

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. GORDON MYSE, its Chair;)
 THE HONS. THOMAS BARLAND,)
 GERALD C. NICHOL, MICHAEL)
 BRENNAN, THOMAS CANE, and)
 DAVID G. DEININGER, its members;)
 and KEVIN J. KENNEDY, its Director)
 and General Counsel,)
)
 Defendants.)
)
 _____)

Case No. 10-cv-518

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 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). Wisconsin sought but did not receive 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 Wisconsin's UOCAVA voters will 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 Wisconsin (the "State") 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.

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 Gordon Myse 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 Thomas Barland, Gerald C. Nichol, Michael Brennan, Thomas Cane, and David G. Deininger 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. 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).

9. 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). Pursuant to Section 102(g)(2)(B)(i) of UOCAVA, the State applied for a hardship waiver on grounds that Wisconsin’s September 14, 2010 primary election prohibited the State from complying with Section 102(a)(8)(A). 42 U.S.C. §§ 1973ff-1(a)(8)(A) & (g)(2)(B)(i). On August 27, 2010, pursuant to its statutory authority, the Department of Defense denied the State’s request for a hardship exemption.

10. On September 14, 2010, the State will conduct a Federal primary election in which voters will select candidates for the Federal general election on November 2, 2010. The date of the September 14, 2010 primary election is 49 days prior to the November 2, 2010 general election for Federal office. Under Wisconsin law, as the post-election canvassing process takes approximately 14 days, the list of certified candidates for the general election is not required to

be available until September 28, 2010, 35 days before the November 2, 2010 general election.

WIS. STAT. § 7.08(2)(c).

11. Election officials of the State have 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.

12. Under Wisconsin law, local election jurisdictions are required to send absentee ballots to UOCAVA voters by October 4, 2010, WIS. STAT. § 7.15(1)(cm), and thus will transmit ballots 29 days in advance of the November 2, 2010 Federal general election.

13. Under Wisconsin law, ballots from “military electors” must be postmarked by election day and received by a municipal clerk within ten days after election day in order to be counted. WIS. STAT. § 6.221(3)(b). “Military electors” include members of a uniformed service, members of the merchant marine, civilian employees of the United States and civilians officially attached to a uniformed service who are serving outside the United States, peace corps volunteers, and spouses and dependents of the above. WIS. STAT. § 6.22(1)(b). Thus, “military electors” include members of a uniformed service stationed overseas or within the United States. With the ten-day extension, military electors would have 39 days to receive, mark, and submit their ballots.

14. Under Wisconsin law, ballots from overseas citizens who are covered under UOCAVA, but who do not qualify as “military electors,” must be returned by election day to be counted. WIS. STAT. § 6.87(6). Thus, UOCAVA voters who are not “military electors” would only have 29 days to receive, mark, and submit their ballots.

15. Defendants’ failure to transmit absentee ballots to UOCAVA voters 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).

16. 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 sufficient time 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 Wisconsin 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 take such steps as are necessary to assure 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;
- (b) To take such steps as are necessary to afford UOCAVA voters who are eligible to participate in the State's November 2, 2010 general election for Federal office a reasonable opportunity to learn of this Court's order;
- (c) To provide a report to the United States concerning the dates ballots were transmitted and the number of UOCAVA ballots, by county, sent, received, and counted for the November 2, 2010 general 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 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: September 10, 2010

ERIC H. HOLDER, JR.
Attorney General

JOHN W. VAUDREUIL
United States Attorney

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

s/ Leslie K. Herje
LESLIE K. HERJE
Assistant United States Attorney
Western District of Wisconsin
660 West Washington Avenue
Suite 303
Madison, WI 53703
Telephone: (608) 264-5158

s/ Abel Gomez
T. CHRISTIAN HERREN JR.
REBECCA WERTZ
ABEL GOMEZ
LEMA BASHIR
AMANDA GREGORY
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-1582
Facsimile: (202) 307-3961

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
 United States of America

(b) County of Residence of First Listed Plaintiff _____
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
 See attachment

DEFENDANTS
 State of Wisconsin; the Wisconsin Government Accountability Board; the Hon. Gordon Myse, its Chair; the Hons. Thomas Barland, Gerald C. Nichol, Michael Brennan . . (cont'd, for full list see attachment)

County of Residence of First Listed Defendant Dane County
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)
 Thomas C. Bellavia, Assistant Attorney General, Wisconsin
 Department of Justice, 17 W. Main St., PO Box 7857, Madison, WI 53707, Telephone: (608) 266-8690

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question (U.S. Government Not a Party)

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF	PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4 <input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5 <input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input checked="" type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district (specify)

6 Multidistrict Litigation

7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff-1(a)(8)

Brief description of cause:
Failure to mail absentee ballots to uniformed and overseas citizens 45 days before the Federal general election

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ _____

CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE: 09/10/2010

SIGNATURE OF ATTORNEY OF RECORD: 

FOR OFFICE USE ONLY:

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

Complete List of Defendants:

The State of Wisconsin; the Wisconsin Government Accountability Board; the Hon. Gordon Myse, its Chair; the Hons. Thomas Barland, Gerald C. Nichol, Michael Brennan, Thomas Cane, and David G. Deininger, its members; and Kevin J. Kennedy, its Director and General Counsel

Attorneys for Plaintiff, United States of America:

Leslie K. Herje
Assistant U.S. Attorney
Chief, Civil Division
United States Attorney's Office
Western District of Wisconsin
660 W. Washington Ave., Suite 303
P.O. Box 1585
Madison, WI 53701-1585
Telephone: (608) 264-5158
Facsimile: (608) 264-5724

T. Christian Herren Jr.
Rebecca Wertz
Abel Gomez
Lema Bashir
Amanda Gregory
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-1582
Facsimile: (202) 307-3961