

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JACOB CORMAN, et al.,

Plaintiffs,

v.

ROBERT TORRES, et al.,

Defendants.

No. 18-cv-00443-CCC

FILED
HARRISBURG, PA
MAR 09 2018
PER
DEPUTY CLERK

**MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE IN
SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION**

1. The Movant, Senator Guy Reschenthaler of the Senate of Pennsylvania, seeks leave to participate in this case as Amicus Curiae in support of the Legislative and Congressional plaintiffs' motion for preliminary injunction.

2. A district court has discretion to determine whether and to what extent an Amicus Curiae may participate in a pending proceeding, *see Waste Mgmt. of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995), and, where the matter is one of immense public import, such as the one presently before the court, participation by amici is especially welcome. *See Liberty Res., Inc. v. Philadelphia Hous. Auth.*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005)

3. Between 2007 and 2012, Senator Reschenthaler served as a JAG Officer in the United States Navy, during which time, he was deployed to Iraq on two separate occasions.

4. Since 2015, Senator Reschenthaler has represented the 37th Senatorial District, which includes over 250,000 voters from parts of Allegheny and Washington Counties.

5. While Senator Reschenthaler, as an elected member of the General Assembly, has an interest in preventing the dilution of the authority conferred on that body by the Elections Clause of the United States Constitution, he submits this brief to dispel the notion, advanced by Defendants, that public policy considerations militate against entering the Preliminary Injunction sought by Plaintiffs

6. Specifically, given his background, he is uniquely situated to comment on this matter from two perspectives: (a) as state legislator with regular constituent contact, he has intimate knowledge of the voting patterns and voter sentiment in his district; and (b) having served overseas on two separate occasions, he has a special interest in protecting the right of military personnel abroad to cast a ballot.

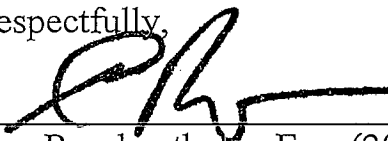
7. To that end, Senator Reschenthaler requests permission to submit an amicus brief, attached hereto as Exhibit A, rebutting Defendants' assertion that

compliance with the federal statute governing military absentee ballots would compel postponing the primary in the event that the Motion is granted. As set forth in that brief, it is, in fact the Department of State's plan for complying with the Court Drawn Map that is likely to violate the spirit, if not the letter of the relevant federal statute.

8. Pursuant to LR 7.1, Senator Guy Reschenthaler has sought concurrence in the motion and concurrence was not given.

WHEREFORE, Movant, Senator Guy Reschenthaler, requests that this Court grant his Motion for Leave to Participate as Amicus Curiae.

Respectfully,



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**Admission status pending*

Dated: March 9, 2018

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JACOB CORMAN, et al.,

Plaintiffs,

v.

ROBERT TORRES, et al.,

Defendants.

No. 18-cv-00443-CCC

**BRIEF OF AMICUS CURIAE, SENATOR GUY RESCHENTHALER OF
THE SENATE OF PENNSYLVANIA IN SUPPORT OF THE PLAINTIFFS’
MOTION FOR PRELIMINARY INJUNCTION**

Amicus Curiae, Senator Guy Reschenthaler of the Senate of Pennsylvania, respectfully requests that this Court grant Plaintiffs’ Motion for Preliminary Injunction (the “Motion) and, in support, submits this brief to discuss two specific public policy concerns central to this action – voter confusion and the interest of military voters.

INTRODUCTION

A district court has discretion to determine whether and to what extent an Amicus Curiae may participate in a pending proceeding. *Waste Mgmt. of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995). While courts are not bound by a talismanic test, courts have considered participation by

amici particularly appropriate where the proposed filing is likely to be useful in resolving a matter of public import. *See Liberty Res., Inc. v. Philadelphia Hous. Auth.*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005). Without a doubt, this action, involving fundamental constitutional questions concerning the authority to craft a Congressional districting plan is of immense public import. Moreover, given Senator Reschenthaler's background, he is well-situated to offer a unique and useful perspective on the public policy implications of this Court's decision.

First, as a former JAG officer in the United States Navy, Senator Reschenthaler served overseas on two separate occasions and, thus, he has a special interest in protecting the right of military personnel abroad to cast a ballot.

Second, as a current member of the General Assembly representing over 250,000 individuals in parts of Allegheny and Washington Counties, Senator Reschenthaler has regular contact with constituents regarding a variety of issues, including the matter currently before this Court. As such, Senator Reschenthaler has an understanding of the practical consequences of permitting the State Supreme Court's plan to be implemented.

ARGUMENT

Senator Reschenthaler fully agrees with Plaintiffs that the State Supreme Court's decision to redraw the Commonwealth's congressional boundaries without giving the General Assembly an opportunity to enact a new plan through the

legislative process was a clear violation of the Elections Clause. Indeed, the notion that Senator Reschenthaler and his colleagues could have passed redistricting legislation by February 9, 2018 rests on pure fantasy, in light of the fact that State Supreme Court did not issue instructions on *how* to do so until February 7, 2018. Senator Reschenthaler, however, will not belabor that point as Plaintiffs have aptly articulated these constitutional arguments and provide a cogent exposition of the many reasons why this Court should grant the Motion. However, two specific points regarding the public interest must be underscored.

Preliminarily, the notion that reinstating the 2011 Plan would require postponing the primary rests on a faulty premise that misrepresents a federal statute protecting military and overseas voters. Indeed, to the contrary, Defendants' proposal, although currently in technical compliance with that statute, is likely to violate it in practice. Further, Defendants substantially understate the mass confusion and chaos that has unfolded as a result of the State Supreme Court's newly-devised congressional boundaries (the "Court Map").

I. Granting a Preliminary Injunction will not require postponing the primary and Defendants argument to the contrary is based on a misunderstanding of a federal statute, which, in fact, they are likely to violate if permitted to implement the Court Map.

One of Defendants' chief arguments in opposing the Motion is that reinstating the 2011 plan would require postponing the primary at significant cost to the taxpayers. Specifically, they maintain that any further delays to the election

calendar, would make it impossible to hold the primary in May, without violating the Federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), *see* 52 U.S.C. §§ 20301, a federal statute that requires states to “transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter ... not later than 45 days before the election[.]” *Id.* at § 20302(a)(8). However, while it is true that sending absentee ballots 45 days before the primary is not feasible at this point, Defendants fail to recognize other available options for ensuring compliance with UOCAVA, short of postponing the primary.

Faced with similar circumstances, federal courts routinely devise plans instructing elections administrators to implement additional measures to protect the rights of overseas voters, while permitting an election to be held as scheduled. Most often, courts order the state and county officials to extend the deadline for accepting absentee ballots. *See, e.g., United States v. Alabama*, 857 F. Supp. 2d 1236, 1243 (M.D. Ala. 2012); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1378 (N.D. Ga. 2012); *Doe v. Walker*, 746 F. Supp. 2d 667, 683 (D. Md. 2010).¹ In

¹ In addition to these published decisions, there are a host of unpublished decisions directing states to extend the period for accepting absentee ballots. *See, e.g. United States v. W. Va.*, No. CIV.A. 2:14-27456, 2014 WL 7338867, at *3 (S.D.W. Va. Dec. 22, 2014); *United States v. Cunningham*, No. CIV. A. 3:08CV709, 2009 WL 3350028, at *10 n.3 (E.D. Va. Oct. 15, 2009) (collecting no less than nine cases from various jurisdictions where courts have ordered states to extend the deadline for receiving absentee ballots by as much as twenty days). Additionally, Courts have also entered consent decrees approving States’ proposals to extend the

fact, this Court prescribed this exact remedy in 2004, when faced with the prospect of voter confusion and last minute changes that resulted in delays. *See Reitz v. Rendell*, No. CIV.A. 104-CV-2360, 2004 WL 2451454, at *1 (M.D. Pa. Oct. 29, 2004) (ordering election officials to continue accepting absentee ballots from overseas beyond the ordinary deadline). Accordingly, there can be no doubt that this Court has the authority to enter such relief and, applying that remedy here, the primary can be held as scheduled, with the only delay occurring in officially certifying the election results. Particularly given that Pennsylvania's primary is relatively early, a short postponement to ensure all ballots from overseas absentee voters are counted will not be disruptive. As such, the preferable remedy is a court order that would keep the election calendar in its current form, but compels county boards of elections to count submitted ballots for an allotted time after the primary election to ensure compliance with the 45-day requirement of the UOVACA.

Indeed, Defendants' reliance on UOVACA to contort the public interest prong of the present inquiry in their favor is especially curious, given that their revised election calendar will almost undoubtedly force them to appear before this very Court in a few weeks, asking for the very same type of extension that they would like this Court to believe does not exist. Specifically, according the revised timetable adopted by Defendants, UOVACA ballots must be transmitted on March _____ deadline for receiving absentee ballots as a means of ensuing compliance. A sampling of such decrees is attached hereto as Exhibit 1.

30, 2018 – *i.e.* 45 days before the primary – but decisions on petition challenges must be rendered by April 4.

The revised calendar, therefore, is clearly flawed, since it permits a scenario where petition challenges could (and likely will) continue beyond the deadline for transmitting UOVACA ballots. Moreover, notwithstanding Defendants’ assertions that their plan has “created no UOCAVA issues beyond those faced in a normal election cycle[,]” Def. Br. at 27 n.16, this is an obvious deviation from a “normal election cycle,” in which the deadline for resolving petition challenges is prior to the deadline for transmitting ballots to military personal and citizens overseas. 25 P.S. § 2937. As Plaintiffs explained in their opening briefs, under Defendants’ plan, county boards of election tasked with providing absentee ballots would either have to violate federal law by sending ballots after the statutory deadline, or send ballots containing names of individuals who have been disqualified or withdrawn. Either choice entails the distinct possibility of disenfranchising UOCAVA voters, or relegating them to a second-class-type role.

Therefore, the preferable remedy would be to keep the election calendar in its current form, but to compel county boards of elections to accept submitted ballots for a time beyond the ordinary period to ensure compliance with the 45-day statutory requirement. In addition, this Court should also order a timetable setting the date for transmitting ballots overseas *after* the deadline for resolving objections

to nomination petitions. As noted by at least one court, a voter under UOVACA, “is at the very least, entitled . . . to have the same information on his or her ballot that the voter who is stateside has . . .” *U.S. v. Georgia*, 952 F.Supp.2d 1318, 1329 (ND Ga. 2013). Indeed, while perhaps incomprehensible to many Americans in this age of instant communication, information does not travel with the same ease to voters overseas – especially to *military* personnel stationed overseas. As such, they cannot be expected to readily learn of any changes to the makeup of a ballot. This proposed remedy would ensure stability on the front end – by providing overseas voters with accurate information – while also ensuring fairness on the back end – by guaranteeing military and civilian absentee ballots are counted in accordance with UOVACA.

In sum, while Senator Reschenthaler has first-hand knowledge of the importance of vigilantly guarding the rights afforded by UOCAVA, Defendants’ reliance on that statute for their claim that a preliminary injunction would require postponing the primary is simply unsustainable.

II. The Court Map has generated far more confusion and chaos than would result from reinstating the 2011 Map.

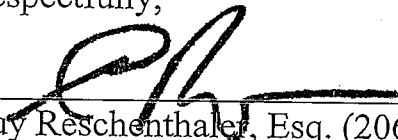
Defendants’ also maintain that reinstating the 2011 Plan will require postponement because of the resulting confusion and the difficulties the counties would face in attempting to re-implement the plan. Whatever Defendants’ expertise in administering elections from Harrisburg may be, they clearly lack even

a basic understanding of how the voters are reacting to the last-minute reformulation of the districts. These problems are most clearly discernible in Senator Reschenthaler district and the areas surrounding it. In addition to displacing a significant number of voters out of their original districts, the State Supreme Court has caused inexcusable confusion by deciding to conduct the special election in the 18th Congressional District – scheduled for next week – under the 2011 Plan, while holding a primary under the new plan two months later. Thus, while reversing course at this juncture is bound to cause some confusion and difficulties, those problems will be exponentially larger if Defendants are permitted to stay the course and conduct the May primary in accordance with the Court Map. Senator Reschenthaler’s discussion with various county-level election officials also confirms this. As one County Commissioner and member of the County Board Of Elections notes in a declaration attached to this brief as Exhibit 2, “the pervasive confusion currently extant[,]” is far greater than any potential negative impact of reinstating a map with which voters are deeply familiar. In this regard, Plaintiffs are correct that reverting to the 2011 plan, which has been used in three prior election cycles, will result in the most predictable and fair process for all voters, many of whom may not be privy to the ever-evolving process of this case. Therefore, the most appropriate remedy is to revert to the only map duly enacted in

accordance with the United States' and Pennsylvania Constitutions and the map with which the general public is intimately familiar.

For all the aforementioned reasons, Amicus Curaie, Senator Guy Reschenthaler, requests that this Court grant the Plaintiff's Motion for Preliminary Injunction.

Respectfully,



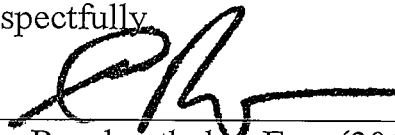
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**Admission status pending*

Dated: March 9, 2018

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Proposed Order, Motion, and Brief was filed with the Clerk of Court on March 8, 2018 and parties were notified via first class mail.

Respectfully



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**Admission status pending*

Dated: March 9, 2018

2014 WL 7338867

Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia.

UNITED STATES of America, Plaintiff,

v.

The State of WEST VIRGINIA and Natalie
E. Tennant, Secretary of State of West
Virginia, in her official capacity, Defendants.

Civil Action No. 2:14-27456.

Signed Dec. 22, 2014.

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Opinion*MEMORANDUM OPINION & ORDER*

JOHN T. COPENHAVER, JR., District Judge.

*1 The dispute in this case arises out of the administration of the November 4, 2014 election, and in particular the provision of absentee ballots to certain overseas citizens and uniformed service members. For reasons that are more fully described below, thirty absentee voters in the 35th House of Delegates District were provided with two separate absentee ballots—an original ballot, and, later, a corrected ballot—in the run up to the election. Four of those voters returned only original ballots. Those four ballots are the only ones now at issue in this case. The West Virginia Secretary of State, Natalie Tennant, has ordered that those original ballots may not be counted. The United States maintains that they must be counted in the races for United States Senate and United States House of Representatives.

On November 25, 2014, the parties presented their Integrated Pretrial Order. On the same date, the parties

entered into a joint stipulation of facts and informed the court that no material fact remained in dispute between them.¹ The United States submitted its brief on the merits on December 5, 2014. The defendants responded on December 12, 2014, and the plaintiff replied on December 18, 2014. The court now makes the following findings of fact and conclusions of law.

I.

The Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 52 U.S.C.A. §§ 20301–20311 (2014), is a federal law that requires states to permit uniformed service voters and overseas citizens to “vote by absentee ballot in general, special, primary, and runoff elections for Federal office [.]” 52 U.S.C.A. § 20302(a)(1). States are specifically responsible for transmitting absentee ballots to “absent uniformed service voter[s] or overseas voter[s] ... not later than [forty-five] days before the election,” provided that the voter requests the ballot at least forty-five days before the election. *Id.* § 20302(a)(8)(A). Under the statutory framework, the deadline for transmitting absentee ballots to absent uniformed service members and overseas citizens (the “UOCAVA voters”) who requested them at least forty-five days before the November 4, 2014 election was September 20, 2014. *See* Joint Stip. ¶ 7.

The parties agree that the defendants initially transmitted ballots to UOCAVA voters in a timely manner on September 19, 2014 (the “original ballots”). *See* Joint Stip. ¶ 9. Three days after that deadline, however, the Kanawha County Republican Executive Committee (“KREC”) and Marie McDavid filed a petition for a writ of mandamus with the Supreme Court of Appeals of West Virginia, seeking to require Secretary Tennant and the State Election Committee to substitute McDavid as the Republican candidate in the race for the House of Delegates in the State's 35th House District following the withdrawal of the party's original candidate. Joint Stip. ¶ 10; *see also State ex rel. McDavid v. Tennant*, No. 14–939, slip op. at 1–2 (W.Va. Oct. 1, 2014). Specifically, the petition prayed that the Supreme Court of Appeals would compel the Secretary of State to certify McDavid, add her to the ballot, and—critically—instruct the Kanawha County Clerk to “mail valid ballots to all absentee voters with instructions that the invalid ballot that is incomplete shall be void.”

*2 On October 1, 2014, the Supreme Court of Appeals ruled in favor of McDavid and the KREC, granted the writ of mandamus, ordered McDavid's name to be added to the ballot, and ordered the Secretary of State to issue corrected ballots. Joint Stip. ¶ 11; *McDavid*, No. 14-0939, slip op. at 10. The court's opinion did not specifically address whether the original ballots were to be considered void but, as noted, the writ was granted. That same day, Vera J. McCormick, the Clerk of the Kanawha County Commission, wrote to the thirty UOCAVA voters in the 35th House District who previously received the original ballots, informed them of the Supreme Court of Appeals' decision, and advised that new ballots would be forthcoming in due course. Joint Stip., Ex. 2. The letter asked the UOCAVA voters to "return [the] original ballot in addition to th[e] new ballot," but did not indicate whether the original ballot remained valid. *Id.*

On October 3, 2014, just thirty-two (rather than forty-five) days prior to the election, revised ballots listing McDavid as a candidate (the "corrected ballots") were transmitted to the UOCAVA voters in the 35th House District. Joint Stip. ¶ 16. The October 3, 2014 transmission also included instructions to the UOCAVA voters on how to return their ballots. Joint Stip. ¶ 37. Those instructions directed voters to, among other things, read and sign an enclosed "Oath of Voter" that contained the following attestation:

I understand that I may only cast one ballot in any election. I further understand that anyone who votes more than once in the same election; or knowingly votes or attempts to vote more than one ballot for the same office ... shall be guilty of a misdemeanor, and, on conviction thereof, shall for each offense be fined not more than one thousand dollars or confined in the county jail for not more than one year, or both[.]

Joint Stip., Ex. 3 at 4. The instructions did not otherwise explain whether the original ballots remained valid, or whether the UOCAVA voters were required to return a corrected ballot. Joint Stip. ¶ 37.

Five days later, on October 8, 2014, Secretary Tennant's office sent a follow up e-mail to the UOCAVA voters in

the 35th House District that read, in pertinent part, as follows:

As you may be aware, a change was made to the ballot after the original absentee ballot was mailed to you. The County Clerk[s] office] ... continue[s] their efforts to make sure you have an opportunity to vote the corrected ballot. The Department of Justice has requested that this office ... reach out to you to verify that you have received the corrected ballot and that you have enough time to return it to be counted.

Joint Stip., Ex. 5. The e-mail "did not address whether original ballots cast by UOCAVA voters would be counted and did not address the validity of any votes cast for the Federal offices on the original ballot." Joint Stip. ¶ 39.

In the weeks that followed, most of the UOCAVA voters in the 35th House District responded to the Secretary's outreach efforts and confirmed that they received the corrected ballot; many also indicated that they foresaw no barrier to returning the corrected ballot in time to be counted. Some voters never responded at all. Two of the four voters at issue (Voter A and Voter B) called the Kanawha County Commission and explained that they had already returned the original ballot and shredded their corrected ballots. Joint Stip. ¶ 40. They indicated that they did not intend to return corrected ballots, *id.*, and later clarified that they received the corrected ballot after submitting their original ballots and were "afraid to send back two ballots," Joint Stip. ¶ 56.

*3 On October 14, 2014, Secretary Tennant's office e-mailed Voter A and Voter B, and advised them that it was "not certain that the first (pre-correction) ballot w[ould] be counted." Joint Stip., Ex. 6. The e-mail explained that "[a]ny decision on whether to count the [original] ballot w[ould] be made by the Kanawha County [Commission's] board of canvassers," and warned that "[t]he only way to be certain that your vote will count is to vote and submit the corrected ballot[.]" *Id.* It appears, however, that Voter A and Voter B did not receive the Secretary's e-mail until possibly as late as November 10, 2014.²

As the Secretary's e-mail to Voter A and Voter B demonstrates, there was a prevailing sense of uncertainty about the validity of the original ballots throughout the month of October. In a letter to federal officials dated October 3, 2014, the Secretary's office stated that it had "received assurance that if the second ballot ... [wa]s not returned in time to be counted, but the initial ballot ha[d] been returned, [Kanawha County would] count the initial ballot." Joint Stip. ¶ 15. Based on other correspondence in the record, it appears that the Kanawha County board of canvassers in fact "voted to accept all [original] ballots" at some point before October 21, 2014. *See* Joint Stip., Ex. 1. Nevertheless, perhaps hoping to remove any doubt, Secretary Tennant filed a motion, on October 27, 2014, with the Supreme Court of Appeals, requesting clarification that the decision in *McDavid* did not prohibit counting votes cast on validly executed original ballots in the federal races, provided that no corrected ballot was received. *See* Joint Stip. ¶ 23. Three days later, on October 30, 2014, the Supreme Court of Appeals refused the request for clarification without comment, Joint Stip. ¶ 25, and the Secretary interpreted that refusal as "an affirmative indication that the writ of mandamus" granted in *McDavid* "prohibits the counting of any votes cast on any original ballot," Joint Stip. ¶ 26.

The following day, the Friday before Election Day, the United States initiated this action, charging the State and the Secretary of State with violating the UOCAVA and requesting: (1) "a declaratory judgment under 28 U.S.C. § 2201 that the failure ... to ensure that absentee ballots [were] transmitted ... at least 45 days in advance of the November 4, 2014 [election] ... violates 52 U.S.C. § 20302(a)(8)(A)"; and (2) an injunction ordering the defendants to "take such steps as are necessary to ensure that affected UOCAVA voters in State Delegate District 35 have sufficient opportunity ... to receive, mark, and return their ballots." *See* Compl. at Prayer of Relief.

On Monday, November 3, 2014, the parties submitted, and the court entered, a consent decree that extended the receipt deadline for corrected ballots returned by mail until November 17, 2014; the consent decree also required the Secretary of State to inform the UOCAVA voters in the 35th House District—for the first time—that "they had to return the corrected ballot ... if they wished to have their vote counted in the election." Joint Stip. ¶¶ 29, 45–46, 48. Notwithstanding the deadline extension, the United States reserved the right to move

for "supplemental relief ... with regard to the counting of votes ... on an original ballot ..., if that ballot [wa]s the only ballot returned by that voter[.]" Consent Decree at 8; *see also* Joint Stip. ¶ 29.

*4 Election Day came and went, and eighteen of the thirty UOCAVA voters in the 35th House District returned corrected ballots. Joint Stip. ¶ 49. Eight more returned no ballot. Joint Stip. ¶ 50. The remaining four voters returned original ballots on or before November 4, 2014, but did not return a corrected ballot. Joint Stip. ¶ 51. Those four included Voter A and Voter B, plus two others—Voter C and Voter D³—who both previously informed Secretary Tennant's office that they received the corrected ballot and foresaw no obstacle to returning it, but nevertheless returned only the original ballot.

Finally, on November 6, 2014, prior to the start of canvassing, Secretary Tennant issued an order directing "the Kanawha County board of canvassers to *NOT* count any [original] ballot in any federal, state or county election on the ballot[.]" As a result, no votes cast on original ballots were counted in the canvass for the two federal races.

II.

All that remains to be determined in this case is the fate of the votes cast on original ballots by Voters A, B, C, and D in the races for United States Senate and United States House of Representatives (the "contested votes"). The United States has requested an injunction ordering the defendants to count those votes and include them in the tally for the House and Senate elections. The Secretary "believe[s] that all voters who cast only [o]riginal [b]allots should have their votes counted," but also maintains that the Supreme Court of Appeals' decision in *McDavid* prohibits her from ordering the contested votes to be counted. *See* Secretary of State's Response to the United States' Brief on the Merits ("Secretary's Resp.") at 1–2. She has declined to take a position on whether the relief requested by the United States is appropriate. *Id.* at 4. The State of West Virginia responds that it "does not oppose the relief requested by the United States in its brief on the merits." West Virginia's Response to the United States' Brief on the Merits ("State's Resp.") at 1.

The UOCAVA empowers the Attorney General to seek “declaratory or injunctive relief as may be necessary to carry out” the statute’s requirements. *See* 52 U.S.C.A. § 20307(a). As noted, the United States’ complaint in this case sought both forms of relief—a declaration that the defendants violated 52 U.S.C. § 20302(a)(8)(A), and an injunction ordering the defendants to “take such steps as are necessary to ensure that affected UOCAVA voters in State Delegate District 35 have sufficient opportunity ... to receive, mark, and return their ballots.” *See* Compl. at Prayer of Relief. In addition, the pretrial order prepared by the parties raises the alternative theory that the “State’s failure to count the votes for Federal office cast on the four ballots at issue violates” 52 U.S.C.A. § 20302(a)(1), which generally requires each state to “permit [UOCAVA] voters to use absentee registration procedures and to vote by absentee ballot in” federal elections. Thus, the resolution of this case turns on two questions: First, did the defendants violate §§ 20302(a)(1) or 20302(a)(8)(A)? Second, if so, is the United States entitled to the injunction it seeks?

A.

*5 The first question is easily answered. Section 20302(a)(8)(A) requires States to transmit validly requested absentee ballots to “absent uniformed service voter[s] or overseas voter[s] ... not later than [forty-five] days before the election,” provided that the voter requests the ballot at least forty-five days before the election. *Id.* § 20302(a)(8)(A). The parties agree that all thirty of the UOCAVA voters in the 35th House District requested an absentee ballot more than forty-five days before the election, *see* Joint Stip. ¶ 9, and also agree that corrected ballots were not transmitted to those voters until October 3, 2014, only thirty-two days before the election, Joint Stip. ¶ 16. The parties have stipulated, and the court agrees, that transmitting the corrected ballots on October 3, 2014 violated § 20302(a)(8)(A).⁴ *See, e.g., United States v. Alabama*, 857 F.Supp.2d 1236, 1240–42 (M.D.Ala.2012) (finding high likelihood of success on the merits of a § 20302(a)(8)(A) claim where the state issued absentee ballots less than forty-five days before a federal election); *see also*, Joint Stip. ¶ 8.

B.

The remaining question is more complex. To obtain a permanent injunction, the plaintiff “must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 126 (4th Cir.2011) (reciting the *eBay* factors). Even then, both the UOCAVA and the limits of the court’s equitable powers dictate that the relief prayed for must be no more than is necessary to carry out the statute’s requirements. *See* 52 U.S.C.A. § 20307(a) (“The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this chapter.”); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir.2003) (“It is well established that ‘injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.’” (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979))). In other words, any injunction granted must “carefully address only the circumstances in the case,” without sweeping more broadly than “necessary to provide complete relief to the plaintiff.” *Mead Johnson & Co.*, 639 F.3d at 128 (internal quotation marks and citation omitted).

1.

After considering the relevant factors, the court concludes that injunctive relief is proper. As it stands, four UOCAVA voters who attempted to cast an absentee ballot would not have their votes counted in the federal races. “Courts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir.2014) (collecting authority), mandate stayed *North Carolina v. League of Women Voters of N.C.*, 135 S.Ct. 6 (Oct. 8, 2014) (mem.). Several courts have therefore concluded that a state’s failure to timely issue UOCAVA ballots clearly presents the likelihood, *Alabama*, 857 F.Supp.2d at 1240–42, or reality of irreparable harm, *United States v. Georgia*, 952 F.Supp.2d 1318, 1331–32 (N.D.Ga.2013) (“Irreparable harm occurs when a UOCAVA voter is denied the right to receive a sufficient absentee ballot

in accordance with the provisions of” § 20302(a)(8)(A)). More generally, courts also recognize that a state's failure to count absentee ballots protected by federal law gives rise to irreparable harm. *Cf. Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir.2005) (“The district court found that the plaintiff voters will be irreparably harmed if the Board certifies the election results without counting their absentee ballots. We agree.”); *Hershcopf v. Lomenzo*, 350 F.Supp. 156, 159 (E.D.N.Y.1972) (“The fact that throughout the state at least nineteen boards of elections apply the statute so that absentee voters ... will be disenfranchised is sufficient irreparable injury[.]”). There is no prospect that such an injury could be remedied by money damages.

*6 Regarding the third factor, the court finds that the balance of the equities tips in favor of the United States. The potential harm to the UOCAVA voters—the possibility that their votes will not be counted—far exceeds the burden to the State caused by counting the contested votes. *See Alabama*, 857 F.Supp.2d at 1242 (noting that the State is already “legally mandated ... to vindicate the fundamental right of its military and overseas constituents to vote in federal elections” under the express terms of the UOCAVA). Indeed, the State does not object to the additional supplemental relief requested, State's Resp. at 1, and the Secretary of State has repeatedly expressed her desire for every vote to be counted, Secretary's Resp. at 1–2.

Finally, the public interest will be served, rather than disserved, by an injunction. For our citizens living abroad, and for uniformed service members, “voting by absentee ballot may be the only practical means to exercise” their right to vote. *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F.Supp.2d 1305, 1307 (N.D.Fla.2000). “Thus, ensuring that these voters, many of whom risk their lives at the request of their government, have the opportunity to vote is certainly in the public interest.” *Alabama*, 857 F.Supp.2d at 1242; *see also Doe v. Walker*, 746 F.Supp.2d 667, 670 (D.Md.2010) (Noting that the UOCAVA was amended “in response to the widespread disenfranchisement of absent uniformed services and overseas voters during the November 2008 general elections.”).

2.

The court also concludes that ordering the defendants to count the contested votes is both necessary to carry out the provisions of the UOCAVA, and no broader than necessary to provide complete relief to the plaintiff. The purpose of § 20302(a)(8)(A) is “to allow absent uniformed service voters and overseas voters enough time to vote in an election for Federal office.” 52 U.S.C.A. § 20302(g)(1)(A). Indeed, the United States specifically stated that it was “bringing this enforcement action to ensure that West Virginia's [UOCAVA voters would] have sufficient opportunity ... to receive, mark and return their absentee ballots[.]” Compl. ¶ 2. To achieve that goal, the plaintiff prayed for an injunction ordering the defendants to “take such steps as are necessary to ensure that affected UOCAVA voters in State Delegate District 35 have sufficient opportunity ... to receive, mark, and return their ballots.” *See* Compl. at Prayer of Relief.

In the usual case, that relief might well have been provided by simply extending the state-law ballot receipt deadline, as the parties agreed to do here. *See, e.g., Alabama*, 857 F.Supp.2d at 1240–42; *see also United States v. Cunningham*, No. 08–709, 2009 WL 3350028, at *10 n. 3 (E.D.Va. Oct. 15, 2009) (collecting nine additional cases authorizing deadline extensions ranging in length from three business days to fourteen days.). Indeed, at an earlier stage in this litigation, when little was known about the content of the defendants' communications with the UOCAVA voters in the 35th House District, it appeared that remedy may suffice in this case as well. Order herein of Nov. 18, 2014, denying preliminary injunction. It is now clear, however, that the ongoing uncertainty regarding the validity of the original ballots deprived the four affected UOCAVA voters of sufficient time to vote in the November 4, 2014 election.

*7 As discussed above, the UOCAVA voters in the 35th House District received conflicting information about their obligation to vote a corrected ballot. The October 1, 2014 mailing asked voters to return both ballots, but the instructions included with the corrected ballots on October 3, 2014 advised voters that it was a violation of State law to vote more than one ballot in any election. The effect of these conflicting messages is not purely theoretical: Voter A and Voter B specifically stated that they shredded their corrected ballots because they had already returned their original ballots, and were afraid to return two ballots. Although Secretary Tennant's office attempted to inform Voter A and Voter B on October 14,

2014 that it was “not certain that the first (pre-correction) ballot w[ould] be counted,” no UOCAVA voter in the 35th House District was told definitively of the need to return a corrected ballot until November 3, 2014, the night before Election Day. In effect, voters who had not yet done so were left with one day to mark and return their corrected ballot—by any measure, that does not constitute the meaningful opportunity to cast a ballot that § 20302(a)(8)(A) seeks to ensure.

III.

The defendants violated § 20302(a)(8)(A) of the UOCAVA by failing to transmit valid absentee ballots to voters in the 35th House District forty-five days before the November 4, 2014 election. Although they agreed to extend the ballot receipt deadline, doing so was not sufficient to provide the plaintiff with complete relief in light of the uncertainty concerning the validity of the original ballots throughout the month of October. Absent further injunctive relief, four voters who returned an original ballot will be disenfranchised.

The court is not unmindful that ordering the relief requested by the plaintiff will require the defendants to count votes that Secretary Tennant believes are invalid under State law. But, as noted, the Attorney General is empowered to seek (and so the courts presumably are empowered to grant) “injunctive relief as may be necessary to carry out” the UOCAVA's requirements. *See* 52 U.S.C.A. § 20307(a). Those federal-law requirements are supreme, U.S. Const. art. VI, cl. 2, and though the State retains an important interest in the orderly conduct of its elections, “deference to state decision-making does

not require the court to sit by idly and watch violations of the law persist. In some cases, and this is one, if federally-guaranteed voting rights are to be protected, the court must act.” *Alabama*, 857 F.Supp.2d at 1242 (internal quotation marks and citation omitted). Here, the confusion caused by the issuance of the corrected ballots and the ensuing uncertainty about the validity of the original ballots deprived UOCAVA voters in the 35th House District of a meaningful opportunity to receive, mark, and return a ballot in the November 4, 2014 election. For the small number of those voters who expressed their intent to vote on an original ballot, but failed to return a corrected ballot, counting the original ballot provides the only meaningful relief available.

*8 Accordingly, it is ORDERED that the defendants be, and they hereby are, directed to take such steps as are necessary to ensure that: (1) the votes in the November 4, 2014 election for United States Senate and United States House of Representatives on otherwise conforming original ballots cast by the four UOCAVA voters in the 35th House District who did not return a corrected ballot are counted; and (2) the results in those two races are amended to reflect the inclusion of those votes. It is further ORDERED that the defendants be, and they hereby are, directed to notify the court and counsel for the United States within forty days of the entry of this order that those votes in those two races have been counted.

The Clerk is requested to transmit a copy of this order to all counsel of record.

All Citations

Not Reported in F.Supp.3d, 2014 WL 7338867

Footnotes

- 1 The joint stipulation also includes a number of documentary exhibits. The parties have stipulated that those documents are admissible, and agree “not to impose evidentiary objections to those documents on the basis of authenticity, foundation, hearsay, or relevancy.” Joint Stipulation of Undisputed Facts and Law (“Joint Stip.”) at 8.
- 2 Voter A and Voter B are identified in the record as a mother and son living together in Canada. Joint Stip. ¶¶ 51, 55. An email from Voter A to the Secretary of State's office, dated November 10, 2014, stated that “she could not reply until [then] because her computer broke.” *See* Joint Stip. ¶ 56.
- 3 “According to information on file with the State, [Voter C and Voter D] reside[] domestically in North Carolina[.]” Joint Stip. ¶ 51.
- 4 In light of this disposition, the court need not address whether the defendants' conduct violated § 20302(a)(1).

2009 WL 3350028

Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Richmond Division.

UNITED STATES of America, Plaintiff,
v.
Jean CUNNINGHAM, et al., Defendants.

Civil Action No. 3:08cv709.

|
Oct. 15, 2009.

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Opinion

MEMORANDUM OPINION

RICHARD L. WILLIAMS, Senior District Judge.

*1 This matter is before the Court on the parties' cross-motions for summary judgment. For the reasons set forth herein, the Court will grant Plaintiff's motion for summary judgment and deny Defendants' motion.

I. BACKGROUND

A. Relevant Federal and Virginia Law

The Commonwealth of Virginia is the legal voting residence of many men and women of the United States uniformed services or merchant marine who are absent from the United States by reason of their active duty or service, as well as other United States citizens otherwise residing currently outside of the United States. Understandably, these citizens are typically unable to vote in person in Virginia, so they are left to exercise their right to vote by casting absentee ballots from abroad. To preserve for these citizens the right to vote in federal elections, Congress passed the Uniformed and

Overseas Citizens Absentee Voting Act ("UOCAVA"), which extends federal voting rights to certain United States citizens formerly resident in a State who presently reside outside the United States. *See* 42 U.S.C. § 1973ff-1 to 1973ff-6. More specifically, UOCAVA provides that certain uniformed services voters and overseas voters (collectively "UOCAVA voters") shall be permitted by each State "to use absentee registration procedures and to vote by absentee ballot in general, special, primary and runoff elections for Federal office." 42 U.S.C. § 1973ff-1.

To count as validly-cast, absentee ballots in Virginia must be "returned to the electoral board or general registrar before the closing of the polls [on election day]." Va.Code Ann. § 24.2-709. To allow absentee voters to have a meaningful opportunity to cast absentee ballots, therefore, Virginia requires the electoral board to "make printed ballots available for absentee voting at least (i) 45 days prior to any November general election or special election held at the same time and (ii) 30 days prior to any other general, special, or primary election." Va.Code Ann. § 24.2-612. These Virginia schedules for the availability of absentee ballots are much in line with those suggested by the federal agencies responsible for carrying out the provisions of UOCAVA.

The Department of Defense's Federal Voting Assistance Program ("FVAP") is charged with administering UOCAVA as delegated by the Secretary of Defense, the Presidential designee under the statute. FVAP determined that mailing overseas ballots less than thirty days before an election does not afford overseas voters a reasonable opportunity to cast their ballots, and it recommended that States mail overseas absentee ballots at least forty-five days before the election. These numbers are derived at least in part from federal postal authorities' estimates that international mail usually requires thirty days or more for round-trip processing. UOCAVA itself, however, does not set a mandatory minimum deadline by which States must mail absentee ballots to UOCAVA voters, though United States Senator Charles E. Schumer of New York has proposed legislation that would set the deadline at forty-five days if the request is received at least forty-five days before the election.

*2 Where delinquent State electoral boards fail to provide State absentee ballots to UOCAVA voters, UOCAVA explicitly provides for at least two remedies. First, when necessary to carry out the provisions of

UOCAVA, the statute empowers the Attorney General to “bring a civil action in an appropriate district court for ... declaratory or injunctive relief.” 42 U.S.C. § 1973ff-4. Second, where UOCAVA voters “make timely application for, and do not receive, States absentee ballots,” UOCAVA provides for a “Federal write-in absentee ballot ... for use in general elections for Federal office.” 42 U.S.C. § 1973ff-2. This Federal write-in absentee ballot, however, affords only some relief to UOCAVA voters, as it is available solely for use in general elections, and it is also blank, requiring voters to know beforehand, among other things, what offices and candidates are up for election so that they may write them in.

B. Facts and Procedural History

In preparation for the November 4, 2008 general election, many hundreds of UOCAVA voters requested an absentee ballot from the Commonwealth of Virginia in a timely manner. At least 2,114 of these timely-requested absentee ballots were mailed to UOCAVA voters less than 30 days before the November 4, 2008 election. At least 96 of these timely-requested, completed ballots were received by local electoral officials after the closing of the polls on November 4, 2008, and were, therefore, not counted. These ballots do not indicate the date on which they were received or completed by UOCAVA voters, though they should indicate the date on which they were mailed back to Virginia's local electoral boards or registrars.

On November 4, 2008, the Commonwealth of Virginia conducted a general federal election in which voters participated in the selection of candidates for, *inter alia*, President of the United States. One day prior to the election, on November 3, 2008, McCain–Palin 2008, Inc. (“McCain–Palin”), the official campaign committee for Senator John McCain, then the Republican nominee for President of the United States, filed the initial Complaint pursuant to 42 U.S.C. § 1983 and UOCAVA, 42 U.S.C. § 1973ff *et seq.*, naming as defendants Jean Cunningham, Harold Pyon, and Nancy Rodrigues (“original defendants”) in their official capacities as officers of the Virginia State Board of Elections. In its Complaint, McCain–Palin alleged that the Commonwealth of Virginia violated UOCAVA by failing to send timely-requested absentee ballots to UOCAVA voters at least forty-five days before the November 4, 2008 election.

On November 6, 2008, the original defendants moved to dismiss the Complaint. On November 14, 2008, the United States (“Plaintiff”) moved to intervene and filed a Complaint in Intervention, adding as defendants the Commonwealth of Virginia and the Virginia State Board of Elections (collectively with original defendants, “Defendants”). In its Complaint in Intervention, Plaintiff sought declaratory and injunctive relief, specifically (1) an order to count the votes of UOCAVA voters whose timely-requested ballots were mailed late and received by election officials by 7:00 p.m. on November 14, 2008, (2) an order requiring Defendants to generate a report of the number of UOCAVA ballots received and counted, and (3) permanent relief to ensure compliance with UOCAVA in future elections such that UOCAVA voters have “a fair and reasonable opportunity to participate in future elections for federal office.” On November 16, 2008, Defendants moved to dismiss Plaintiff's Complaint in Intervention.

*3 On November 17, 2008, the Court granted both Plaintiff's motion to intervene and the original defendants' November 6, 2008 motion to dismiss as to plaintiff McCain–Palin, additionally dismissing permanently the § 1983 claim. On December 8, 2008, the Court heard oral argument on Defendants' November 16, 2008 motion to dismiss Plaintiff's Complaint in Intervention, and on December 9, 2008, the Court denied the motion. On July 17, 2009, Defendants filed their Motion for Summary Judgment, and on August 28, 2009 Plaintiff filed its Cross–Motion for Summary Judgment. The Court heard oral argument on the parties' cross-motions for summary judgment on October 5, 2009, and the parties participated in further discussions via telephone conference with the Court on October 9, 2009.

C. The Parties' Arguments for Summary Judgment

(1) Defendants' Motion for Summary Judgment Arguments

In their motion for summary judgment, Defendants advance two primary arguments. First, Defendants argue that UOCAVA does not require States to mail absentee ballots a mandatory number of days before an election. In addition to the text of the statute which does not establish a mandatory pre-election deadline, Defendants offer as evidence of UOCAVA's lack of such a deadline the fact that legislation has been introduced in Congress that would indeed create a mandatory pre-election

deadline for mailing absentee ballots to UOCAVA voters. Second, Defendants contend that UOCAVA provides the exclusive remedy for the situation at issue by allowing UOCAVA voters to vote by Federal write-in ballot. In other words, Defendants believe that UOCAVA voters whose legal voting residence States do not mail them absentee ballots in time enough for them to validly-cast their ballots may vote by Federal write-in ballot or not at all.

Defendants make two ancillary arguments in addition to their two primary arguments. First, though never raised by Plaintiff in its motion for summary judgment, Defendants argue that FVAP's thirty-day determination and forty-five-day recommendation do not qualify for *Chevron* deference. Second, they contend that local electoral officials are necessary parties pursuant to Federal Rule of Civil Procedure 19(a) because they perform the function of counting the absentee ballots.

(2) Plaintiff's Cross-Motion for Summary Judgment Arguments

The United States first argues that the doctrine of "the law of the case" calls for the rejection of all of Defendants' arguments citing the Court's statement from the bench and ensuing December 8, 2008 Order denying Defendants' motion to dismiss. Second, Plaintiff argues that "undisputed evidence" and "unanimous case authority" establish that Virginia's late mailing of absentee ballots violated UOCAVA by failing to give UOCAVA voters sufficient time prior to the election to have a meaningful opportunity to vote. Third, Plaintiff argues that the right to cast a Federal write-in ballot does not defeat its claim or remedy the harm caused by a state's failure to send a timely absentee ballot because (1) it is available only for *general* elections for Federal office, while UOCAVA grants rights in absentees for "general, special, primary and runoff elections," and (2) the Federal write-in ballot is not equal to a state ballot because (a) not all absentees are aware it exists, (b) UOCAVA voters must actively obtain it, (c) it is blank and requires voters to have complete and advance knowledge of their jurisdiction's ballots, and (d) it does not provide instructions on return deadlines or other applicable state law requirements for its submission. Finally, Plaintiff abandons its original request for a ten-day extension of Virginia's election day deadline for absentee ballots in favor of a more sweeping request to count as validly-cast *all* absentee ballots that were rejected for having been received too late.

II. STANDARD OF REVIEW

*4 Federal Rule of Civil Procedure 56(c) provides that a court should grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.' " *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir.2003) (quoting *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 62 n. 4 (1st Cir.1997)). "When considering each individual motion, the court must take care to 'resolve all factual disputes and any competing, rational inferences in the light most favorable' to the party opposing that motion." *Id.* (quoting *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir.1996)).

III. DISCUSSION

The right to vote is "a fundamental political right." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Indeed, "[n]o right is more precious," and "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). "For our citizens overseas, voting by absentee ballot may be the only practical means to exercise [the right to vote]. For the members of our military, the absentee ballot is a cherished mechanism to voice their political opinion." *Bush v. Hillsborough County Canvassing Bd.*, 123 F.Supp.2d 1305, 1307 (N.D.Fla.2000). Given that how and where our servicemembers conduct their lives is dictated by the government, their right to vote is "their last vestige of expression and should be provided no matter what their location." *Id.* By failing to mail absentee ballots to certain UOCAVA voters thirty days or more prior to the November 4, 2008 general election, the Commonwealth of Virginia prevented these voters from having an opportunity to vote in a federal election in violation of UOCAVA. Though these votes will not affect the outcome of the election, the Court will order the Commonwealth of Virginia to count as validly-cast

all timely-requested absentee ballots received within thirty days of the close of the polls on November 4, 2008 so as to uphold and give meaning to the dearest of individual rights.¹

A. Virginia violated UOCAVA by failing to mail absentee ballots to UOCAVA voters at least thirty days before the November 4, 2008 general election.

(1) The “law of the case” doctrine does not apply.

Plaintiff seeks a declaratory judgment that the failure of election officials to send absentee ballots to UOCAVA voters in sufficient time for them to be received, marked, and returned by November 4, 2008 violates UOCAVA. Citing the Court's statement from the bench and associated Order of December 8, 2008 denying Defendants' motion to dismiss, Plaintiff first argues that the “law of the case” doctrine operates to reject all of Defendants' arguments. Under the law of the case doctrine, “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Arizona v. California*, 460 U.S. 605, 619, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). The doctrine applies to “questions actually decided as well as to those decided by necessary implication.” *United States v. Lentz*, 524 F.3d 501, 528 (4th Cir.2008), cert. denied, 555 U.S. 928, 129 S.Ct. 303, 172 L.Ed.2d 222 (2008).

*5 In this case, Plaintiff points to the Court's following statement made at the December 8, 2008 Motion to Dismiss hearing as the controlling “law of the case”: “If it is indeed true that some ballots were not mailed until within 14 days of the election, it *seems* clear that Virginia did indeed violate [sic] UOCAVA....” Mot. to Dismiss Hr'g Tr. at 14 (emphasis added). The Court had clearly prefaced this suggestion with the statement that it “want[ed] to provide [the parties] with some *guidance*” because “this situation cries out for a solution created by the parties rather than crafted by The Court.” Mot. to Dismiss Hr'g Tr. at 13 (emphasis added). Therefore, as the Court simply offered the parties guidance as to a possible outcome of the case under assumed facts, the Court never “actually decided” at the Motion to Dismiss hearing that Defendants had violated UOCAVA. Further, the Court's statement does not control the case “by necessary implication.” As such, the law of the case doctrine is inapplicable to the parties' cross-motions for summary judgment.

(2) The Commonwealth of Virginia should mail absentee ballots to UOCAVA voters at least thirty days before an election to allow for a meaningful opportunity to vote.

While the Court agrees with Defendants' positions that (1) UOCAVA does not contain a specific mandatory time deadline by which States must mail absentee ballots to UOCAVA voters and (2) Senator Schumer's proposed legislation would in fact institute such a mandatory deadline, the fact that a specific mandatory deadline does not exist does not mean that UOCAVA contains no deadline at all. Indeed, if no deadline whatsoever for sending absentee ballots to UOCAVA voters exists, then, effectively, States would never be required to send absentee ballots at all. As such, the Court must infer a deadline defined by reason.

While Plaintiff cites relevant case law that suggests Defendants' late-mailing of absentee ballots violated UOCAVA,² Plaintiff is most correct in arguing that the evidence before the Court establishes the violation. It is undisputed that at least 2,114 UOCAVA voters timely-requested absentee ballots and were mailed their ballot less than 30 days before the November 4, 2008 election. It is also undisputed that at least 96 of these timely-requested ballots were completed and returned to the appropriate local electoral official, but arrived after the close of the polls on November 4, 2008, and were not counted. Additionally, in its Complaint in Intervention, Plaintiff alleged that “at least 125 military servicemembers and overseas citizens who requested a timely absentee ballot did not have their absentee ballot envelope labels printed until *two* weeks (or less) before the November 4, 2008 election. Pl.'s Compl. in Intervention ¶ 11 (emphasis in original). Defendants failed to admit or deny this allegation, answering instead that “[t]he UOCAVA records speak for themselves.” Defs.' Answer to P.'s Compl. in Intervention ¶ 11. According to the law of pleading, what is not denied is conceded. *Casey v. Galli*, 94 U.S. 673, 679, 24 L.Ed. 168 (1876). Therefore, for purposes of the parties' cross-motions for summary judgment, Defendants are deemed to have admitted that the Commonwealth of Virginia did not mail at least 125 UOCAVA voters their absentee ballots until two weeks or less before the November 4, 2008 election. Additionally, Defendants never disputed the fact that these 125 voters were mailed their ballots that late.

*6 While determining how long international mail takes for round-trip delivery is not a precise science, there is no dispute that transit times from the United States to servicemembers deployed abroad can be quite long. Commander Teddie Dyson, the Military Postal Service Agency's Chief of Plans & Policy, declared under penalty of perjury that transit times from a post office in the United States to an Army or Air Force Post Office ("APO") or Fleet Post Office ("FPO") in the Iraq theater range from seven to thirteen days, "not includ[ing] the time it takes to reach a Servicemember in the field..." Pl.'s Mot. for Summ. J. Ex. I, Dyson Decl. ¶ 6. Seven days is also the bare minimum amount of time it takes mail to reach APOs and FPOs in Europe, Japan, Korea, the Pacific Islands, the Far East, Central America, South America, and the Carribean. On the opposite extreme, in "some remote, austere locations," it may take as long as thirty-five days just for mail to travel from the United States to that location in the first place before the servicemember can even open and read that mail, much less send response mail back to the United States. Pl.'s Mot. for Summ. J. Ex. I, Dyson Decl. ¶ 6. Other evidence put before the Court by Plaintiff indicates that "at least 30 days is a reasonable benchmark for round-trip transit time for international mail." Pl.'s Mot. for Summ. J. Ex. K, Carey Decl. ¶ 7. Indeed, the relevant federal postal services all suggest that an average of thirty days is required for receiving and sending round-trip international mail. Pl.'s Mot. for Summ. J. Ex. J, Moser Decl. ¶ 5. Furthermore, other courts have accepted thirty days as the average round-trip transit time for the receiving and casting of overseas absentee ballots. *United States v. Pennsylvania*, No. 1:CV-04-830 (M.D.Pa. Apr.16, 2004); *United States v. Georgia*, No. 1:04-CV-2040-CAP (N.D.Ga. July 15, 2004).

Defendants attack these estimates as "internally inconsistent." Defs.' Memo. in Opp'n to Pl.'s Mot. for Summ. J. at 4-5. Nevertheless, Defendants do not dispute the veracity of the sworn declarations, and there is no evidence before the Court suggesting the declarations are untrue or inaccurate. Therefore, at an absolute minimum, round trip delivery of mail to a servicemember in the field overseas takes more than fourteen days (at least seven days to arrive in the APO/FPO, plus an unknown number of days to reach the servicemember in the field, plus at least seven more days to return to the United States). In other words, it is impossible for these UOCAVA voters

to receive an absentee ballot in time enough to complete it and return it before the close of the polls on election day if the ballot was sent from the United States only fourteen days before the election. As such, for the at least 125 UOCAVA voters to whom the Commonwealth of Virginia did not mail their absentee ballots until fourteen days or less before the November 4, 2008 election, it was physically impossible to cast a valid Virginia absentee ballot. Additionally, for the 2,114 UOCAVA voters who timely-requested absentee ballots from Virginia and did not have them mailed to them thirty days or more before the election, their ability to cast a valid Virginia absentee ballot was also seriously jeopardized, and, likely in a number of cases, made impossible.

*7 At the very least, the actions of the Commonwealth of Virginia threatened to deprive these UOCAVA voters of an opportunity to vote in a federal election. UOCAVA requires that states "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." 42 U.S.C. § 1973ff1 (a)(1). If States fail to mail absentee ballots to military and overseas voters in time to be received, marked, and returned by the election deadline, they have not permitted such voters "to vote by absentee ballot." UOCAVA, therefore, exists to protect overseas citizens' right to vote. The right to vote means a right to cast a ballot that will be counted. *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). If even a single voter was deprived of that right solely as a result of Defendants' tardy-mailing of absentee ballots, then Defendants unquestionably violated UOCAVA.

Therefore, while the Court does not find a specific mandatory deadline for mailing absentee ballots in UOCAVA, the Court finds that Defendants violated UOCAVA by failing to give UOCAVA voters a reasonable opportunity to execute and return as validly-cast their timely-requested absentee ballots. Of course, Defendants cannot be asked to research where each UOCAVA voter is located so that they may calculate how long in advance of the election to mail the ballot in time for it to reach the voter to allow for a meaningful opportunity to vote. It is also unrealistic to require States to send out absentee ballots seventy or more days before an election as would be required for round-trip transit for UOCAVA voters residing in the most "remote" and "austere" locations. So an implied deadline

of reasonableness must control, and here that deadline is thirty days. With very few exceptions, a UOCAVA voter can reasonably expect to receive, execute, and return an absentee ballot in time for it to be counted as validly-cast if it is originally mailed to him thirty days before an election. This deadline is not arbitrary as Defendants suggest, but is instead a calculated and reasonable deadline based on undisputed evidence before the Court. Therefore, by failing to mail absentee ballots to UOCAVA voters thirty days or more before the November 4, 2008 election, Defendants violated UOCAVA.

(3) The Federal write-in ballot is not the exclusive remedy under UOCAVA.

Defendants argue that Congress anticipated the controversy presented in the case at bar and provided the exclusive remedy in the form of the Federal write-in ballot. The Court acknowledges, as Defendants do, that no UOCAVA voters were prevented from voting using a Federal write-in ballot in the November 4, 2008 general election. Nevertheless, the Court rejects Defendants' argument that it is the exclusive remedy and accepts Plaintiff's argument that the mere right to cast a Federal write-in ballot neither defeats a UOCAVA claim nor remedies harm caused by a State's failure to send timely absentee ballots. UOCAVA provides for a Federal write-in ballot "for use in *general* elections for Federal office by absent uniformed services voters and overseas voters who make timely application for, and do not receive, States, absentee ballots." 42 U.S.C. § 1973ff-2 (emphasis added). Therefore, UOCAVA voters denied timely absentee ballots in special, primary, and runoff federal elections would be left with no remedy at all. Such a result runs contrary to UOCAVA's requiring States to permit UOCAVA voters "to vote by absentee ballot in *general, special, primary, and runoff* elections for Federal office." 42 U.S.C. § 1973ff1 (a)(1). This result would violate "a fundamental rule of statutory construction that a statute should not be construed in a manner which renders certain provisions meaningless or insignificant." *Lee v. Alleghany Reg'l Hosp. Corp.*, 778 F.Supp. 900, 904 (W.D.Va.1991) (citing cases).

*8 Further, the Federal write-in ballot is not equivalent to a State absentee ballot. Congress explained that the Federal write-in ballot "is intended as an emergency back-up measure *rather than as a replacement* for the regular ballot." H.R. Rep. 99-765, at 14 (1986) (emphasis added). Congress also recognized that the Federal write-in ballot

does not provide UOCAVA voters the same opportunity to vote as full, printed absentee ballots. *Id.* at 16. Indeed, the differences are substantial, not the least of which is the fact that regular absentee ballots list all offices, names, party affiliations, and ballot propositions, while the Federal write-in ballot is blank and requires voters to be able to make choices based on complete and advance knowledge of their jurisdiction's ballot. Voters using the Federal write-in ballot must also have had an opportunity to research "any other State requirements for absentee ballots, such as notarization" that their legal voting residence requires for submitting valid absentee ballots. *Id.* at 14 (1986) (citing 42 U.S.C. § 1973ff-2(b), "a Federal write-in absentee ballot shall be submitted and processed in the manner provided by law for absentee ballots in the State involved.") Therefore, the Court finds that the Federal write-in ballot is only an imperfect emergency measure available to UOCAVA voters as a rudimentary remedy when States fail to send absentee ballots timely. It exists as a last-ditch effort to salvage one's franchise, but its existence by no means authorizes States to mail absentee ballots belatedly. Accordingly, the Court rejects Defendants' argument that the Federal write-in ballot is the exclusive remedy available when States fail to send absentee ballots timely.

(4) Chevron deference is not at issue.

Defendants argue that FVAP's "determination" and "recommendation" do not qualify for administrative deference as a government agency's interpretation of its own statutory mandate, as set out in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Indeed, Plaintiff does not argue for such deference in its Motion for Summary Judgment, and the Court affords no *Chevron* or other deference to either the determination or the recommendation in making its finding that Defendants violated UOCAVA. Accordingly, the Court need not address the issue as to whether deference is appropriate in this matter and dismisses with this portion of Defendants' Motion for Summary Judgment.

(5) Local electoral officials are not necessary parties.

Finally, the Court rejects Defendants' argument that local electoral officials are necessary parties pursuant to Federal Rule of Civil Procedure 19(a), finding instead that all necessary parties are before the Court. The Commonwealth of Virginia, a party to this action, is

directed by UOCAVA ensure its compliance by the local election boards. Therefore, the local electoral officials are not so vitally interested in this action that a valid judgment cannot be rendered, completely and finally determining the controversy without their presence as parties. Further, “[t]he absence of a necessary party does not generally seem sufficient ground for ... the entry of summary judgment in favor of the defendant.” *Maryland v. Acme Poultry Corp.*, No. Civ. A-651, 9 F.R.D. 687, 688 (D.Del.1949). As such, Defendants' necessary party argument will not save them from summary judgment.

(6) Virginia violated UOCAVA.

*9 By failing to mail timely-requested absentee ballots to UOCAVA voters in sufficient time prior to the November 4, 2008 election to allow for a meaningful vote, the Commonwealth of Virginia offended these voters' prized right to vote in a federal election in violation of UOCAVA. To that end, finding that there are no genuine issues of material fact and viewing the facts in the light most favorable to Defendants, the Court finds that Plaintiff is entitled to judgment as a matter of law. Accordingly, the Court will grant Plaintiff's Motion for Summary Judgment to the extent that it requests a declaration that the Commonwealth of Virginia violated UOCAVA, and it will deny Defendants' motion to the extent that it requests a declaration otherwise.

B. The timely-requested, but belatedly-received absentee ballots that were executed by UOCAVA voters, but not received by the local electoral boards before the close of the polls on election day, should be certified and counted as validly-cast votes in the November 4, 2008 general election if they were received within thirty days of the election.

Plaintiff seeks an order requiring Defendants to count as validly-cast ballots all absentee ballots from UOCAVA voters that were rejected solely because election officials received them too late to be counted. Defendants contend that this issue is moot because these absentee votes will not be outcome-determinative in the November 4, 2008 election, and they assert further that, even if not moot, the Court lacks the authority to order the votes to be counted as validly-cast. For the reasons set forth below, the Court finds that the issue is not moot and that the Court does have the authority to order the ballots to be counted as validly-cast. To that end, the Court will order the Commonwealth of Virginia to count as validly-cast all timely-requested, but belatedly-mailed absentee ballots

that were received within thirty days of the close of polls on November 4, 2008, so long as such ballots are otherwise valid under Virginia law.

(1) The issue of whether to count the timely-requested, but belatedly received absentee ballots is not moot.

It is undisputed that counting the timely-requested, but belatedly-received absentee ballots as validly-cast will have no effect on the outcome of the November 4, 2008 federal election. The parties do dispute, however, whether counting those votes is moot. “[T]he doctrine of mootness constitutes a part of the constitutional limits of federal court jurisdiction.... [A controversy] is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Townes v. Jarvis*, 577 F.3d 543, 546 (4th Cir.2009) (quoting *United States v. Hardy*, 545 F.3d 280, 283 (4th Cir.2008)). The Fourth Circuit recognizes the doctrine of mootness as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)). Such a continuing interest must exist so that courts “avoid [rendering] advisory opinions on abstract propositions of law.” *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969). Therefore, “for a controversy to be moot, it must lack at least one of the three required elements of Article III standing: (1) injury in fact, (2) causation, or (3) redressability.” *Townes*, 577 F.3d at 546–47.

*10 In this case, for purposes of mootness, the Commonwealth of Virginia does not challenge that Plaintiff has shown an injury in fact or the requisite causation, arguing only that there is no effective way to redress the complained-of injury. “[F]or an injury to meet the redressability standard, ‘it must be *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision.’” *In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 216–17 (4th Cir.2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) (emphasis original). The injury at issue here is that of disenfranchisement—that the Commonwealth of Virginia deprived certain UOCAVA voters of their right to vote by mailing timely-requested absentee ballots too late for them to be cast and received by local electoral boards and registrars in time to meet Virginia's statutory deadline. Such an injury is clearly redressable by counting

as validly-cast those timely-requested absentee ballots that were rejected solely because they were received after the close of the polls on election day through no fault of the voter. Therefore, the only remaining question as to whether the injury is redressable is whether the Court has the authority to order the Commonwealth of Virginia to extend its statutory deadline for receiving absentee ballots such that those ballots may be counted as validly-cast. For the reasons set forth below, the Court does have such authority.

(2) The Court has the authority to order the counting of the timely-requested, but belatedly-received absentee ballots that were executed and received by the local electoral boards and registrars after the close of the polls on November 4, 2008.

Defendants argue that the Court does not have the authority to order the Commonwealth of Virginia to count the timely-requested, but belatedly-mailed absentee ballots as valid, asserting that doing so wrongfully re-writes Virginia law. The Court rejects Defendants' argument, finding, as many courts have done before,³ that it does have the authority to order the Commonwealth of Virginia to count as validly-cast the timely-requested, but belatedly-received absentee ballots that would have been, but for their tardy receipt, valid under Virginia law. To count as validly-cast, absentee ballots in Virginia must be "returned to the electoral board or general registrar before the closing of the polls [on election day]." Va.Code Ann. § 24.2-709. Therefore, requiring Virginia to count as validly-cast those absentee ballots it received within thirty days of the close of the polls on November 4, 2008 effectively requires Virginia to extend its statutory deadline. Plaintiff argues, and the Court agrees, that the Court is authorized to take such action by the Supremacy Clause of the United States Constitution.

The Supremacy Clause provides that "the Laws of the United States ... shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. States have an "obligation under the Supremacy Clause, to protect federally guaranteed civil rights as zealously as would a federal court." *Rachel v. Georgia*, 342 F.2d 336, 342 (5th Cir.1965). In this case, therefore, the Commonwealth of Virginia has an obligation under the Supremacy Clause to protect the federally-guaranteed civil right of UOCAVA voters to vote by absentee ballot in federal elections. To the extent

that protecting that right conflicts with Virginia law, Virginia law must give way. *Swift & Co. v. Wickham*, 382 U.S. 111, 120, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965) ("[I]f a state measure conflicts with a federal requirement, the state provision must give way.") Additionally, Federal courts are authorized to order States to comply with federal law, and States have a duty to obey such orders. *See Cooper v. Aaron*, 358 U.S. 1, 18-19, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). Therefore, the Court has the authority to order the Commonwealth of Virginia to comply with UOCAVA, and the Commonwealth of Virginia has a duty to obey that order.

(3) The Court defers to the parties the determination of how to count and certify as valid the timely-requested, but belatedly-received absentee ballots.

*11 The Court and the parties recognize that counting and certifying the absentee ballots at issue in this case will take some time and come at some expense. Therefore, the Court leaves to the parties the decision as to how the Commonwealth of Virginia will go about counting and certifying the ballots, whether it be exactly as prescribed in the Virginia Code or as alternatively-crafted by the parties with an eye for efficiency and economy. The parties will be given twenty days from the entry of this Opinion and associated Order to agree on an appropriate procedure and memorialize their agreement in writing. The Commonwealth of Virginia will then be given an additional ten days to count and certify the ballots in accordance with the agreed-upon procedure.

Additionally, pursuant to Plaintiff's request, and trusting that the Commonwealth of Virginia will not have continuing problems complying with UOCAVA, the Court also defers to the parties the determination as to the appropriate way in which to ensure UOCAVA compliance in future federal elections.

IV. CONCLUSION

For the foregoing reasons, having reviewed each motion separately on its own merits, the Court finds that there are no genuine issues of material fact and that Plaintiff is entitled to judgment as a matter of law. Accordingly, the Court will grant Plaintiff's Motion for Summary Judgment (docket no. 47), and deny Defendants' Motion for Summary Judgment (docket no. 43).

All Citations

An appropriate Order shall issue.

Not Reported in F.Supp.2d, 2009 WL 3350028

Footnotes

- 1 To the extent that Plaintiff requested time following the entry of judgment to confer with Defendants and report back on relief issues related to the November 4, 2008 election, the Court finds it in the interest of justice and judicial economy to reject that request and prescribe relief in this Opinion and associated Order. The parties have participated in two unsuccessful settlement conferences with the Honorable United States Magistrate Judge Dennis W. Dohnal and have shown no indication that further discussion will lead to an efficient, mutually agreeable resolution of relief issues related to last year's election. The Court wishes to restore UOCAVA voters' confidence in their ability to cast a meaningful vote and redress Plaintiff's injuries as justly and efficiently as possible. Further delay with little hope of successful discussion between the parties will aid no one.
- 2 Plaintiff cites a number of cases from different jurisdictions in which federal district courts found at the preliminary injunction stage that the United States was "likely to prevail" on its claim that the State at issue violated UOCAVA, or there were "reasonable grounds to believe" UOCAVA was violated, by mailing absentee ballots too late: *United States v. Georgia*, No. 1:04-CV-2040 (N.D. Ga. July 15, 2004; entered July 16, 2004); *United States v. Pennsylvania*, No. 1:CV-04-830 (M.D.Pa. April 16, 2004); *United States v. Delaware*, No. 92-523 (D.Del. Sept. 11, 1992); *United States v. Tennessee*, No. 3-90-0958 (M.D.Tenn. Nov. 5, 1990); and *United States v. Wyoming*, No. C88-0238-8 (D.Wyo. Aug. 16, 1988). Given that these courts did not actually make a final determination that the States had in fact violated UOCAVA, they are not entirely persuasive in favor of Plaintiff's argument.
- 3 Numerous courts have entered consent orders or decrees extending a State's deadline for receipt of validly-cast absentee ballots. See, e.g., *United States v. New York*, 1:09-cv-335 (N.D. N.Y. Mar. 26, 2009) (ordering 6-day extension to ballot receipt deadline and corresponding adjustments to other state law deadline); *United States v. Michigan*, No. L 88-208 CA5 (W.D.Mich. July 29, 1988) (10-day extension of ballot receipt deadline); *United States v. Idaho*, No. 88-1187 (D. Idaho May 21, 1988; entered May 23, 1988) (10-day extension of ballot receipt deadline); *United States v. Oklahoma*, No. CIV-88-1444 P (W.D.Okla. Aug. 22, 1988) (10-day extension of ballot receipt deadline); *United States v. New Jersey*, No. 90-2357(JCL) (D.N.J. June 5, 1990) (10-day extension of ballot receipt deadline); *United States v. Colorado*, No. 90-C-1419 (D.Colo. Aug. 10, 1990) (10-day extension of ballot receipt deadline); *United States v. New Jersey*, No. 92-4203 (D.N. J. June 2, 1992) (14-day extension of ballot receipt deadline); *United States v. Michigan*, No. 1:92-CV-529 (W.D.Mich. Aug. 3, 1992) (20-day extension of ballot receipt deadline); *United States v. Georgia*, No. 1:04-CV-2040-CAP (N.D.Ga. July 16, 2004) (3 business day-extension).

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2004 WL 2451454

Only the Westlaw citation is currently available.

United States District Court,
M.D. Pennsylvania.

SPC Steven J. REITZ, and SPC
Matthew J. Schramm, Plaintiffs

v.

RENDELL, et al., Defendants

No. Civ.A. 104-CV-2360.

|

Oct. 29, 2004.

Attorneys and Law Firms

Matthew Dunham, Harrisburg, PA, for Plaintiffs.

Opinion

ORDER

KANE, J.

*1 The subject of the November 2, 2004 Presidential Election has been before this Court since April of this year when the United States Attorney General sought and obtained injunctive relief under the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. §§ 1973ff-1 *et seq.* (“UOCAVA”), to protect the right of overseas and military voters to participate in primary elections. In connection with *United States of America v. Commonwealth of Pennsylvania, et al.*, (Civil Action No. 1:04-CV-830), the Commonwealth of Pennsylvania has reported to the United States Attorney General regarding the Commonwealth's compliance with election laws as they affect overseas and military voters, including providing information concerning the mailing of absentee ballots.

On October 8, 2004, the United States Attorney General sought an order requiring the Commonwealth to issue to all UOCAVA voters new absentee ballots excluding the names Ralph Nader and Peter Miguel Comejo as candidates for President and Vice President of the United States. To allow for the return of such amended ballots, the Government sought a two week extension. This Court denied that relief on October 20, 2004, finding that the reissuance of ballots that excluded the names of Nader

and Comejo would not serve the interests of overseas voters or the public at large.¹ The Government did not seek any extension of election deadlines independent of its request for amended ballots. In fact, the Government produced evidence that military and overseas voters were receiving one-on-one assistance in voting and that their ballots would be returned by express mail in time for the general election.

On Wednesday, October 27, 2004, this private action was brought under UOCAVA. Plaintiffs Steven J. Reitz and Matthew J. Schramm, members of the United States military serving in Iraq and Kuwait, respectively, complain that their home counties did not mail absentee ballots in time for their votes to be counted in the November 2, 2004 election, and that absent emergency injunctive relief, they and other similarly situated military voters will be disenfranchised.² Representatives of Plaintiffs proffer that serious lapses in assistance to military voters and serious delays in the return of military mail to the United States threaten their rights under UOCAVA. This proffered testimony would support an order of this Court extending the deadline for overseas and military voters. In light of this proffered testimony, representatives of the Commonwealth, together with Plaintiffs' counsel, have negotiated a consensual resolution extending the deadline for receipt of absentee ballots from UOCAVA voters until 5:00 p.m. on November 10, 2004. Based on Plaintiffs' proffer, this Court has approved a stipulation memorializing the parties' agreement.

Accordingly, IT IS HEREBY ORDERED THAT:

1. To assure the rights of “absent uniformed services and overseas voters” who are protected by the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA” or “Act”), 42 U.S.C. § 1973ff-1973ff-6, the Secretary of the Commonwealth shall take all reasonable steps necessary to direct the county boards of elections—notwithstanding the deadline prescribed by Pa. Stat. Ann. tit. 25, § 3145.6(a) (West Supp.2003)—to accept as timely received, *solely for purposes of the Federal offices that are included on such ballots for the November 2, 2004, General Election*, absentee ballots, including any federal write in ballots, cast by “absent uniformed services and overseas voters” as defined by the Act (including absent uniformed services voters who are “overseas voters” as defined by the Act), *so long as those ballots are received by the appropriate county*

board of elections not later than 5 P.M. on Wednesday, November 10, 2004.

*2 2. For those absentee ballots received from the absent uniformed services and overseas voters described in ¶ 1, the Secretary of the Commonwealth shall take all reasonable steps necessary to direct the county boards of elections to canvass the absentee ballots in accordance with Pennsylvania law and to count the valid votes cast *for Federal offices only* on those determined by the board of elections to be valid absentee ballots under Pennsylvania law.

3. No absentee ballot cast by an absent uniformed services voter or overseas voter described by ¶ 1 shall be valid unless it was cast by the voter not later than 8:00 P.M. Eastern Standard Time on Tuesday, November 2, 2004. For purposes of determining that an absentee ballot was cast on or before November 2, 2004, the Secretary of the Commonwealth shall direct the county boards of elections that proof of mailing or delivery of the completed absentee ballot on or before November 2, 2004, will be required to demonstrate that the ballot was timely cast.

4. This Court makes no findings of liability against the Governor or the Secretary of the Commonwealth that they failed to fulfill any responsibilities placed upon them by federal law.

5. The Governor and the Secretary of the Commonwealth, pursuant to delegation by the Pennsylvania Attorney General, agrees to file an action in the Commonwealth Court in their own names seeking the same extension of time as referenced in ¶ 1 for all for all absent uniformed services and overseas voters as defined by the Act to have timely received ballots and validly cast votes for state office on those ballots determined by the board of elections to be valid absentee ballots under Pennsylvania law.

6. This Court shall retain jurisdiction over this matter.

All Citations

Not Reported in F.Supp.2d, 2004 WL 2451454

Footnotes

1 This Court's October 20, 2004 opinion is published at www.pamd.uscourts.gov.

2 The Court notes that the relief requested by Plaintiffs in the instant case differs significantly from that requested by the United States Attorney General. In that case, the United States sought to have the Commonwealth issue amended absentee ballots to UOCAVA voters two weeks prior to the election. Moreover, the United States requested that UOCAVA voters be permitted to return these newly issued amended ballots by electronic mail, facsimile, or other means not provided for under Pennsylvania law, and that the Court direct the Commonwealth to extend the deadline for receiving UOCAVA voters' ballots for at least two weeks. In the instant case, Plaintiffs do not seek to have amended ballots printed and issued, nor do they seek alternative means of returning ballots. Instead, Plaintiffs request only that UOCAVA voters be given an additional period of time to return their absentee ballots to remedy delays regarding the issuance of such ballots.

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Case No. 12-CV-197
v.)	
)	
THE STATE OF WISCONSIN, et al.,)	
)	
Defendants.)	
_____)	

CONSENT DECREE

Plaintiff United States of America (“United States”) initiated this action against the State of Wisconsin (the “State”); the Wisconsin Government Accountability Board (the “G.A.B.”); Judges David G. Deininger, Michael Brennan, Gerald C. Nichol, Thomas Barland, and Thomas Cane in their official capacities as officers or members of the G.A.B.; and Kevin J. Kennedy, in his official capacity as Director and General Counsel of the G.A.B. (collectively, “Defendants”), to enforce the requirements of the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. §§ 1973ff to 1973ff-7. The United States alleges violations of UOCAVA arising from the failure to transmit absentee ballots to absent uniformed services voters and overseas voters from at least 65 Wisconsin municipalities by the 45th day before the April 3, 2012 presidential preference primary election. Absent corrective action, some UOCAVA voters from Wisconsin will not be provided 45 days to receive, mark, and submit their ballots in time to have those ballots counted in the April 3, 2012 presidential preference primary election.

The United States and Defendants, through their respective counsel, have conferred and agree that this action should be settled without the delay and expense of litigation. The parties share the goal of providing UOCAVA voters with sufficient opportunity under Federal law to participate in the April 3, 2012 presidential preference primary election and subsequent 2012 Federal elections. Accordingly, the parties have negotiated in good faith and hereby agree to the entry of this Consent Decree as an appropriate resolution of the UOCAVA violation alleged by the United States. Accordingly, the United States and Defendants stipulate and agree that:

1. This action is brought by the Attorney General on behalf of the United States pursuant to UOCAVA, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) (“MOVE Act”). UOCAVA provides that absent uniformed services voters and overseas voters shall be permitted “to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.” 42 U.S.C. § 1973ff-1.

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4, and this Court has jurisdiction of this action pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

3. Defendant State of Wisconsin is responsible for complying with UOCAVA, and ensuring that validly-requested absentee ballots are sent to UOCAVA voters in accordance with its terms. 42 U.S.C. § 1973ff-1. Pursuant to Wisconsin law, municipal clerks in 1,851 local jurisdictions are responsible for transmitting absentee ballots to absent uniformed services and overseas voters in accordance with UOCAVA. WIS. STAT. § 7.15(1)(cm).

4. Defendant Wisconsin Government Accountability Board is responsible for administering election laws in the State and promulgating rules applicable to jurisdictions in the State “for the

purpose of interpreting or implementing the laws regulating the conduct of elections.” WIS. STAT. § 5.05(1).

5. Defendant Judge David G. Deininger is the G.A.B.’s Chair and is sued in his official capacity. The Chair of the G.A.B. or his designee is responsible for canvassing and certifying the election returns. WIS. STAT. § 7.70(3). Defendants Judges Michael Brennan, Gerald C. Nichol, Thomas Barland, and Thomas Cane are members of the G.A.B. and are sued in their official capacities.

6. Defendant Kevin J. Kennedy is sued in his official capacity as the Director and General Counsel of the G.A.B. As General Counsel of the G.A.B., Defendant Kennedy “perform[s] legal and administrative functions for the board.” WIS. STAT. § 5.05(1m). Defendant Kennedy has been designated by the G.A.B. as the Chief Election Officer for the State pursuant to WIS. STAT. § 5.05(3g).

7. Section 102(a)(8) of UOCAVA requires that States transmit validly requested ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election, unless a hardship exemption is obtained pursuant to Section 102(g) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(8).

8. States can be exempted from the requirement to transmit ballots 45 days in advance of a Federal election if they apply for, and are granted, a hardship waiver from the Presidential Designee for UOCAVA, the Secretary of Defense. 42 U.S.C. § 1973ff-1(g). Wisconsin did not seek or obtain a hardship exemption for the April 3, 2012 Federal primary election.

9. On April 3, 2012, the State will conduct a Federal primary election, a presidential preference primary.

10. Municipalities of the State received timely requests for absentee ballots on or before the 45th day prior to the April 3, 2012 presidential preference primary election from voters who are entitled to vote pursuant to the provisions of UOCAVA.

11. The deadline for transmission of absentee ballots to UOCAVA voters who had requested them at least 45 days before the April 3, 2012 presidential preference primary election was February 18, 2012.

12. Under Wisconsin law, municipal clerks are required to send official absentee ballots to UOCAVA voters by postal mail, or electronically by either email or telefacsimile, according to the request of the voter, by February 16, 2012, 47 days in advance of the April 3, 2012 presidential preference primary election. WIS. STAT. § 7.15(1)(cm).

13. Absentee ballots from UOCAVA voters must be postmarked by election day and received by a municipal clerk no later than 4 p.m. on the Friday after election day in order to be counted. WIS. STAT. §§ 7.515(3); 6.22 (5); 6.24 (7). For the April 3, 2012 presidential preference primary, the receipt deadline is April 6, 2012.

14. On March 8 and 9, 2012, the G.A.B. provided a preliminary report of compliance with the 45-day transmittal deadline of February 18, 2012 for UOCAVA ballots, based on the response of 1,197 of the State's 1,851 municipalities. On March 14, 2012, the G.A.B. supplemented its preliminary report to include the response of an additional 263 municipalities, and on March 21, 2012, the G.A.B. provided a second supplemental report to correct information and to report additional data.

15. According to the G.A.B.'s preliminary reports received through March 21, 2012, at least 65 Wisconsin municipalities did not transmit ballots by the 45-day transmittal deadline of February 18, 2012, to UOCAVA voters who requested ballots by that date (hereinafter "late-

transmittal municipalities”). According to the G.A.B., as of March 21, 2012, 229 UOCAVA ballots were sent past the 45-day transmittal deadline. One hundred and ten (110) ballots were transmitted between February 20 and 24, 2012, two to seven days past the deadline. One hundred (100) ballots were transmitted between February 25 and March 3, 2012, over a week past the deadline. Thirteen ballots were transmitted between March 5 and 10, 2012, over two weeks past the deadline. Six ballots were transmitted after March 13, 2012, over three weeks past the 45-day deadline.

16. As of March 21, 2012, three hundred and fifty (350) of the State’s 1,851 municipalities have not confirmed whether they received requests for absentee ballots from UOCAVA voters, or whether ballots were sent to those voters who submitted timely requests on or before the 45-day transmittal deadline of February 18, 2012 (hereinafter “non-reporting municipalities”).

17. The failure to transmit absentee ballots to UOCAVA voters who requested them by February 18, 2012, the 45th day before the April 3, 2012 presidential preference primary election, constitutes a violation of Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A).

18. In order to avoid the burdens, delays, and uncertainties of litigation and to efficiently and expeditiously promote the parties’ shared goal of ensuring that Wisconsin’s UOCAVA voters will have sufficient opportunity to receive absentee ballots they have requested and submit marked absentee ballots in time to be counted for the April 3, 2012 presidential preference primary election, the parties agree that this Court should enter an order that extends the deadline for receipt of ballots from UOCAVA voters in all late-transmittal municipalities and non-reporting municipalities.

WHEREFORE, the parties having freely given their consent, and the terms of the Decree being fair, reasonable, and consistent with the requirements of UOCAVA, it is hereby ORDERED, ADJUDGED, AND DECREED that:

- (1) The deadline for receipt of ballots from UOCAVA voters for the April 3, 2012 presidential preference primary election is extended beyond April 3, 2012 by the total number of days past February 18, 2012 that each late-transmittal municipality transmitted the requested ballots. However, for those late-transmittal municipalities that transmitted UOCAVA ballots one to three days past the 45-day deadline, the deadline for receipt of ballots from UOCAVA voters is April 6, 2012. Absentee ballots from all UOCAVA voters in late-transmittal municipalities that are executed and sent by April 3, 2012, and received by the close of business on the date of the applicable extended receipt deadline, will be accepted and tabulated in the final presidential preference primary election results. A list of all late-transmittal municipalities and the dates of the applicable extended receipt deadlines is attached as Exhibit 1.
- (2) The deadline for receipt of ballots from UOCAVA voters for the April 3, 2012 presidential preference primary election in any non-reporting municipality that transmitted ballots after the 45-day transmittal deadline is as described in paragraph (1). Within one day of the entry of this Consent Decree, the G.A.B. shall issue a communication to all non-reporting municipalities that (1) orders a report on compliance

within one business day; and (2) notifies non-reporting municipalities that failed to comply with the 45-day transmittal deadline that they shall implement an extension of the ballot receipt deadline as described in paragraph (1) and the notice requirements in paragraph (4).

- (3) Defendants shall take all steps necessary to ensure that all timely-requested UOCAVA ballots, including Federal Write-in Absentee Ballots, are counted as validly-cast ballots in the April 3, 2012 presidential preference primary election, provided such ballots are executed and postmarked or show a dated endorsement of receipt by another agency of the United States government by April 3, 2012, are received by the date of the applicable extended receipt deadline, and are otherwise valid. Provided, however, election results for the April 3, 2012 presidential preference primary election may be formally certified by late-transmittal municipalities if the number of outstanding absentee ballots from UOCAVA voters could not mathematically alter the outcome of the election, subject to amendment or re-certification to add any votes from any ballots returned by the extended receipt deadline.
- (4) Defendants shall take all steps necessary to ensure that any affected UOCAVA voters for whom the State or late-transmittal municipalities have electronic mail contact information are contacted by electronic mail to notify those voters that if they have not yet received their

ballots, then they may choose to receive their ballots for the April 3, 2012 presidential preference primary election by telefacsimile or electronic mail, instead of by postal mail. If the State or late-transmittal municipalities lack electronic mail contact information for affected voters, but do have telefacsimile contact information for such voters, Defendants shall ensure that the notification required by this paragraph is provided by telefacsimile. The notice shall, at minimum: (a) explain that the deadline for the ballot to be executed and sent is April 3, 2012; (b) explain that the deadline for receipt of the ballot has been extended to the applicable extended receipt deadline; (c) explain the rules for counting the ballots referenced in paragraph (5); and (d) provide appropriate contact information at the G.A.B. for assistance. Non-reporting municipalities that did not transmit ballots by February 18, 2012 to UOCAVA voters who requested ballots by that date are also subject to the provisions of this paragraph.

- (5) To ensure that UOCAVA voters who received a ballot by mail and by email will have their ballot validly counted, the Defendants shall establish a procedure providing which ballot shall be counted if both ballots are returned, and notify all UOCAVA voters of these rules.
- (6) Upon entry of this Consent Decree, Defendants shall notify the Director of the Federal Voting Assistance Program of the United States Department of Defense ("FVAP") and request assistance in notifying military and other eligible voters of the relief afforded by

this agreement, and coordinate with FVAP as necessary to facilitate such notice.

- (7) Upon the entry of this Consent Decree, Defendants shall take the following steps to endeavor to give affected voters notice of the contents of this agreement: (a) issue a press statement for immediate release, posted immediately on the State's election information website, and distributed as broadly and immediately as practicable to national and local wire services, to radio and television broadcast stations and to daily newspapers of general circulation in the State. The release shall also be distributed to the Federal Voting Assistance Program; International Herald Tribune (<http://www.iht.com>); USA Today International (<http://www.usatoday.com>); Military Times Media Group (cvinch@militarytimes.com); Overseas Vote Foundation (<http://www.overseasvotefoundation.org/intro/>); Stars and Stripes (www.estripes.com), and any other appropriate newspaper or news media in the State of Wisconsin. The news release shall, at a minimum: (a) summarize this order, including a notice that the deadline for receipt of the ballot has been extended in certain municipalities within the State; (b) notify UOCAVA voters that they may choose to receive their ballots for the April 3, 2012 presidential preference primary election by telefacsimile or electronic mail; and (c) provide appropriate contact information at the G.A.B. for assistance. Defendants shall also prepare and distribute written public service

announcements describing this Consent Decree for broadcast on radio and television networks, including but not limited to the media described above.

(8) Defendants shall provide a report to counsel of record for the United States no later than May 18, 2012, concerning the number of UOCAVA absentee ballots, by municipality, received and counted for the April 3, 2012 presidential preference primary election. The report will set forth the following information, by municipality, categorized by absent uniformed services voters with APO/FPO addresses or non-US street addresses; uniformed services voters at a street address within the US; and overseas civilian voters:

- a. The number of absentee ballots from UOCAVA voters received by municipalities before the close of business on April 6, 2012, and counted;
- b. The number of absentee ballots from UOCAVA voters received and counted after the close of business on April 6, 2012, but prior to the close of business on the date of the applicable extended receipt deadlines;
- c. The number of absentee ballots from UOCAVA voters received later than the close of business on the date of the applicable extended receipt deadline for all of the affected municipalities; and
- d. The number of absentee ballots from UOCAVA voters that were not counted in the April 3, 2012 presidential preference primary election, for reasons other than late receipt, and the reasons such ballots were not counted.

(9) To ensure Wisconsin's compliance with UOCAVA for the remaining 2012 Federal elections, Defendants shall gather the following information and report it to counsel of record for the United States:

a. Beginning June 1, 2012, survey each Wisconsin municipality to determine, for the remaining 2012 Federal elections: (1) whether each municipality has the technical capacity to transmit all requested ballots by the requested method of transmission; (2) whether any municipality anticipates difficulties or a situation that would prevent it from transmitting all requested ballots to UOCAVA voters by the requested method of transmission and by the appropriate deadline; (3) what measures any such municipality will implement to address any difficulties or obstacles to transmitting all requested ballots to UOCAVA voters by the requested method and by the appropriate deadline; and (4) whether it would be appropriate for Defendants to provide additional support to any municipality to ensure that it meets the appropriate deadlines. Where additional support to the municipalities is appropriate, Defendants shall provide it. Defendants shall provide the results of their survey to counsel for the United States in a format agreed to by the parties no later than 5:00 pm Central time on the 48th day before each Federal election;

- b. By the 48th day prior to each Federal election, survey each county clerk in Wisconsin to determine whether each municipality has received a sufficient number of printed absentee ballots sufficiently ahead of the 45-day mailing deadline to transmit those ballots as required by UOCAVA. Defendants shall provide the results of this survey to counsel for the United States no later than 5:00 pm Central time on the 47th day before each Federal election;
- c. By the 43rd day prior to each Federal election, obtain written or electronic certifications, in a format agreed to by the parties, of: (1) the number of absentee ballot applications received by each municipality on or before the 45th day before each Federal election from any voter entitled to vote pursuant to UOCAVA and the method of transmission requested; (2) the date on which the municipality began sending absentee ballots to those UOCAVA voters; (3) the date on which and method of transmission by which the municipality completed sending those absentee ballots; and (4) an affirmative declaration that all UOCAVA ballots requested by the 45th day were transmitted by the 45th day by the requested method of transmission;
- d. Compile the data provided by the municipalities described in paragraph (9)(c) above into a spreadsheet format

devised in consultation with the United States and transmit the spreadsheet electronically to counsel for the United States no later than 5:00 pm Central time on the 41st day before each Federal election;

e. Certify in writing to counsel for the United States that all of the data reported pursuant to paragraph (9)(c) of this Supplemental Decree is accurate to the best of their knowledge;

f. Obtain written or electronic certifications, in a format agreed to by the parties, of: (1) the number of absentee ballot applications received by each municipality after the 45th day and on or before the 30th day before each Federal election from any voter entitled to vote pursuant to UOCAVA and the method of transmission requested; and (2) the date on which and method of transmission by which the municipality sent the requested ballots; and (3) an affirmative declaration that all UOCAVA ballots requested after the 45th day and on or before the 30th day were transmitted promptly by the requested method of transmission;

g. Compile the data provided by the municipalities described in paragraph (9)(f) above into a spreadsheet format devised in consultation with the United States and transmit the spreadsheet electronically to counsel for the United States no

later than 5:00 pm Central time on the 28th day before each Federal election; and

h. Certify in writing to counsel for the United States that all of the data reported pursuant to paragraph (9)(f) of this Supplemental Decree is accurate to the best of their knowledge.

- (10) The Defendants shall take such actions as are necessary to ensure that UOCAVA voters shall have the full opportunity to vote guaranteed by UOCAVA in future Federal elections, including determining the cause of the late mailed ballots and taking any administrative, legislative, or other actions necessary to prevent future violations arising from the State's election calendar or practices of the State, counties, or municipalities. The parties shall confer on the progress of these efforts, and Defendants shall provide a status report to the United States by April 1, 2013.

The Court shall retain jurisdiction over this action to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree and to ensure compliance with UOCAVA through April 30, 2013. For good cause shown, any party may move to extend the consent decree or to reopen the case.

The undersigned agree to entry of this Consent Decree on March 23, 2012:

For the Plaintiff:

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United States Attorney

s/ Leslie K. Herje

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For the Defendants:

J.B. VAN HOLLEN
Wisconsin Attorney General

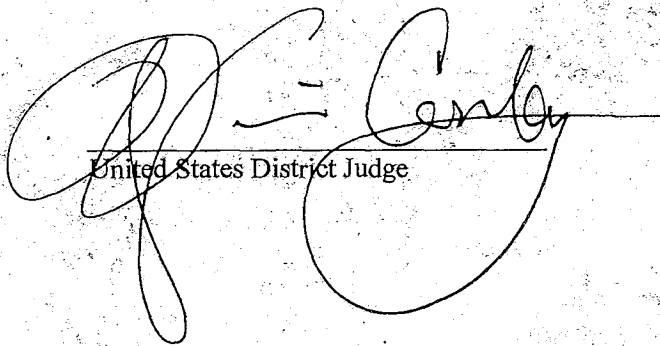
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SO ORDERED this 23rd day of March, 2012.



United States District Judge

Exhibit 1: Late-Transmitting Municipalities

Municipality	County	Timely Requested UOCAVA Ballots Sent After 45-Day Transmittal Deadline: February 18, 2012	Date on Which Ballots were Transmitted	Days Past the Transmittal Deadline	Extended Ballot Receipt Deadline
Village of Friendship	Adams County	1	03/05/2012	16	04/19/12
City of Barron	Barron County	3	02/23/2012	5	04/08/12
Town of Barron	Barron County	1	03/08/2012	19	04/22/12
Town of Stanley	Barron County	2	2/27/2012	9	04/12/12
Town of Belvidere	Buffalo County	2	02/21/2012	3	04/06/12
Town of Sherman	Clark County	2	02/22/2012	4	04/07/12
Town of Worden	Clark County	2	03/01/2012	12	04/15/12
City of Verona	Dane County	7	03/01/2012	12	04/15/12
Town of Blue Mounds	Dane County	3	03/02/2012	13	04/16/12
Town of Perry	Dane County	2	02/27/2012	9	04/12/12
Town of Sun Prairie	Dane County	1	03/06/2012	17	04/20/12
Village of Blue Mounds	Dane County	1	03/02/2012	13	04/16/12
Village of Mazomanie	Dane County	2	02/21/2012	3	04/06/12
Village of Mount Horeb	Dane County	6	02/23/2012	5	04/08/12
City of Mayville	Dodge County	1	02/20/2012	2	04/06/12
Town of Oakland	Douglas County	1	02/25/2012	7	04/10/12
Village of Superior	Douglas County	1	03/01/2012	12	04/15/12
Town of Brunswick	Eau Claire County	1	02/23/2012	5	04/08/12
Town of	Eau Claire	1	03/07/2012	18	04/21/12

Municipality	County	Timely Requested UOCAVA Ballots Sent After 45-Day Transmittal Deadline: February 18, 2012	Date on Which Ballots were Transmitted	Days Past the Transmittal Deadline	Extended Ballot Receipt Deadline
Drammen	County				
Village of Fall Creek	Eau Claire County	1	03/08/2012	19	04/22/12
Town of Marshfield	Fond Du Lac County	2	02/22/2012	4	04/07/12
Town of Taycheedah	Fond Du Lac County	1	02/22/2012	4	04/07/12
Town of Cradon	Forest County	1	03/01/2012	12	04/15/12
City of Monroe	Green County	6	02/29/2012	11	04/14/12
Town of Albany	Green County	1	02/21/2012	3	04/06/12
Town of Garfield	Jackson County	1	02/22/2012	4	04/07/12
City of Waterloo	Jefferson County	1	03/07/2012	18	04/21/12
Town of Koshkonong	Jefferson County	1	03/15/2012	26	04/29/12
City of Kenosha	Kenosha County	55	02/28/2012	10	04/13/12
City of Tomahawk	Lincoln County	6	02/22/2012	4	04/07/12
Town of Maple Grove	Manitowoc County	1	02/20/2012	2	04/06/12
Town of Meeme	Manitowoc County	1	02/24/2012	6	04/09/12
City of Wausau	Marathon County	19	02/20/2012	2	04/06/12
Town of Green Valley	Marathon County	2	02/26/2012	8	04/11/12
Town of Maine	Marathon County	2	03/07/2012	18	04/21/12
Village of Whitefish Bay	Milwaukee County	10	02/20/2012	2	04/06/12
Town of Greenfield	Monroe County	1	02/23/2012	5	04/08/12

Municipality	County	Timely Requested UOCAVA Ballots Sent After 45-Day Transmittal Deadline: February 18, 2012	Date on Which Ballots were Transmitted	Days Past the Transmittal Deadline	Extended Ballot Receipt Deadline
Town of Abrams	Oconto County	3	3/15/2012	26	04/29/12
City of Gillett	Oconto County	1	03/05/2012	16	04/19/12
Town of Doty	Oconto County	1	02/20/2012	2	04/06/12
Town of Ellington	Outagamie County	1	02/29/2012	11	04/14/12
Town of Freedom	Outagamie County	4	02/20/2012	2	04/06/12
Town of Hortonia	Outagamie County	2	02/28/2012	10	04/13/12
Town of Saukville	Ozaukee County	1	02/29/2012	11	04/14/12
Village of Saukville	Ozaukee County	2	02/20/2012	2	04/06/12
Town of Hartland	Pierce County	1	03/05/2012	16	04/19/12
Town of New Hope	Portage County	1	02/28/2012	10	04/13/12
Town of Norway	Racine County	1	03/13/2012	24	04/27/12
City of Baraboo	Sauk County	2	02/27/2012	9	04/12/12
Village of Lake Delton	Sauk County	1	03/01/2012	12	04/15/12
Town of Plymouth	Sheboygan County	4	02/23/2012	5	04/08/12
Town of Scott	Sheboygan County	4	02/28/2012	10	04/13/12
City of Westby	Vernon County	1	03/13/2012	24	04/27/12
Town of Manitowish Waters	Vilas County	1	03/10/2012	21	04/24/12
City of Whitewater-	Walworth County	1	02/24/2012	6	04/09/12

Municipality	County	Timely Requested UOCAVA Ballots Sent After 45-Day Transmittal Deadline: February 18, 2012	Date on Which Ballots were Transmitted	Days Past the Transmittal Deadline	Extended Ballot Receipt Deadline
Main					
Town of Madge	Washburn County	2	03/03/2012	14	04/17/12
City of Hartford-Main	Washington County	1	03/01/2012	12	04/15/12
Town of Trenton	Washington County	1	03/02/2012	13	04/16/12
City of New Berlin	Waukesha County	18	02/24/2012	6	04/09/12
City of Oconomowoc	Waukesha County	13	02/22/2012	4	04/07/12
Town of Eagle	Waukesha County	3	02/20/2012	2	04/06/12
Town of Ottawa	Waukesha County	2	02/24/2012; 03/07/2012	18	04/21/12
City of New London	Waupaca County	1	03/01/2012	12	04/15/12
Town of Helvetia	Winnebago County	3	02/22/2012	4	04/08/12
Village of Winneconne	Winnebago County	1	02/20/2012	2	04/06/12

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

THE TERRITORY OF THE VIRGIN ISLANDS;)
VIRGIN ISLANDS JOINT BOARDS OF)
ELECTIONS; BOARD OF ELECTIONS, ST.)
CROIX DISTRICT; BOARD OF ELECTIONS,)
ST. THOMAS/ST. JOHN DISTRICT; AND)
JOHN ABRAMSON, JR., VIRGIN ISLANDS)
SUPERVISOR OF ELECTIONS, in his official)
capacity,)

Defendants.)

CASE NO. 3:12-CV-00069

CONSENT DECREE

Plaintiff United States of America (“United States”) initiated this action against the Territory of the Virgin Islands (the “Territory”); the Virgin Islands Joint Boards of Elections; the Board of Elections, St. Croix District; the Board of Elections, St. Thomas/St. John District; and the Virgin Islands Supervisor of Elections, John Abramson, Jr., in his official capacity, to enforce the requirements of the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. §§ 1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-89, 123 Stat. 2190, 2318-35 (2009) (“MOVE Act”). The United States alleges violations of UOCAVA arising from the Territory’s failure to transmit absentee ballots to absent uniformed services voters and overseas voters (“UOCAVA voters”) by the 45th day before the September 8, 2012 Federal primary election and its inability to transmit absentee ballots to UOCAVA voters by the 45th day before the November 6, 2012 Federal general election. Without corrective action, UOCAVA voters from

the Virgin Islands will not be provided sufficient time to receive, mark, and submit their ballots in time to have those ballots counted in the Territory's 2012 Federal elections and in all future elections for Federal office.

The United States and Defendants, through their respective counsel, have conferred and agree that this action should be settled without the delay and expense of litigation. The parties share the goal of providing UOCAVA voters with a sufficient opportunity to participate in the September 8 and November 6 Federal elections, and all subsequent elections for Federal office. Accordingly, the parties have negotiated in good faith and hereby agree to the entry of this Consent Decree as an appropriate resolution of the UOCAVA violations alleged by the United States. Accordingly, the United States and Defendants stipulate and agree that:

JURISDICTION

1. This action is brought by the Attorney General on behalf of the United States pursuant to UOCAVA, as amended by the MOVE Act. UOCAVA provides that absent uniformed services voters and overseas voters shall be permitted "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 42 U.S.C. § 1973ff-1.
2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4(a), and this Court has jurisdiction of this action pursuant to 42 U.S.C. § 1973ff-4; 28 U.S.C. §§ 1345, 2201; and 48 U.S.C. § 1612(a).
3. Defendant Territory of the Virgin Islands is considered a State for purposes of UOCAVA, *see* 42 U.S.C. 1973ff-6(6), and thus is charged with the responsibility of complying with UOCAVA and ensuring that validly requested absentee ballots are transmitted to UOCAVA voters in accordance with its terms. 42 U.S.C. § 1973ff-1.

DEFENDANTS

4. Defendant Virgin Islands Joint Boards of Elections is “the policy-making body of the Virgin Islands Elections System.” V.I. Code Ann. tit. 18, § 4(a). The Joint Boards of Elections can “promulgate and issue uniform rules and regulations for the administration and the enforcement of elections laws” in the Territory. V.I. Code Ann. tit. 18, § 47(13).

5. Defendant Board of Elections, St. Croix District, has general jurisdiction over the election process in the St. Croix Election District, including “the registration of electors and conduct of primaries and elections.” V.I. Code Ann. tit. 18, §§ 41 and 47.

6. Defendant Board of Elections, St. Thomas/St. John District, has general jurisdiction over the election process in the St. Thomas/St. John Election District, including “the registration of electors and conduct of primaries and elections.” V.I. Code Ann. tit. 18, §§ 41 and 47.

7. Defendant John Abramson, Jr. is sued in his official capacity as the Supervisor of Elections of the Territory of the Virgin Islands. The Supervisor of Elections is appointed by the Virgin Islands Joint Boards of Elections and is the Territory’s chief election official. 18 V.I. Code Ann. tit. 18, § 4. The Supervisor of Elections is, among other things, charged with preparing, receiving applications for, and distributing absentee ballots. *Id.*

FEDERAL PRIMARY ELECTION

8. On September 8, 2012, the Territory will hold a Federal primary election for the Virgin Islands Delegate to the United States House of Representatives. *See* V.I. Code Ann. tit. 18, § 232. The Virgin Islands Delegate is elected at large by majority vote in even-numbered years. 48 U.S.C. §§ 1712, 1715.

9. Section 102(a)(8) of UOCAVA requires that States transmit validly requested ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is

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received at least 45 days before the election, unless a hardship exemption is obtained pursuant to Section 102(g) of UOCAVA, 42 U.S.C. § 1973ff-1(g). 42 U.S.C. § 1973ff-1(a)(8). The Virgin Islands has not sought or obtained a hardship exemption for any of its 2012 Federal elections.

10. The deadline for transmission of absentee ballots to UOCAVA voters who have requested them at least 45 days before the September 8, 2012 Federal primary election was July 25, 2012.

11. Under Territory law, this year's candidate qualifying period for the September 8, 2012 primary election for Delegate did not end until August 14, 2012. *See* V.I. Code Ann. tit. 18, § 410(a)(2).

12. The Virgin Islands failed to transmit absentee ballots for the September 8, 2012 Federal primary election to UOCAVA voters who requested them by the deadline of July 25, 2012.

13. The Territory's failure to transmit ballots to UOCAVA voters who requested them by July 25, 2012, the 45th day before the September 8, 2012 Federal primary election, violates Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A).

14. The Virgin Islands recently enacted legislation to move its primary election date to the first Saturday in August. However, the Act specifies that the change in the Territory's primary election date does not take effect until the 2014 primary election. 2012 V.I. Sess. Laws Bill No. 29-0305. The Act's changes to the Territory's primary election calendar will not provide sufficient time between the dates established for candidate qualifying and the deadline for transmission of absentee ballots for the Territory to comply with UOCAVA's 45-day deadline in future Federal primary elections. *See id.*, Section 2 (amending V.I. Code Ann. tit. 18, §§ 350, 351, 410).¹

¹ The Territory's special election law to fill a vacancy in the position of Delegate also has the potential to create a violation of UOCAVA. Territorial law requires the holding of a special election to fill any vacancy

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FEDERAL GENERAL ELECTION

15. On November 6, 2012, the Territory will hold a Federal general election for the Virgin Islands Delegate to the United States House of Representatives. See V.I. Code Ann. tit. 18, § 231.

16. The deadline for transmission of absentee ballots to UOCAVA voters who have requested them at least 45 days before the November 6, 2012 Federal general election is September 22, 2012.

17. In the Virgin Islands, to be timely submitted for counting, absentee ballots from UOCAVA voters must be received no later than ten days after the election. V.I. Code Ann. tit. 18, § 665(a). Thus, for the September 8, 2012 Federal primary election, UOCAVA ballots must be received by September 18, 2012. For the November 6, 2012 Federal general election, UOCAVA ballots must be received by November 16, 2012.

18. The Boards of Elections must certify results of an election to the Supervisor of Elections no later than 15 days following a primary or general election. V.I. Code Ann. tit. 18, § 47(9). Thus, the Boards have five days following the deadline for receipt of UOCAVA ballots to certify the results. For the September 8, 2012 Federal primary election, the results therefore must be certified by September 23, 2012. For the November 6, 2012 Federal general election, the results must be certified no later than November 21, 2012.

19. According to information provided by Territory officials, the Supervisor of Elections requires at least seven to ten days following the certification of the results of the September 8,

occurring six months or more prior to the next general election. V.I. Code Ann. tit 18, § 21(d)(2). The special election must occur "not less than 30 nor more than 45 days after the date of the occurrence of the vacancy." *Id.* In that event, the compressed election calendar required by Territorial law may prevent the Virgin Islands from transmitting UOCAVA ballots 45 days before the special election.

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2012 Federal primary election to design the Federal general election ballot, have it approved by the Board of Elections, and prepare for its transmission to UOCAVA voters.

20. Therefore, the Territory is unable to transmit ballots for the Federal general election to UOCAVA voters until September 30, 2012, at the earliest. This means that UOCAVA voters will be sent an absentee ballot no earlier than 37 days before the Federal general election.

21. The Territory's inability to transmit ballots to UOCAVA voters who have requested them by September 22, 2012, the 45th day before the November 6, 2012 Federal general election, will constitute a violation of Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A).

22. In order to avoid the burdens, delays, and uncertainties of litigation and to efficiently and expeditiously promote the parties' shared goal of ensuring that the Territory's UOCAVA voters will have sufficient opportunity to receive absentee ballots they have requested and submit marked absentee ballots in time to be counted for the September 8, 2012 Federal primary election and the November 6, 2012 Federal general election, the parties agree that this Court should enter an order which, among other remedies extends the deadline for receipt of ballots for the Federal primary election. The parties also agree that the Territory shall take all actions and adopt other permanent measures to ensure compliance with UOCAVA in all future elections for Federal office.

WHEREFORE, the parties having freely given their consent, and the terms of the Consent Decree being fair, reasonable, and consistent with the requirements of UOCAVA, it is hereby ORDERED, ADJUDGED, AND DECREED that:

- (1) Deadline for transmission of absentee ballots for Federal primary election. No later than August 31, 2012, Defendants shall transmit an

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absentee ballot for the September 8, 2012 Federal primary election to all UOCAVA voters who requested a ballot by that date.

(2) Outgoing express mail and electronic transmission options for the Federal primary election. For UOCAVA voters who by July 25, 2012 requested to receive their ballot for the September 8, 2012 Federal primary election by mail, Defendants shall send the absentee ballot using an express delivery service. In addition, such voters shall be offered the option of receiving their ballot by email or fax.

(3) Extension of ballot receipt deadline for Federal primary election. The deadline for receipt of ballots from UOCAVA voters for the September 8, 2012 primary election is extended by 7 days, from September 18, 2012, as provided by Territorial law, until September 25, 2012. In addition to accepting validly cast UOCAVA ballots for the September 8, 2012 primary election received by September 18, 2012, in accordance with Territorial law, Defendants shall take all steps necessary to ensure that all timely requested UOCAVA ballots, including Federal and Territory Write-in Absentee Ballots, are counted as validly cast ballots in the September 8, 2012 Federal primary election, provided such ballots are executed and sent by September 8, 2012, received by September 25, 2012, and are otherwise valid.

(4) Deadline for transmission of absentee ballots for Federal general election. No later than October 2, 2012, Defendants shall transmit an

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absentee ballot for the November 6, 2012 Federal general election to all UOCAVA voters who requested a ballot by that date.

- (5) Outgoing express mail and electronic transmission options for the Federal general election. For UOCAVA voters who by September 22, 2012 requested to receive their ballot for the November 6, 2012 Federal general election by mail, Defendants shall send the absentee ballot using an express delivery service. In addition, such voters shall be offered the option of receiving their ballot by email or fax.
- (6) Electronic and express mail ballot return and notice. Defendants shall provide all UOCAVA voters eligible to vote in the September 8, 2012 Federal primary election and the November 6, 2012 Federal general election with the option of returning their ballot by email, fax, or express delivery service at no cost to the voter. Defendants shall instruct each UOCAVA voter on how to exercise these return options by no later than August 31, 2012 for the Federal primary election and October 2, 2012 for the Federal general election.
- (7) Ballot counting procedures and notice. To ensure that UOCAVA voters who received two ballots will have their ballot validly counted, Defendants shall establish a procedure providing which ballot shall be counted if both ballots are returned and notify all UOCAVA voters of these rules.
- (8) Deadline for certification of Federal election results. Defendants shall certify the results of the September 8, 2012 Federal primary election

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no later than September 28, 2012. Defendants shall certify the results of the November 6, 2012 Federal general election no later than November 21, 2012.

- (9) Training of election officials. Defendants shall provide guidance and training to election officials regarding the requirements of UOCAVA and all relief being imposed under this Consent Decree, in order to enable them to take any action necessary for its implementation.
- (10) Coordination with FVAP on notice. Upon entry of this Consent Decree, Defendants shall notify the Director of the Federal Voting Assistance Program of the United States Department of Defense ("FVAP") and request assistance in notifying military and other eligible voters of the relief afforded by this agreement, and coordinate with FVAP as necessary to facilitate such notice.
- (11) Press release issuance. Upon the entry of this Consent Decree, Defendants shall take the following steps to give affected UOCAVA voters notice of the contents of this agreement by issuing a press release for immediate release, posted immediately on the Territory's election information website, and distributed as broadly and immediately as practicable to national and local wire services, to radio and television broadcast stations, and to daily newspapers of general circulation in the Territory. The press release shall also be distributed to the Federal Voting Assistance Program; International Herald Tribune (<http://www.iht.com>); USA Today International

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(<http://www.usatoday.com>); Military Times Media Group
(cvinch@militarytimes.com); Overseas Vote Foundation
(<http://www.overseasvotefoundation.org/intro/>); Stars and Stripes
(www.estripes.com), and any other appropriate newspaper or news
media in the Territory of the Virgin Islands. The press release shall, at
a minimum: (a) summarize this order, including a notice that the
deadlines for receipt of ballots for the Federal primary election has
been extended; (b) notify UOCAVA voters that they may choose to
receive their ballot for the September 8, 2012 Federal primary election
by email, fax, or express mail at no cost to the voter; (c) notify
UOCAVA voters that they may return their ballots for the September
8, 2012 Federal primary election and the November 6, 2012 Federal
general election by email, fax, or express mail at no cost to the voter;
and (d) provide appropriate contact information for the Office of the
Supervisor of Elections.

- (12) Funding Source. Defendants shall set aside at least \$9,100 in
funds to cover costs associated with the implementation of this
Consent Decree, including but not limited to, the costs of express mail
and of maintaining the Territory's election information website
through November 30, 2012.
- (13) Reporting on absentee ballots. Defendants shall provide reports
to counsel of record for the United States no later than September 28,
2012 concerning the number of UOCAVA absentee ballots received

and counted for the September 8, 2012 Federal primary election and no later than December 6, 2012 for the Federal general election. The reports will set forth the following information in a format agreed upon by the parties, categorized by absent uniformed services voters with APO/FPO addresses or non-U.S. street addresses; uniformed services voters at a street address within the U.S.; and overseas civilian voters:

- a. The number of absentee ballots from UOCAVA voters received by the applicable receipt deadline and counted;
- b. The number of absentee ballots from UOCAVA voters received later than the receipt deadline; and
- c. The number of absentee ballots from UOCAVA voters that were not counted for reasons other than late receipt, and the reasons such ballots were not counted.

(14) Records retention. Defendants shall maintain written records of all actions taken pursuant to this Consent Decree sufficient to document compliance with its terms. Such records shall be made available to the United States upon request.

(15) Future relief. To ensure compliance with UOCAVA in all future elections for Federal office, Defendants shall by December 1, 2013 take all actions and adopt such permanent measures as are necessary to ensure that UOCAVA voters have the full and effective opportunity to vote guaranteed by UOCAVA in all elections for Federal office, including taking any legislative,

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administrative, or other actions necessary to prevent future violations arising from the Territory's election calendar or other practices of the Territory. The Supervisor of Elections specifically shall undertake such efforts as are necessary to inform the Legislative and Executive branches of the Territorial government regarding the requirements of UOCAVA and the need to ensure that the Territory correct any structural barriers that would inhibit compliance in future Federal elections. The parties shall confer on the progress of these efforts, and Defendants shall provide status reports to the United States by December 1, 2012; June 1, 2013; and December 1, 2013.

Court jurisdiction. The Court shall retain jurisdiction over this action to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree and to ensure compliance with UOCAVA through January 31, 2014. For good cause shown, any party may move to extend the Consent Decree or to reopen the case.

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AGREED AND CONSENTED TO September 5, 2012

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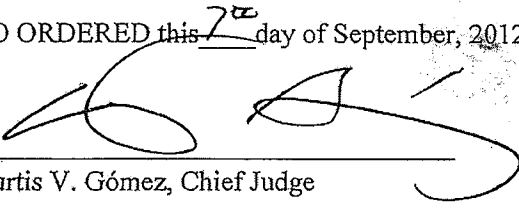
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United States v. The Territory of the Virgin Islands, et al.
Case No. 3:12-CV-00069

SO ORDERED this 7th day of September, 2012.



Curtis V. Gómez, Chief Judge

ACE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Case No. 13-cv-00189
v.)	Judge: Norgle
)	
THE STATE OF ILLINOIS;)	
THE ILLINOIS STATE BOARD OF)	
ELECTIONS; and RUPERT)	
BORGSMILLER, Executive Director)	
of the Illinois State Board of Elections,)	
)	
Defendants.)	
_____)	

CONSENT DECREE

Plaintiff United States of America initiated this action against the State of Illinois, the Illinois State Board of Elections, and Rupert Borgsmiller, the Executive Director of the Illinois State Board of Elections, in his official capacity (collectively, "Defendants"), to enforce the requirements of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. §§ 1973ff to 1973ff-7. The United States' complaint alleges a violation of UOCAVA arising from certain provisions of Illinois law that prevent the Defendants from transmitting absentee ballots to absent uniformed services voters and overseas voters ("UOCAVA voters") by the 45th day before the recently scheduled special primary election and special election for Federal office, as required by Section 102(a)(8)(A) of UOCAVA. In particular, the State will not be able to transmit ballots to UOCAVA voters 45 days prior to the scheduled February 26, 2013 special primary election and April 9, 2013 special election to fill a vacated seat in the State's 2nd Congressional District. Accordingly, UOCAVA voters will not be provided the time specified under Federal law to receive, mark, and submit their ballots and have those ballots counted in

those Federal elections.

The United States and Defendants, through their respective counsel, have conferred and agree that this action should be settled without the delay and expense of litigation. The parties share the goal of providing UOCAVA voters with sufficient opportunity under Federal law to participate in the February 26, 2013 special primary election and April 9, 2013 special election and future special elections for Federal office. The parties have negotiated in good faith and hereby agree to the entry of this Consent Decree as an appropriate resolution of the UOCAVA violations alleged by the United States. Accordingly, the United States and Defendants stipulate and agree that:

1. This action is brought by the Attorney General on behalf of the United States pursuant to UOCAVA, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) ("MOVE Act"). UOCAVA provides that UOCAVA voters shall be permitted "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 42 U.S.C. § 1973ff-1.

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4, and this Court has jurisdiction of this action pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

3. UOCAVA requires the State of Illinois to comply with UOCAVA and to ensure that validly requested absentee ballots are transmitted to UOCAVA voters in accordance with the statute's requirements. 42 U.S.C. §§ 1973ff-1 & 1973ff-6. Defendant Illinois State Board of Elections ("Board") is the state body with general supervisory powers over the administration of election laws in Illinois and is comprised of eight members appointed by the Governor. 10 Ill.

Comp. Stat. 5/1A-1. Rupert Borgsmiller is the Executive Director of the Illinois State Board of Elections and is sued in his official capacity.

4. Election authorities are the elected officers of the county clerk or Board of Election Commissioners, which are appointed by the Circuit Court in the respective jurisdictions and are responsible for the conduct of the elections, including the administration of absentee voting in their respective jurisdictions. 10 Ill. Comp. Stat. 5/1-1 et seq. Election authorities transmit ballots to UOCAVA voters, receive ballots returned by UOCAVA voters, and count the ballots as part of the election process. The State of Illinois, however, retains responsibility for ensuring compliance with UOCAVA. For purposes of this decree, the parties understand that although the local election authorities will continue to send, receive and count UOCAVA ballots as provided for in state law, as well as provide individual notice to voters as referenced in paragraph 1 of the Order, the State bears the responsibility for ensuring that the requirements of UOCAVA and this consent decree are met.

5. Pursuant to amendments made by the MOVE Act, Section 102(a)(8)(A) of UOCAVA requires that states transmit validly requested ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election, unless a hardship exemption is obtained pursuant to Section 102(g) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(8)(A).

6. Pursuant to the Illinois election code, when a vacancy occurs in the office of a representative of Congress from the State (more than 180 days before the next general election), the Governor shall issue a writ within five days following the vacancy setting a date within 115 days to hold a special election to fill the vacancy. 10 Ill. Comp. Stat. 5/25-7(a). On November 21, 2012, Representative Jesse Jackson, Jr. resigned from Congress. The Governor initially set

February 26, 2013 as the date for the special primary election and March 19, 2013, as the date for the special election.

7. Public Act 097-1134 of the Illinois General Assembly, signed by the Governor on December 2, 2012, amended the State's special election statute to require the special primary election to be held on February 26, 2013, and to require the date of the special election to be changed from March 19 to April 9, 2013. Pursuant to the amended statute, the Defendants issued a Special Election Calendar establishing deadlines related to the special primary election and special election ("Election Calendar").

8. The deadline for transmission of absentee ballots to UOCAVA voters who request them at least 45 days before the February 26, 2013 special primary election for Federal office is January 12, 2013.

9. The State's current Election Calendar requires that ballots for the February 26, 2013 special primary election be transmitted by January 12, 2013. Candidates were required to file for the open congressional seat by 5 pm on January 7, 2013. The State expects challenges to candidate petitions to be filed, and January 14, 2013, is the deadline to file such challenges. The State has represented that it will certify a ballot to go out to UOCAVA voters on January 15, 2013. Absent an order from this court, the ballot the election authorities would send to UOCAVA voters on that date, in accordance with the amended State statute, would be a blank state write-in absentee ballots (SWABs) (without an accompanying list of qualified candidates) instead of an official printed ballot. 10 Ill. Comp. Stat. 5/25-7(b). Blank SWABs will not satisfy UOCAVA's 45-day transit requirement, Section 102(a)(8)(A) of UOCAVA; 42 U.S.C. § 1973ff-1(a)(8)(A).

10. Under Illinois law, ballots from UOCAVA voters postmarked by midnight on the day before the election will be counted if they are received by the 14th day following Election Day. *See* 10 Ill. Comp. Stat. 5/20-2; 10 Ill. Comp. Stat. 5/20-2.1. Accordingly, for the February 26, 2013 special primary election, ballots from UOCAVA voters must be postmarked by February 25, 2013 and received by March 12, 2013 in order to be counted.

11. Under Illinois law, UOCAVA voters must return marked ballots (i) by mail, (ii) by delivery in person (or by a spouse, parent, child, brother, or sister), or (iii) via delivery by a licensed commercial carrier. 10 Ill. Comp. Stat. 5/20-5, 5/20-6. Illinois law does not expressly allow UOCAVA voters to return ballots by electronic means (by email or facsimile).

12. The deadline for transmission of absentee ballots to UOCAVA voters who request them at least 45 days before the April 9, 2013 special election is February 23, 2013. The State's Election Calendar requires ballots to be sent by March 14, 2013, which is 26 days before the special election. Even if the State's 14-day ballot return deadline is counted, a transmittal deadline of March 14 will not allow UOCAVA voters 45 days to receive, mark, and return their ballots for the April 9 special election.

13. The failure to transmit absentee ballots to UOCAVA voters who requested them by the 45th day before a Federal primary or general election, constitutes a violation of Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A).

14. To avoid the burdens, delays, and uncertainties of litigation and to efficiently and expeditiously promote the parties' shared goal of ensuring that Illinois's UOCAVA voters will have sufficient opportunity under Federal law to participate in the February 26, 2013 special primary election and April 9, 2013 special election for Federal office, the parties agree that this Court should enter an order setting forth amendments to the Special Election Calendar,

including: (1) changing the ballot transmission deadline for the special primary election from January 12 to January 15, 2013; (2) establishing January 31, 2013, as the last day to transmit expedited, individual notice of the final list of official candidates who qualify to appear on the ballot as determined by the State Board of Elections for the special primary election; (3) changing the ballot receipt deadline for the special primary from March 12, 2013 to March 6, 2013; and (4) establishing March 8, 2013, as the last day to transmit the official ballot for the special election. Under this calendar, for the February 26 special primary election ballots would be transmitted to UOCAVA voters no less than 42 days before the date of the election and 49 days before the ballot receipt deadline, and for the April 9 special election, ballots would be transmitted to UOCAVA voters no less than 32 days before the date of the election and 46 days before the ballot receipt deadline.

15. The parties further agree that this Court should enter an order requiring that:

- (a) by January 15, 2013, the State ensure transmittal of an official absentee ballot to each UOCAVA voter who has applied for an absentee ballot on or before January 15, 2013, accompanied by a notice identifying the candidate challenges that have been filed by the January 14, 2013 challenge deadline, stating that such challenges will be adjudicated by the State Board of Elections by no later than January 30, 2013, and advising voters of possible judicial review of any such challenges;
- (b) by January 31, 2013, the State ensure expedited transmittal to each UOCAVA voter of a notice of the final list of candidates who will appear on the ballot for the February 26, 2013 special primary election according to the determination of the State Board of Elections;

- (c) by March 8, 2013, the State ensure transmittal of ballots to each UOCAVA voter who has applied for an absentee ballot;
- (d) the State ensure expedited transmittal of all UOCAVA ballots for both the February 26, 2013 special primary election and April 9, 2013 special election according to the preference of the voter (by mail, email, or facsimile). For those voters who requested that their ballot be sent by mail, the State shall send the ballot by express mail delivery; and
- (e) the State permit all UOCAVA voters the option of returning their marked ballots by express mail at no expense to the voter, or by electronic means, including electronic mail, facsimile, and the on-line marking and return system available to UOCAVA voters in the City of Chicago and Cook County.

The parties reserve the right to modify this agreement as necessary, subject to approval from the Court. For example, the deadline to file challenges to candidate petitions (January 14) has not yet passed. The parties will confer after that deadline and, if it appears that due to the number or complexity of the challenges the process for resolving petition challenges will not be completed by January 30, 2012, the parties may seek appropriate modification of this decree or other relief from the Court. The parties also reserve the right to seek additional supplemental relief if information regarding additional UOCAVA violations is discovered.

WHEREFORE, the parties having freely given their consent, and the terms of the Decree being fair, reasonable, and consistent with the requirements of UOCAVA, it is hereby ORDERED, ADJUDGED, and DECREED by the Court that:

- (1) Defendants shall, upon entry of this decree, ensure that all UOCAVA voters who, on or before January 15, 2013, request absentee ballots for

the February 26, 2013 special primary election for Federal office are transmitted ballots by January 15, 2013 by the requested method. The ballots shall be official ballots identifying the candidates certified on January 15, 2013, and the information provided with the ballots shall include: (a) a notice identifying any candidate challenges that have been filed by January 14, 2013, stating that such challenges will be adjudicated by the State Board of Elections by no later than January 30, 2013, advising that the Board will provide notice to voters of the outcome of those challenges by January 31, 2013, and advising voters of possible judicial review of any such challenges; and (b) appropriate instructions explaining the ballot return deadlines, and the options and procedures for returning a ballot in order for it to be counted. By no later than January 31, 2013, Defendants shall transmit by expedited means to all UOCAVA voters an individual notice of the final list of names of certified candidates who qualify to appear on the ballot for the February 26, 2013 special primary election according to the determination of the State Board of Elections.

- (2) To ensure that Illinois's UOCAVA voters will have sufficient opportunity under Federal law to receive absentee ballots they have requested and to submit marked absentee ballots in time to be counted for the February 26, 2013 special primary election, Illinois shall count as validly cast ballots in the February 26, 2013 special primary election all ballots, including Federal Write-In Absentee Ballots, that

are postmarked on or before February 25, 2013, are received by March 6, 2013 and are otherwise valid; or if received electronically (by email, facsimile, or an online ballot marking and return system) by 7:00 p.m. CST on Election Day.

- (3) Defendants shall, upon entry of this decree, ensure that all UOCAVA voters who, on or before March 8, 2013, request absentee ballots for the April 9, 2013 special election for Federal office are transmitted their ballots by the requested method. The ballots shall be official ballots, and the information provided with the ballots shall include appropriate instructions explaining the ballot return deadlines and the options and procedures for returning a ballot in order for it to be counted.
- (4) To ensure that Illinois's UOCAVA voters will have sufficient opportunity under Federal law to receive absentee ballots they have requested and to submit marked absentee ballots in time to be counted for the April 9, 2013 special election, Illinois shall count as validly cast ballots in the April 9, 2013 special election all ballots, including Federal Write-In Absentee Ballots, that are postmarked on or before April 8, 2013, are received by April 23, 2013, and are otherwise valid; or if received electronically (by email, facsimile, or an online ballot marking and return system) by 7:00 p.m. CST on Election Day.
- (5) The State shall ensure expedited transmittal of all UOCAVA ballots for both the February 26, 2013 special primary election and April 9,

2013 special election according to the preference of the voter (by mail, email, facsimile, or an online ballot marking and return system). For those voters who requested that their ballot be sent by mail, the State shall send the ballot by express mail delivery.

- (6) The State shall provide an option for express mail delivery service and electronic return (the voter may choose either one) for the marked ballots for all UOCAVA voters at no expense to those voters for both the special primary and the special election.
- (7) For purposes of this Decree, the term "postmark" shall include the date contained on the express mail delivery packaging for ballots returned by express mail delivery (or absent a postmark, the date inserted on the certification, as provided in 10 Ill. Comp. Stat. 5/20-8(c)).
- (8) Upon entry of this Consent Decree, the Defendants shall issue a press statement for immediate release, posted immediately on the Illinois's State Board of Elections website and distributed to the Federal Voting Assistance Program (FVAP); International Herald Tribune (<http://www.ihf.com>); USA Today International (<http://www.usatoday.com>); Military Times Media Group (cvinch@militarytimes.com); Overseas Vote Foundation (<http://www.overseasvotefoundation.org/intro/>); Stars and Stripes (<http://www.estripes.com>); and any other Illinois newspaper or news media Defendants choose to reach UOCAVA voters in the 2nd Congressional district. The news release shall, at a minimum: (a)

summarize this order, including a notice of the specific deadlines for receipt of the ballot for the special primary and special elections; (b) identify the contests for Federal office that will be on the ballot for the February 26, 2013 special primary election and April 9, 2013 special election; and (c) provide appropriate contact information for the State Board of Elections for assistance.

(9) The Defendants shall provide a report to the United States Department of Justice no later than January 16, 2013, concerning the transmittal of UOCAVA ballots for the February 26, 2013 special primary election by local election jurisdictions. The report shall:

a. Certify that absentee ballots were transmitted no later than January 15, 2013, to all qualified UOCAVA voters whose applications for ballots were received and approved by that date; and

b. Indicate, by local election jurisdiction, the number of requests received and the number of UOCAVA absentee ballots transmitted by January 15, 2013, and the method of transmittal thereof.

(10) The Defendants shall provide a report to the United States Department of Justice no later than February 1, 2013, confirming that each UOCAVA voter has been provided individual notice electronically or through other means of the final list of names of certified candidates who qualify to appear on the ballot for the

February 26, 2013 special primary.

(11) The Defendants shall file a report with the United States

Department of Justice no later than March 11, 2013, concerning the transmittal of UOCAVA ballots for the April 9, 2013, special election for Federal office. The report shall:

- a. Certify that absentee ballots were transmitted no later than March 8, 2013, to all qualified UOCAVA voters whose applications for ballots were received and approved by that date; and
- b. Indicate, by local election jurisdiction, the number of requests received and the number of UOCAVA absentee ballots transmitted by March 8, 2013, and the method of transmittal thereof.

(12) The Defendants shall take such actions as are necessary to assure that UOCAVA voters shall have a fair and reasonable opportunity to participate in future Federal elections, including proposing legislation and taking any administrative actions needed to fully remedy the potential UOCAVA violations arising from Illinois law governing the State's special election calendar. Specifically, the State Board of Elections will recommend an amendment to Section 25-7 of the Election Code, providing additional time to schedule special primary elections and special elections to fill vacancies in the office of U.S. Representative in Congress taking into account

the 45 day advance ballot transmittal requirements of UOCAVA.

The parties agree to confer on the progress of these efforts, and

Defendants shall provide a status report to the United States

Department of Justice by June 3, 2013.

The Court shall retain jurisdiction over this action through October 31, 2013, within which the parties may file motions to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree and to enter such relief as may be necessary to abate any UOCAVA violation with respect to future Federal elections.

The undersigned agree to entry of this Consent Decree.

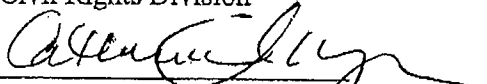
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Date: January 10, 2013

For the Defendants:

State Board of Elections

By: *August H. Bergman*
Title: *Executive Director*

Date: *1/10/13*

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SO ORDERED this *11* day of *JAN*, 2013.

Charles R. Noyes
United States District Judge

EXHIBIT 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JACOB CORMAN, et al.,

Plaintiffs,

v.

ROBERT TORRES, et al.,

Defendants.

No. 18-cv-00443-CCC

(filed electronically)

DECLARATION OF COMMISSIONER RODNEY D. RUDDOCK

1. I am submitting this Declaration in support of Plaintiffs' Motion for Preliminary Injunction.

2. I am the County Commissioner of Indiana, in which capacity, I am also a member of the Indiana Board of Elections. Since being elected in 2004, I have overseen 22 elections in Indiana. The County Board of Elections performs all duties imposed upon them at the state level by the Pennsylvania Election Code and at the federal level by the National Voter Registration Act (NVRA), and the Help America Vote Act (HAVA). This also includes the obligation to ensure that absentee ballots to military personnel and oversees voters are sent in a timely manner, as required under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).

3. I am aware that officials from the Pennsylvania Department of State, who are Defendants in this action, have alleged that reverting to the 2011 Map would cause mass confusion and pose insurmountable logistical obstacles to local county officials charged with administering elections. While I believe the Department has operated with commendable speed in attempting to make the necessary adjustment and I do not question their good-faith efforts, respectfully, I believe they are ill-situated to comment on the state of affairs at the local level with respect to the pervasive confusion currently extant. I have no reason to disbelieve Defendants' averment that from a technical, high-level administrative aspect, they have been successful in implementing the new congressional boundaries. However, I can say with strong certainty that confusion will impact the electorate of Indiana County.

4. While Defendants are correct that a further truncated timetable resulting from a preliminary injunction will cause some confusion and logistical difficulties, these challenges pale in comparison to the sheer confusion that has resulted – and will undoubtedly continue – from the efforts to implement the new redistricting plan ordered by the State Supreme Court.

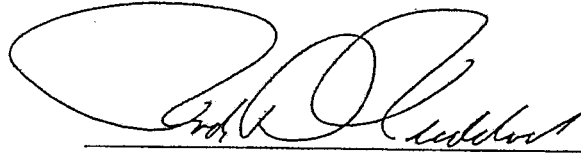
5. I recognize that if the election schedule is altered any further, it may not be possible to have absentee ballots ready for transmittal 45 days prior to the May 2018 primary, as required by federal law. However, unlike Defendants, I

believe it would be entirely feasible to revert to the 2011 Plan without violating the federal statute and implement the proposal in the next election cycle. Faced with similar circumstances, federal courts routinely craft plans that permit an election to be held as scheduled, while also requiring elections administrators to implement additional measures to protect the rights of overseas voters. Most often, courts order the state and county officials to extend the deadline for accepting absentee ballots. Applying that remedy here, the primary can be held as scheduled, with the only delay occurring in officially certifying the election results. Particularly given that Pennsylvania's primary is relatively early, a short postponement in this respect will not be disruptive.

6. In fact, a court order clearly delineating each county's responsibilities is far more preferable than the revised calendar currently in place. According to this timetable, County Boards of Elections are required to transmit absentee all ballots by March 30, 2018, but the congressional candidates whose names will appear on the ballots for the May 2018 primary election will not be finalized until April 4, 2018. As such, if there are any challenges (which there likely will be), county boards of election will face a difficult choice: either send unsettled ballots, or violate federal law by sending ballots after the statutory deadline.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Respectfully,

A handwritten signature in black ink, appearing to read "Rodney D. Ruddock", written over a horizontal line.

Rodney D. Ruddock, Commissioner
Indiana County Board of Commissioners
Indiana County Courthouse
825 Philadelphia Street
Indiana, PA 15701

Executed on March 7, 2018

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JACOB CORMAN, et al.,

Plaintiffs,

v.

ROBERT TORRES, et al.,

Defendants.

No. 18-cv-00443-CCC

ORDER

AND NOW, this ____ day of _____, 2018, in consideration of the Motion for Leave to Participate as Amicus Curiae filed by Movant, Senator Guy Reschenthaler of the Senate of Pennsylvania, the Motion is hereby granted. Amicus Curiae is hereby granted leave to file its Brief.

By the Court:

Kent A. Jordan, Circuit Judge
*United States Court of Appeals
for the Third Circuit*

Christopher C. Conner, Chief District Judge
*United States District Court
for the Middle District of Pennsylvania*

Jerome B. Simandle, District Judge
*United States District Court
for the District of New Jersey*