No. 17-1463

In the Supreme Court of the United States

LUIS SEGOVIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

AARON M. KATZ
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

JUSTIN WEINSTEIN-TULL
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305

JONATHAN R. FERENCE-BURKE
Counsel of Record
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 508-4731
Jonathan.Ference-Burke@ropesgray.com

ADAM M. HARRIS
HAYDEN A. MILLER
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036

QUESTION PRESENTED

Whether a plaintiff has standing to challenge an unconstitutional federal law even though an individual state could, in theory, take action to remedy the unconstitutional treatment prescribed by the federal law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes

Statutes—Continued Page(s)

Miscellaneous:

INTEREST OF AMICI CURIAE[1]

Amici are legal academics whose scholarship and teaching focus on constitutional law and election law.

This brief reflects the consensus of the amici that this Court should grant the Petition for Writ of Certiorari in order to correct the Seventh Circuit's opinion below.

Joshua Sellers is an Associate Professor of Law at Sandra Day O'Connor College of Law, Arizona State University. His principal areas of research and teaching are in election law, legislation and regulation, constitutional law, and civil procedure.

Justin Weinstein-Tull is a Thomas C. Grey Fellow and Lecturer in Law at Stanford Law School. He writes on federalism, election law, and state and local government law. He previously enforced the Uniformed and Overseas Citizens Absentee Voter Act as a trial attorney in the U.S. Department of Justice, Civil Rights Division, Voting Section.

SUMMARY OF THE ARGUMENT

In *Segovia* v. *United States*, the Seventh Circuit issued a standing opinion that contravenes existing doc-

---

[1] Pursuant to Rule 37.1 of the Rules of the Supreme Court of the United States, no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for amici notified counsel for parties of their intent to file this brief more than ten days before the date for filing the response brief. All parties have consented to the filing of this amici curiae brief.

trine and disturbs well-established federalism principles. The holding is broad and has applicability far beyond the narrow statutory context the court was considering. The Court should grant the petition to resolve a circuit split and to provide clarity on a legal issue that promises to grow in importance as more federal laws solicit or require state action.

The Seventh Circuit held that the plaintiffs lacked standing to challenge the constitutionality of the Uniformed and Overseas Citizens Absentee Voter Act (UOCAVA) because the State of Illinois could have cured the federal law's constitutional defect. UOCAVA requires states to transmit absentee ballots to military and overseas voters no fewer than forty-five days before an election. 52 U.S.C. 20302(a)(8). However, UOCAVA excludes former state residents now living in *certain* U.S. Territories, but not others, from its definition of "overseas voters" due absentee ballots.[2] Because Illinois complies with UOCAVA's territorial requirements, it administers UOCAVA's differing treatment of former residents now living in the Territories.

Rather than reach the merits of whether UOCAVA's treatment of the Territories violates the plaintiffs' constitutional rights, the Seventh Circuit held that the plaintiffs lacked standing to challenge

---

[2] The term "Overseas voters" is defined to include "a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States." 52 U.S.C. 20310(5)(B). The requirement to provide absentee ballots to "overseas voters" excludes former residents of Illinois (and other states) now domiciled in several American Territories because the statute defines "State" and the "United States" to include "the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa." See 52 U.S.C. 20310(6), (8).

UOCAVA because Illinois was capable of remedying any constitutional defect by enacting state law that equalized UOCAVA's treatment of the Territories and made the plaintiffs whole. Pet App. 5a-7a.

Part I of this brief argues that *Segovia*'s standing holding applies to a broader set of federal laws than just UOCAVA. Because UOCAVA provides a federal rights floor, but no ceiling, *Segovia* held that it was Illinois's decision not to equalize the treatment of Territories that was the cause of the harm. See Pet App. 5a-8a. But many federal laws share UOCAVA's structure—other election laws, other rights laws more generally, and some cooperative federalism programs—so the idea that the federal government cannot be sued when discriminatory federal laws provide only rights floors and not rights ceilings would have much broader application than just UOCAVA.

Part II demonstrates that *Segovia*'s standing holding finds no support in the existing case law and, in fact, radically departs from it. Litigants have standing to challenge federal cooperative federalism programs even when those programs implicate a broad range of state action, including state action that itself caused the plaintiffs' injuries and curative state action. And in constitutional challenges to federal statutes on discrimination grounds, the Court has not looked to whether states could have cured the discriminatory federal statute through state legislation before proceeding to the merits of the federal challenge.

Part III argues that *Segovia*'s holding violates well-established principles of federalism. By making states responsible for curing unconstitutional federal laws, it

interprets UOCAVA to disturb the federal-state balance of power, violating the plain statement rule. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). And because it diminishes accountability for UOCAVA by obscuring the party responsible for its constitutional defects—federal or state officials—it interprets UOCAVA in a manner that would violate the anti-commandeering principle. See *Printz* v. *United States*, 521 U.S. 898, 925 (1997).

ARGUMENT

The Seventh Circuit's holding in *Segovia* v. *United States* that the plaintiffs lack standing to challenge the constitutionality of UOCAVA contravenes this Court's judgments on federalism and standing. Pet App. 81a. *Segovia* holds the federal government immune from challenges to unconstitutional federal laws when states are able—through their own lawmaking—to cure those constitutional defects. Pet. App. 14a. This holding disrupts the federal-state balance of power by making states responsible for federal missteps, and therefore violates the plain statement and anti-commandeering principles. *Segovia* also flouts existing doctrine on standing to challenge the constitutionality of federal laws, which does not consider potentially curative state action.

Besides being wrong, *Segovia*'s standing holding is dangerous and creates a circuit split.[3] *Segovia* is written broadly enough so that it would erroneously constrain standing to challenge a wide swath of federal laws, beyond the narrow context of UOCAVA. Doctrine in the

[3] In two similar challenges, federal appellate courts did not reject plaintiffs' claims on standing grounds. *See* Pet. 18-19.

context of the many federal statutes that solicit or require state action is thin, and the Seventh Circuit's opinion has the potential to fill a doctrinal gap with bad law.

These legal issues deserve more analysis. Federal laws that implicate both the federal and state governments "have given rise to many new and difficult legal questions," including questions of "state-versus-federal-court jurisdiction, * * * statutory enforcement, and standards of review." Abbe R. Gluck, *Our [National] Federalism*, 123 Yale L.J. 1996, 1997-1998 (2014). Often, "courts do not even recognize these questions as federalism questions, even though they unquestionably concern the discretion, influence, and sovereignty of states in a national legal landscape." *Id.* at 1998. Doctrines that might resolve questions like the ones presented here "have split the lower courts, have yet to be resolved by the U.S. Supreme Court, and are affecting how major federal laws are being carried out across the country." *Ibid.*

The Seventh Circuit did not recognize its standing holding as a matter of federalism—it does not once mention it—even though the issues it purports to resolve implicate existing federalism doctrines and raise new questions about the balance of power between federal and state governments. Instead of allowing this opinion to fill a gap in the law of statutes that implicate the federal-state relationship, the Court should grant the petition.

I. THE SEVENTH CIRCUIT'S OPINION HAS BROAD IMPACT

The Seventh Circuit's standing decision sets a precedent far beyond the narrow context of UOCAVA. Like UOCAVA, many federal laws now involve some action by the states. These laws may regulate state action, like

UOCAVA and other election laws do, or they may encourage states to partner with the federal government, like public assistance and environmental programs. If the Seventh Circuit's opinion were to stand, it would improperly limit standing to challenge this much broader set of federal laws.

In particular, the reasoning of the Seventh Circuit's opinion extends beyond UOCAVA to the larger universe of federal laws that implicate federal-state cooperation and interaction. Important to the Seventh Circuit's decision was that UOCAVA provides a federal rights floor, but no ceiling. Pet. App. 5a-6a. Because it creates no ceiling, the court reasoned, it was Illinois's decision not to equalize the treatment of Territories that was the cause of the harm. *Ibid.* And because many federal laws share UOCAVA's structure, the idea that discriminatory federal laws cannot be challenged when they provide only rights floors and not rights ceilings would have broad application among federal laws.

For starters, other voting laws take a similar form to UOCAVA, see Justin Weinstein-Tull, *Election Law Federalism*, 114 Mich. L. Rev. 747, 755-759 (2016) (describing the similar structures of federal election administration statutes), and would be affected by the Seventh Circuit's ruling. The National Voter Registration Act of 1993 (NVRA), for example, requires states to provide voter registration opportunities in state motor vehicle offices and public assistance offices. 52 U.S.C. 20504, 20506. The Help America Vote Act of 2002 (HAVA) imposes technical requirements on the voting system hardware used by states, creates rules for provisional ballots, and requires states to implement statewide voter registration lists controlled centrally. See 52 U.S.C. 21081-

21082. In the same way that UOCAVA imposes federal standards onto a state activity—sending absentee ballots—the NVRA imposes federal standards onto the voter registration process and HAVA regulates the mechanics of the voting process. And like UOCAVA, neither the NVRA nor HAVA prohibit states from engaging in additional registration or election administration processes.

The Seventh Circuit's logic leads to absurd results in the context of these statutes. For example, imagine that a Hispanic voter believed that in fairly administering the NVRA's voter registration requirements, his state violated the Equal Protection Clause by disproportionately registering white voters. Because the state *could* offer voter registration opportunities that equalize that racial balance, *Segovia* would strip that voter of standing to challenge the NVRA itself and instead require him to sue the state for failing to immediately identify and cure any constitutional defects in the federal statute. But it cannot be right that the NVRA creates a cause of action against the state—without any mention of that cause of action in the statute—just because the state might have been able to, but chose not to, expand voter registration opportunities to locations that would equalize an allegedly racially discriminatory NVRA administration. Similarly, it cannot be right that standing to challenge the constitutionality of a federal statute depends on the independent actions of state government.

Segovia's logic would infect federal laws in other areas as well. Take the Americans with Disabilities Act (ADA), which provides a rights floor preventing states and local governments from excluding persons with disabilities from participating in any public programs, 42

U.S.C. 12132, or enjoying any public accommodations, 42 U.S.C. 12182(a). Like UOCAVA, the ADA does not provide a rights ceiling for the state to expand the group of people considered disabled by the ADA. See 42 U.S.C. 12102. By the Seventh Circuit's logic, if disabled persons *not* covered by the ADA wanted to challenge the ADA, they would not have standing to sue the federal government. They *might* have standing to challenge the state for not independently assessing any discriminatory impact of the ADA and legislatively remedying it.

Cooperative federalism laws could also be affected by the Seventh Circuit's decision. These programs, like the Food Stamp Act and the Affordable Care Act, are more complex than UOCAVA but share a similar structure: through funding promises from the federal government, states agree to administer federal programs with various rights floors. Many of these laws give states the flexibility to go beyond the requirements set by the federal laws. The Food Stamp Act, for example, only provides benefits to U.S. citizens and certain lawfully-present non-citizens, see 7 U.S.C. 2015(f), but does not prohibit states from providing their own form of assistance to a wider group of non-citizens. And, in fact, many states do just that. See National Immigration Law Center, State-Funded Food Assistance Programs, https://www.nilc.org/wp-content/uploads/2016/03/tbl12_statefood_2016-08.pdf (last updated August 2016) (describing how six states have expanded food assistance programs to a larger group of non-citizens).

To see how *Segovia* leads to absurd results in the context of cooperative federalism programs, imagine a public assistance program that provides funding to

states to administer the federal benefit, but only to whites. Because the program does not prohibit states from providing those same benefits to other races, *Segovia* would prohibit non-whites from challenging the constitutionality of the federal program. It is no different here: plaintiffs allege that UOCAVA is facially unconstitutional in how it distinguishes between the Territories. Curative state actions are irrelevant.

The *Segovia* decision also has implications beyond the Equal Protection context and could affect a plaintiff's standing to challenge other types of unconstitutional conduct by the federal government. For example, suppose that Congress prohibited doctors from discussing with patients on Medicaid their options for birth control, but allowed states, as part of their administration of the program, to enact exceptions for particular contraceptive methods. A physician who sought to challenge the federal prohibition on First Amendment grounds could lack standing under *Segovia* on the theory that the state where the doctor resides *could* take steps to create exceptions to the prohibition on speech. Likewise, a patient who seeks to challenge the policy on due process grounds could lack standing for the same reason. Nothing in *Segovia* limits its reach to Equal Protection challenges only.

In another example, imagine that Congress passes a law that requires the federal Transportation Security Administration to adopt a policy under which it will conduct extremely invasive strip searches of passengers at U.S. airports on a random basis, but allows states to opt-out of the policy if they enact legislation prohibiting such searches at airports within their state borders. Under the reasoning of *Segovia*, passengers subjected to such

searches would lack standing to sue the federal government on Fourth Amendment grounds merely because the states in which they were traveling could have taken steps to opt out—thus improperly insulating the federal policy and federal actors from any judicial review.

As these examples demonstrate, the Seventh Circuit's standing decision in *Segovia* would affect standing to challenge more federal laws than just UOCAVA; it would create perverse standing doctrine among a wide scope of other federal laws.

II. THE SEVENTH CIRCUIT'S OPINION CONTRAVENES ESTABLISHED STANDING LAW

The Seventh Circuit's standing holding is a radical and unwise departure from well-established standing doctrine. Standing to challenge the constitutionality of a federal law has never hinged on the plaintiff's state's ability to cure the federal law's constitutional defects on its own. This is true for both federal laws that explicitly call for state action and federal laws that operate in policy areas that states concurrently regulate. The Seventh Circuit's holding that a plaintiff lacks standing to challenge the constitutionality of a federal law when a state "could provide" a cure for the law's unconstitutional defects, Pet. App. 5a, is inconsistent with longstanding standing doctrine.

In challenges to cooperative federalism programs, where federal and state actions are more closely intertwined, standing to challenge the federal law does not (and should not) depend on the availability of curative state action. For example, in *City of Chicago* v. *Shalala*, resident non-citizens had standing to challenge provisions of the Personal Responsibility and Work Oppor-

tunity Reconciliation Act of 1996 (PRWORA) which disqualified non-citizens from receiving certain welfare benefits. 189 F.3d 598, 603 (7th Cir. 1999) ("There is no dispute that the intervenors who have been rendered ineligible for benefits have standing to challenge the constitutionality of the [Welfare Reform] Act."). The court did not care that PRWORA did not prohibit individual states from providing supplemental welfare benefits, and that Illinois had not taken the opportunity to do so. Indeed, states have standing to challenge the constitutionality of federal programs even when they elect to participate in those programs. See *Kansas* v. *United States*, 24 F. Supp. 2d 1192, 1195 (D. Kan. 1998) ("[T]he State of Kansas has standing to challenge the [constitutionality of the] requirements of PRWORA, even though the State agreed to participate in the program.").

In private challenges to the federal government's implementation of cooperative federalism programs, courts have also found standing to sue the federal government despite a broad range of state action. First, private plaintiffs possess standing to challenge the federal government's implementation of cooperative federalism programs even when individual states played a large role in the plaintiffs' injuries. For example, land developers had standing to sue the Environmental Protection Agency (EPA) for arbitrarily enforcing the Clean Water Act even though they were denied access to waste disposal services by a state agency rather than by EPA itself. See *Shanty Town Assocs. LP* v. *EPA*, 843 F.2d 782, 788 (4th Cir. 1988) ("It is true that it was the local Sanitary Commission, as the entity responsible for the day-to-day operation of the federally-funded system, that actually imposed the restrictions on service to Shanty Town's property. But we think it plain, from the record

before us, that the Sanitary Commission would not have imposed those restrictions had it not been for EPA's insistence upon them.").

Second, plaintiffs possess standing to challenge federal implementation even when states already engage in some curative action. Voting rights organizations had standing to challenge the U.S. Election Assistance Commission's approval of voter registration forms requesting documentary proof of citizenship (proposed by Alabama, Georgia, and Kansas) as violating the National Voter Registration Act. See *League of Women Voters of the United States* v. *Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016). The *Newby* Court found standing even though Alabama and Georgia actually engaged in curative action by refusing to require proof of citizenship. *Id.* at 6 ("Alabama and Georgia were not, for the moment, enforcing the proof-of-citizenship laws.").

Segovia also contravenes standing principles from this Court's landmark Equal Protection cases involving federal laws that deprived people of federal benefits that *could have* been ameliorated at the state level. In *United States* v. *Windsor*, for example, the federal definition of marriage as between a man and a woman prevented the plaintiffs from receiving a federal tax benefit in the form of an estate tax exemption for surviving spouses. 570 U.S. 744, 750 (2013). The plaintiff challenged the federal government's definition of marriage. *Ibid.* The plaintiff had standing to challenge the federal law even though the State of New York, where the plaintiff resided, could have passed a law to make individuals like the plaintiff whole by giving them additional tax

benefits to counter the loss of the federal benefit.[4] But New York's tax laws were of no moment in the Court's analysis.

The Court's classic sex discrimination cases demonstrate similar disregard for state curative action. In *Weinberger* v. *Wiesenfeld*, a widower challenged the constitutionality of the Social Security Act provision that permitted a widow to receive benefits based on past earnings of her deceased husband but did not permit a widower to receive those same benefits based on past earning of his deceased wife. 420 U.S. 636, 638 (1975). Like in *Windsor*, it was of no moment that New Jersey, where the widower lived, could have cured the Social Security Act's constitutional defects. A *Segovia*-style standing holding in *Weinberger* would have been ridiculous: how would New Jersey know the federal law was unconstitutional or how to remedy it?[5]

In sum, a state's ability to cure federal constitutional defects has not in the past defeated standing. Here, the

---

[4] In fact, some non-state entities did make same-sex couples whole. Prior to *Windsor*, some private employers offered additional "gross up" payments to employees married to same-sex partners to make them whole for their unequal treatment under federal tax law. See Michael T. Harren et al., *Employee Benefits: Same-Sex Marriage and Domestic Partners*, https://www.americanbar.org/content/dam/aba/events/labor_law/2013/02/employee_benefitscommitteemidwintermeeting/17b.authcheckdam.pdf ("Some employers, to alleviate income tax burden of domestic partner benefits, have grossed up an employee's salary.").

[5] These Equal Protection cases differ from *Segovia* in the sense that the federal laws at issue did not themselves require state action, as UOCAVA does. Like UOCAVA, however, those federal laws operated in policy areas traditionally governed by and actively regulated by states: family law and public assistance.

state has done little more than implement UOCAVA, as it is required to, and that requirement is sufficient to confer standing to challenge UOCAVA.

III. The Seventh Circuit's opinion disturbs established federalism principles

Though the Seventh Circuit's opinion never once mentions the word "federalism," its standing holding has wide-ranging federalism implications. It improperly shifts responsibility for discriminatory federal laws from federal actors to state actors and, in so doing, alters the federal-state balance of power and responsibility. It also diminishes accountability for federal laws by insulating the federal government from challenges to its own laws, instead forcing citizens to tease apart federal and state action. These two federalism results conflict with two of the Court's settled federalism doctrines: the plain statement rule and the anti-commandeering principle.

The plain statement rule prevents the federal government from creating state liability or altering the federal-state balance of power without being explicit about it. When Congress alters that balance of powers by legislating in areas typically regulated by states, it must make its intentions clear by plain statement. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). In *Gregory*, the Court upheld a Missouri law that imposed mandatory retirement ages for state judges, despite the federal Age Discrimination in Employment Act's prohibition on age discrimination. The Court held that to disrupt the traditional federal-state balance, which includes permitting the states to structure their governments as they see fit, Congress must make a "plain statement" of its intention to do so.

Segovia's standing holding contravenes that principle. It states that the plaintiffs' injuries are traceable not to UOCAVA but to Illinois's decision not to cure UOCAVA's defects—*i.e.*, if these injuries exist, Illinois is responsible for them. But the Seventh Circuit's opinion mentions nothing about UOCAVA's intention to make states responsible for federal constitutional defects in the law. Nor does UOCAVA's text state plainly—or even by implication—that states would be responsible for failing to cure those defects.

The Seventh Circuit's broad reasoning also contravenes the accountability concerns set out by the anti-commandeering principle, recently reaffirmed by the Court in *Murphy* v. *NCAA*, 138 S. Ct. 1461 (2018). That principle states that the federal government may not "compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz* v. *United States*, 521 U.S. 898, 925 (1997). In *New York* v. *United States*, the Court struck down a federal statute that forced states to take title to low-level radioactive waste unless the state could dispose of that waste—either itself or through an interstate compact—by a certain date. 505 U.S. 144, 153-154, 186-188 (1992).

The anti-commandeering principle maintains a "healthy balance of power between the States and the Federal Government," in part by "prevent[ing] Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477 (citation omitted). The anti-commandeering principle "promotes political accountability" by making transparent the authority responsible for various policies. *Ibid.* When Congress forces states to administer federal programs, "responsibility is

blurred." *Ibid.* Voters will not know whom to reward or punish at the polls.

Segovia turns the anti-commandeering principle on its head. It holds the federal government immune from suit by interpreting UOCAVA to command states to cure any of UOCAVA's own constitutional defects. Pet. App. 5a-7a. The Seventh Circuit's opinion—in the broader context of statutes like the ADA and programs like the Food Stamp Act—gives a state this choice: do nothing but implement the federal law and invite a lawsuit challenging its failure to cure constitutional defects in the federal law, or be commandeered to enact state law that cures the defect. That choice is no choice at all.

This result is also inconsistent with the anti-commandeering principle's attention to accountability. If states must cure constitutional defects in federal laws, who is politically accountable for the policy result? The federal government, which enacted the defective law in the first place, or the state, which may or may not have cured the defect? Voters would not know who to hold accountable. Accountability concerns are especially applicable here, where the state's responsibility to cure constitutional defects would be entirely discretionary. That is, even if voters understood the state curative action to be caused by federal constitutional defects, they couldn't possibly know what the range of appropriate state options were.

CONCLUSION

Segovia is dangerously broad and creates a circuit split. It contravenes existing standing doctrine and distributes well-established federalism principles. The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

JONATHAN R. FERENCE-BURKE
AARON M. KATZ
ADAM M. HARRIS
HAYDEN A. MILLER
ROPES & GRAY LLP

JUSTIN WEINSTEIN-TULL
STANFORD LAW SCHOOL

Counsel for Amici Curiae

JUNE 2018