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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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THE WRIT SHOULD BE GRANTED

Respondents' submissions underscore the problems with the Seventh Circuit's opinion and the need for this Court's review. Notably, state respondents *do not oppose review* at all. And *no respondent* has seriously attempted to defend the Seventh Circuit's failure to apply heightened scrutiny, or its reliance on facts that have not existed for decades to survive rational-basis review. Both rulings create circuit splits and conflict with this Court's precedent.

While federal respondents defend the Seventh Circuit's holding that petitioners lack standing to challenge discriminatory federal laws when a State could act to remedy that discrimination, they misconstrue the standing issue and thus fail to square the opinion below with this Court's precedents or the approach to standing taken by other Courts of Appeals.

Review is warranted on all three questions presented, for the following reasons.

First, respondents' submissions show in striking fashion that the accountability and buck-passing problems portended by the Seventh Circuit's standing ruling have already manifested. Pet. 22; Constitutional Law Professors' Amicus Br. 14-16. Federal respondents' entire argument is that petitioners' injury is caused by state law. *See, e.g.*, Opp'n 9-10. Yet state respondents take no position on the merits on the basis that they do not create policy but instead are only following the dictates of federal and state law. T. Burns Ltr. at 1, Aug. 24, 2018; P. Castro Ltr. at 1, Aug. 24, 2018. And despite invitations from petitioners and state respondents at every stage of the proceeding, the State of Illinois has declined to

defend the merits *of its own law* – presumably because Illinois's overseas voting law was enacted in response to federal requirements in the first place. The "hot-potato" dynamic created by the Seventh Circuit's decision demonstrates the sensibility of this Court's and other circuits' approach to standing – that when overlapping federal and state laws interact in causing injury, plaintiffs have standing to sue *both* federal and state defendants.

Second, respondents' collective silence regarding the proper level of review is equally striking given the fundamental nature of the rights at issue. Federal respondents offer only a sentence concerning the level of review, contending that there is no "conflict regarding the proper standard for reviewing" challenges to UOCAVA. Opp'n 13. But they ignore the existing conflict over how to scrutinize laws that extend voting rights selectively among similarly situated individuals, as elaborated in the petition and an amicus submission by Prof. Samuel Issacharoff and colleagues. Pet. 25-28; Voting Rights Scholars Amicus Br. 9-13. The laws at issue here selectively extend voting rights in the same manner that has irreconcilably divided federal Courts of Appeals, squarely presenting a split that is ripe for review.

Furthermore, no respondent even attempts to dispute the importance of whether the voting rights at issue here are "fundamental." Meanwhile, Puerto Rico and the U.S. Virgin Islands have both filed briefs stressing the fundamental importance of the right to vote and demonstrating how the challenged discrimination adversely affects the Territories' interests. Puerto Rico Amicus Br. 2 ("The questions

presented are immensely important to Puerto Rico ...."); U.S. Virgin Islands Amicus Br. 2 ("This case presents issues of fundamental importance to the United States Virgin Islands.").

Third, no respondent denies the existence of a circuit split over the question whether a law fails rational-basis review when the only government interest posited for its enactment is based on facts that have long since ceased to exist. *See* Pet. 32-35. The Seventh Circuit concluded that changed circumstances do not matter under rational-basis review. App. 11a. But this Court has said that they do, *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 (1938), and the Tenth Circuit has held the same, *Dias* v. *City and County of Denver*, 567 F.3d 1169, 1183 (CA10 2009). Because the sole basis for the Seventh Circuit's rational-basis ruling was that the state law at issue "was rational in 1979" even if it "became irrational" over time, App. 11a, this split, too, is squarely presented for review.

In short, there is no real opposition to the Court's review of the second and third questions presented.[1]

The only question where review is seriously contested is the first, concerning petitioners' standing to sue federal respondents. As to this question, federal

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[1] Federal respondents suggest that the Court should not review petitioners' challenge to UOCAVA because the Seventh Circuit resolved that challenge on standing grounds before reaching the merits. Opp'n 13. But the question of the proper standard to apply to the federal law is functionally identical to that with respect to Illinois law – which federal respondents do not dispute is ripe for review.

respondents' position on standing (1) misapprehends the relevant injury, leading its standing analysis astray; (2) ignores the broad implications of the Seventh Circuit's ruling for other laws and the adverse federalism and accountability consequences of the decision; and (3) fails to reconcile the clear split among the circuits concerning a plaintiff's right to sue the federal government where an intervening actor could but does not ameliorate harm caused by federal law.

A. Federal Respondents Misapprehend the Nature of Petitioners' Injury.

Federal respondents' standing argument misfires because it misapprehends the relevant injury. The injury is not, as framed in their question presented, that UOCAVA "fails to force Illinois to permit [petitioners] to vote absentee," Opp'n I, but that petitioners are not treated equally *by UOCAVA itself*. *See, e.g.*, *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (describing the "Equal Protection Clause as a shield against arbitrary classifications"); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (explaining that equal protection "is essentially a direction that all persons similarly situated should be treated alike"). Both UOCAVA and MOVE selectively extend voting rights to former state citizens residing in some places but not others. As such, *both* laws cause harm in the form of unequal treatment.

Because the injury is unequal treatment under the law, petitioners' standing to sue does not turn on whether they could obtain all the relief they are seeking against each defendant. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jack-*

sonville, 508 U.S. 656, 666 (1993) (standing does not demand that a plaintiff "would have obtained the benefit but for the barrier"). As this Court has explained, the standing of equal-protection plaintiffs like petitioners flows from "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*

Thus, the State's ability to level the unequal "floor" set under federal law by granting petitioners the right to vote in federal elections is immaterial to petitioners' standing. Regardless of the contours of Illinois law, petitioners have been injured because federal law singles them out for disfavored treatment, and that injury would be remedied by a court order enjoining federal respondents to enforce the law in an evenhanded fashion.

Federal respondents suggest that such injury would amount only to "abstract harm" since Illinois law could remedy it by granting more expansive voting rights. Opp'n 9. But that argument ignores this Court's precedents that, as noted above, define unequal treatment under the laws as a concrete, actionable harm.

Federal respondents' misunderstanding of the standing inquiry is also revealed by the fact that their arguments would logically apply with equal force to state respondents. State respondents also could argue that state law merely sets a floor, that Congress may act to exceed that floor, and that any state harm is abstract because Congress could further expand voting rights. The only way to avoid this kind of circular finger-pointing when there are overlapping federal and state laws is to recognize that

plaintiffs have standing to sue both federal and state defendants.

Accordingly, petitioners' injury stems from both federal and state law, and thus *both* federal and state respondents must be subject to suit.

B. Federal Respondents Ignore the Far-Reaching Ramifications of the Decision Below.

Moreover, federal respondents do not even attempt to address the broad implications of the Seventh Circuit's standing ruling or the adverse federalism consequences of its decision.

Under the Seventh Circuit's ruling and federal respondents' position, federal law would be immune from review on standing grounds if Congress provided that States must extend voting rights to white voters who move to Territories; or to male voters who move to Territories; or to voters whose last names begin with A through L and move to Territories – as long as a State could remedy Congress's discrimination by extending the right to other voters as well. And the same would be true for other laws beyond voting, since many federal laws share UOCAVA's structure and overlap with state law, as elaborated in the Constitutional Law Professors' amicus brief (at 5-10). That cannot be what standing doctrine requires, and it plainly is not under this Court's controlling decisions.

The federalism burdens are equally evident. Under the Seventh Circuit's logic, the onus will be on a State to cure the constitutional defects in a federal law (like UOCAVA) that sets a floor but not a ceiling. At the same time, the federal government – though

the architect of the law – would be insulated from suit or accountability. As amici put it, "[t]he Seventh Circuit's opinion … 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." Constitutional Law Professors' Amicus Br. 16.

But the anti-commandeering doctrine bars just this kind of imposition. By forcing the State to answer to constitutional challenges when an underinclusive federal statute sets a floor but no ceiling, the decision below jeopardizes the "fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1475 (2018). Placing the entire burden on the State to remedy discrimination originating in federal law also erodes "political accountability" because voters who dislike the federal discrimination – or the State's efforts to remedy that inequality – do not know "who to … blame." *Id.* at 1477. Review is necessary to reaffirm and make clear that a State's mere "ability to provide redress does not insulate the federal [government] from liability." App. 36a.

C. The Seventh Circuit's Standing Decision Conflicts with this Court's Precedent and Rulings from Other Circuits.

Finally, federal respondents misconstrue the basis of the Seventh Circuit's decision and, as a result, fail to reconcile that decision with the precedents of this Court and the federal Courts of Appeals holding that

plaintiffs have standing to sue federal defendants in analogous circumstances. *See* Pet. 16-22.

According to federal respondents, the nub of the Seventh Circuit's ruling is not that petitioners lack standing to sue federal respondents because "Illinois has the 'discretion' to 'counteract' any harm caused to them by federal law," but that they lack standing because "federal law has not harmed them." Opp'n 9-10.

In fact, however, the Seventh Circuit said *both* these things. Federal respondents point only to the court's ultimate conclusion and ignore its reasoning, which is that Illinois "determine[s] eligibility for overseas absentee ballots under its election laws," making it an "independent actor[]" with "unfettered discretion" to decide "whether the plaintiffs can obtain absentee ballots." App. 7a. "Given that type of unfettered discretion with respect to the plaintiffs," the Seventh Circuit reasoned, "the federal government cannot be the cause of their injuries." *Id.* That is simply wrong, as explained in the petition and as this Court and other courts have held in analogous circumstances. Federal respondents attempt to distinguish those precedents, but these attempted distinctions fail for similar reasons.

1. For example, federal respondents claim that the Seventh Circuit did not run afoul of this Court's decisions in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), *Barlow* v. *Collins*, 397 U.S. 159 (1970), and *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221 (1986), because those cases "do not directly address the Article III traceability requirement at all" or involved federal "authoriz[ation]" of harmful conduct. Opp'n 10-11. Neither is correct.

The cases plainly address the question of traceability, and federal respondents' contrary contention rests on an extremely formalistic reading of the decisions. In *Data Processing*, for example, the Court held not only that the petitioners had suffered an injury-in-fact, but also that the "challenged [federal] action had caused" that injury. 397 U.S. at 152. This Court decided *Barlow* as a companion case to *Data Processing* and adopted much of *Data Processing*'s reasoning, concluding that all the requirements of Article III had been met – including traceability. 397 U.S. at 164-65 (noting that petitioners' injury had been caused "by agency action"). Finally, the Court in *Japan Whaling* was squarely presented with a standing challenge and found the Article III requirements to have been met. *See* 478 U.S. at 230 n.4; *see also id.* (concluding that injury had been caused "by agency action").

Nor can these cases be distinguished because they supposedly involved federal "authoriz[ation]" of harmful conduct. Opp'n 10-11. According to federal respondents, these precedents are distinct because UOCAVA does not "authoriz[e]" Illinois to discriminate against petitioners in that it leaves Illinois free to "'provide [petitioners] the ballots they seek.'" *Id.* 11 (second alteration in original) (quoting App. 5a). Again, this argument mischaracterizes the injury, which strictly speaking is unequal treatment rather than access to ballots. And in any event, the cases cited are indistinguishable in the relevant sense, which is that they created a legal framework under federal law that vested third parties with discretion to injure the plaintiffs – and the existence of this discretion was no bar to suing the federal defendants. *See Japan Whaling*, 478 U.S. at 230 n.4 (failure to

impose sanctions permitted "continued whale harvesting"); *Barlow*, 397 U.S. at 162 (regulation permitting landlords to seek payments from tenants); *Data Processing*, 397 U.S. at 152 (Comptroller ruling permitting banks to "make available" data processing services). As such, this Court's standing rulings directly contradict the Seventh Circuit's reasoning here.

2. The Seventh Circuit's decision is also irreconcilable with the decisions of other Courts of Appeals in analogous cases. Federal respondents' attempts to distinguish these cases again miss the mark. As noted in the petition (at 18-19), the First and Second Circuits have entertained challenges to UOCAVA without questioning standing. Federal respondents endeavor to downplay the significance of these decisions because they did not expressly decide standing. Opp'n 11. But those courts' implicit determinations that the plaintiffs had standing to challenge the federal law are significant in light of a federal court's unflagging obligation to police its own jurisdiction.

In any event, the Seventh Circuit's reasoning is irreconcilable with several other decisions that do not address UOCAVA but reject precisely the same standing argument pressed by federal respondents here. Pet. 19-22. Federal respondents contend that there is no conflict because the Seventh Circuit's decision is essentially sui generis and fact-bound. Opp'n 12 (asserting that the decision was limited to "the facts of this case"). As discussed above, however, the Seventh Circuit's *reasoning* is broader than its conclusion: it held that standing will not lie against a federal defendant for disparate treatment under federal law when the challenged law grants discre-

tion to a third party to go beyond the law's requirements and extend benefits to all.

Federal respondents next contend that some appellate cases have involved "'two obstacles,' one imposed by the federal government and one by the State," *id.* (citing *Khodara Envtl., Inc.* v. *Blakey*, 376 F.3d 187, 195 (CA3 2004) (Alito, J.)), repeating their assertion that petitioners' injury here stems entirely from state law. But as previously shown, petitioners are injured by unequal treatment imposed by *both* federal and state law. Moreover, federal respondents ignore *Khodara*'s reasoning, which underscored the possibility that state defendants would attempt to shift blame to absent federal parties if standing requirements were construed to bar plaintiffs from suing federal defendants – "an absurd result," 376 F.3d at 195, and exactly what has happened here.

Federal respondents also attempt to distinguish *National Parks Conservation Ass'n* v. *Manson*, 414 F.3d 1 (CADC 2005) and *Scenic America, Inc.* v. *United States Department of Transportation*, 836 F.3d 42 (CADC 2016) on the ground that *Manson* involved federal action that "ha[d] the effect of exempting the States from a[] federal requirement" and *Scenic America* "authoriz[ed] the States to take an injurious action that otherwise would have been forbidden by federal law," Opp'n 12, but this attempted distinction also fails. What mattered in both cases was that the federal government could "exert[] legal authority" over the supposedly independent actor to compel or directly encourage the relief sought. *Manson*, 414 F.3d at 6; *see also Scenic Am.*, 836 F.3d at 55.

As *Manson* explained, notwithstanding the fact that "the state permitting authority [retained] final decision-making authority," the fact that the federal government likewise could take action very likely to remedy the plaintiffs' alleged injury by exercise of its retained authority sufficed for standing purposes and distinguished the case from *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) – which is the primary case on which the Seventh Circuit relied here. *Manson*, 414 F.3d at 6.

Here, too, the federal government can "exert legal authority" over state voter-eligibility requirements. Thus, it is of no moment that "'*nothing* other than [state] law prevent[s] the plaintiffs from receiving' their desired remedy," as federal respondents contend, Opp'n 12 (first alteration in original) (quoting App. 7a). That was true in *Manson* and *Scenic America* as well, where the state authorities were free to provide the plaintiffs all the relief they were seeking. As such, these cases directly contradict the core holding below – that the State's "unfettered discretion" meant petitioners' injury was caused exclusively by state law. For this reason too, the Court should grant review and reverse.

CONCLUSION

For the foregoing reasons and those set forth in the opening brief, the Court should grant the petition.

Respectfully submitted,

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