

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE STATE OF WISCONSIN; THE )  
 WISCONSIN GOVERNMENT )  
 ACCOUNTABILITY BOARD; THE )  
 HON. DAVID G. DEININGER, its Chair; )  
 THE HONS., MICHAEL BRENNAN, )  
 GERALD C. NICHOL, THOMAS BARLAND )  
 and THOMAS CANE, its members; )  
 and KEVIN J. KENNEDY, its Director )  
 and General Counsel, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

Case No. 12-CV-197

**COMPLAINT**

The United States of America alleges:

1. This action is initiated by the Attorney General on behalf of the United States pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) of 1986, 42 U.S.C. §§ 1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment Act (“MOVE Act”) of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009). UOCAVA provides 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).

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4, and brings this action for declaratory and injunctive relief to ensure that absent uniformed services voters and overseas voters (“UOCAVA voters”) will have the opportunity to vote guaranteed by UOCAVA in Wisconsin’s 2012 elections for Federal office and in future elections for Federal office.

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 Wisconsin (the “State”) is charged with the responsibility of 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.

5. Defendant Wisconsin Government Accountability Board (the “G.A.B.”) 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).

6. 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.

7. 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).

8. UOCAVA requires that States transmit all validly-requested ballots to UOCAVA voters by mail or electronically, in accordance with the voter’s designation, 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 waiver is obtained pursuant to Section 102(g) of UOCAVA. *See* 42 U.S.C. §§ 1973ff-1(a)(8) & (g).

9. In 2010, Wisconsin sought a hardship exemption under UOCAVA because the date of Wisconsin’s 2010 Federal primary election and other State laws related to certifying candidates and preparing ballots for the 2010 Federal general election precluded the State from transmitting absentee ballots to UOCAVA voters by the 45-day transmittal deadline. On August 27, 2010, the Department of Defense denied the request for a waiver. On September 10, 2010, the Department filed a lawsuit against the State to enforce UOCAVA.

10. On September 15, 2010, the Court entered a consent decree, which among other terms, provided that the State ensure that all UOCAVA voters who requested a ballot for the 2010 Federal general election were sent a ballot by October 1, 2010, and extended the ballot receipt deadline for UOCAVA voters to November 19, 2010. However, a total of 95 ballots were sent to UOCAVA voters after the October 1, 2010 deadline, including 25 ballots that were sent with less than 45 days total transit time (*i.e.*, between 44 and 42 days before the ballot return deadline.). The State was subject to the terms of the Consent Decree through December 31, 2010.

11. Wisconsin will hold a Federal primary election, a presidential preference primary, on April 3, 2012; a Federal primary election for United States Senate and members of the State’s

Congressional delegation on August 14, 2012; and a Federal general election on November 6, 2012. The State of Wisconsin neither has sought nor received a hardship waiver under UOCAVA for any Federal election in 2012.

12. The 45th day before the April 3, 2012 presidential preference primary election was February 18, 2012.

13. Municipalities of the State have received timely requests for absentee ballots for the April 3, 2012 presidential preference primary election from voters who are entitled to vote pursuant to the provisions of UOCAVA.

14. 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).

15. 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).

16. On March 8 and 9, 2012, the G.A.B. provided the United States with a preliminary report of compliance with UOCAVA's 45-day transmittal deadline of February 18, 2012 for the presidential preference primary, based on the responses 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.

17. According to the G.A.B.'s preliminary reports, received through March 21, 2012, at least 65 Wisconsin municipalities did not transmit ballots by February 18, 2012, to UOCAVA

voters who requested ballots by that date. 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.

18. Defendants' failure to transmit absentee ballots to UOCAVA voters 45 days in advance of the April 3, 2012 presidential primary election constitutes a violation of Section 102(a)(8)(A) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(8)(A).

19. An order of this Court is necessary requiring Defendants to take corrective action in order to protect the rights granted by UOCAVA and to ensure that the State's UOCAVA voters have 45 days to receive, mark, and submit their ballots in time to have them counted for the April 3, 2012 presidential preference primary election, and in all future Federal elections.

WHEREFORE, the United States asks this Court to hear this action pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. § 1345 & 2201, and:

(1) Issue a declaratory judgment under 28 U.S.C. § 2201 that Wisconsin violated Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. §§ 1973ff-1(a)(8)(A), by failing to ensure that absentee ballots were transmitted to UOCAVA voters by February 18, 2012, for the April 3, 2012 presidential preference primary election; and

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

(a) To take such 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 April 3, 2012 presidential preference primary election;

(b) To take such steps as are necessary to afford UOCAVA voters who are eligible to participate in the State's April 3, 2012 presidential preference primary election a reasonable opportunity to learn of this Court's order;

(c) To report to the United States and the Court concerning the transmission, receipt and counting of UOCAVA ballots, by municipality, and related procedures, for the April 3, 2012 presidential primary election for Federal office pursuant to this Court's order within 45 days after the election; and

(d) To take such other steps as are necessary to assure that the State conducts all future Federal elections in full compliance with UOCAVA, including requiring Defendants to provide pre- and post-election reports to the United States as to its UOCAVA compliance efforts for 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.

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