U.S. Department of Justice

Civil Rights Division

Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403

October 10, 2012

Margaret Carter, Clerk
United States Court of Appeals for
the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: *Colón-Marrero* v. *Conty-Perez*, No. 12-2145

Dear Ms. Carter:

The United States submits this letter brief as amicus curiae in response to this Court's invitation in its order dated October 3, 2012. As explained below, the provisions of the National Voter Registration Act of 1993 (NVRA), Pub. L. 103-31, 107 Stat. 77, addressed in this case do not apply to Puerto Rico. Furthermore, Congress's choice to exempt Puerto Rico from such coverage does not amount to a violation of the Equal Protection Clause. The United States expresses no view on any other issue in this appeal.

1. The Relevant Provisions Of The NVRA Do Not Apply To Puerto Rico

Plaintiff contends that various officials of Puerto Rico violated the NVRA by removing her from the rolls of those registered to vote in the 2012 federal election because she failed to vote in the 2008 federal election. As the district court correctly stated, this claim is erroneous, because the NVRA provision upon which she relies does not apply to Puerto Rico.

In relevant part, the NVRA provides:

> Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office * * * shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual * * * has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

42 U.S.C. 1973gg-6(b)(2)(B). By its terms, this provision, like many others in the NVRA, only applies to a "State program or activity."

A different provision of the NVRA defines the term "State" as "a State of the United States and the District of Columbia." 42 U.S.C. 1973gg-1(4). Thus, even as Congress explicitly expanded the definition of "State" beyond the term's ordinary usage to include the District of Columbia, it chose not to include Puerto Rico. Plaintiff asks that this provision be read as though Congress also had included Puerto Rico, but the rule of statutory construction *expressio unius est exclusio alterius* precludes this argument. See, *e.g.*, *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (where the Federal Rules of Civil Procedure require greater specificity in pleading fraud or mistake, *expressio unius est exclusio alterius* bars the expansion of such specificity requirement to other claims).

Moreover, where Congress wishes to include Puerto Rico (and various other jurisdictions) in the definition of "State," it knows how to do so – and has done so many times. See, *e.g.*, 2 U.S.C. 60e-1b ("the term 'State' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States"); 2 U.S.C. 431(12) ("The term 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United states"). In particular, just seven years prior to NVRA's passage, Congress had enacted the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), Pub. L. 99-410, 100 Stat. 927, in which it defined "State" as "a State of the United states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa." 42 U.S.C. 1973ff-6(6). And just a few years later, in the Help America Vote Act of 2002 (HAVA), Pub. L. 107-252, 116 Stat. 1727, Congress defined State as "the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, and the United States Virgin Islands." 42 U.S.C. 15541. Against that background, there is no reason to think that exclusion of Puerto Rico from the NVRA's definition of "State" was anything other than a deliberate choice.

Plaintiff misses the mark in observing, see Appellants' Br. 26-27, that the NVRA incorporates the Federal Election Campaign Act (FECA) of 1971's broad definition of "Federal office," which includes Puerto Rico's Resident Commissioner to the Congress. See 42 U.S.C. 1973gg-1(2) (incorporating definition provided in 2 U.S.C. 431(3)). Even as Congress incorporated that broad definition of "Federal office" into the NVRA, it chose in the same enactment not to incorporate the FECA's equally broad definition of "State," instead defining "State" more narrowly. Compare 2 U.S.C. 431(12) ("State" includes Puerto Rico) with 42 U.S.C. 1973gg-1(4) ("State" does not). There is no basis for plaintiff's argument that Congress's incorporation of a different FECA definition into the NVRA can supersede its choice not to incorporate FECA's definition with respect to the very term at issue here. Rather, the different treatment of those two terms from FECA further illustrates that Congress made the deliberate decision to incorporate one but not the other.

Plaintiff also errs in arguing that HAVA implicitly expanded the NVRA's reach to cover additional jurisdictions, including Puerto Rico. See Appellant's Br. 30-31. To be sure, HAVA itself covers Puerto Rico. See 42 U.S.C. 15541. But while HAVA imposes obligations of its own on covered jurisdictions – including Puerto Rico – it does not expand the coverage of the NVRA. Cf. *Gonzalez* v. *Arizona*, 677 F.3d 383, 402 (9th Cir. 2012) (en banc) ("Congress intended to preserve the NVRA except as to the specific changes it enacted in HAVA."), petition for cert. pending, No. 12-71 (filed July 16, 2012).

Plaintiff relies upon a provision of HAVA that states:

> The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> (A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

42 U.S.C. 15483(a)(4)(A). Nothing in this provision is inconsistent with the NVRA or purports to expand the NVRA's coverage to additional jurisdictions. To the contrary, HAVA elsewhere specifically provides, and contemplates in multiple places, that certain States exempted from the NVRA's original coverage remain exempted. See, *e.g.*, 42 U.S.C. 15483(b)(5) ("Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the [NVRA] before October 29, 2002, to comply with such a provision after [October 29, 2002]."). [1] Moreover, while there is no ambiguity in the statutory language, HAVA's legislative history confirms that Congress had no intention of altering its choice in the NVRA to leave certain jurisdictions uncovered. See H.R. Rep. No. 329, Pt. 1, 107th Cong., 1st Sess. 37 (2001) (HAVA House Report) ("H.R. 3295 leaves NVRA intact, and does not undermine it in any way."). Accordingly, the United States has consistently taken the position since HAVA's passage that HAVA does not add jurisdictions to the coverage of the NVRA. See, *e.g.*, Letter from Assistant Attorney General Ralph F. Boyd, Jr., to The Honorable Aurelio Gracia Morales 2 (Mar. 17, 2003) (attached) (NVRA requirements "apply to all States, except those exempt from the NVRA, which 'shall remove the names of ineligible voters from the computerized list in accordance with state law'").

The plain language of the NVRA thus unambiguously provides that Puerto Rico is not a "State" within the meaning of the statute. It is irrelevant that Puerto Rico in some circumstances is assumed to be covered by federal laws that are silent on the matter, see Appellant's Br. 9-10, 29-30, because the NVRA is not silent as to how expansively to read the term "State." As this Court has explained, it also is immaterial that "there is caselaw treating Puerto Rico as the

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[1] Furthermore, HAVA explicitly provides that list maintenance under the computerized statewide voter registration list newly mandated by HAVA shall be performed in accordance with the state law for those States that are exempt from the NVRA. See 42 U.S.C. 15483(a)(2)(A)(iii) (providing that a State exempted from NVRA coverage "shall remove the names of ineligible voters from the computerized list in accordance with State law"). Congress also made clear that, with one exception not relevant here, HAVA was not designed to modify the NVRA obligations. See 42 U.S.C. 15545(a)(4) ("nothing in this Act may be construed to authorize or require conduct prohibited under * * * or to supersede, restrict, or limit the application of * * * [the NVRA]").

functional equivalent of a state for purposes of applying certain constitutional clauses," in the face of unambiguous statutory or constitutional language excluding Puerto Rico in a particular circumstance. *Igartúa* v. *United States*, 626 F.3d 592, 598 (1st Cir. 2010), cert. denied, 132 S. Ct. 2375 and 132 S. Ct. 2376 (2012); see also *Antilles Cement Corp.* v. *Fortuño*, 670 F.3d 310, 320-321 (1st Cir. 2012) (presumption that federal law treats Puerto Rico like a State overcome by statute's plain language).

Moreover, it is reasonable to read the NVRA, consistent with its plain language, as excluding Puerto Rico from its coverage. With respect to many NVRA provisions, Puerto Rico elections are not similarly situated to those of the States and the District of Columbia, and so the NVRA would not operate in the same manner.

The provision at issue here illustrates this point well. Unlike the States and the District of Columbia, which hold general federal elections every two years, Puerto Rico holds such elections only every four years, when it selects its only federal officeholder, the Resident Commissioner to the Congress. See 48 U.S.C. 891. Accordingly, if subject to the NVRA, Puerto Rico would have to wait twice as long as would a covered State before any non-voter would be subject to removal from the rolls. Plaintiff has not voted in a federal general election since 2004. If she lived in a covered State and otherwise satisfied the NVRA's requirements for removal – that is, the State had evidence she may have moved outside the jurisdiction and she failed to respond to a confirmation notice – the NVRA would have permitted the removal of her name from the rolls following the 2008 election, yet here she contends that the NVRA bars such action until after the 2012 election. Thus, the NVRA, as amended by HAVA, cannot readily be applied to Puerto Rico without altering the balance Congress struck with respect to covered jurisdictions.

Not only would the NVRA not apply in the same manner in Puerto Rico, but it would do little to address the primary problems the NVRA was meant to address. Unlike HAVA and other related statutes, the NVRA exempts even certain States – those that do not require registration prior to Election Day. See 42 U.S.C. 1973gg-2(b). Congress thus made a deliberate choice not to extend the NVRA's coverage to those jurisdictions where such coverage would not significantly further the NVRA's purposes. Puerto Rico, unlike the District of Columbia and the States, has no Presidential electors, nor does it hold elections for Senators or Representatives. Its only federal elected official, the Resident Commissioner, cannot cast floor votes in the House. Accordingly, Congress did not find it necessary to include Puerto Rico in the NVRA's coverage.

2. The NVRA's Exclusion Of Puerto Rico Does Not Violate The Equal Protection Clause

Plaintiff does not brief an equal protection argument with any detail, making it difficult to respond to this question. But Congress did not violate the Equal Protection Clause by choosing not to apply to Puerto Rico all of the provisions of the NVRA. As a general matter, Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Harris* v. *Rosario*, 446 U.S. 651, 651-652 (1980) (per curiam); accord *Trailer Marine Transp. Corp.* v. *Rivera Vazquez*, 977 F.2d 1, 7 (1st Cir. 1992); *United States* v. *Rivera Torres*, 826 F.2d 151, 154 (1st Cir. 1987).

For the reasons described above, Congress had rational bases for declining to extend the requirements of the NVRA to Puerto Rico, just as it declined to extend them to certain States where the NVRA's purposes would not be served. First, the NVRA – including the specific provision at issue here – would not apply in the same way to Puerto Rico as it would to States that hold general federal elections every two years. Second, applying the NVRA to Puerto Rico would not achieve the same federal goals as does its application to the States and the District of Columbia, since Puerto Rico does not elect Presidential electors, nor Senators and Representatives. Under those circumstances, and particularly given the complex relationship between Puerto Rico and the United States, see *Trailer Marine Transport Corp.*, 977 F.2d at 6-7 (summarizing history), Congress could rationally decide not to impose the requirements of the NVRA on election officials in Puerto Rico.

It is irrelevant that greater scrutiny attaches to laws that restrict the right to vote, see Appellant's Br. 12, because neither the NVRA nor Congress's decision not to extend that law to Puerto Rico does any such thing. Rather, as this Court found in denying a similar challenge to UOCAVA, "[a]lthough [the NVRA] affects the right to vote, the Act does not infringe that right but rather limits a state's ability to restrict it." *Igartua* v. *United States*, 32 F.3d 8, 10 n.2 (1st Cir. 1994) (per curiam). Indeed, nothing in the NVRA prevents Puerto Rico from enacting, as a matter of local law, precisely the protections plaintiff seeks.[2]

Sincerely,

s/ Jessica Dunsay Silver

Jessica Dunsay Silver
Principal Deputy Chief

Sasha Samberg-Champion
Attorney
Appellate Section
Civil Rights Division
Sasha.Samberg-Champion@usdoj.gov
(202) 307-0714

cc: Counsel of Record

[2] Numerous courts have upheld the NVRA as a lawful exercise of Congress's authority to regulate federal elections under the Elections Clause in Article I, Section 4 of the Constitution. See, *e.g.*, *Association of Cmty. Orgs. for Reform Now* v. *Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition* v. *Wilson*, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996); *Association of Cmty. Orgs. for Reform Now* v. *Miller*, 129 F.3d 833 (6th Cir. 1997).

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2012, I electronically filed the foregoing letter brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jessica Dunsay Silver
JESSICA DUNSAY SILVER
Attorney

ATTACHMENT

U.S. Department of Justice

Civil Rights Division

Assistant Attorney General

950 Pennsylvania Avenue, N.W. - MJB
Washington, DC 20530

March 17, 2003

The Honorable Aurelio Gracia Morales
Chairperson
Commonwealth Election Commission
P.O. Box 195552
San Juan, Puerto Rico 00919-5552

Dear Chairperson Morales:

The Help America Vote Act of 2002, Public Law 107-252, 42 U.S.C. 15301-15545 ("HAVA"), was signed into law by the President on October 29, 2002. This landmark legislation, a copy of which is enclosed, seeks to improve the administration of elections throughout the United States.

Under §401 of Title IV, the Attorney General has enforcement authority for the uniform and nondiscriminatory election technology and administration requirements that apply to the States under Sections 301, 302, and 303 of Title III. Responsibility for this task has been delegated to the Civil Rights Division of the Department of Justice, and I have assigned primary responsibility within the Division to the Voting Section, which will coordinate with the Disability Rights Section on HAVA's disability provisions. The Division stands ready to assist you in your efforts to implement HAVA.

Title III of HAVA applies to all 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands. We are aware that States have been concerned whether federal funding would be available under Titles I and II to assist in complying with Title III. As you are probably aware, Congress passed an omnibus budget bill for fiscal year 2003 on February 13th that included $1.5 billion for election reform. In any event, regardless of whether States choose to accept federal funding when it becomes available, each State must comply with Title III in its entirety, absent a state-specific exemption in the law.

We encourage States to begin their preparations now because several provisions must be implemented by January 1, 2004, when States will begin holding primary elections for federal office. What follows is a brief summary of Title III's provisions, their implementation time line, and their exemptions, as well as several other significant provisions.

Section 301, which applies to all States, establishes standards for voting systems to be used in federal elections, including alternative language accessibility. It is effective on January 1, 2006. Under the Section 301 standards, each voting system must be accessible for persons with disabilities, including persons who are blind or have low vision. Specifically, each polling place must have at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities so that the individuals can vote independently and privately. The Election Assistance Commission ("EAC") set up under HAVA will eventually issue voluntary voting guidelines and guidance as to what constitutes an accessible voting system. Until that guidance is adopted, the voluntary guidance of the Federal Election Commission on Voting System Standards can be used to determine the accessibility of voting machines. (These can be found at www.fec.gov/pages/vss/vss.html at section 2.2.7 of the Voluntary System Standards).

Section 302(a) sets forth standards for provisional voting in federal elections for voters who assert they are registered and eligible voters in the applicable jurisdiction where they are attempting to vote. This requirement applies to all States, but States exempt from the National Voter Registration Act ("NVRA") may comply by using voter registration procedures established under state law. Section 302(b) sets forth standards for voter information to be posted at each polling place for each federal election and also applies to all States. Section 302(c) sets out new rules for all States for voters who cast votes after polls close as a result of Federal or state court or other orders. The effective date of all of these requirements is January 1, 2004.

Section 303(a)(1) requires States to create, for use in federal elections, a single, uniform, centralized, and interactive computerized statewide voter registration list, containing registration information and a unique identifier for every registered voter. This applies to all States, except those that do not presently require voter registration for federal elections. Section 303(a)(2) requires States to maintain the list according to specific standards. For example, names must be removed from the list in accordance with the NVRA (as amended by §903 of HAVA), and the list must be coordinated with State agency records on felony status and death. These requirements apply to all States, except those exempt from the NVRA, which "shall remove the names of ineligible voters from the computerized list in accordance with State law."

Section 303(a)(5) provides that States may not accept or process any type of voter registration application for federal elections unless it includes the applicant's driver license number or, if the applicant has no driver license number, the last four digits of the applicant's social security number. If the applicant has neither, then the State must assign an identifying number. The State must also verify the statewide voter registration database information against state driver license databases and federal social security number databases. These requirements apply to all States, but are optional for States permitted under Section 7 of the Privacy Act (5 U.S.C. 552a note) to ask, and which actually do ask, registrants for a complete social security number on registration applications.

The effective date of all the registration list requirements of Section 303(a) is January 1, 2004, but can be extended until January 1, 2006 if a State certifies to the EAC, when it is constituted, that, for good cause, it cannot meet the original deadline.

Under Section 303(b), certain categories of individuals who register to vote by mail for the first time must provide specific identification documents or verifying information, either at the time of registration or the first time they vote. It also requires changes in the content of the national NVRA mail-in registration form, including a citizenship question. Individuals who register to vote by mail for federal elections after January 1, 2003 must submit identification materials that meet the new requirements in the first federal primary or general election in which they vote after January 1, 2004. There is information about the effective date of this provision on the Voting Section's website (www.usdoj.gov/crt/voting). I encourage States to take steps now to conform their mail-in forms to Section 303(b) standards, to advise registrants of the new identification requirements, and to verify information for new mail-in registrants, even though these steps are not required until 2004. These efforts will reduce the need for voters to present identification during the 2004 elections.

Section 304 notes that Title III sets "minimum requirements," and that nothing prevents a State from establishing standards that are "more strict" so long as such requirements are not inconsistent with federal law.

Section 305 provides that the specific choices on the methods of complying with Title III shall be left to the discretion of the State.

Section 402(b) requires "nonparticipating" States (i.e., States that do not give notice during 2003 that they intend to seek Title I or II funding) either to certify by January 1, 2004, to the EAC that they have established an administrative grievance procedure under Section 402(a) to hear complaints from private individuals about possible violations of Title III, or to submit a compliance plan to the Department of Justice describing how they intend to comply with Title III. Nonparticipating States that do not do one of the above will be deemed out of compliance with Title III. Because there is little reason, however, for States not to seek funding under HAVA, we do not expect to receive many compliance plans for review.

Section 261 establishes a grant program authorizing the Secretary of Health and Human Services to provide funds for improving physical access to polling places for voters with disabilities, including persons who are blind or have low vision. Funds accepted under Section 261 must be used to make polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to individuals with disabilities, and to provide individuals with disabilities with information about the accessibility of polling places. In addition, a State may use funds obtained under Section 101(a) of HAVA to improve the accessibility and quantity of polling places, including providing physical access for individuals with disabilities.

Section 906 provides (with one specific exception) that nothing in HAVA may be construed "to authorize or require conduct prohibited under" or "supersede, restrict, or limit the application of" six other laws enforced by the Civil Rights Division.

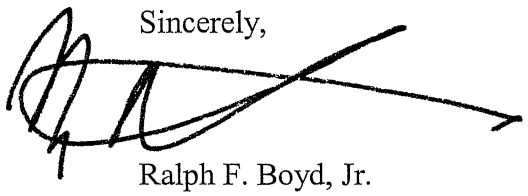
You should also be aware of the relationship between HAVA and two provisions of the federal Voting Rights Act (VRA). The obligation of state officials to comply with Section 5 of the VRA when implementing HAVA is similar to that of States under the NVRA when it was passed by Congress in the early 1990s. See *Young v. Fordice*, 520 U.S. 273 (1997) (when discretion is granted to state officials in the manner in which they implement federal legislation, covered jurisdictions must comply with preclearance provisions of Section 5). There are 16 states covered at least in part by the preclearance requirement in Section 5. For voting changes occasioned by implementation of HAVA and requiring preclearance, covered jurisdictions should seek Section 5 review as soon as possible from the Attorney General or the U.S. District Court for the District of Columbia, i.e., after the changes are final, but before they are implemented. If you choose to submit changes to the Attorney General rather than to the Court, please include for our reference, if possible, copies of your state plans under Title II, funding applications under Title I, and any information on actions taken on those applications. However, states need not seek preclearance of funding applications or state plans submitted to the GSA or the EAC. Any action taken by other federal agencies on state plans or state funding requests will not affect preclearance review.

There are 31 states covered in full or in part by the minority language assistance provisions in Sections 203 and 4(f)(4) of the VRA. Minority language issues will arise, for example, when designing new voting systems under Section 301, provisional ballots and voter information posters under Section 302, and voter registration and list maintenance materials under Section 303. Covered jurisdictions should bear in mind the continuing need to make these election materials accessible to covered language minorities as required by law.

Should you have any questions concerning HAVA, please contact Hans A. von Spakovsky (202-305-9750), Counsel to the Assistant Attorney General, or Chris Herren (202-514-1416) and Brian Heffernan (202-514-4755), who are attorneys in the Voting Section. If you have any questions about the disability provisions of HAVA, please contact Lucia Blacksher (202-514-1947), an attorney in the Disability Rights Section. In addition, the Voting Section will be posting on its website the names of other staff members who will be acting as points of contact for designated States.

We look forward to working with you as you take steps to implement HAVA.

Sincerely,



Ralph F. Boyd, Jr.
Assistant Attorney General

Enclosure

cc: Governor Sila Calderon
Attorney General Annabelle Rodriguez