

LEXSEE 265 F.3D 118

XAVIER ROMEU, Plaintiff-Appellant, PEDRO ROSSELLO, Intervenor-Plaintiff-Appellant, in his official capacity as Governor of the Commonwealth of Puerto Rico, v. WILLIAM S. COHEN, Secretary of Defense of the United States of America, WILLIAM JEFFERSON CLINTON, President of the United States of America, GEORGE PATAKI, Governor of the State of New York & CAROL LEE SUNDERLAND, Commissioner of the Westchester County Board of Elections, Defendants-Appellees.

Docket Nos. 00-6287, 00-6303

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**October 30, 2000, Argued
September 6, 2001, Decided**

PRIOR HISTORY: [**1] Plaintiff, a U.S. citizen formerly domiciled in New York, now living in Puerto Rico, and desirous of voting in New York in the 2000 presidential election, brought action seeking (i) an order permitting him do so, and (ii) a judgment declaring that the Federal Uniformed and Overseas Citizens Absentee Voting Act and the New York Election Law violate, inter alia, the *Equal Protection Clause of the U.S. Constitution* in that they unfairly discriminate among U.S. citizens formerly domiciled in a State, allowing those who now reside overseas but not those who now reside in a U.S. territory to vote in a federal election held in their State of former domicile. The United States District Court for the Southern District of New York, Shira A. Scheindlin, J., dismissed the complaint for failure to state a claim on which relief could be granted, and plaintiff appealed.

DISPOSITION: Judgment affirmed.

COUNSEL: Xavier Romeu, Esq., Isla Verde, Carolina, Puerto Rico, plaintiff-appellant, Pro se.

Angel E. Rotger-Sabat, Attorney General of the Commonwealth of Puerto Rico, Gustavo A. Gelpi, Solicitor General, Rosa N. Russe Garcia, Deputy Solicitor General, and Irene S. Soroeta-Kodesh, Assistant Solicitor General, [**2] for intervenor-plaintiff-appellant Governor Pedro Rossello.

Mary Jo White, United States Attorney for the Southern

District of New York (by Daniel S. Alter and Gideon A. Schor, Assistant United States Attorneys), for defendants-appellees Secretary of Defense William S. Cohen and President William Jefferson Clinton.

Alan D. Scheinkman, Westchester County Attorney (by Stacey Dolgin Kmetz, Chief Deputy County Attorney, and Deborah A. Porder, Senior Assistant County Attorney), for defendant-appellee Carol Lee Sunderland, Commissioner of the Westchester County Board of Elections.

Eliot Spitzer, Attorney General of the State of New York (by Joel Graber, Assistant Attorney General), for defendant-appellee George Pataki, Governor of the State of New York.

Gregorio Igartua de la Rosa, amicus curiae in support of plaintiff-appellant.

JUDGES: Before: WALKER, Chief Judge, OAKES, and LEVAL, Circuit Judges. The Court of Appeals, Leval, Circuit Judge, affirms. Chief Judge Walker joins the opinion and writes a separate concurrence.

OPINION BY: LEVAL

OPINION

[*120] LEVAL, Circuit Judge:

Plaintiff appeals from the judgment of the United States District Court for the Southern District of New York [**3] (Shira A. Scheindlin, J.), dismissing his complaint for failure to state a claim. Plaintiff, a U.S. citizen residing in Puerto Rico who was formerly a resident of New York, asserts the right to vote for New York's presidential electors in the election held November 7, 2000. One theory of his complaint is that the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") and the New York Election Law ("NYEL") violate the U.S. Constitution by extending the right to vote in a presidential election to U.S. citizens formerly domiciled in New York and now residing outside the United States, but not to U.S. citizens formerly domiciled in New York and now residing in a U.S. territory. *See 42 U.S.C. §§ 1973ff-1 & 1973ff-6; N.Y. Elec. Law § 11-200(1)* (McKinney 1998). Plaintiff contends also that these statutes have infringed his constitutional rights to vote and travel, and his rights under the Privileges and Immunities and Due Process Clauses. Finding no such violations, we affirm the judgment of the district court.

Background

Plaintiff-appellant Xavier Romeu, a natural born United States citizen, lived in Westchester County in New York State from [**4] 1994 through May 16, 1999. Romeu registered to vote and did vote in New York in the 1996 presidential elections, casting a ballot in Westchester County. On May 17, 1999, Romeu moved to and became a resident of the Commonwealth of Puerto Rico. On July 9, 1999, Romeu registered to vote in Puerto Rico. U.S. territories, including Puerto Rico, do not participate in presidential elections. Subsequently, Romeu requested an absentee ballot from the State of New York to vote in the 2000 presidential election.

State absentee ballot laws are governed, in part, by the Federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), which extends federal voting rights to U.S. citizens formerly citizens of a State who reside outside the United States. *See 42 U.S.C. § 1973ff-1 to 1973ff-6*. The Act preserves for a citizen [*121] formerly resident in a State who moves outside the United States the right to vote in federal elections held in the citizen's previous State of residence. In relevant part, the UOCAVA provides that each "State" (a term defined under the Act to include U.S. territories) shall permit absentee "overseas" voters "to use absentee registration

procedures [**5] and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office" and requires States to "accept and process . . . any otherwise valid voter registration application from an absent . . . 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*. The Act defines "overseas voter," in relevant part, as "a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States" or "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." *42 U.S.C. § 1973ff-6(5)(B) & (C)*. Under the statute's definition, a person who, like the plaintiff, resides in a U.S. territory does not qualify as an "overseas voter" because such a person does not reside "outside the United States." The UOCAVA further defines the term "State" to mean "a State of the United States, the District of Columbia, the Commonwealth [**6] of Puerto Rico, Guam, the Virgin Islands, and American Samoa," so that a U.S. citizen living in a U.S. territory such as Puerto Rico who moves outside the United States retains whatever right to vote in elections for federal office that the citizen could have exercised had he or she continued to reside in that U.S. territory. *42 U.S.C. § 1973ff-6(6)*.

Carrying out the mandate of the UOCAVA, the New York Election Law ("NYEL") provides that a U.S. citizen "now residing outside the United States" whose most recent U.S. domicile was New York is entitled to vote as a "special federal voter," so long as "such citizen does not maintain a place of abode or domicile, is not registered to vote and is not voting in any other election district, state, territory or possession of the United States." *N.Y. Elec. Law § 11-200(1)* (McKinney 1998).¹

1 The statute provides as follows:

Every citizen of the United States now residing outside the United States whose last domicile in the United States immediately prior to his departure from the United States was in the state of New York, shall be entitled to vote from such last domicile, as a special federal voter in all primary, special and general elections for the public

offices or party positions of president and vice-president of the United States, United States senator, representative in congress and delegates and alternate delegates to a national convention, provided . . . that such citizen does not maintain a place of abode or domicile, is not registered to vote and is not voting in any other election district, state, territory or possession of the United States . . .

N.Y. Elec. Law § 11-200(1) (McKinney 1998).

[**7] Romeu received a standard form New York State absentee ballot application on September 27, 1999, from the Westchester County Board of Elections. Pursuant to the NYEL and the UOCAVA, Section 8 of the absentee ballot application form required Romeu to swear or affirm that he was "not . . . voting in any other U.S. State, territory or possession or subdivision thereof in the coming election(s)." Section 6 of the absentee ballot application form required that Romeu swear or affirm that he was in one of several categories of U.S. citizens living outside the United States, none of which included a U.S. citizen residing in a U.S. territory. As a U.S. citizen residing in a U.S. territory, Romeu [*122] was unable to swear or affirm either that he was not a voter in a U.S. territory, or that he was a U.S. citizen residing outside the United States.

Romeu brought this suit on March 24, 2000, seeking an order compelling the Westchester County election board to issue him a ballot and a declaratory judgment that the UOCAVA and the NYEL violate his constitutional rights. In particular, Romeu claimed violations of his constitutional rights to vote and to travel, his rights under the Privileges and Immunities [**8] Clause of Article IV, his *Fourteenth* and *Fifth Amendment* Due Process rights, and his rights to equal protection of the laws under the *Fourteenth* and *Fifth Amendments*. Pedro Rossello, the then-Governor of Puerto Rico, intervened in support of Romeu's claims.

On cross-motions for judgment on the pleadings, the district court dismissed Romeu's claim. Although expressing the view that Romeu, as a citizen of the United States residing in Puerto Rico and denied the right

to vote for the President of the United States, "is suffering a grave injustice," Judge Scheindlin found no violation of Romeu's constitutional rights primarily because the deprivation of which he complains is created by the Constitution.

Romeu filed an expedited appeal in this court. Because of the importance of speedy resolution of Romeu's appeal before the November 2000 presidential election, we summarily affirmed the order of the district court on October 31, 2000, noting that we would issue an opinion in due course setting out our reasoning. We now issue that opinion.

Discussion

In the Jones Act of 1917, also known as the Organic Act of 1917, Congress extended U.S. citizenship to persons then living in Puerto [**9] Rico, and to persons born in Puerto Rico thereafter. *See* Jones Act, 39 Stat. 951 (1917). For voting rights, however, the status of a U.S. citizen living in the U.S. territory of Puerto Rico is not identical to that of a U.S. citizen living in a State. Article IV of the Constitution empowers Congress "to dispose of and make all needful Rules and Regulations respecting the Territory. . . belonging to the United States." U.S. Const. art. 4, § 3. In the *Insular Cases*, decided in 1901, ² and in a series of subsequent decisions, the Supreme Court has held that because territories such as Puerto Rico belong to the United States but are not "incorporated into the United States as a body politic," *Dorr v. United States*, 195 U.S. 138, 143, 49 L. Ed. 128, 24 S. Ct. 808 (1904); *see also* *Balzac v. People of Porto Rico*, 258 U.S. 298, 304-05, 66 L. Ed. 627, 42 S. Ct. 343 (1922), Congress's regulation of the territories under Article IV is not "subject to all the restrictions which are imposed upon [Congress] when passing laws for the United States," *Dorr*, 195 U.S. at 142; *see also* Jose A. Cabranes, *Citizenship and the American Empire* [**10] 45-51 (1979); Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* 40-74 (1985). Congress's power in the territories is not unlimited; territorial regulations must comport with those basic principles "so fundamental [in] nature" that they form "the basis of all free government." *Downes v. Bidwell*, 182 U.S. 244, 291, 45 L. Ed. 1088, 21 S. Ct. 770 (1901) (White, J., concurring). But such principles [*123] of fundamental justice do not incorporate all the mandates of the *Bill of Rights*. *See* *Balzac*, 258 U.S. at 304-05; *Dorr*, 195 U.S. at 149; *Territory of Hawaii v.*

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Mankichi, 190 U.S. 197, 211, 217-18, 47 L. Ed. 1016, 23 S. Ct. 787 (1903).

2 See *Downes v. Bidwell*, 182 U.S. 244, 45 L. Ed. 1088, 21 S. Ct. 770 (1901); *Armstrong v. United States*, 182 U.S. 243, 45 L. Ed. 1086, 21 S. Ct. 827 (1901); *Dooley v. United States*, 182 U.S. 222, 45 L. Ed. 1074, 21 S. Ct. 762 (1901); *De Lima v. Bidwell*, 182 U.S. 1, 45 L. Ed. 1041, 21 S. Ct. 743 (1901).

[**11] Citizens living in Puerto Rico, like all U.S. citizens living in U.S. territories, possess more limited voting rights than U.S. citizens living in a State. Puerto Rico does not elect voting representatives to the U.S. Congress. It is represented in the House of Representatives by a Resident Commissioner who is "entitled to receive official recognition . . . by all of the departments of the Government of the United States," but who is not granted full voting rights. See 48 U.S.C. § 891; see also Juan R. Torruella, *Hacia Donde vas Puerto Rico?*, 107 *Yale L.J.* 1503, 1519-20 & n.105 (1998) (reviewing Jose Trias Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* (1997)). In addition, citizens residing in Puerto Rico do not vote for the President and Vice President of the United States. Indeed, the Constitution does not directly confer on any citizens the right to vote in a presidential election. Article II, section 1 provides instead that "each state shall appoint, in such manner as the legislature thereof may direct, a number of electors," whose function is to select the President. The Constitution thus confers the right [**12] to vote in presidential elections on electors designated by the States, not on individual citizens. See *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 529, 148 L. Ed. 2d 388 (2000). Accordingly, no U.S. citizen, whether residing in a State or territory or elsewhere, has an expressly declared constitutional right to vote for electors in presidential elections. See *McPherson v. Blacker*, 146 U.S. 1, 25, 36 L. Ed. 869, 13 S. Ct. 3 (1892) ("The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall . . .'").

Despite the fact that the Constitution confers the power to appoint electors on States rather than on individual citizens, most U.S. citizens have a limited, constitutionally enforceable right to vote in presidential elections as those elections are currently configured. The States have uniformly exercised their Article II authority by delegating the power to appoint presidential (and

vice-presidential) electors to U.S. citizens residing in the State to be exercised in democratic elections. In so delegating the power to appoint electors, States are barred under the Constitution from delegating [**13] that power in any way that "violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968); see also *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 n.18, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983).

U.S. citizens who are residents of Puerto Rico and the other U.S. territories have not received similar rights to vote for presidential electors because the process set out in Article II for the appointment of electors is limited to "States" and does not include territories. U.S. territories (including Puerto Rico) are not States, and therefore those Courts of Appeals that have decided the issue have all held that the absence of presidential and vice-presidential voting rights for U.S. citizens living in U.S. territories does not violate the Constitution. See *Igartua de la Rosa v. United States*, 32 F.3d 8, 9-10 (1st Cir. 1994) (per curiam) ("*Igartua I*"); *Attorney General of the Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) ("Since Guam . . . is not a state, it can have no electors, and plaintiffs cannot exercise individual votes [**14] in a presidential election."); see also *Igartua de la Rosa v. United States*, 229 F.3d 80, 83-85 [**124] (1st Cir. 2000) (per curiam) ("*Igartua II*") (reaffirming the holding of *Igartua I*).

The question we face here is a slightly different one -- not whether Puerto Ricans have a constitutional right to vote for the President, but rather whether Equal Protection is violated by the UOCAVA, in that it provides presidential voting rights to former residents of States residing outside the United States but not to former residents of States residing in Puerto Rico. Like the First Circuit, we answer this question in the negative. See *Igartua I*, 32 F.3d at 10-11.

Plaintiff contends that because of the distinctions it draws among various categories of U.S. citizens, the UOCAVA is subject to strict scrutiny under the *Equal Protection Clause*. Defendants argue in response that application of strict scrutiny is inappropriate, and that the application of strict scrutiny is precluded by the Supreme Court's decision in *Harris v. Rosario*, 446 U.S. 651, 651-52, 64 L. Ed. 2d 587, 100 S. Ct. 1929 (1980) (per curiam) (holding that under Article IV, section [**15] 3, Congress "may treat Puerto Rico differently from States

so long as there is a rational basis for its actions"); *see also Califano v. Gautier Torres*, 435 U.S. 1, 3 n.4, 55 L. Ed. 2d 65, 98 S. Ct. 906 (1978) (per curiam) (suggesting that "Congress has the power to treat Puerto Rico differently and that every federal program does not have to be extended to it"). *But see Lopez Lopez v. Aran*, 844 F.2d 898, 913 (1st Cir. 1988) (Torruella, J., concurring in part and dissenting in part).

Given the deference owed to Congress in making "all needful Rules and Regulations respecting the Territory" of the United States, U.S. Const. art. IV § 3, we conclude that the UOCAVA's distinction between former residents of States now living outside the United States and former residents of States now living in the U.S. territories is not subject to strict scrutiny. As then-Judge Ginsburg observed in *Quiban v. Veterans Administration*, 289 U.S. App. D.C. 62, 928 F.2d 1154, 1160 (D.C. Cir. 1991), "to require the government . . . to meet the most exacting standard of review . . . would be inconsistent with Congress's 'large powers' [under Article IV] [**16] to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.'" *Id.* (citations omitted). We need not decide, however, the precise standard governing the limits of Congress's authority to confer voting rights in federal elections on former residents of States now living outside the United States while not conferring such rights on former residents of States now living in a U.S. Territory. For we conclude that regardless whether this distinction is appropriately analyzed under rational basis review or intermediate scrutiny, or under some alternative analytic framework independent of the three-tier standard that has been established in Equal Protection cases, *see Gautier Torres*, 435 U.S. at 3 n.4 ("Puerto Rico has a relationship with the United States 'that has no parallel in our history.'" (quoting *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 596, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976))), Congress may distinguish between those U.S. citizens formerly residing in a State who live outside the U.S., and those who live in the U.S. territories.

The distinction drawn by the UOCAVA between U.S. citizens moving [**17] from a State to a foreign country and U.S. citizens moving from a State to a U.S. territory is supported by strong considerations, and the statute is well tailored to serve these considerations. For one thing, citizens who move outside the United States, many of whom are United States military service personnel, might be completely excluded from

participating in the election of governmental [*125] officials in the United States but for the UOCAVA. In contrast, citizens of a State who move to Puerto Rico may vote in local elections for officials of Puerto Rico's government (as well as for the federal post of Resident Commissioner). In this regard, it is significant to note that in excluding citizens who move from a State to Puerto Rico from the statute's benefits, the UOCAVA treats them in the same manner as it treats citizens of a State who leave that State to establish residence in another State. Had Romeu left New York to become a resident of Florida, he would similarly not have been permitted to exercise the right created by the UOCAVA to vote in the federal elections conducted in New York. And if a citizen of Puerto Rico took up residence outside the United States, the UOCAVA would entitle [**18] that citizen to continue, despite her foreign residence, to participate in Puerto Rico's elections for the federal office of Resident Commissioner. Congress thus extended voting rights in the prior place of residence to those U.S. citizens who by reason of their move outside the United States would otherwise have lacked any U.S. voting rights, without similarly extending such rights to U.S. citizens who, having moved to another political subdivision of the United States, possess voting rights in their new place of residence. *See McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807, 809, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969) (upholding absentee voting statutes that were "designed to make voting more available to some groups who cannot easily get to the polls," without making voting more available to all such groups, on the ground that legislatures may "take reform 'one step at a time'" (quoting *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489, 99 L. Ed. 563, 75 S. Ct. 461 (1955))); *see also Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 550, 148 L. Ed. 2d 388 (2000) (Ginsburg, J., dissenting) (slip. op., at 9) (citing [**19] and quoting *McDonald* and *Williamson*); *Katzenbach v. Morgan*, 384 U.S. 641, 657, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966) (applying to voting rights reform legislation the rule that "a statute is not invalid under the Constitution because it might have gone farther than it did" (internal quotation marks omitted)).

Moreover, if the UOCAVA had done what plaintiff contends it should have done - namely, extended the vote in federal elections to U.S. citizens formerly citizens of a State now residing in Puerto Rico while not extending it to U.S. citizens residing in Puerto Rico who have never resided in a State - the UOCAVA would have created a

distinction of questionable fairness among Puerto Rican U.S. citizens, some of whom would be able to vote for President and others not, depending whether they had previously resided in a State. The arguable unfairness and potential divisiveness of this distinction might be exacerbated by the fact that access to the vote might effectively turn on wealth. Puerto Rican voters who could establish a residence for a time in a State would retain the right to vote for the President after their return to Puerto Rico, while Puerto Rican [**20] voters who could not arrange to reside for a time in a State would be permanently excluded.

In sum, the considerations underlying the UOCAVA's distinction are not insubstantial. As a result, we hold that Congress acted in accordance with the requirements of the *Equal Protection Clause* in requiring States and territories to extend voting rights in federal elections to former resident citizens residing outside the United States, but not to former resident citizens residing in either a State or a territory of the United States.

[*126] Nor do we find merit in plaintiff's other constitutional theories. The district court properly held that the constitutional right to vote is not violated by the statutes in question. New York may constitutionally require that New York voters reside in New York, subject of course to the provisions of the UOCAVA and the *Supremacy Clause*. See *Carrington v. Rash*, 380 U.S. 89, 91, 13 L. Ed. 2d 675, 85 S. Ct. 775 (1965) ("Texas has unquestioned power to impose reasonable residence restrictions [on] the availability of the ballot."). Romeu therefore has no claim to a constitutional right to vote in New York. And while the UOCAVA failed to extend to [**21] him the right to vote in New York, it did not deprive him of an existing right to vote. As explained above, Romeu cannot vote for the President in Puerto Rico because the existing laws do not confer such a voting right on U.S. citizens domiciled in Puerto Rico.

Nor is the right to travel violated by the UOCAVA and the NYEL. The Supreme Court has recently asserted that the right to travel is made up of "at least three different components. It protects [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500,

143 L. Ed. 2d 689, 119 S. Ct. 1518 (1999). Even assuming for purposes of this opinion that *Saenz's* references to States were intended to encompass also territories and that the reference to the right to enter and leave a State includes also the right to change one's residence from one political subdivision of the United States to another, we find no [**22] violation of any of the components of the right to travel listed in *Saenz*. As to the first, New York has not impaired Romeu's right to travel to Puerto Rico. It is true that the UOCAVA and the New York statute have placed a cost on his becoming a permanent resident of Puerto Rico. On abandoning his residence in New York, he would have retained the right to vote in the presidential election had he moved to any place other than a U.S. territory. Had he moved outside the United States, he could have continued to vote in New York's presidential election. Had he moved to another State, he could have voted as a citizen of that State. His move to a U.S. territory, in contrast, required that he give up voting for the office of President. However, neither the NYEL nor the UOCAVA caused that loss. His loss of the right to vote for President is the consequence of his decision to become a citizen of a territory in a constitutional scheme that allocates the right to appoint electors to States but not to territories. His situation is not materially different from that of a New York citizen, prior to the passage of the UOCAVA, who decided to leave New York to reside in France. His doing so would [**23] involve giving up the right to vote in New York because participation in New York's elections was reserved to citizens of New York. New York's failure to offer Romeu the opportunity to continue to vote in its elections after his taking up residence in Puerto Rico no more violated his right to travel than did New York's failure under the pre-UOCAVA law to offer continued voting rights to its citizens who moved to France. A citizen's decision to move away from her State of residence will inevitably involve certain losses. She will lose the right to participate in that State's local elections, as well as its federal elections, the right to receive that State's police protection at her place of residence, the right to benefit from the State's welfare programs, and the [*127] right to the full benefits of the State's public education system. Such consequences of the citizen's choice do not constitute an unconstitutional interference with the right to travel. Cf. *Gautier Torres*, 435 U.S. at 4-5 (holding that a federal cash benefit program for the aged, blind, and disabled did not violate the right to travel by applying only to U.S. citizens living in the fifty states and the District [**24] of Columbia, and thus excluding