

# Exhibit A



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Appearances

Robin Elaine Perrin, Esq.

Rebecca Wertz, Esq.

Alberto Ruisanche, Esq.

For the United States.

Robert A. Dybing, Esq.

For the defendants.

1 THE CLERK: Case number 3:08 CV 709.

2 United States of America versus Jean

3 Cunningham and others.

4 Robin E. Perrin, Alberto Ruisanchez and

5 Rebecca Wertz represent the plaintiff.

6 Mr. Robert A. Dybing represents the

7 defendant.

8 Are counsel ready to proceed?

9 MR. DYBING: Ready.

10 THE COURT: I believe we are here on your

11 motion to dismiss.

12 Do you care to address it?

13 MR. DYBING: Yes, Your Honor.

14 THE COURT: All right.

15 MR. DYBING: Good afternoon. May it please

16 The Court. When we were last here, Your Honor,

17 The Court denied the request for a TRO. And among

18 The Court's comments was that when Congress has

19 prescribed a remedial scheme, that is a strong

20 indication that Congress did what it wanted to do,

21 and it is not for The Court to substitute their

22 own judgment for a different remedial scheme, as

23 is proposed in this case.

24 The complaint alleges a violation of the

25 statute called UOCAVA. The complaint, however,

1       understandably does not point to any provision  
2       about the UOCAVA that is allegedly violated.  
3       Instead they point to a "determination" made by an  
4       organization within the Defense Department.

5               Well, that determination, however reasonable,  
6       is not law. It is not under force of law. And we  
7       know that because in the UOCAVA statute Congress  
8       assigned federal responsibilities. None of those  
9       responsibilities includes preparing regulations,  
10      setting deadlines for states to mail out absentee  
11      ballots. Instead, UOCAVA also prescribed state  
12      responsibilities. And among those  
13      responsibilities, conspicuously, is not the  
14      obligation to mail out absentee ballots by a  
15      certain deadline before the election.

16             Congress knows how to set deadlines. In  
17      fact, the UOCAVA statute in many places refers to  
18      deadlines. 30 days to do this, 90 days to do  
19      that. Therefore, the absence of a state deadline  
20      to mail out absentee ballots is clearly Congress'  
21      advertent decision and not an inadvertent omission  
22      creating a vacuum that courts should fill in.

23             With regard to the particular concerns of the  
24      intervenor, the defendants understand those  
25      concerns. In fact, those concerns are what led to

1 the adoption UOCAVA and the federal write-in in  
2 1973 FF-2. And that statute says that there shall  
3 be a process for dealing with UOCAVA voters who  
4 make application for but do not receive state  
5 absentee ballots. That is precisely the situation  
6 The Court is addressing today, and we submit that  
7 where Congress, as here, prescribed a remedy for  
8 precisely the concern addressed by the intervenor  
9 in his suit papers, The Court's resolution should  
10 be guided by what Congress did and not, as  
11 intervenor suggests, to graft an ad hoc and  
12 statutorily unauthorized remedy on top of the  
13 remedy that Congress expressly adopted.

14 For those reasons, Your Honor, we  
15 respectfully move The Court to dismiss the  
16 complaint.

17 THE COURT: All right. Thank you.

18 Who is going to respond on behalf of the  
19 government?

20 MR. RUISANCHEZ: I, am Your Honor.

21 THE COURT: All right.

22 MR. RUISANCHEZ: May it please The Court, the  
23 right to vote under UOCAVA means the right to  
24 receive a timely absentee ballot. Section 102 (a)  
25 1 requires that states permit military and

1 overseas voters to vote by absentee ballot. If a  
2 defendant fails to mail absentee ballots in time  
3 for them to be received, executed, and returned by  
4 the counting deadline, then the statute has failed  
5 to permit those voters to vote by absentee ballot.  
6 That is a clear and unambiguous violation of  
7 section 102 (a) 1. Moreover, the federal voting  
8 assistance program which administers UOCAVA, the  
9 Department of Justice, which enforces UOCAVA, and  
10 court rulings for the past 20 years all contradict  
11 defendants' position.

12 They all state that UOCAVA is violated when a  
13 state fails to mail timely absentee ballots.  
14 Conversely, the defendants have failed to cite a  
15 single case, and the United States has not found  
16 one, in which a court has ruled that a state can  
17 mail untimely absentee ballots without violating  
18 UOCAVA.

19 In addition, Congress amended UOCAVA several  
20 times since its enactment, most recently in 2004.  
21 So Congress was aware of how the federal voting  
22 assistance program was administering UOCAVA, was  
23 aware of how the Department of Justice was  
24 enforcing UOCAVA, and was aware of how courts were  
25 interpreting UOCAVA. Congress had the opportunity

1 to amended that uniform interpretation of UOCAVA,  
2 and it chose not to do so.

3 Defendants argue that the failure to send  
4 timely absentee ballots does not violate UOCAVA  
5 because these voters can cast a federal write-in  
6 absentee ballot. The federal write-in absentee  
7 ballot; however, does not discharge a state of its  
8 obligation under section 102 (a) 1 to permit  
9 military and overseas voters to vote by absentee  
10 ballot. As noted, section 102 (a) 1 requires the  
11 state permit military and overseas voters to vote  
12 by absentee ballot. And section 102 (a) 3  
13 requires that states permit military and overseas  
14 voters to vote using the federal write-in absentee  
15 ballot. So it is clear that UOCAVA requires  
16 states to do both. It requires states to both  
17 permit military and overseas voters to vote by  
18 absentee ballot and to permit military and  
19 overseas voters to vote using the federal write-in  
20 absentee ballot. So the statutory language of  
21 UOCAVA is clear that the federal write-in ballot  
22 is in addition to, not instead of, the obligation  
23 that states have to permit military and overseas  
24 voters to vote by sending them an absentee ballot  
25 in a timely manner.



1           Moreover, Congress in its legislative history  
2 is clear the federal write-in absentee ballot was  
3 intended to be an emergency back-up measure. It  
4 was not intended to be a replacement for the  
5 regular state absentee ballot.

6           The defendants also argue that UOCAVA makes  
7 the federal write-in absentee ballot the exclusive  
8 remedy for late mailing. Nothing in statutory  
9 language, however, states that the federal  
10 write-in absentee ballot is the exclusive, the  
11 sole, or the only authorized remedy for late  
12 mailing. To the contrary, section 105 of UOCAVA  
13 gives the Attorney General broad enforcement  
14 authority to bring lawsuits for such declaratory  
15 and injunctive relief as is necessary to carry out  
16 this title.

17           In this case the United States submits the  
18 only relief that is necessary, or part of the  
19 relief that is necessary in order to make sure  
20 that these military and overseas voters are not  
21 disenfranchised is an order from this court to  
22 count the disputed absentee ballots that would  
23 have arrived on time had it not been for the local  
24 election officials' untimely mailing of the  
25 absentee ballot.

1           Finally, the federal write-in absentee ballot  
2 is not an equivalent to the opportunity to vote by  
3 regular absentee ballot. For many reasons. The  
4 first is, unlike a regular absentee ballot, the  
5 federal write-in absentee ballot is not mailed or  
6 sent directly to the military and overseas voter.  
7 The military and overseas voter must seek that  
8 federal write-in absentee ballot out. And for  
9 some military and overseas voters, especially  
10 those in combat areas, or those overseas citizens  
11 who are far away from where the federal write-in  
12 absentee ballot is made available, it may be very  
13 difficult for them to get a hold of the federal  
14 write-in absentee ballot. In addition, the  
15 federal absentee write-in ballot, unlike the  
16 regular absentee ballot, does not contain the  
17 names of the candidates who are running, the  
18 parties that they are affiliated with, or the  
19 positions that they are running for. So military  
20 and overseas voters may have to do some additional  
21 research when they vote with the federal write-in  
22 absentee ballot to determine exactly who they want  
23 to vote for.

24           Finally, the federal write-in absentee ballot  
25 does not contain the state instructions that are

1 needed to make sure that the federal write-in  
2 absentee ballot of the voter complies with that  
3 state's laws and is counted under those state's  
4 laws. So that, in addition, is another  
5 requirement that the military and overseas voter  
6 has to do to make sure that the federal write-in  
7 absentee ballot is counted under that voter's  
8 state law.

9 It is clear that the federal write-in  
10 absentee ballot is better than altogether  
11 disenfranchising, but Congress did not intend it  
12 to be a replacement for the regular ballot and  
13 UOCAVA does not discharge a state of its  
14 obligation to mail timely absentee ballots simply  
15 because the federal write-in ballot is available.  
16 The united States has stated an avowed claim for  
17 relief here and requests this court deny the  
18 defendants' motion to dismiss.

19 THE COURT: Thank you.

20 Mr. Dybing.

21 MR. RUISANCHEZ: Thank you Your Honor.

22 MR. DYBING: Your Honor, two points to make.

23 One is that the authority conferred on THE  
24 Attorney General to enforce UOCAVA says that he  
25 may seek relief as may be necessary to carry OUT

1 this subchapter. It does not say as necessary to  
2 carry out the determinations of people within the  
3 Department of Defense.

4 Secondly, with regard to the alleged flaws in  
5 the UOCAVA statute, we understand their position,  
6 those points are better addressed toward Congress  
7 rather than the federal judiciary.

8 THE COURT: Thank you.

9 The defendants argue that the United States'  
10 complaint should be dismissed for failure to state  
11 a claim upon which relief can be granted. This  
12 argument is premised on the absence of a specific  
13 deadline in UOCAVA for the mailing of state  
14 absentee ballots. The defendants also make an  
15 argument that the case is now moot because the  
16 results have been certified; and, two, the United  
17 States lacks standing to bring claims based on  
18 special, primary, or run-off elections. These  
19 later arguments can be dispensed with quickly.

20 Certification of the election results does  
21 nothing to change The Court's earlier  
22 determination that this is a case capable of  
23 repetition, yet evading review. Moreover, the  
24 United States is advancing an argument about  
25 canons of statutory construction, not actual

1 injury, in its discussions of special, primary,  
2 and run-off elections. Therefore, the defendants'  
3 standing argument must fail.

4 In evaluating the defendants' primary claim  
5 The Court is mindful of the admonition that; A,  
6 rule 12(b)(6) motion should be granted only in  
7 very limited circumstances, such as when the  
8 complaint fails to allege enough facts to state a  
9 claim to relief that is plausible on its face. In  
10 this case the United States is alleging that the  
11 defendants violated their obligations under UOCAVA  
12 to permit eligible voters to vote by absentee  
13 ballot in the November 4, 2008 general election.  
14 The United States asserts that the defendants  
15 failed to mail ballots to some eligible UOCAVA  
16 voters until within a fortnight of the election.  
17 Claiming this late mailing violates UOCAVA, the  
18 United States seeks an expansion of the deadline  
19 for receiving absentee ballots. It also requests  
20 that the defendants be ordered to take such steps  
21 as are necessary to insure that eligible UOCAVA  
22 voters are afforded "a fair and reasonable  
23 opportunity to participate in future federal  
24 elections." Under 42 United States Code section  
25 1973 ff-4 the United States Attorney General has

1 the power to bring civil actions for declaratory  
2 and injunctive relieve to enforce UOCAVA. In  
3 short, therefore, the party charged with enforcing  
4 UOCAVA has brought a claim that Virginia violated  
5 the statute by its alleged tardiness in mailing  
6 absentee ballots, a facially plausible claim.  
7 Given this, The Court denies the defendants'  
8 motion to dismiss.

9 Now, having read the copious filings in this  
10 case, and becoming ever more convinced that this  
11 situation cries out for a solution created by the  
12 parties rather than crafted by The Court, I want  
13 to provide you with some guidance.

14 Even if all these allegations are true, I am  
15 unlikely to order the counting of the late  
16 received ballots because, one, they will not alter  
17 the election outcomes; and in some ways, more  
18 importantly, two, under the United States' own  
19 reasoning that a minimum of 30 days is required  
20 for successful mailing, receipt, and execution of  
21 an absentee ballot a ten-day extension will not  
22 help those most harmed by Virginia's inexplicable  
23 delay in mailing absentee ballots, namely, the 125  
24 individuals whose ballots were mailed in the last  
25 fortnight before the election.

1           Moreover, a 30-day deadline cannot be  
2 rigorously enforced or justified under UOCAVA  
3 since the statute itself requires states to honor  
4 ballot applications received by the later of, one,  
5 the state's deadline for receiving them; or two,  
6 30 days before the election. Given this, Congress  
7 obviously envisioned some situations in which a  
8 state's absentee ballot would be mailed within 30  
9 days of the election. However, Congress also  
10 evidently thinks that 60 days is the necessary  
11 buffer between an election and the provisions of a  
12 state's ballot to obviate the need for the  
13 protection of a federal write-in absentee ballot.  
14 See section 1973 ff-2 (e). If it is indeed true  
15 that some ballots were not mailed until within 14  
16 days of the election, it seems clear that Virginia  
17 did indeed violate you UOCAVA and does need to  
18 take steps to insure the ballots are made  
19 available either through mailing, faxing,  
20 e-mailing, or some other method to UOCAVA voters  
21 in a better manner in future elections.  
22 Obviously, the parties have the best understanding  
23 of what steps must be taken to insure that such a  
24 troubling situation does not arise again.  
25 Therefore, I encourage you to seriously talk among

1 yourselves to see if you can reach a mutually  
2 agreeable solution for future elections. I want  
3 you -- I am going to adjourn court, but I want you  
4 to contact my law clerk to set a hearing on the  
5 merits, on the merits of your case. In the  
6 meantime, I will enter an order referring this  
7 case to a magistrate judge for a settlement  
8 conference.

9 Adjourn court until tomorrow morning, at what  
10 time?

11 THE CLERK: 10:0010.

12 THE COURT: At 10:00 o'clock.

13  
14 HEARING ADJOURNED

15 The foregoing is a true and correct transcript.

16  
17 Gilbert Frank Halasz, RMR

18 Official Court Reporter  
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