

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

MCCAIN-PALIN 2008, INC.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 3:08cv709
)	
JEAN CUNNINGHAM,)	
Chairman, Virginia State Board of Elections;)	
HAROLD PYON,)	
Vice-Chairman, Virginia State Board of Elections;)	
and NANCY RODRIGUES,)	
Secretary, Virginia State Board of Elections,)	
)	
<i>Defendants.</i>)	
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**PLAINTIFF’S RESPONSE TO THE UNITED STATES’
MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Plaintiff McCain-Palin 2008, Inc. (“McCain”), by counsel, JOINS in the United States’ Motion for Temporary Restraining Order and Preliminary Injunction and, in support whereof, McCain restates the arguments in made in its Memorandum in Support of its Motion for Temporary Restraining Order and Preliminary Injunction; alternatively, McCain adopts the arguments of the United States in support of its motion. In further support of said motion, McCain says as follows:

Defendants note that UOCAVA provides an individual remedy for voters who do not receive a state-issued absentee ballot on time. They point out that a UOCAVA voter may use a federal write-in ballot to cast his vote. Yet, UOCAVA does not say that this is the *only* remedy available under the law. Indeed, if it were the only remedy, then

Defendants would never have to mail any absentee ballots to military and overseas voters.

Defendants' interpretation of UOCAVA disregards the mandatory language of 42 U.S.C. § 1973ff-1: "Each State *shall* . . . permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot . . . [and shall] accept and process" such ballots. 42 U.S.C. § 1973ff-1 (emphasis added). Defendants' reading of the statute effectively would permit a state to disregard military and overseas voters altogether, relying entirely on the federal writ-in ballot. This is not the purpose envisioned by Congress in enacting UOCAVA. Instead, UOCAVA contemplates that state-issued absentee ballots would take precedence over federal write-in ballots. *See* 42 U.S.C § 1973ff-2(b)(3) (federal write-in ballot not counted if State absentee ballot received). Defendant's interpretation would turn this provision on its head.

Defendants also contend that "UOCAVA does not require States to mail absentee ballots to UOCAVA voters a minimum number of days before an election." Defendant's Memorandum in Support of Motion to Dismiss at 3. This claim, too, ignores the mandatory language of UOCAVA. UOCAVA provides that "[e]ach State *shall* . . . accept and process" any "absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election." 42 U.S.C. § 1973ff-1(a)(3) (emphasis added).¹ Failure of a state to mail an absentee ballot requested within 30 days of the

¹ This is a deadline for UOCAVA voters to submit their applications for absentee ballots; it does not mean that local election officials can "sit" on applications received earlier.

election within adequate time for that ballot to be received and cast plainly violates UOCAVA.

In addition, Defendants forget to mention that, this year, they sought to frustrate UOCAVA by ordering that thousands of federal write-in ballots not be counted on the theory that the federally-approved ballot format did not comply with state law. According to published news reports, the Defendants “instructed local registrars to set aside any vote submitted on a federally-furnished write-in ballot unless the ballot includes the name and address of the person who witnessed to vote.” *Law Threatens Thousands of Military Votes*, Virginian-Pilot (Oct. 24, 2008) (reproduced by military.com) (see <http://www.military.com/news/article/law-threatens-thousands-of-military-votes.html>, last visited Nov. 17, 2008) (attached as **Exhibit A**); see also *200 Military Absentee Votes in Jeopardy*, Associated Press (Oct. 24, 2008) (reproduced by marinecorpstimes.com) (see http://www.marinecorpstimes.com/news/2008/10/ap_absentee_votes102308/, last visited Nov. 17, 2008) (attached as **Exhibit B**). Although state law apparently calls for that information, the federal form does not require it, and Defendants chose to follow the state law rather than the federal.

Only when the Virginia Attorney General issued an opinion over-ruling the Defendants did they relent and allow the federal write-in ballots to be counted. See Op. Att’y Gen. (Oct. 27, 2008) (attached as **Exhibit C**). By then, however, much damage had already been done. The Attorney General’s opinion was issued on October 27, one week before the election. By then, the news of the Defendants’ refusal to count federal write-in ballots had been publicized through military news channels, such as military.com, thereby chilling the use of those ballots and causing military voters to fall back on the

sate-issued ballots which were belatedly mailed to them, but acceptable to the Defendants. Under such circumstances, it is especially important to count the “late” absentee ballots cast by America’s military and other overseas citizens.

Respectfully submitted,

MCCAIN-PALIN 2008, INC.

By: _____ /s/

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CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of November, 2008, I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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