

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 THE STATE OF NEW MEXICO and)
 NEW MEXICO SECRETARY OF STATE)
 MARY HERRERA, in her official capacity,)
)
 Defendants.)
)
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)
 _____)

Case No. 10-cv-968

COMPLAINT

The United States of America alleges:

1. This action is brought by the Attorney General on behalf of the United States pursuant to 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, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) (“MOVE Act”). UOCAVA requires that absent uniformed services voters and overseas voters (“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. Pursuant to amendments made by the MOVE Act, UOCAVA requires that states transmit absentee ballots to UOCAVA voters at least 45 days in advance of an election for Federal office when ballot requests have been received within 45 days of that election, unless the state receives a hardship exemption pursuant to UOCAVA. 42 U.S.C. §§ 1973ff-1(a)(8) & (g). New Mexico neither

sought nor received a hardship waiver under UOCAVA for the November 2, 2010 Federal general election.

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4, and brings this enforcement action to ensure that New Mexico's UOCAVA voters have sufficient time to receive absentee ballots they have requested and submit marked absentee ballots in time to be counted for the November 2, 2010 Federal general election.

3. This Court has jurisdiction pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

4. Defendant State of New Mexico 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 & 1973ff-6.

5. Defendant Mary Herrera is sued in her official capacity as the New Mexico Secretary of State. As Secretary of State, Herrera is New Mexico's chief state election officer and responsible for the State's compliance with UOCAVA. N.M. Stat. Ann. § 1-2-1.

6. 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). New Mexico did not seek or obtain any such hardship exemption for the November 2, 2010 election.

7. New Mexico election officials received timely requests for absentee ballots for the November 2, 2010 Federal general election from voters who are entitled to vote pursuant to the provisions of UOCAVA.

8. The 45th day before the November 2, 2010 Federal general election was September 18, 2010.

9. Under New Mexico law, ballots from UOCAVA voters must be received by 7 pm on election day to be counted. N.M Stat. Ann. § 1-6-10(B).

10. Election officials in six New Mexico counties—Curry, Los Alamos, McKinley, Rio Arriba, Sandoval, and Taos—did not transmit ballots by September 18, 2010 to the UOCAVA voters in those counties who validly requested ballots by that date. Instead, those ballots were transmitted to UOCAVA voters two to four days late on September 20-22, 2010. Depending on the preference of the voter, the ballots were either sent electronically or mailed by the U.S. Postal Service. At least 102 ballots were transmitted late; 50 of those by postal mail.

11. Failure to transmit absentee ballots to the UOCAVA voters in Curry, Los Alamos, McKinley, Rio Arriba, Sandoval, and Taos Counties 45 days in advance of the November 2, 2010 Federal general election constitutes a violation of Section 102(a)(8)(A) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(8)(A).

12. An order of this Court is necessary to require Defendants to take corrective action in order to protect the rights granted by UOCAVA and to ensure that the UOCAVA voters have sufficient opportunity to receive, mark, and submit their ballots in time to have them counted for the November 2, 2010 general election for Federal office.

WHEREFORE, Plaintiff asks this Court to hear this action pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. § 1345, and:

(1) Issue a declaratory judgment under 28 U.S.C. § 2201 that the failure of New Mexico election officials to send absentee ballots to UOCAVA voters at least 45 days in advance of the

November 2, 2010 general election for Federal office violates Section 102(a)(8)(A) of UOCAVA; and

(2) Issue injunctive relief ordering the Defendants, their agents and successors in office, and all persons acting in concert with them:

- (a) To count as validly cast ballots in the November 2, 2010 general election for Federal office all ballots cast by UOCAVA voters who requested ballots by September 18, 2010, provided such ballots are executed by November 2, 2010, received by 7 pm on November 6, 2010, and are otherwise valid;
- (b) To take all additional steps as are necessary to ensure that UOCAVA voters shall have sufficient time to receive, mark, and submit their ballots in time to have them counted in the November 2, 2010 general election for Federal office;
- (c) To take such steps as are necessary to afford UOCAVA voters who are eligible to participate in New Mexico's November 2, 2010 general election for Federal office a reasonable opportunity to learn of this Court's order;
- (d) To provide a report to the United States concerning the transmission, receipt, and counting of ballots for the November 2, 2010 general election for Federal office pursuant to this Court's order within 45 days after the election; and
- (e) To take such other steps as are necessary to assure that New Mexico conducts its elections in compliance with UOCAVA in future federal elections.

The United States further asks this Court to order such other relief as the interests of justice may require, together with the costs and disbursements of this action.

Date: October 12, 2010

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