

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss.

SJC NO. 12996

SJ-2020-0584

REBECCA GROSSMAN, ET AL.,

Plaintiffs,

v.

WILLIAM FRANCIS GALVIN,
in his Official Capacity as Secretary of the Commonwealth of
Massachusetts,

Defendant

**BRIEF OF THE UNITED STATES PURSUANT TO 28 U.S.C. § 517, OR, IN
THE ALTERNATIVE, MOTION OF THE UNITED STATES
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

The Attorney General is authorized to attend to the interests of the United States in any pending suit in federal or state court. 28 U.S.C. § 517.¹ The relief requested in this

¹Section 517, in its entirety, provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

Section 517 provides clear statutory authority for the United States, in its discretion, to attend to its interests in any court or proceeding to which it is not a party. The United States has a long history of using this authority in private suits, filing over 600 statements of interest since 1925.

case implicates important questions related to Massachusetts' ability to comply with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act of 1986, ("UOCAVA"), 52 U.S.C. § 20301 *et seq.*, as amended by the Military and Overseas Voter Empowerment Act of 2009, ("MOVE Act"), Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009). The Attorney General is charged with the responsibility for the enforcement of UOCAVA, 52 U.S.C. § 20307, and has a strong interest in ensuring that the voting rights of military and overseas voters are protected, independent of any of the arguments advanced by the parties. The United States has filed similar statements of interest in other states concerning the effect of potential changes to state election schedules on UOCAVA compliance.²

In the alternative, the United States submits this motion pursuant to Rule 17(a) of the Massachusetts Rules of Appellate Procedure to file a brief as *amicus curiae* in this matter.

The Brief of the United States is attached.

Victor Zapana, Note, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 Harv. C.R.-C.L. L. Rev. 227, 228-29 (2017).

² See, e.g., *Coal. for Good Governance v. Raffensperger*, No. 1:20-CV-01677 (N.D. Ga. May 8, 2020) (ECF No. 24); *Perez v. Perry*, No. 5:11-CV-0360 (W.D. Tex. Jan. 27, 2012) (ECF No. 592).

Date: August 24, 2020

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief of the United States pursuant to 28 U.S.C. § 517, or In the Alternative, Motion of the United States for Leave to File a Brief as Amicus Curiae, in Grossman v. Galvin, SJC No. 12996, in the Supreme Judicial Court of the Commonwealth of Massachusetts, was sent via the Court's electronic notification system and via email to the following counsel of record on August 24, 2020 to:

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REBECCA GROSSMAN, ET AL.,

Plaintiffs,

v.

WILLIAM FRANCIS GALVIN,
in his Official Capacity as Secretary of the
Commonwealth of Massachusetts,

Defendant

On Application for Review

**BRIEF OF THE UNITED STATES
UNDER THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE
VOTING ACT**

IN SUPPORT OF NEITHER PARTY AND SUPPORTING NEITHER
GRANTING NOR DENYING RELIEF

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Dated: August 24, 2020

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Military and Overseas Voter Empowerment (MOVE) Act of
2009, 156 Cong. Rec. S4513-02 (daily ed. May 27, 2010)
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STATEMENT OF IDENTITY AND INTEREST

The United States files this brief pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit, and in the alternative, under Massachusetts Rule of Appellate Procedure 17. The relief requested in this case implicates important questions related to Massachusetts' ability to comply with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act of 1986, ("UOCAVA"), 52 U.S.C. § 20301 *et seq.*, as amended by the Military and Overseas Voter Empowerment Act of 2009, ("MOVE Act"), Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009). The Attorney General is charged with the responsibility for the enforcement of UOCAVA, 52 U.S.C. § 20307, and has a strong interest in ensuring that the voting rights of military and overseas voters are protected, independent of any of the arguments advanced by the parties.

RULE 17(c)(5) DECLARATION

The United States declares, in accordance with Massachusetts Rule of Appellate Procedure 17(c)(5), that: (A) no party or party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; (C) no person or entity contributed money that was intended to fund preparing or submitting this brief; and (D) neither the United States nor its counsel represents or has represented one of the parties to the present case in another proceeding involving similar issues, nor was a party or represented a party in a proceeding or legal transaction that is at issue in the present case.

ARGUMENT

1. Background

This Court is considering Plaintiffs' request to extend the ballot receipt deadline for the September 1, 2020 Federal primary election. This question necessarily implicates other election deadlines, which in turn implicate important questions related to Massachusetts' ability to comply with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act of 1986, ("UOCAVA"), 52 U.S.C. § 20301 *et seq.*, as amended by the Military and Overseas Voter Empowerment Act of 2009, ("MOVE Act"), Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009).

The Attorney General is charged with the responsibility for the enforcement of UOCAVA, 52 U.S.C. § 20307, and has a strong interest in ensuring that the voting rights of military and overseas voters are protected. Accordingly, the United States respectfully requests that the Court factor the requirements of UOCAVA into its consideration of the Plaintiffs' requested ballot receipt deadline extension for the September 1, 2020 Federal primary election and ensure that any modification to the

election deadlines or schedule, if granted, provides sufficient time for Massachusetts to transmit ballots for the November 3, 2020 Federal general election in accordance with UOCAVA's mandate.

2. Discussion

UOCAVA guarantees active duty members of the uniformed services (and their spouses and dependents) absent from home by reason of that active duty, and United States citizens residing overseas, the right "to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 52 U.S.C. § 20302(a)(1). UOCAVA reflects Congress' determination that military and overseas voter participation in Federal elections is a vital national interest. *See Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000) ("[Voting is] a sacred element of the democratic process. For our citizens overseas, voting by absentee ballot may be the only practical means to exercise that right. For the members of our military, the absentee ballot is a cherished mechanism to voice their political opinion. . . . [It] should be provided no matter what their location.").

The MOVE Act reaffirmed Congress' commitment to ensuring that UOCAVA voters have sufficient time to receive, mark, and return their ballots in time to be counted. See Military and Overseas Voter Empowerment (MOVE) Act of 2009, 156 Cong. Rec. S4513-02, S4518 (daily ed. May 27, 2010) (statement of Sen. Charles Schumer). To give these voters adequate time to vote, the MOVE Act amended UOCAVA to require that states transmit validly requested ballots to UOCAVA voters at least 45 days before an election for Federal office when the request is received at least 45 days before the election.¹ 52 U.S.C. § 20302(a)(8) ("Each state shall . . . transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election."); 52 U.S.C. § 20302(g)(1)(A) ("the purpose [of the 45-day requirement] is to allow absent uniformed services voters and overseas enough time to

¹ Section 102(g) of UOCAVA permits a state in certain limited circumstances to seek a hardship exemption from the 45-day advance transmission requirements from the Presidential designee, the Secretary of Defense. 52 U.S.C. § 20302(g); Exec. Order No. 12,642, 53 Fed. Reg. 21,975 (June 8, 1988). However, the hardship exemption provision should not be viewed as a safe harbor for a schedule that avoidably fails to comply with the 45-day requirement.

vote"); see 156 Cong. Rec. at S4518 (discussing development of 45-day advance transmission requirement based upon evidence before Congress).

We urge the Court to ensure that any extension of the ballot receipt deadline or other alteration of the schedule for the September 1, 2020 Federal primary election, if granted, will not impede Massachusetts' compliance with UOCAVA. The 45-day ballot transmission deadline required by UOCAVA for the November 3, 2020 Federal general election is September 19, 2020. In order for Massachusetts to meet its Federal law obligations to military and overseas voters, there must be sufficient time after the September 1, 2020 Federal primary election for the State to certify the general election ballot and provide those ballots to the local clerks of elections so that they can timely transmit the military and overseas ballots by email, fax, or mail (as requested by the voter) by September 19, 2020. Sending ballots to UOCAVA voters after the 45-day deadline violates Federal law requirements embodied in UOCAVA, undermines the purpose of the MOVE Act and presents the real possibility of disenfranchising military and overseas voters.

The United States does not advocate here for or against an extension of the ballot receipt deadline, or for or against an extension of any particular number of days. The United States simply requests that any modification of the election deadlines or schedule, if granted, enables Massachusetts to transmit ballots for the November 3, 2020 Federal general election in timely compliance with UOCAVA.² The United States does not express a view on any other claim or issue presented in this litigation.

3. Conclusion

The United States respectfully requests that this Court account for the requirements of UOCAVA in its consideration of Plaintiffs' requested relief and ensure that any order issued will allow for ballots

² To the extent any state laws or party regulations impede the ability to ensure ballots are sent by the UOCAVA deadline, they must give way. See *Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d at 1314 (noting that any state law that conflicts with UOCAVA is preempted and invalid); *United States v. Cunningham*, No. 08-cv-709, 2009 WL 3350028, at *10 (E.D. Va. Oct. 15, 2009) ("[T]he Commonwealth of Virginia has an obligation under the Supremacy Clause to protect the federally-guaranteed civil right of UOCAVA voters to vote by absentee ballot in federal elections. To the extent that protecting that right conflicts with Virginia law, Virginia law must give way.").

for the November 3, 2020 Federal general election to be transmitted timely to military and overseas voters no later than the UOCAVA deadline of September 19, 2020. It is essential that Massachusetts' UOCAVA voters, many of whom are deployed across the United States and abroad in service to our country, are provided the full opportunity to vote embodied in UOCAVA.

Date: August 24, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Rules 17 and 20 of the Massachusetts Rules of Appellate Procedure. In compliance with Rules 20(a)(2)(C) and 20(a)(4), the brief uses monospaced Courier New 12 point font with 10 characters per inch. It has one inch top and bottom margins, and 1.5 inch left and right margins. The brief is 6 non-excluded pages and thereby does not exceed 35 pages of countable material.

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