated “sense” of the importance of the right to vote in UOCAVA. 52 U.S.C. §20301, notes.

III. UOCAVA’s discrimination against Puerto Rican citizens lacks any rational basis.

The Seventh Circuit proffered three reasons for holding that the provisions of UOCAVA and the Illinois Election Code are constitutional under the rational-basis analysis it performed. None withstands scrutiny, even if the rational-basis scrutiny applied.

Petitioners allege that there is no rational basis for UOCAVA’s different treatment of the Northern Marianas, which are not included within the territorial definition of “United States”, and Puerto Rico, Guam, the Virgin Islands and American Samoa, which are. They further allege that there is no rational basis for Illinois’ different treatment of American Samoa, which falls within the definition of “United States” of UOCAVA. The Seventh Circuit justified the disparate treatment by stating that, at the time of passage of both statutes, American Samoa was an “outlying possession” and the Northern Marianas were a “Trust Territory”, not entitled to elect a non-voting delegate

to the House of Representatives in 1979, when the Illinois statute was approved. Pet. App. 11a.

That reasoning is deeply flawed. First, although American Samoa was an outlying possession in 1979, and is still now, it has been entitled to a non-voting delegate to the House since 1978, 48 U.S.C. §1731, and has “bec[o]me more integrated into the United States.” Pet. App. 11a. Second, UOCAVA expressly includes American Samoa within its territorial definition of “United States”. Therefore, that American Samoa is an outlying possession is irrelevant to the rational-basis analysis.

With regard to the Northern Marianas, they have not been included within the definition of “United States” in UOCAVA, even though they have been represented in the House of Representatives by a non-voting delegate since 2008. If having a non-voting delegate in the House were the rational basis for including Puerto Rico in the territorial definition of “United States”, UOCAVA would have been amended to add the Northern Marianas to that list. Likewise, the Illinois statute would have been amended since 2008 to exclude Northern Marianas from the absentee ballot protection, and since 1979 to exclude American Samoa. There is no present justification for UOCAVA and the Illinois Election Code’s disparate treatment among territories.

The Seventh Circuit also stated that, in any event, the proper remedy would be to treat equally all territories by contracting the voting rights of all the

absentee voters who live in all the territories. Pet. App. 11a-12a. This solution runs squarely against the letter and purpose of UOCAVA and is contrary to the Constitution. Instead, the remedy would be to provide that all “States” are required to preserve the full federal voting rights that absentee voters have in their respective jurisdictions whenever they move to a jurisdiction in which they would have lesser rights. Under this remedy, Puerto Rico and the other territories would be bound to protect the federal right of their residents, when they are in foreign nations, to vote for a non-voting delegate for the House of Representatives. And the States would be bound to protect the federal right of their former residents to vote for President, Vice-President and their representatives in Congress when they move to a territory. This is the only remedy consistent with the fundamental nature of the right to vote because it focuses not on the status of the territories, but on the protection of the federal voting rights of United States citizens who move to a different jurisdiction. It also solves any inconsistency among the treatment of territories in UOCAVA.

This remedy would also resolve the problem of treating a United States citizen who moves to a foreign country better than one who moves to a territory of the United States. Under the Seventh Circuit decision, United States citizens who move to the Northern Marianas, or even to a foreign country, enjoy more rights than those United States citizens who move to Puerto Rico. This absurd situation is a disincentive for talented United States citizens (including persons

born in Puerto Rico) who presently live in the States to go reside in Puerto Rico, talent that Puerto Rico sorely needs at the present time.



CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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