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September 12, 2017

BY ECF

Gino J. Agnello
Office of the Clerk
United States Court of Appeals for
the Seventh Circuit
Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street
Room 2722
Chicago, Illinois 60604

RE: Luis Segovia et al. v. United States et al., No.
16-4240

Dear Mr. Agnello:

Pursuant to Rule 28(j), plaintiffs-appellants respectfully submit this response to federal defendants-appellees' letter of September 11, 2017 – four days before argument – which cites the three-month-old *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) for the proposition that “the proper remedy for an equal protection violation” in this case would be to “eliminate favorable treatment for that group, rather than expansion of more favorable treatment to everyone.”

The letter should be disregarded because the argument is improperly raised for the first time in a 28(j) letter. Plaintiffs raised the remedial issue in their opening brief (at 24-25), and federal defendants did not address it in their merits brief. *See United States v. Ashford*, 718 F.3d

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377, 380-81 (4th Cir. 2013) (government's new argument in "eleventh-hour" 28(j) was disregarded); *cf. Califano v. Westcott*, 443 U.S. 76, 90-91 (1979) ("no need" to question the propriety of expansive remedy where the government had not "presented that issue").

Federal defendants in any event misread *Morales-Santana*. That case expressly reiterated that, "[o]rdinarily, ... 'extension, rather than nullification, is the proper course.'" 137 S. Ct. at 1699 (citation omitted). It nevertheless nullified, but only because the exception at issue ran contrary to an overriding congressional policy requiring longer-term physical presence in the United States, to which extension of the exception would be anathema. Notably, defendants cite no voting-rights case in which a court ordered nullification to remedy an equal-protection violation, nor are plaintiffs aware of such a decision from the Supreme Court or this Court.

Here, the express purpose of the laws at issue is to ensure former state residents do not lose their voice in federal elections because they move outside the states. *See* 1975 U.S.C.C.A.N. 2358, 2358-62. Thus, the statutes extend voting rights to former state residents living in 99.99% of the land area outside the 50 states and the District of Columbia. As Rep. Al Swift urged regarding UOCAVA's passage, the law would "protect a fundamental right" retained by American citizens, "wherever in the world they might be." 132 Cong. Rec. 20,976 (Aug. 12, 1986). Nullification would undermine that purpose.

Sincerely,

/s/ Charles F. Smith

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