U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 22, 2014

The Honorable Patrick Leahy
President Pro Tempore
United States Senate
Washington, DC 20510

Dear Senator Leahy:

Enclosed please find the annual report to Congress pursuant to the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. §§ 20301 to 20311, as amended by the Military and Overseas Voter Empowerment Act of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009).

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 22, 2014

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

Enclosed please find the annual report to Congress pursuant to the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. §§ 20301 to 20311, as amended by the Military and Overseas Voter Empowerment Act of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009).

Sincerely,

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Assistant Attorney General

Enclosure

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Washington, D.C. 20530

December 22, 2014

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

Enclosed please find the annual report to Congress pursuant to the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. §§ 20301 to 20311, as amended by the Military and Overseas Voter Empowerment Act of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009).

Sincerely,

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Washington, D.C. 20530

December 22, 2014

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Enclosed please find the annual report to Congress pursuant to the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. §§ 20301 to 20311, as amended by the Military and Overseas Voter Empowerment Act of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009).

Sincerely,

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Assistant Attorney General

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Washington, D.C. 20530

December 22, 2014

The Honorable Kevin McCarthy
Majority Leader
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Leader:

Enclosed please find the annual report to Congress pursuant to the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. §§ 20301 to 20311, as amended by the Military and Overseas Voter Empowerment Act of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009).

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 22, 2014

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, DC 20515

Dear Madam Leader:

Enclosed please find the annual report to Congress pursuant to the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. §§ 20301 to 20311, as amended by the Military and Overseas Voter Empowerment Act of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009).

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

United States Department of Justice
Uniformed and Overseas Citizens Absentee Voting Act
Annual Report to Congress
2014

I. Summary

The Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") of 1986, 52 U.S.C. §§ 20301-20311, as amended by the Military and Overseas Voter Empowerment Act ("MOVE Act") of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009), requires States to afford military and overseas voters a meaningful opportunity to register and vote absentee in elections for Federal office. This report describes the Department of Justice's work to enforce this important statute in 2014.

Protecting the voting rights of military and overseas voters remains one of the highest priorities of the Department of Justice ("Department"). In the 2014 Federal election year, the Department again devoted significant resources to monitoring UOCAVA compliance throughout the country during the primary elections, in advance of special congressional elections, and in the months and weeks leading up to the general election. In this cycle, one State, West Virginia, sought an undue-hardship waiver from the 45-day ballot transmission deadline from the Defense Department pursuant to UOCAVA, 52 U.S.C. § 20302(g). That waiver request was denied by the Department of Defense, and the Department of Justice subsequently filed a lawsuit against West Virginia to obtain UOCAVA compliance for the general election.

In early 2014, the Department wrote to all the chief State election officials[1] reminding them of their UOCAVA responsibilities and requesting teleconferences to discuss their preparations for the primary elections. We requested that the State election offices monitor the transmission of absentee ballots and provide confirmation to the Department that ballots that were requested by the 45th day prior to the Federal primary elections were transmitted by that date. Our contacts with States continued throughout the 2014 election cycle as we sought to assess and ensure UOCAVA compliance for all Federal elections, including for special congressional elections to fill vacancies that occurred during the year. In preparation for the Federal general election, we contacted States again to emphasize the requirement to transmit ballots by September 20, the 45th day before the 2014 general election. We again requested that the States monitor transmission of UOCAVA ballots and provide confirmation to the Department that the general election absentee ballots were timely sent. Throughout our work this year with State officials, we urged election officials to alert us to any issues that might impact timely transmission of UOCAVA ballots and engaged in extensive and continuous follow up with every State on ballot transmission deadlines and other obligations.

[1] UOCAVA defines "State" to include the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa. 52 U.S.C. § 20310(6). Consequently, our general references in this report to the phrase "State" include the District of Columbia and the enumerated territories.

For the 2014 Federal election cycle, the Department's UOCAVA enforcement activities resulted in a new lawsuit filed against one State to remedy a UOCAVA violation in the general election, an agreement to ensure UOCAVA compliance for the 2014 Federal runoff elections in another State, and state legislative changes designed to avoid future UOCAVA violations in another State. In 2014, we also devoted substantial efforts to advancing our litigation in two previously filed cases. That work included extensive proceedings to bring the Department's case against the State of Alabama to a successful resolution in the district court, and to defend a favorable judgment in that case in an appeal pending in the Eleventh Circuit Court of Appeals. It also included continuing work to defend a favorable judgment in our case against the State of Georgia, in an appeal pending in the Eleventh Circuit. Finally, in our UOCAVA litigation against the State of New York, the court ordered a schedule for conducting the 2014 Federal elections to effectuate the ruling the Department obtained in 2012 requiring an earlier primary election date to facilitate UOCAVA compliance in Federal general elections.

In addition to our vigorous monitoring and enforcement efforts, the Department continued to advocate for legislation to provide even stronger protections for military and overseas voters. Again this year, the Department prepared a set of legislative proposals to enhance the enforcement of UOCAVA. In coordination with the Department of Defense, these proposals were transmitted to Congress in April 2014 as part of the Defense Department's FY 2015 National Defense Authorization Act proposals,[2] and are similar to sets of proposals transmitted to Congress in September 2011 and May 2013.[3] In November 2013, several Senators introduced the "Safeguarding Elections for our Nation's Troops through Reforms and Improvements (SENTRI) Act," a bill that would amend UOCAVA and includes provisions that would implement versions of several reforms advocated in the Department's legislative proposals. In 2014, the SENTRI Act (S. 1728) and various modifications of the original bill were considered by the Senate Rules Committee. A version of the Act was successfully voted out of the Senate committee and placed on the Senate legislative calendar. The SENTRI Act was also introduced in the House of Representative in November 2013 (H.R. 3576) and subsequently referred to several House committees. The Department's UOCAVA proposals would enhance our ability to enforce these important protections, and we strongly urge passage of our proposals.

II. Background

UOCAVA, enacted in 1986, requires that States and Territories allow American citizens who are active duty members of the United States uniformed services and merchant marine, their spouses and dependents, and American citizens residing outside the United States to register and vote absentee in elections for Federal offices. UOCAVA was strengthened significantly in 2009

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[2] *See First Package of Legislative Proposals Sent to Congress for Inclusion in the National Defense Authorization Act for Fiscal Year 2015 -- Bill Text (Sent to Congress on April 1, 2014)*, available at http://www.dod.mil/dodgc/olc/legispro15.html

[3] *See Third Package of Legislative Proposals Sent to Congress for Inclusion in the National Defense Authorization Act for Fiscal Year 2014 (Sent to Congress on May 15, 2013),* "UOCAVA Amendments.pdf," available at http://www.dod.mil/dodgc/olc/legispro14.html.

when Congress passed the MOVE Act to expand the protections for individuals eligible to vote under its terms.

The Secretary of Defense is the Presidential designee with primary responsibility for implementing the Federal functions mandated by UOCAVA, and the Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out the provisions of UOCAVA. 52 U.S.C. § 20301(a); 52 U.S.C. § 20307(a). The Attorney General has assigned responsibility for enforcement of UOCAVA to the Civil Rights Division. Since UOCAVA was enacted in 1986, the Division has initiated and resolved numerous cases to enforce UOCAVA. A case list and selected case documents are available at http://www.justice.gov/crt/about/vot/litigation/caselist.php.

Under the MOVE Act amendments, UOCAVA requires that the Attorney General submit an annual report to Congress by December 31 of each year on any civil action brought under the Attorney General's enforcement authority under UOCAVA during the preceding year. 52 U.S.C. § 20307(b). As detailed in its prior reports to Congress, the Department has engaged in extensive enforcement of the MOVE Act's requirements since they went into effect for the 2010 general election.

III. Enforcement Activity by the Attorney General in 2014

As noted above, the Attorney General filed a lawsuit against West Virginia to enforce UOCAVA prior to the 2014 Federal general election. In other activity, the Department continued its litigation in cases against Alabama and Georgia and memorialized enforcement activities to achieve compliance in letters to Vermont and Mississippi. In addition, the court in the Department's 2010 enforcement action against New York entered a supplemental order for the 2014 elections. Copies of the significant court orders and letters referenced herein are attached to this report.

A. Civil Actions Filed in 2014 to Enforce UOCAVA

- West Virginia: On October 31, 2014, the United States filed a lawsuit against the State of West Virginia alleging violations of UOCAVA arising from the failure to timely transmit final UOCAVA ballots to voters in State House of Delegates District 35 prior to the November 4, 2014 Federal general election. *United States v. West Virginia*, 14-cv-27456 (S.D. W. Va.). Although the original UOCAVA ballots were timely transmitted to the affected UOCAVA voters on or before UOCAVA's 45-day transmittal deadline of September 20, on October 1, the Supreme Court of Appeals of West Virginia resolved a legal contest over the replacement of a candidate in State Delegate District 35 and ordered that corrected ballots be issued to all absentee voters. On October 3, after UOCAVA's 45-day deadline, corrected ballots were transmitted to the affected UOCAVA voters in the District. The State applied for a hardship waiver from the Federal Voting Assistance Program of the Department of Defense on October 1, which was later withdrawn and another request submitted on October 10. On October 20, 2014, the Department of Defense denied the State's waiver request. On October 30, the Supreme Court of Appeals of West Virginia

denied the Secretary of State's motion to clarify its October 1 order regarding the order's effect on the Federal contests contained on the original ballots.

In its lawsuit the Department alleged that the State's failure to transmit timely final absentee ballots to affected UOCAVA voters by the 45th day before the November 4, 2014 Federal general election, or to obtain a waiver from that requirement from the Department of Defense, violated UOCAVA. The lawsuit was partially resolved on November 3, 2014, through a consent decree approved by the Federal district court which, among other things, extended the deadline for counting the votes for Federal offices on any corrected ballots returned by affected UOCAVA voters to ensuring a 45-day transmittal time for those ballots.

However, in order to obtain a complete remedy for West Virginia's violation of UOCAVA, the United States also sought a preliminary injunction requiring West Virginia to count the votes for Federal office on any of the original ballots returned by UOCAVA voters if the original ballot was the only ballot returned in time to be counted. Neither Defendant opposed the counting of the original ballots, with the Secretary of State taking the position that she could not count the original ballots in light of the West Virginia Supreme Court of Appeals' original order and refusal to clarify. On November 18, the court declined to enter the injunction and set the case for trial. Upon the parties' filing of a joint stipulation of facts and representation that no contested issues of fact existed, the Court ordered that the trial be cancelled and the parties submit final briefing on the merits of the case. On December 5, the United States filed its merits brief requesting that West Virginia be ordered to count the votes for Federal office contained on the four original UOCAVA ballots at issue that were timely requested and timely returned by UOCAVA voters. In their responsive briefs, neither Defendant opposed the counting of the original ballots. The case remains pending a decision by the district court.

B. Activity in Other Litigation by the Attorney General under UOCAVA

The Department has continued to litigate and monitor compliance with orders in UOCAVA cases initiated in previous election cycles. Additional orders were entered in the following cases filed by the Department prior to 2014:

- Alabama: In 2014, the Department continued its litigation against Alabama for the State's failure to transmit ballots to UOCAVA voters at least 45 days prior to the 2012 Federal primary election and failure to ensure ballots would be transmitted by the 45th day before any Federal primary runoff election that would be needed. *United States v. Alabama*, No. 2: 12-cv-179 (M.D. Ala.); See also *Alabama v United States*, No. 14-11298-DD (11th Cir.).

  In 2012, the court granted the Department's motions for preliminary injunctive relief and in 2013 granted relief to ensure Alabama's UOCAVA compliance for a special election to fill a Congressional vacancy. Also in 2013, the United States moved for summary judgment based on undisputed evidence that Alabama had violated

UOCAVA's 45-day advance transmission deadline in the three previous regularly scheduled Federal elections—the November 2, 2010 general election, the March 13, 2012 primary election, and the November 6, 2012 general election – and that Alabama's statutory primary runoff calendar, which requires a runoff to be held 42 days following a primary election, violates UOCAVA's 45-day transmittal deadline for Federal primary runoff elections. *See* U.S. Department of Justice, UOCAVA Annual Reports to Congress, 2012 and 2013.

On January 17, 2014, following court-ordered mediation, the court entered the parties' proposed remedial order to resolve one portion of the case. The agreed order included a plan to ensure Alabama's compliance with UOCAVA's 45-day deadline in all future Federal elections (other than runoff elections) and thereby resolved the United States' claim related to Alabama's failures to timely transmit UOCAVA ballots in Federal primary and general elections. Subsequently, the court vacated portions of the January 17, 2014 remedial order on the ground that recently-adopted state legislation made changes to Alabama's election calendar that rendered certain portions of the order no longer necessary.

On February 11, 2014, the court granted the United States' motion for summary judgment on its runoff election claim. The court declared that UOCAVA's 45-day transmittal requirement applies to Federal runoff elections and that Alabama's runoff statute violates UOCAVA's 45-day transmittal requirement, and gave the parties 14 days to propose or request any additional relief. On February 25, 2014, Alabama filed an unopposed proposed remedial order designed to prevent future UOCAVA violations under Alabama's primary runoff statute. On March 4, 2014, the court adopted the State's proposal as a "consent order" authorizing Alabama to use an instant runoff system to comply with UOCAVA for the 2014 election cycle and, beginning with the 2016 election cycle, ordering Alabama to hold any Federal runoff elections nine weeks (63 days) after the Federal primary election.

On March 25, 2014, Alabama appealed the court's order granting summary judgment to the United States on its runoff claim, and requested that the court's March 4, 2014 consent order be vacated. That appeal is currently pending in the United States Court of Appeals for the Eleventh Circuit.

- Georgia: In 2014, the Department continued its litigation against Georgia to obtain compliance with UOCAVA in Federal runoff elections. *United States v. Georgia*, No. 1:12-cv-02230 (N.D. Ga.); *see also Georgia v. United States*, No. 13-14065 (11th Cir.).

In June 2012, the United States filed a lawsuit and motion for emergency injunctive relief alleging that Georgia's Federal primary runoff election schedule violated UOCAVA by failing to allow the required 45-day transmittal time for UOCAVA ballots. The court granted the requested emergency relief in July 2012, and in 2013 granted the United States' motion for summary judgment, holding that UOCAVA's 45-day transmission requirement applies to Federal runoff elections. The court

ordered that Georgia's Federal primary runoff be held nine weeks after the Federal primary election and thirteen weeks before the Federal general election, and its Federal general runoff elections be held nine weeks after the Federal general election. The district court denied Georgia's motion for a stay of the injunction pending appeal in October 2013, and the parties fully briefed the case in the Eleventh Circuit. *See* U.S. Department of Justice, UOCAVA Annual Reports to Congress, 2012 and 2013.

On January 6, 2014, the Court of Appeals denied Georgia's motion to stay the district court's injunction while the appeal was pending. Shortly thereafter, on January 21, 2014, Georgia enacted legislation adopting for Federal elections the electoral calendar that had been imposed by the district court. The adjusted schedule allows sufficient time for the State to comply with UOCAVA's 45-day deadline in Federal runoff elections.

On June 13, 2014, the United States Court of Appeals for the 11th Circuit heard oral argument in the case, and a decision by the appellate court is pending.

- New York: For the 2014 election cycle, in *United States v. New York*, No. 1:10-cv-1214 (N.D.N.Y.), the Department's lawsuit against New York for violating UOCAVA in the 2010 Federal general election, the court entered an order requested by the State of New York setting the election calendar to govern the 2014 Federal elections.

  In 2012, after New York failed to enact legislation to modify its election calendar to cure the structural issues that contributed to New York's late transmission of UOCAVA ballots in the 2010 Federal general election, the court granted the Department's motion for supplemental relief to alter the election calendar. The court entered a permanent injunction and ordered a modification of New York's Federal primary election date from September to June, setting the 2012 Federal primary election for June 26, 2012. The court further ordered that future Federal primary elections would be held on the fourth Tuesday in June, unless and until New York enacted legislation resetting the Federal primary date for one that complies fully with UOCAVA and is approved by the court.

  The court's December 12, 2013 order, to which the Department lodged no objection, superseded provisions of New York law pertaining to the 2014 election calendar to ensure UOCAVA compliance for the June 24, 2014 Federal primary date. The State has yet to enact legislation to alter the September Federal primary election date.

C. Other Enforcement Activity Memorialized in Letters

In 2014, the Department memorialized in letters the work it engaged in with two States to achieve UOCAVA compliance. In each case, the States possessed the authority to change the election date and/or procedures necessary to provide at least 45 days for the transmission and return of UOCAVA ballots without the need for a Federal court order. The Department sent

such letters to the following States:

- Vermont: In October 2012, the Department settled a lawsuit with Vermont for failure to transmit ballots to UOCAVA voters 45 days prior to the November 2012 general election. *United States v. Vermont*, No. 5:12-cv-236 (D. Vt.). During that litigation, Vermont had expressed support for moving its Federal primary election to an earlier date, but the state legislature failed to act in 2013. By letter dated January 28, 2014, the Department reiterated its concern to Vermont that its late Federal primary election date did not provide enough time to ensure timely transmission of UOCAVA ballots for Federal general elections. In May 2014, Vermont enacted legislation to change the primary date from the fourth Tuesday to the second Tuesday in August starting with the 2016 Federal election cycle.

- Mississippi: By letter dated March 5, 2014, the Department confirmed discussions with Mississippi that the State's existing law and procedures for Federal primary runoff elections are inconsistent with UOCAVA. Specifically, the Department expressed concern that the state law requirement that a "second [federal] primary election" or a primary runoff election be held three weeks after the initial primary election is inconsistent with UOCAVA's 45-day transmittal deadline, and that the State's practice of sending out two identical ballots prior to the primary election if a runoff is possible risks the disenfranchisement of UOCAVA voters. Soon thereafter, Mississippi promulgated a temporary administrative rule, revised its written plan for Federal runoff elections, and authorized ranked choice ballots for UOCAVA voters in the event of a Federal primary runoff election in 2014.

Attachments

III. Enforcement Activity by the Attorney General in 2014

A. Civil Actions Filed in 2014 to Enforce UOCAVA

State of West Virginia

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF WEST VIRGINIA; and NATALIE E. TENNANT, Secretary of State of the State of West Virginia, in her official capacity, Defendants.	)	Civil Action No. 2:14-cv-27456

COMPLAINT

The United States of America alleges:

1. This action is brought by the Attorney General on behalf of the United States under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C §§ 20301 *et seq*. UOCAVA requires that absent uniformed services voters and overseas voters ("UOCAVA voters") shall be permitted "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 52 U.S.C § 20302(a)(1). Further, UOCAVA requires that states transmit validly requested absentee ballots to UOCAVA voters at least 45 days in advance of an election for Federal office, unless the State receives a waiver of that requirement pursuant to the hardship exemption provision in Section 102(g) of UOCAVA. 52 U.S.C § 20302(a)(8) and (g).

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 52 U.S.C. § 20307, and brings this enforcement action to ensure that West Virginia's absent uniformed services voters and overseas voters ("UOCAVA voters") have sufficient opportunity under

Federal law to receive, mark and return their absentee ballots in time to be counted for the November 4, 2014 Federal general election.

3. This Court has jurisdiction pursuant to 52 U.S.C. § 20307 and 28 U.S.C. §§ 1345 and 2201.

4. Defendant State of West Virginia (the "State") is responsible for complying with UOCAVA and ensuring that validly-requested absentee ballots are transmitted to UOCAVA voters in accordance with the statute's terms. 52 U.S.C § 20307.

5. Defendant Natalie E. Tennant is the West Virginia Secretary of State and is sued in her official capacity. The West Virginia Secretary of State is the chief election official of the state and has authority under the West Virginia Code, §3-1A-6, to issue orders and promulgate legislative rules. With regard to absentee voting, the Secretary of State "shall make, amend and rescind rules, regulations, orders and instructions, and prescribe forms, lists and records, and consolidation of forms, lists and records as may be necessary to carry out the policy of the Legislature . . . as may be necessary to provide for an effective, efficient and orderly administration of the absentee voter law [of West Virginia]." W. Va. Code § 3-3-12.

6. Section 102(a)(8)(A) of UOCAVA requires that states transmit validly requested ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election, unless a waiver is granted pursuant to Section 102(g) of UOCAVA. 52 U.S.C §§ 20302(a)(8)(A) & (g).

7. States can be exempted from the requirement to transmit ballots 45 days in advance of a Federal election if they apply for, and are granted, a waiver from the Presidential Designee for UOCAVA, the Secretary of Defense. 52 U.S.C. § 20302(g).

8. The deadline for transmission of absentee ballots to UOCAVA voters who requested them at least 45 days before the November 4, 2014 Federal general election was September 20, 2014.

9. On September 22, 2014, a petition for writ of mandamus was filed seeking to require the State Election Commission and the Secretary of State to allow a candidate for the West Virginia State House of Delegates District 35 to be placed on the November 4, 2014 ballot to replace one of the incumbent delegates who withdrew from the race. On October 1, 2014, the West Virginia Supreme Court of Appeals ordered the replacement candidate's name to be added to the ballot and corrected ballots to be transmitted to all absentee voters in that district, including the UOCAVA voters to whom ballots had already been transmitted on or before September 20, 2014. *See State ex rel. McDavid, et al. v. Tennant, et al.*, No. 14-0939 (W. Va. Oct. 1, 2014).

10. On October 1, 2014, the State applied for a waiver pursuant to Section 102(g) of UOCAVA. 52 U.S.C. § 20302(g). By letter dated October 3, 2014, prior to the statutory deadline for issuing a determination on the waiver application under 52 U.S.C. § 20302(g)(3), the State withdrew its request for a waiver.

11. On October 3, 2014, the 32nd day before the November 4, 2014 Federal general election, corrected ballots were transmitted to all of the UOCAVA voters in State House of Delegates District 35 to whom the original ballots had been transmitted on or before the UOCAVA transmission deadline of September 20, 2014.

12. Under West Virginia law, ballots returned by UOCAVA voters electronically must be received by the close of the polls on Election Day to be counted. *See* W. Va. Code § 3-3-5(i). UOCAVA ballots returned by mail can be counted if they are received by the time the local board of canvassers convenes to begin the canvass on the 5th day following Election Day,

excluding Sundays. *See* W. Va. Code §§ 3-3-5(h) and 3-6-9(a)(1). Accordingly, for the November 4, 2014 Federal general election, the corrected ballots returned by mail from UOCAVA voters must be received by November 10, 2014, which is 38 days after the date of transmittal of the corrected ballots, in order to be counted.

13. On October 10, 2014, the State again applied for a waiver pursuant to Section 102(g) of UOCAVA. 52 U.S.C. § 20302(g). On October 20, 2014, the Department of Defense, pursuant to its statutory authority, denied the State's application for a waiver pursuant to Section 102(g)(2).

14. The failure by the State either to obtain a waiver or to transmit final absentee ballots to UOCAVA voters in State Delegate District 35 by the 45th day before the November 4, 2014 Federal general election constitutes a violation of Section 102(a)(8)(A) of UOCAVA.

15. An order of this Court is now necessary to require Defendants to take corrective action to protect the rights granted by UOCAVA and to ensure that affected UOCAVA voters in State Delegate District 35 have sufficient opportunity to receive, mark, and submit their ballots in time to have them counted for the November 4, 2014 general election for Federal office.

WHEREFORE, the United States asks this Court to hear this action pursuant to 52 U.S.C. § 20307 and 28 U.S.C. §§ 1345 and 2201, and:

(1) Issue a declaratory judgment under 28 U.S.C. § 2201 that the failure of Defendants to ensure that absentee ballots are transmitted to UOCAVA voters at least 45 days in advance of the November 4, 2014 general election for Federal office violates 52 U.S.C § 20302(a)(8)(A); and

(2) Issue injunctive relief ordering the Defendants, their agents and successors in office, and all persons acting in concert with them:

(a) To take such steps as are necessary to ensure that affected UOCAVA voters in State Delegate District 35 have sufficient opportunity in accordance with UOCAVA to receive, mark, and return their ballots in time to have them counted for the November 4, 2014 Federal general election;

(b) To take steps as are necessary to afford affected UOCAVA voters an opportunity to learn of this Court's order; and

(c) To provide reports to the United States and the Court concerning the transmission, receipt, and counting of UOCAVA ballots for the November 4, 2014, Federal general election pursuant to this Court's order.

The United States further asks this Court to order such other relief as the interests of justice may require, together with the costs and disbursements of this action.

For the Plaintiff United States of America:

R. BOOTH GOODWIN II
United States Attorney
Southern District of West Virginia

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF WEST VIRGINIA; and NATALIE E. TENNANT, Secretary of State of the State of West Virginia, in her official capacity, Defendants.	Civil Action No. 2:14-cv-27456

CONSENT DECREE

Plaintiff United States of America initiated this action against the State of West Virginia ("State"); and Natalie Tennant, the Secretary of State of West Virginia, in their official capacities (collectively "Defendants"), to enforce the requirements of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). 52 U.S.C. § 20301 *et seq*. The United States' Complaint alleges a violation of UOCAVA arising from the Defendants' failure to transmit the final absentee ballots to some of West Virginia's absent uniformed services voters and overseas voters ("UOCAVA voters") by the 45th day before the November 4, 2014 Federal general election, as required by Section 102(a)(8)(A) of UOCAVA or to receive a waiver of that requirement pursuant to the hardship exemption provision in Section 102(g) of UOCAVA ("waiver"). 52 U.S.C. § 20302(a)(8) and (g).

The United States and Defendants, through their respective counsel, have conferred and agree to a partial settlement of this action without the delay and expense of litigation. The parties share the goal of providing affected UOCAVA voters with sufficient opportunity under

Federal law to receive, cast and have their absentee ballots counted in the November 4, 2014 Federal general election. The parties have negotiated in good faith and agree to the entry of this Consent Decree as an appropriate partial resolution of the UOCAVA violation alleged by the United States. Accordingly, the United States and Defendants stipulate and agree that:

1. This action is brought by the Attorney General on behalf of the United States under UOCAVA. 52 U.S.C. § 20301 *et seq*. UOCAVA provides that UOCAVA voters shall be permitted "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 52 U.S.C. § 20302.

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 52 U.S.C. § 20307, and this Court has jurisdiction of this action pursuant to 52 U.S.C. § 20307 and 28 U.S.C. §§ 1345 and 2201.

3. Defendant State of West Virginia is responsible for complying with UOCAVA and ensuring that validly requested absentee ballots are transmitted to UOCAVA voters in accordance with the statute's terms. 52 U.S.C. § 20307.

4. Defendant Natalie E. Tennant is the West Virginia Secretary of State and is sued in her official capacity. The West Virginia Secretary of State is the chief election official of the state and has authority under the West Virginia Code, § 3-1A-6, to issue orders and promulgate legislative rules. With regard to absentee voting, the Secretary of State "shall make, amend and rescind rules, regulations, orders and instructions, and prescribe forms, lists and records, and consolidation of forms, lists and records as may be necessary to carry out the policy of the Legislature . . . as may be necessary to provide for an effective, efficient and orderly administration of the absentee voter law [of West Virginia]." W. Va. Code § 3-3-12.

5. Section 102(a)(8)(A) of UOCAVA requires that states transmit validly requested ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election, unless a waiver is granted pursuant to Section 102(g) of UOCAVA. 52 U.S.C. § 20302(a)(8)(A) and (g). An "election" for "federal office" is defined as an election for "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." 52 U.S.C. § 30101(1), (3).

6. States can be exempted from the requirement to transmit ballots 45 days in advance of a Federal election if they apply for, and are granted, a waiver from the Presidential Designee for UOCAVA, the Secretary of Defense. 52 U.S.C. § 20302(g).

7. The deadline for transmission of absentee ballots to UOCAVA voters who requested them at least 45 days before the November 4, 2014 Federal general election was September 20, 2014.

8. On September 22, 2014, a petition for writ of mandamus was filed with the West Virginia Supreme Court of Appeals seeking to require the State Election Commission to allow the Kanawha County Republican Executive Committee to fill the ballot vacancy created by the withdrawal of a candidate. On October 1, 2014, the West Virginia Supreme Court of Appeals ordered the replacement candidate's name be added to the ballot and corrected ballots to be transmitted to all absentee voters in that district, including the UOCAVA voters to whom ballots had already been transmitted on or before September 20, 2014. *See State ex rel. McDavid, et al. v. Tennant, et al.*, No. 14-0939 (W. Va. Oct. 1, 2014).

9. On October 3, 2014, the 32nd day before the November 4, 2014 Federal general election, corrected ballots were transmitted to all of the UOCAVA voters in State House of

Delegates District 35 to whom the original ballots had been transmitted on or before the UOCAVA transmission deadline of September 20, 2014. Corrected ballots were transmitted to affected UOCAVA voters either electronically or by postal mail based on the voters' preferred transmittal method. The ballots to those UOCAVA voters requesting mail delivery to an overseas address were transmitted by express mail along with a postage prepaid express mail envelope for return delivery. All affected UOCAVA voters were provided the option to return their ballots by email, facsimile or express or overnight mail with the return postage prepaid, regardless of their previously requested transmittal method. Further, election officials attempted to contact all affected UOCAVA voters to ensure that they had received the corrected ballot and no impediments exist for a timely return of the ballot. Not all UOCAVA voters, however, have acknowledged election officials' attempts to contact them and some have returned only the original ballots as of the filing of this Decree.

10. Under West Virginia law, ballots returned by UOCAVA voters electronically must be received by the close of the polls on Election Day to be counted. *See* W. Va. Code § 3-3-5(i). UOCAVA ballots returned by mail can be counted if they are received by the time the local board of canvassers convenes to begin the canvass on the 5th day following Election Day, excluding Sundays. *See* W. Va. Code §§ 3-3-5(h) and 3-6-9(a)(1). Accordingly, for the November 4, 2014 Federal general election, the corrected ballots returned by mail from UOCAVA voters must be received by November 10, 2014, which is 38 days after the date of transmittal of the corrected ballots, in order to be counted.

11. On October 10, 2014, the State applied for a waiver pursuant to Section 102(g) of UOCAVA. 52 U.S.C. § 20302(g). On October 20, 2014, the Department of Defense, pursuant to its statutory authority, denied the State's application for a waiver pursuant to Section

102(g)(2). *See* Ex. 1 (Letter from Jessica L. Wright (Under Secretary of Defense for Personnel and Readiness) to The Honorable Natalie Tennant (Oct. 20, 2014) (with enclosure)).

12. The failure by the State either to obtain a waiver or to transmit the final absentee ballots to UOCAVA voters in State Delegate District 35 by the 45th day before the November 4, 2014 Federal general election constitutes a violation of Section 102(a)(8)(A) of UOCAVA.

13. To avoid the burdens, delays and uncertainties of litigation the parties agree that this Court should enter an order: (1) extending the ballot receipt deadline for the corrected UOCAVA ballots and any Federal Write-In Absentee Ballots returned by mail from affected UOCAVA voters in State Delegate District 35 to November 17, 2014; and (2) requiring the State to provide notice to the affected UOCAVA voters of the extended receipt deadline for mailed ballots.

14. The parties agree that this Consent Decree applies only to the ballots cast in the elections for Federal office for the November 4, 2014 Federal general election, and has no application whatsoever on the votes cast in the state and local elections held on November 4, 2014. Nothing in this Consent Decree shall be construed as imposing any obligation on Defendants with regard to the state and local elections held on November 4, 2014.

WHEREFORE, the parties having freely given their consent, and the terms of the Decree being fair, reasonable, and consistent with the requirements of UOCAVA, it is hereby ORDERED, ADJUDGED, and DECREED by the Court that:

(1) To ensure that affected UOCAVA voters in State Delegate District 35 will have an opportunity to receive corrected absentee ballots and to submit marked corrected absentee ballots in time to be counted in elections for Federal office for the November 4, 2014 Federal general

election, the Secretary of State shall issue an Order directing the Kanawha County Commission to count: all those votes for Federal office, as defined by paragraph (5) of the stipulations above, contained on corrected UOCAVA ballots transmitted on October 3, 2014 to affected voters in State Delegate District 35, and all those votes for Federal office, as defined by paragraph (5) of the stipulations above, contained on any Federal Write-In Absentee Ballots returned by such voters by postal or express mail that are received after the State's ballot receipt deadline of November 10, 2014, provided they are executed on or before November 4, 2014 and received by November 17, 2014, or returned by email or facsimile by November 4, 2014, and are otherwise valid under State law. Election results for the November 4, 2014 Federal general election may be formally certified pursuant to the state law deadline if the number of outstanding corrected absentee ballots from affected UOCAVA voters in State Delegate District 35 could not mathematically alter the outcome of the election, subject to amendment or re-certification to add any votes from ballots accepted in accordance with this Court's Order;

(2) Defendants shall take such steps as are necessary to afford affected UOCAVA voters an opportunity to learn of this Court's order and to ensure that all affected UOCAVA voters in State Delegate District 35 receive appropriate instructions explaining ballot return deadlines and the options and procedures for returning a corrected ballot.

Defendants shall provide such notice to UOCAVA voters who have not yet returned a corrected ballot using the individualized means of voter contact obtained and previously employed since the State's transmission of corrected ballots on October 3, 2014. Such notice shall, at minimum explain the relevant deadlines for executing and returning all corrected ballots by postal mail, email, and telefacsimile and ask UOCAVA voters to acknowledge receipt of the notice. *See* Ex. 2 Notice to Affected UOCAVA Voters.

(3) The Defendants shall provide a report no later than November 4, 2014 in an agreed upon format to the United States Department of Justice, confirming that each affected UOCAVA voter has been provided the individualized notice described in paragraph (2) above, explaining the method of notice given to each UOCAVA voter, and the form of acknowledgement of receipt of such notice. If all affected voters have not been contacted by that date, Defendants shall continue to attempt to contact such voters and shall continue to report results to the United States on an agreed upon schedule. All reports provided pursuant to this paragraph shall include the number of UOCAVA voters who have returned original UOCAVA ballots, the number of voters who have returned corrected UOCAVA ballots, and the number of voters who have not returned either the original or the corrected ballot; and

(4) Defendants shall file a report with this Court no later than December 15, 2014, in a format agreed upon by the parties, concerning the number of affected UOCAVA ballots received and counted for the November 4, 2014 Federal general election.

The Court shall retain jurisdiction over this action to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree or of UOCAVA. In particular, the Court shall retain jurisdiction to consider entry of any supplemental relief sought by the United States with regard to the counting of votes in elections for Federal office contained on an original ballot from a UOCAVA voter, if that ballot is the only ballot returned by that voter, if the Court determines such supplemental relief is appropriate.

The undersigned agree to entry of this Consent Decree:

For the Plaintiff United States of America:

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United States Attorney

By: */s/ Gary L. Call*
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WV State Bar No. 589
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/s/ Spencer R. Fisher
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Date: November 3, 2014

For the Defendants State of West Virginia, *et al.*:

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Counsel for Natalie E. Tennant, Secretary of State of the State of West Virginia

Date: November 3, 2014

SO ORDERED this 3rd day of November, 2014.

John T. Copenhaver, Jr.
United States District Judge

Exhibit 1

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND
READINESS

OCT 20 2014

The Honorable Natalie Tennant
Secretary of State
Bldg. 1, Suite 157-K
1900 Kanawha Blvd. East
Charleston, WV 25305-0770

Dear Secretary Tennant:

On October 10, 2014, the Department of Defense received from the State of West Virginia an application dated October 10, 2014, for an undue hardship waiver under the *Uniformed and Overseas Citizens Absentee Voting Act* (*UOCAVA*) for the November 4, 2014, General Election for Federal office.

Under delegated authority from the Secretary of Defense as the Presidential Designee for *UOCAVA*, I have reviewed the State's application, consulted with the representative of the Attorney General, and find it does not meet the requirements for an undue hardship waiver under 52 U.S.C. § 20302 (g)(2). Accordingly, I deny the State of West Virginia's request to waive the application of 52 U.S.C. §20302 (a)(8)(A) for the November 4, 2014, General Election.

This waiver denial is predicated on the assertions made by the State in support of its waiver request as explained in detail in the Memorandum enclosed with this letter. Based on those assertions and the attached rationale, I have determined the following: the State faces an undue hardship. However, the State's proposed comprehensive plan for this election does not provide sufficient time for *UOCAVA* voters to vote and have their ballots counted as a substitute for the requirement that absentee ballots be sent to all *UOCAVA* voters at least 45 days prior to Election Day.

Sincerely,

Jessica L. Wright

Enclosure:
As stated

EXPLANATION AND RATIONALE

Denial of State of West Virginia's Waiver Request
under 52 U.S.C. § 20302 (g)(2)
for the November 4, 2014, Federal General Election

The Federal Voting Assistance Program (FVAP) of the Department of Defense received the application of the State of West Virginia (the State), dated October 10, 2014, for an undue hardship waiver for the November 4, 2014, General Election for Federal office, as provided by the *Uniformed and Overseas Citizens Absentee Voting Act* (*UOCAVA*).[1] Denial of the waiver request and this explanation and rationale are predicated on the assertions made by the State in support of its waiver request in its October 10, 2014, official waiver request letter.[2]

Under delegated authority from the Secretary of Defense as the Presidential Designee for *UOCAVA*,[3] the Under Secretary of Defense for Personnel and Readiness has reviewed West Virginia's application, consulted with the representative of the Attorney General, and finds the State's application does not meet the requirements for a one-time undue hardship waiver under 52 U.S.C. § 20302 (g)(2)(B)(ii),[4] and denies West Virginia's waiver request from the application of 52 U.S.C. § 20302 (a)(8)(A)[5] for the November 4, 2014, Federal General Election. For purposes of this Memorandum, the term "Presidential Designee" includes those officials exercising authority delegated by the Presidential Designee.

I. Background and Initial Findings

UOCAVA authorizes the Presidential Designee to grant a waiver only to those States whose reason for a waiver corresponds with one of the following situations:

1. The State's primary election date prohibits the State from complying with subsection (a)(8)(A);
2. The State has suffered a delay in generating ballots due to a legal contest; or
3. The State Constitution prohibits the State from complying with such Section.[6]

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[1] 52 U.S.C § 20302 (*formerly* 42 U.S.C. § 1973ff, *et seq.*) *UOCAVA*'s waiver provision is found at 52 U.S.C. § 20302 (g)(2).

[2] West Virginia previously submitted a request for an undue hardship exemption based on the legal contest provision on October 1, 2014. On October 2, the Presidential Designee initiated a conference call between West Virginia State officials and officials from FVAP and the United States Department of Justice's Voting Section. By a letter dated October 3, 2014, and prior to the statutory deadline for issuing a determination under 52 U.S.C. § 20302 (g)(3), West Virginia withdrew the October 1 waiver request. On October 10, 2014, West Virginia filed a new request for an undue hardship exemption. In deciding the instant waiver application, the Presidential Designee has considered all the information provided by West Virginia in support of its current and previous waiver request.

[3] The Secretary of Defense was designated the Presidential Designee by Executive Order 12642 (June 8, 1988), 53 CFR § 21975. The Secretary of Defense has delegated this authority to the Under Secretary of Defense (Personnel & Readiness) through DOD Directive 5124.02.

[4] *Formerly* 42 U.S.C. § 1973ff-1(g)(2)(B)(ii).

[5] *Formerly* 42 U.S.C. § 1973ff-1(a)(8)(A).

[6] 52 U.S.C. § 20302 (g)(2)(B) (*formerly* 42 U.S.C. § 1973ff-1(g)(2)(B)).

West Virginia states that after transmitting *UOCAVA* ballots for the Federal General Election by *UOCAVA*'s 45-day statutory deadline of September 20, 2014, the West Virginia Supreme Court of Appeals decided a legal contest over the replacement of a candidate for the 35th Delegate District of the West Virginia House of Delegates. The Court entered an order on October 1, 2014, requiring the State to amend the ballot and send *UOCAVA* voters new ballots for the Federal General Election (which includes the offices of U.S. Senate and members of the U.S. House of Representatives, 2nd District). The State asserts that the ruling in this legal contest, issued eleven (11) days after the 45 day deadline for sending *UOCAVA* ballots, prevents the State from complying with 52 U.S.C. § 20302 (a)(8)(A).[7]

Under *UOCAVA*, if a State determines that it is unable to comply with the requirement to transmit absentee ballots at least 45 days before an election for Federal office (45-day prior requirement) due to one of the three situations referenced above resulting in an undue hardship, the Chief State Election Official shall request a waiver from the Presidential Designee pursuant to the Act. The Presidential Designee shall approve such a request if the Presidential Designee determines that:

1. One or more of the three referenced situations creates an undue hardship for the State; and,
2. The State's comprehensive plan presented in support of its request provides absent Uniformed Services and overseas voters (*UOCAVA* voters) sufficient time to receive and submit absentee ballots they have requested in time to be counted in the election for Federal office.

The Presidential Designee's findings for each of these requirements are addressed separately below.

In the memorandum of February 7, 2012, to Chief State Election Officials, the Director of FVAP provided guidance on *UOCAVA* ballot delivery waivers. In Appendix A, Section IV, Evaluation of Comprehensive Plans, the guidance concludes:

> "In summary, a State's comprehensive plan must provide sufficient time for *UOCAVA* voters to receive, mark, and return the ballot in time to be counted. The burden is upon the State to demonstrate that a waiver qualifying condition exists, that compliance with the requirements of *UOCAVA* in light of the condition presents an undue hardship to the State, and that the comprehensive plan provides the *UOCAVA* voters sufficient time to receive, mark, and return their ballots in time to be counted. To serve as a substitute for the 45-day prior requirement, the comprehensive plan must provide *UOCAVA* voters sufficient time to successfully vote as compared to the time available by strictly complying with *UOCAVA*'s minimum ballot transmission requirements."[8]

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[7] *Formerly* 42 U.S.C. § 1973ff-1(a)(8)(A)); *see also* 52 U.S.C. § 20302 (g)(2)(B)(i) (*formerly* 42 U.S.C. § 1973ff-1(g)(2)(B)(i)).

[8] Guidance on *Uniformed and Overseas Citizen Absentee Voting Act* (*UOCAVA*) Ballot Delivery Waivers, Memorandum Dated February 7, 2012, available at http://www.fvap.gov/eo/waivers.

The comprehensive plan proposed by West Virginia addressed the following requirements set forth in *UOCAVA*:

> (i) the steps the State will take to ensure that *UOCAVA* voters have time to receive, mark, and submit their ballots in time to have those ballots counted in the election;
> (ii) why the plan provides *UOCAVA* voters sufficient time to vote as a substitute for the requirements of the *UOCAVA*; and
> (iii) the underlying factual information which explains how the plan provides such sufficient time to vote as a substitute for such requirements.[9]

Further, as required by 52 U.S.C. § 20302 (g)(1)(A),[10] West Virginia's application includes recognition that the purpose of the Act's 45-day transmission requirement is to allow *UOCAVA* voters enough time to vote and have their votes counted in an election for Federal office.

In determining whether the State's comprehensive plan provides sufficient time to vote as a substitute for the requirement to transmit ballots 45 days before the election, the Presidential Designee considered that the minimum absentee ballot requirements under the law require ballots to be transmitted 45 days prior to Election Day, using the voter's choice of either postal mail or electronic transmission method.

The State's comprehensive plan was evaluated against several criteria; the analysis as to whether the comprehensive plan provides sufficient time was examined by considering the totality of circumstances presented. Among the issues considered was the total time a voter has to receive, mark and return the ballot and have it counted (including the number of days before and after Election Day). Also among the issues considered was the cumulative number and accessibility of alternative methods of ballot transmission, and, if applicable, ballot return, as additional alternative methods provide more *UOCAVA* voters with the likelihood they will have sufficient time to receive, vote, and return their ballot and have it counted. Finally, the comprehensive plan was reviewed for any additional efforts made by the State that improved the likelihood a *UOCAVA* voter would be able to receive, vote and return the ballot and have it count.

II. The State Has Shown Undue Hardship

West Virginia's Chief State Election Official has determined that the court decision in West Virginia ex rel. Marie McDavid and Kanawha County Republican Executive Committee v. Natalie Tennant, Secretary of State, et al.,[11] required that replacement ballots be sent to *UOCAVA* voters in the 35th Delegate District of the West Virginia House of Delegates. The State had previously met the 45-day prior requirement for transmitting ballots to *UOCAVA* voters for the November General Election. The court decision on October 1, 2014, requiring the printing and transmission of new ballots makes compliance with the 45-day prior requirement for the new ballots impossible.

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[9] 52 U.S.C. § 20302 (g)(1)(D) (*formerly* 42 U.S.C. § 1973ff-1(g)(1)(D)).
[10] *Formerly* 42 U.S.C. § 1973ff-1(g)(1)(A).
[11] State ex rel. McDavid, et al. v. Tennant, et al., No. 14-0939 (W. Va. Oct. 1, 2014), http://www.courtswv.gov/supreme-court/memo-decisions/fall2014/14-0939memo.pdf.

For this reason, the State's waiver application has demonstrated an undue hardship.

III. The State's Comprehensive Plan Provides Insufficient Time for *UOCAVA* Voters To Vote and Have That Vote Counted

The Presidential Designee concludes that West Virginia did not establish that its proposed comprehensive plan provides *UOCAVA* voters "sufficient time for *UOCAVA* voters to receive, mark, and return the ballot in time to be counted" in the November 4, 2014, Federal General Election.[12] In reaching this determination, the Presidential Designee examined the totality of circumstances presented in the plan to determine whether it provided sufficient time to vote as a substitute for *UOCAVA*'s requirement that ballots be transmitted at least 45 days prior to Election Day. Among the issues considered were the time voters have to receive, mark and return their ballots and have them counted (both before and after Election Day); the cumulative number of alternative methods of ballot transmission and return; and the accessibility of the alternative ballot transmission methods presented in the comprehensive plan.

Under its submitted comprehensive plan, West Virginia transmitted the new absentee ballots to *UOCAVA* voters on October 3, 2014, which is 32 days before the election. In West Virginia, *UOCAVA* ballots returned by postal mail are accepted six (6) days after Election Day, so long as the ballot envelope is postmarked by Election Day. This gives *UOCAVA* voters no more than 38 days of transit time rather than the 45 days provided by 52 U.S.C. § 20302 (a)(8)(A). Those *UOCAVA* voters who return voted ballots by electronic means must transmit their ballots no later than Election Day. This gives them no more than 32 days to receive, mark and return their ballots and have them counted.

We have considered the referenced ballot transit times provided in conjunction with the additional methods other than postal mail available to West Virginia's *UOCAVA* voters to receive and return their ballots. This includes the option of facsimile and email transmission of the ballot to the voter at the voter's request. In addition, the waiver application states that the new ballots sent to voters overseas who requested postal mail were sent by express service. Those overseas *UOCAVA* voters who received the new ballots by express mail were provided express return envelopes, and all other *UOCAVA* voters were informed by email or telephone that they may request that a prepaid express mail return envelope be sent to them. In addition to postal mail, all *UOCAVA* voters may return ballots by email or fax.

While these options may increase the opportunity for some *UOCAVA* voters to receive and cast timely ballots, we cannot conclude that West Virginia's plan ensures sufficient transit time for all *UOCAVA* voters to return their ballots in time to be counted. The voters' preferred method for receiving and returning balloting materials must be a factor, as must the likelihood that at least some *UOCAVA* voters will not have access to any means for electronic transmission of the voted ballot (e.g., Service members deployed in austere locations or otherwise lacking immediate access to the needed technology when they receive the new ballot).

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[12] 52 U.S.C. § 20302 (g)(2)(A) (*formerly* 42 U.S.C. § 1973ff-1(g)(2)(A)).

We also have considered whether *UOCAVA* voters will have a reasonable opportunity for their votes to be counted, at least for the Federal elections, on the original ballots that were timely transmitted under *UOCAVA* prior to the West Virginia Supreme Court of Appeals' order. West Virginia has not supplied us with any authority under State law, particularly in light of the court's order, that provides certainty that those votes cast on the original ballots would be successfully counted if the *UOCAVA* voters' new ballots are not received in time to be counted. Accordingly, based on the information West Virginia has provided, it remains unclear whether *UOCAVA* voters would be disenfranchised if only the original, timely-transmitted, ballots are returned by the State's ballot receipt deadline.

IV. Conclusion

The Presidential Designee has determined that in the totality of circumstances, West Virginia's comprehensive plan fails to provide absent Uniformed Services voters and overseas voters sufficient time to receive and submit absentee ballots they have requested in time to be counted in the November 4, 2014, election. Accordingly, the plan is not a sufficient substitute for 52 U.S.C. § 20302 (a)(8)(A)'s[13] requirement to transmit ballots 45 days in advance of Election Day in Federal elections, and thus cannot serve as the basis for granting a hardship waiver under 52 U.S.C. § 20302 (g)(2).[14]

If you have any questions or concerns, please contact Paddy McGuire, FVAP Deputy Director for State and Local Relations, at 571-372-0739, or paddy.mcguire@fvap.gov.

[13] *Formerly* 42 U.S.C. § 1973ff-1(a)(8)(A).
[14] *Formerly* 42 U.S.C. § 1973ff-1(g)(2).

Exhibit 2

NOTICE FROM THE WEST VIRGINIA SECRETARY OF STATE

On October 3, 2014, you were sent a corrected ballot. You must return that corrected ballot if you wish to have your vote counted in the election. Read this notice carefully. It explains what you must do to have your corrected ballot counted. This notice contains the final instructions and supersedes any other instructions you may have earlier received from this office or anyone else.

YOU MAY RETURN YOUR BALLOT BY THE INDICATED DEADLINE IN THE FOLLOWING WAYS ONLY:

- ***BY MAIL*: If you mail your ballot, the envelope must be postmarked no later than November 4, 2014. Please use either the return envelope this office provided to you or mail your ballot to the following address:**

  Kanawha County Clerk's Office
  Attention: Absentee Ballot Office
  409 Virginia Street East
  Charleston, WV 25301

- ***BY FAX OR EMAIL*: If you fax or email your ballot, it must be received no later than the closing of the polls on November 4, 2014. Please use either of the following:**

  Fax: **(304)-357-0613**
  Email: voter@kanawha.us

If you receive this notice via email, please reply and acknowledge receipt. If you have any questions, please contact lbrown@wvsos.com or 304-558-6000.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA,

Plaintiff,

v. **Civil Action No. 2:14-27456**

THE STATE OF WEST VIRGINIA
and NATALIE E. TENNANT,
Secretary of State of West Virginia,
in her official capacity,

Defendants.

MEMORANDUM OPINION & ORDER

Pending is the plaintiff's motion for emergency supplemental injunctive relief, filed November 6, 2014. The defendants responded on November 7, 2014.

I.

The Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C.A. §§ 20301-20311 (2012), requires states to permit uniformed service voters and overseas citizens to "vote by absentee ballot in general, special, primary, and runoff elections for Federal office[.]" 52 U.S.C.A. § 20302(a)(1). There are two federal offices at stake here, namely, United States Senate and United States House of Representatives.

States are specifically responsible for transmitting absentee ballots to "absent uniformed service voter[s] or overseas voter[s] . . . not later than 45 days before the election," provided that the voter requests the ballot at least 45 days before the election. Id. § 20302(a)(8)(A). The purpose of the forty-five day requirement is to ensure that those voters have enough time to "receive, mark, and return" their ballots. See id. § 20302(g). Under the statutory framework, the deadline for transmitting absentee ballots to absent uniformed service members and overseas citizens (the "UOCAVA voters") who requested them at least 45 days before the recently held November 4, 2014 election was September 20, 2014. See Compl. ¶ 8.

The parties agree that the defendants initially transmitted ballots to UOCAVA voters in a timely manner on or before September 20, 2014 (the "original ballots"). See Consent Decree ¶ 8. Two days after that deadline, however, the Kanawha County Republican Executive Committee ("KREC") and Marie McDavid filed a petition for a writ of mandamus with the Supreme Court of Appeals of West Virginia, seeking to require the West Virginia Secretary of State and the State Election Committee to substitute McDavid as the Republican candidate in the race for the House of Delegates in the State's 35th House District

following the withdrawal of the party's original candidate. See State ex rel. McDavid v. Tennant, No. 14-939, slip op. at 1-2 (W. Va. Oct. 1, 2014). Specifically, the petition prayed that the Supreme Court of Appeals would compel the Secretary of State to certify McDavid and add her to the ballot, and -- critically -- instruct the Kanawha County Clerk to "mail valid ballots to all absentee voters with instructions that the invalid ballot that is incomplete shall be void." On October 1, 2014, the Supreme Court of Appeals ruled in favor of McDavid and the KREC, granted the writ of mandamus, ordered McDavid's name to be added to the ballot, and ordered the Secretary of State to issue corrected ballots. Id. at 10. The court's opinion did not specifically address whether the original ballots were to be considered void but, as noted, the writ was granted.

On October 3, 2014, revised ballots listing McDavid as a candidate (the "corrected ballots") were transmitted to UOCAVA voters in the 35th House District. Compl. ¶ 11. The delay occasioned by the need to comply with the Supreme Court of Appeals' order meant that the corrected ballots were transmitted just 32 (rather than 45) days prior to the election. As a result, on October 31, 2014, the United States initiated this action, charging the State and the Secretary of State with violating the UOCAVA and requesting: (1) "a declaratory judgment

under 28 U.S.C. § 2201 that the failure . . . to ensure that absentee ballots [were] transmitted . . . at least 45 days in advance of the November 4, 2014 [election] . . . violates 52 U.S.C. § 20302(a)(8)(A)"; and (2) an injunction ordering the defendants to "take such steps as are necessary to ensure that affected [overseas] voters in State Delegate District 35 have sufficient opportunity . . . to receive, mark, and return their ballots." See Compl. at Prayer of Relief.

The parties simultaneously filed a proposed consent decree that would have, among other things, extended the deadline for returning UOCAVA ballots until November 17, 2014. That consent decree, if entered, also would have required the Kanawha County Commission to count votes in the races for the United States Senate and House of Representatives cast on original ballots -- that is, those ballots not including McDavid as a candidate -- provided that the voter did not return a corrected ballot, and the original ballot was otherwise validly executed. The relief contemplated by the consent decree was, however, "explicitly conditioned upon the entry of an order by the West Virginia Supreme Court of Appeals . . . clarifying the scope of the ordered relief in [McDavid], . . . and confirming that the scope of the writ of mandamus issued in that case does not prohibit the counting of" the original, uncorrected absentee

ballots with respect to the two federal offices, "if that ballot is the only ballot returned[.]" Proposed Consent Decree at 8. Unbeknownst to the parties, the Supreme Court of Appeals had already declined to so clarify its order on October 30, 2014, thereby mooting the terms of the proposed consent decree.

On Monday, November 3, 2014, the parties submitted, and the court entered, a revised proposed consent decree that extended the deadline for returning UOCAVA ballots until November 17, 2014, as previously contemplated. The revised consent decree did not direct the State to count original ballots, but noted the court's continuing jurisdiction to "consider entry of any supplemental relief sought by the United States with regard to the counting of votes . . . on an original ballot . . . , if that ballot is the only ballot returned by that voter[.]" Consent Decree at 8. The United States has now moved for injunctive relief on precisely that point.

Based on information submitted by the United States in support of the motion, it appears that corrected ballots were sent to the thirty UOCAVA voters in the 35th House District who had requested a ballot. See Pl.'s Mot., Ex. 9 (E-mail from Tim Leach to Spencer Fisher and Sarabeth Donovan, dated November 5, 2014). As of November 5, 2014, seventeen of those voters had returned a corrected ballot. Id. Of the remaining thirteen

voters, ten have not returned either ballot, although five of them advised they had received the corrected ballot and "knew of no impediment," apparently meaning no impediment to returning it. Id. As to the remaining three, all of them had returned the original ballot. Id. Two of those three indicated receipt of the corrected ballot but did not intend to return it. Id. The last of those three is not shown to have responded with respect to the corrected ballot. Id.

The United States argues that counting the original ballots is the only way to remedy the State's UOCAVA violation. The State "does not oppose the relief requested by the United States[.]" The Secretary of State "wishes to have the ballots of overseas and military voters counted," but interprets the Supreme Court of Appeals' refusal to clarify its order in McDavid, as an "indication that no Original Ballots can be counted." See Response of Defendant Secretary of State to United States' Motion for Emergency Supplemental Injunctive Relief ("SOS Resp.") at 2 (emphasis in the original). She professes to be "unable to take a position as to whether the order the United States requests here should be issued as a matter of federal law." Id. at 7.

II.

"A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants[,] . . . . on a temporary basis, the relief that can be granted permanently after trial[.]" The Real Truth About Obama, Inc. v. FEC ("Real Truth I"), 575 F.3d 342, 345 (4th Cir. 2009), vacated on other grounds, Citizens United v. FEC, 558 U.S. 310 (2010), and reissued as to Parts I & II, The Real Truth About Obama, Inc. v. FEC, 607 F.3d 355 (4th Cir. 2010) (per curiam). The party seeking the preliminary injunction must demonstrate:

> **[1] [T]hat he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.**

Id. at 346 (quoting and citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). All four elements must be established by "a clear showing" before the injunction will issue. Id.; see also Winter, 555 U.S. at 22 (stating that a preliminary injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief").

The scope of the injunctive relief to be provided must also be appropriately drawn. "It is well established that injunctive relief should be no more burdensome to the defendant

than necessary to provide complete relief to the plaintiffs." Kentuckians for Commonwealth v. Rivenburgh, 317 F.3d 425, 436 (4th Cir. 2003) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)). Indeed, as our court of appeals recently admonished, an injunction is improper if it "does not carefully address only the circumstances in the case," or sweeps more broadly than "necessary to provide complete relief to the plaintiff." PBM Products, LLC v. Mead Johnson & Co., 639 F.3d 111, 128 (4th Cir. 2011) (internal quotation marks and citation omitted).

From all that appears at this preliminary injunction stage, the state officials have taken such steps as necessary to ensure that affected overseas voters in House District 35 have sufficient opportunity to receive, mark and return ballots for the two federal offices. They have done so by sending out a corrected ballot and by joining in the consent decree entered by the court on November 3, 2014, which extended the time to November 17, 2014, for returning by mail the corrected ballot in keeping with the 45-day period prescribed by the UOCAVA. The thirty affected voters consist of seventeen who returned the corrected ballot, ten who returned neither the original nor the corrected ballot, two who returned the original ballot and indicated receipt of the corrected ballot but declined to return

it, and one who returned the original ballot but has not been heard from respecting the corrected ballot.

The court concludes that the United States has not, at this juncture, made a clear showing of likelihood of success on the merits of its claim that would have the latter three original ballots counted for the federal offices since a corrected ballot was not received from any of the three. Though apparently informed of the consequences, two of the three have chosen not to return a corrected ballot and the reason for the failure of the third to return a corrected ballot is unknown.

As to the remaining factors for the issuance of a preliminary injunction, irreparable harm will not be suffered in the absence of preliminary relief inasmuch as a full measure of relief may yet be afforded should it be found that a voter has been denied the right to cast his or her vote for the two federal offices. The balance of equities tips in favor of first fully developing the facts before compelling action that may prove to be improvident. Finally, a premature injunction is not in the public interest when it may ultimately be concluded, under the circumstances here, that the invalidation of the original ballots for federal offices by the Supreme Court of Appeals of West Virginia may, consistently with the UOCAVA, be upheld.

III.

In an effort to conclude this matter prior to the Governor's proclamation of the federal election outcome pursuant to W. Va. Code § 3-6-11, it is ORDERED that a final hearing on the merits of this action be held at 1:30 p.m. on December 1, 2014. It is further ORDERED that a pretrial conference be conducted at 1:30 p.m. on November 25, 2014.

The defendant Secretary of State is requested to undertake completion of, and file with the court by November 24, 2014, a comprehensive update of the report described on page 7 at paragraph (3) of the Consent Decree of November 3, 2014. It is anticipated that such additional information may provide the basis for a stipulation of facts on which the issues in this case may be submitted for final resolution, in which event the December 1st final hearing on the merits may become unnecessary.

The Clerk is requested to transmit a copy of this order to all counsel of record and any unrepresented parties.

ENTER: November 18, 2014

John T. Copenhaver, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 2:14-27456

THE STATE OF WEST VIRGINIA
and NATALIE E. TENNANT,
Secretary of State of West Virginia,
in her official capacity,

Defendants.

ORDER

On November 25, 2014, the parties jointly filed an integrated pretrial order and stipulation of undisputed facts, as well as several exhibits. The parties maintain that there are no contested issues of fact between them, and that their stipulation and exhibits comprise the sum of the evidence on which they intend to rely.

Accordingly, inasmuch as it appears that no material fact remains in dispute, it is ORDERED that the hearing in this matter set for December 1, 2014 at 1:30 p.m. be, and it hereby is, cancelled. The parties are directed to submit briefing on the merits of the case according to the following schedule:

Case Event	Deadline
Plaintiff's brief	12/05/2014
Defendants' responses	12/12/2014
Plaintiff's reply	12/19/2014

The Clerk is requested to transmit a copy of this order to all counsel of record.

ENTER: November 26, 2014

John T. Copenhaver, Jr.
United States District Judge

III. Enforcement Activity by the Attorney General in 2014

B. Activity in Other Litigation by the Attorney General under UOCAVA

State of Alabama

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ALABAMA and JIM BENNETT, SECRETARY OF STATE OF ALABAMA, in his official capacity, Defendants.	Case No. 2:12-cv-179-MHT-WC

REMEDIAL ORDER

Plaintiff United States of America ("United States") initiated this action against the State of Alabama and the Alabama Secretary of State (collectively, the "State") to enforce the requirements of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. § 1973ff *et seq*., as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) ("MOVE Act"), and specifically the 45-day advance ballot transmission requirement of 42 U.S.C. § 1973ff-1(a)(8)(A) .

The parties share the goal of providing UOCAVA voters with a sufficient opportunity to participate in all elections for Federal office. The parties have negotiated in good faith and, with the exception of the United States' claim addressing Alabama's administration of Federal primary runoff elections, hereby agree to the entry of this Remedial Order as an appropriate resolution of the UOCAVA violations alleged by the United States. This Remedial Order requires certain administrative changes that will expire December 31, 2016, and will make

certain changes to Alabama election law that will remain in effect until otherwise ordered. The United States and the State stipulate and agree that:

1. The Attorney General brought this action on behalf of the United States pursuant to UOCAVA, as amended by the MOVE Act. 42 U.S.C. §1973ff-4(a).

2. UOCAVA provides that absent uniformed services voters and overseas voters shall be permitted "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office . . . ." 42 U.S.C. § 1973ff-1(a)(1).

3. Unless a hardship waiver is obtained, UOCAVA requires States to transmit validly-requested ballots to any UOCAVA voter when "the request is received at least 45 days before an election for Federal office, not later than 45 days before the election." 42 U.S.C. § 1973ff-1(a)(8)(A).[1]

4. The State was unable to comply with UOCAVA's 45-day advance mail and electronic transmission requirement during the November 2, 2010 Federal general election, the March 13, 2012 Federal primary election, and the November 6, 2012 Federal general election.

5. The next regularly scheduled Federal election in Alabama is the June 3, 2014 Federal primary election.

6. Based on the foregoing, the parties agree that this Court has jurisdiction over the issues resolved in this Remedial Order and that the relief ordered herein is appropriate. *See* 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

7. The parties agree that the State will be in a better position to meet its obligations under UOCAVA if changes are made to: 1) the State's election calendar; 2) the State's oversight

[1] The parties disagree regarding the applicability of UOCAVA's 45-day advance ballot transmission mandate to Federal runoff elections. That issue is pending before the Court. This Remedial Order does not address the Federal runoff election issue.

of local election officials who are delegated UOCAVA responsibilities; 3) the training of local election officials; and 4) the electronic ballot transmission system.

8. The Attorney General is authorized to enforce UOCAVA, 42 U.S.C. §1973ff-4(a), and has brought this enforcement action to ensure that Alabama's UOCAVA voters will have sufficient opportunity to receive absentee ballots they have requested and to submit marked absentee ballots in time to be counted for all future Federal elections in the State.

9. Defendant State of Alabama is responsible for complying with UOCAVA, and ensuring that absentee ballots are sent to UOCAVA voters in accordance with its terms. 42 U.S.C. § 1973ff-1.

10. Defendant Secretary of State Jim Bennett is the chief elections official in Alabama. Ala. Code § 17-1-3. The principal office of the Secretary of State's Elections Division is in Montgomery, Alabama.

WHEREFORE, the parties having freely given their consent, and the terms of this Remedial Order being fair, reasonable, and consistent with the requirements of UOCAVA, it is hereby ORDERED, ADJUDGED, AND DECREED that:

I. ALABAMA'S ELECTION CALENDAR AND STATUTORY REQUIREMENTS

Beginning with the 2014 Federal election cycle, the following deadlines and requirements shall be, and shall remain, in effect unless and until they are superseded by a subsequent Court order:

1. Candidate Certification Deadlines

- Notwithstanding the provisions of Ala. Code § 17-6-21, nominations and/or amendments to candidate certifications in Federal primary or general elections must be finalized no later than 76 days prior to the election.

- Notwithstanding the provisions of Ala. Code § 17-9-3, the Secretary of State must certify independent candidates and candidates of minor parties not later than 74 days before the general election.

2. Candidate Withdrawal Notification and Re-Nomination Deadlines

- Notwithstanding the provisions of Ala. Code § 17-13-5, a) candidates must file their declarations with the State or county party chairman no later than 5:00 P.M. on the 116th day before the date of the primary election; b) State or county party chairmen must certify primary candidates 82 days before the primary election; and c) the Secretary of State must certify to each county's probate judge the names of the opposed candidates for nomination 74 days prior to the date of the primary election.
- Notwithstanding the provisions of Ala. Code § 17-13-23, vacancies in nominations must be filled by the State or county executive committees not later than 76 days before an election.

3. Election Contest Deadlines

- Notwithstanding the provisions of Ala. Code § 17-13-82, a) a losing candidate in an election contest can appeal to his or her State executive committee within two business days after determination of such contest by the county executive committee and b) the State executive committee must hear this appeal within five calendar days.
- Notwithstanding the provisions of Ala. Code § 17-13-85, State executive committees or appointed subcommittees must hear direct election contests within five calendar days of the filing of such contests.
- Notwithstanding the provisions of Ala. Code § 17-13-86, a) State or county executive committees must decide contests for county elections not later than 90 days before the

general election and b) the State executive committee must decide contests for a State office not later than 83 days before the general election.

- Notwithstanding the provisions of Ala. Code § 17-13-81, county executive committees must hear election contests not more than five calendar days from the filing of such contests.
- Notwithstanding the provisions of Ala. Code § 17-13-18, the Secretary of State must certify to the probate judge of any county where a primary runoff election is to be held the name or names of the candidates certified by the chair of the state executive committee within two business days of the date the certificate is received by the Secretary of State from the chair of the state executive committee.
- Notwithstanding the provisions of Ala. Code § 17-13-22, the Secretary of State must certify to each county's probate judge the lists of party nominees and each independent candidate not later than 74 days before the general election.

4. Materials Distribution Deadline

- Notwithstanding the provisions of Ala. Code § 17-11-12, the delivery of absentee ballots, envelopes, and supplies to the absentee election managers must occur not less than 55 days prior to the holding of a Federal primary election or Federal general election.

5. Extension of UOCAVA Ballot Receipt Deadline

- Notwithstanding the provisions of Ala. Code § 17-11-18, the deadline for receipt of UOCAVA ballots in Federal primary elections or Federal general elections is noon on the seventh day following the election, where such UOCAVA ballots are postmarked

by the day of the Federal primary or general election and otherwise meet the requirements for absentee ballots.

The State shall notify the appropriate election officials and party officials of these changes, and shall widely publicize the deadlines for candidate certification and withdrawal.

If the State enacts legislation addressing the matters contained within this Section (for example, HB 62 / SB 90, which the Court understands is being considered during the 2014 legislative session), the State shall notify counsel for the United States of the legislation. Thereafter, the parties shall confer as to the effect, if any, of the legislation on the terms of this Order. If either party believes that it is appropriate to notify the Court of the legislation or move for any sort of relief from this Order, the party shall timely do so, and the other party shall have an opportunity to respond.

II. ABSENTEE ELECTION MANAGER TRAINING SESSIONS

Prior to each Federal election cycle, the State shall use reasonable efforts to train county Absentee Election Managers ("AEMs"), and/or their designee(s), on UOCAVA requirements, including UOCAVA's 45-day advance ballot transmission requirement.

Reasonable efforts shall include, but will not be limited, to the following:

1. At least three regional training sessions shall occur at least 60 days and no more than 90 days prior to the date of any Federal primary election. The training sessions shall be spread geographically throughout the State.
2. At least one training session at a place of the Secretary of State's choosing shall occur at least 60 days and no more than 90 days prior to the date of any Federal general election.

3. Advance notice of all training sessions pursuant to Section II of this Remedial Order shall be provided to AEMs, and/or their designees, at least 14 days prior to the training session date. Such notice shall state that it is vital and necessary for AEMs, and/or their designees, to attend at least one training session per election year to ensure compliance with Federal law.
4. Training sessions shall provide instructions on the provisions of this Remedial Order, including monitoring and reporting requirements in Section V.
5. Training sessions shall provide instructions regarding provisions of Alabama law governing voting by UOCAVA voters including the requirements in Section I.
6. Training sessions shall include hands-on computer-based instruction for attendees on the State's electronic ballot transmission system that will be in use during that Federal election cycle.
7. At least seven calendar days prior to any scheduled training session, the State shall provide copies of all written training materials to counsel for the United States, but if the materials are substantively the same for all the regional training sessions then they need be provided only once per Federal election cycle.
8. The State shall maintain attendance rosters, including the time and location of all training sessions, and the training materials involved with such training.
9. Copies of all written training materials shall be distributed to all AEMs no later than 55 days prior to any Federal primary or Federal general election.

III. APPOINTMENT AND RESPONSIBILITIES OF STATE UOCAVA COORDINATOR

Within 60 days of the entry of this Remedial Order, the Secretary of State shall designate a State UOCAVA Coordinator who will oversee, coordinate, and serve as the State's primary

point of contact for the State's UOCAVA Program. The Secretary of State will add performance of UOCAVA duties, including accomplishment of the requirements specified below, as part of the formal evaluation of this employee's job performance. In the event of a vacancy in the State UOCAVA Coordinator position during a year in which regularly scheduled Federal elections are held, the State will promptly notify the United States of the vacancy and will fill such a vacancy within 60 days of the date on which such a vacancy occurs. Any vacancy in the State UOCAVA Coordinator position will not relieve the State of its obligations pursuant to this Remedial Order and UOCAVA during the time of the vacancy.

The responsibilities of the State UOCAVA Coordinator shall include, but will not be limited to, the following:

1. The State UOCAVA Coordinator, or his or her designee, shall serve as the point of contact in the Alabama Secretary of State's office responsible for providing information to UOCAVA voters regarding voter registration procedures and absentee ballot procedures with respect to elections for Federal office.
2. The State UOCAVA Coordinator, or his or her designee, shall serve as a point of contact for any questions, technical assistance, and other UOCAVA-related inquiries from AEMs, and/or their designees, and other local election officials.
3. The State UOCAVA Coordinator, or his or her designee, shall survey all AEMs to provide complete data for the reporting and monitoring requirements of this Remedial Order as set forth in Section V. The State UOCAVA Coordinator shall review survey results in a timely manner to assess any implementation deficiencies and determine appropriate corrective measures. Where any deficiencies are found, and to the extent

practicable, the State UOCAVA Coordinator, or his or her designee, shall remedy or otherwise address them through additional training efforts or by other means.

4. The State UOCAVA Coordinator, or his or her designee, shall survey AEMs, or their designees, who attend training sessions on the effectiveness of that training and consider these responses when planning future training sessions and preparing training materials to be used in those sessions. As needed, the State UOCAVA Coordinator, or his or her designee, shall conduct individualized follow up in person, by telephone, or by e-mail with AEMs, or their designees, who express questions or concerns regarding the effectiveness of training sessions.
5. The State UOCAVA Coordinator, or his or her designee, shall prepare training materials for all training sessions and attend and oversee all training sessions offered pursuant to Section II.
6. The State UOCAVA Coordinator, or his or her designee, shall take reasonable and practicable steps to ensure that the State's electronic ballot transmission system vendor adheres to the requirements of Section IV.

IV. UOCAVA ELECTRONIC BALLOT TRANSMISSION SYSTEM

UOCAVA requires that States establish procedures for at least one method of electronic transmission of blank absentee ballots to UOCAVA voters who request electronic transmission of their ballots. 42 U.S.C. § 1973ff-l(f)(1). The State shall ensure to the extent practicable that any future contract for an electronic ballot transmission system between Alabama and a third party vendor will include, but will not be limited to, the following provisions:

1. A requirement that any electronic ballot transmission system be fully operational not later than 55 days before any Federal primary or general election. Notice will be

provided to counsel for the United States as set out in the reporting and monitoring requirements in Section V.

2. A requirement that a copy of any notification email providing a UOCAVA voter with electronic access to his or her ballot will be sent contemporaneously via email to the State UOCAVA Coordinator, or his or her designee, and the relevant AEM, or his or her designee.

3. A requirement that any electronic ballot transmission system allow the State UOCAVA Coordinator, or his or her designee, and the relevant AEM, or his or her designee, to receive notice if a notification email to a UOCAVA voter containing UOCAVA ballot information fails to be delivered.

4. A requirement that the electronic system provide protection against common data entry mistakes—such as character entry error in @ or .com or .gov in email addresses, or failing to check the box for electronic transmission—in a manner that ensures users are notified of the errors in real-time so such errors can be corrected.

V. REPORTING AND MONITORING FOR 2014 AND 2016 FEDERAL ELECTIONS

For the regularly scheduled Federal primary elections and the regularly scheduled Federal general elections in 2014 and 2016, counsel for the United States and the State will confer at least once 14 to 7 days prior to each election to discuss the State's efforts to ensure UOCAVA compliance and the effectiveness of those efforts.

Because UOCAVA enforcement depends on timely and accurate information about the extent of UOCAVA compliance, the State shall adopt the following procedures designed to determine statewide UOCAVA compliance and shall gather the following information and report it to this Court or counsel of record for the United States as specified below:

1. Beginning the 55th day prior to each Federal primary election and each Federal general election, the State shall survey each Alabama county to determine: (1) whether each county has received a sufficient number of printed absentee ballots sufficiently ahead of the 45-day mailing deadline to transmit those ballots as required by UOCAVA; (2) whether each county has the technical capacity to transmit all requested ballots by the requested method of transmission; and (3) whether any county anticipates any circumstances that would prevent it from transmitting all requested ballots to UOCAVA voters by the requested method of transmission and by the appropriate deadline. Based on the results of this survey, the State will determine whether providing additional support to any county will ensure that it meets UOCAVA's deadlines. The State shall provide the results of their survey to counsel for the United States in a format agreed to by the parties no later than the 48th day before the election. Included with the results of this survey, the State also will certify that the electronic ballot transmission system is fully operational in accordance with Section IV, or, if it is not, explain what problems remain and what is being done to bring the system online.
2. For each Federal primary election and each Federal general election, the State shall use reasonable efforts to obtain from each county written or electronic certification, in a format agreed to by the parties, of: (1) the number of absentee ballot applications received from UOCAVA voters by each county on or before the 45th day before the Federal election, indicating the method of transmission requested; (2) the date on which the county began sending absentee ballots to those UOCAVA voters, by each method of transmission; (3) the date on which the county completed sending those

absentee ballots, by each method of transmission; (4) the number of absentee ballots transmitted to UOCAVA voters by the 45th day before each Federal election, indicating the method of transmission of those ballots; and (5) an affirmative declaration that all UOCAVA ballots requested by the 45th day before each Federal election were transmitted by the 45th day by the requested method of transmission, or an explanation of why such an affirmative declaration is not possible. All certifications shall be provided to counsel for the United States by the 43rd day before the election. By the 41st day before the Federal election, the State shall report to the Court any county that fails to provide the requested information. In addition to the certifications, the State shall compile the data provided by the counties described in this paragraph into a spreadsheet format devised in consultation with the United States and file both the individual county certifications and spreadsheet electronically with the Court by the 41st day before each Federal election.

3. Any reporting formats previously used and agreed to by the parties can be used without further consultation.

In the event of a UOCAVA violation, the State shall investigate the cause of the violation, consult with the United States, determine an appropriate remedy, and report the same to the Court. The United States shall file its response to that report, if any, within three business days.

VI. SPECIAL ELECTIONS

In the event a special Federal election is held in 2014, 2015, or 2016, the United States and the State shall confer about UOCAVA compliance, including appropriate reporting

requirements. The parties agree that some reporting will be appropriate, but they will need to confer about the timing and content of that reporting.

VII. RECORDS RETENTION

The Secretary of State shall maintain written records of all actions taken pursuant to this Remedial Order sufficient to document compliance with its terms. Such records shall be made available to the United States within 14 days of receipt of such a request, subject to objections governing requests for documents under the Federal Rules of Civil Procedure.

VIII. JURISDICTION AND DURATION

The remedies prescribed in Section I of this Remedial Order shall remain in effect until otherwise ordered. The remedies prescribed in Sections II, III, IV, V, VI, VII, VIII, and IX of this Remedial Order will expire on December 31, 2016.

The Court shall retain jurisdiction over this action to enter such further relief as may be necessary to effectuate the terms of this Remedial Order until December 31, 2016. For good cause shown, any party may move to amend the Remedial Order.

IX. ADDITIONAL REQUIREMENTS

The State shall take all reasonable legal and practicable steps to ensure that AEMs, local election officials, and all other responsible persons and entities with election-related duties perform all acts necessary to meet all requirements and deadlines set out in this Remedial Order.

The State shall provide a copy of this Court's Order to all Alabama Probate Judges, Absentee Election Managers and County Boards of Registrars, as well as to the State and county leadership of political parties participating in the primary elections.

The undersigned agree to entry of this Remedial Order on January 14, 2014:

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Acting Assistant Attorney General
Civil Rights Division

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Attorneys for Defendants,
State of Alabama and Jim Bennett,
Alabama Secretary of State

SO ORDERED this ____ day of _____, 2014.

_____
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION NO. 2:12cv179-MHT**
v.	)	**(WO)**
	)	
THE STATE OF ALABAMA and JIM BENNETT, SECRETARY OF STATE OF ALABAMA, in his official capacity,	)	
	)	
Defendants.	)	

OPINION

Plaintiff United States of America and defendants State of Alabama and Alabama Secretary of State have moved for the entry of a proposed remedial order resolving the claims asserted in this case, apart from a single legal issue to be addressed in a later opinion. The proposed order alters current state deadlines and requirements for federal elections under Alabama law to ensure the State will meet its obligations to absent military and overseas voters under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42

U.S.C. § 1973ff et seq. The proposed changes would apply to all future federal elections in Alabama, including the next regularly scheduled primary on June 3, 2014. For reasons explained below, the court, with some hesitation, accepts the parties' proposed remedial order.

I. Background

Since 1986, UOCAVA has guaranteed military and overseas citizens ("UOCAVA voters") the right to vote by absentee ballot in all federal elections. 42 U.S.C. § 1973ff-1(a)(1). In 2009, Congress amended UOCAVA in the Military and Overseas Voter Empowerment Act ("MOVE Act"), Pub. L. No. 111-84, 123 Stat. 2190, 2318-35 (2009). The MOVE act requires States to transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office. 42 U.S.C. § 1973ff-1(a)(8). The MOVE Act's 45-day advanced-transmission requirement became effective for the 2010 federal general election and all subsequent elections. Each State must ensure UOCAVA

compliance. 42 U.S.C. § 1973ff-1(a)(8); see also United States v. Alabama, 857 F.Supp. 2d 1236, 1238-39 (M.D. Ala. 2012) (Thompson, J.) (UOCAVA provides an "explicit statutory directive that Alabama bears full responsibility" for compliance).

This case arises from Alabama's failure to transmit ballots to its UOCAVA voters at least 45 days prior to federal elections. Specifically, the State violated UOCAVA's 45-day advanced-transmission deadline in the last three regularly scheduled federal elections: the November 2, 2010, general election, the March 13, 2012, primary election, and the November 6, 2012, general election. The State does not dispute these violations.

Based on discovery conducted in this case and negotiations between the State and the United States, the parties agree that the State will be in a substantially better position to meet its UOCAVA obligations in future federal elections if changes are made to: (1) the State's statutory-election calendar; (2) the State's oversight of

local-election officials who are delegated UOCAVA responsibilities; (3) the training of local-election officials; and (4) the electronic ballot-transmission system. The parties' proposed remedial order addresses each of these areas for all future elections, including the 2014 federal election cycle.

The next federal election in Alabama is the primary election, scheduled for June 3, 2014. Under current Alabama law, the qualifying deadline for major-party candidates seeking to run in the primary election is April 4, 2014. 1975 Ala Code. § 17-13-5(a) (candidate-qualifying deadline is 60 days prior to the primary election). Under the parties' proposed remedial order, the candidate-qualification deadline would be 116 days prior to the primary election. Proposed Order (Doc. No. 110-1) at I.2. Therefore, under the changes proposed in the remedial order, candidates would have a new qualifying deadline of February 7, 2014, for the upcoming federal primary election. The State has argued that the qualifying-

deadline change, along with other deadline changes that follow the qualifying change, as proposed in the order is necessary for the State to comply with UOCAVA's 45-day advanced-transmission requirement.

The Alabama Education Association, a professional organization representing teachers and other employees of school systems in Alabama, moved for and was granted leave to appear in this matter as amicus curiae. The association has objected to the proposed remedial order on several grounds, including that the new candidate-qualification deadline drastically reduces, without sufficient prior notice, the time in which potential candidates have to qualify for the June 3 primary. It argues that, for this primary election only, the court should impose a remedial plan that allows more time for candidates to qualify.

II. Discussion

This case presents a classic instance of the dilemma Shakespeare identified: "rights by rights foulder." Coriolanus, Act IV, Scene 7.* In other words, when two rights come into conflict, sometimes one must simply give way in whole or in part to the other. In this case, the court is faced with two competing and compelling interests, and under these circumstances one must give way.

The first interest is the right to vote. In passing the MOVE Act to amend UOCAVA, Congress reaffirmed the critical importance of protecting the right to vote for members of the military and other citizens living overseas. Remedial measures to ensure those citizens' right to vote are clearly necessary in this case. The record before the court on a parallel motion for summary judgment amply demonstrates that the State of Alabama has

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*** "One fire drives out one fire; one nail, one nail; Rights by rights foulder, strengths by strengths do fail." Coriolanus, Act IV, Scene 7.**

consistently and substantially violated UOCAVA's 45-day requirement. The court is therefore firmly convinced that, absent the proposed remedial changes, including the qualifying-date change, the rights of UOCAVA voters would almost certainly be seriously and substantially compromised.

The second interest is that of potential candidates to run for nomination in the upcoming party primaries. In this regard, the court is deeply troubled by the last-minute nature of this proposed remedy. The plan in this case would alter the deadline to qualify for the June primary from April 4 to February 7, which would be a mere 21 days after the entry of this order and a mere 24 days after the parties first submitted this proposal to the court. The court is concerned that potential primary candidates have likely relied on the April qualifying date in planning their fund-raising, employment (to extent they are government employees who may need to resign or take leaves of absence to run for office), and other matters.

Switching the date now, at the last minute, is at best unfair to them and at worst raises some constitutional concerns. Cf. Campbell v. Bennett, 212 F. Supp. 2d 1339, 1343-44 (M.D. Ala. 2002) (Thompson, J.) (finding, in the context of qualification for the general-election ballot, that "[t]he application of the new deadline, without fair notice of the new deadline and coupled with the short time before that new deadline was to expire" rendered it unconstitutional).

Nevertheless, the court is convinced that the second interest must give way to the first here. First, while military and overseas voters' rights under UOCAVA are clear and certain, the question whether potential candidates' interests rise to the level of associational rights protected by the First Amendment appears to be an unresolved issue. See New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196 (2008) (reserving the question of whether associational rights include "the right to run" in a party primary). Second, to ameliorate any prejudice

resulting from the qualifying-date change, the State has represented to the court that the Secretary of State has already given public notice of the anticipated change in the form of a January 2, 2014, press release, and the State has also already given notice of the likely change to the political parties participating in the primaries.

Finally, the court cannot close without noting the very troubling concern that the reasons the State has given for the shortened time period might be pretextual, for the new deadline could be reasonably viewed as favoring incumbents (who have likely been privy to these proceedings and the potential settlement for some time, and who most likely already have the machinery in place to run) over challengers (who are less likely to have received timely notice of the proposed qualifying-date change). However, there is no evidence to suggest that the State has acted pretextually in proposing the change to qualification deadline. Indeed, the record reflects that the State agreed to this proposed remedial order only

after two years of contentious litigation and extensive negotiations conducted under the supervision of a magistrate judge. Based on the history of this litigation, the court finds that the agreement, which contains that proposed qualifying-date change, was reached in good faith.

Therefore, the court will approve the parties' proposed remedial plan. A separate order will issue.

DONE, this the 17th day of January, 2014.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES OF AMERICA **Plaintiff,** **v.** **THE STATE OF ALABAMA and JIM BENNETT, in his official capacity as Secretary of State of Alabama,** **Defendants.**	)	**CIVIL ACTION NO. 2:12cv179-MHT (WO)**

OPINION

In this lawsuit, plaintiff United States of America named as defendants the State of Alabama and its Secretary of State and asserted claims based on the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), as amended, 42 U.S.C. § 1973ff. The United States sought to enforce the right of military members, their families, and other United States citizens living overseas ("UOCAVA voters") to vote by absentee ballot in Alabama's federal elections. Jurisdiction is

proper under 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2001.

This matter is now before the court on cross-motions for summary judgment on the one remaining claim in this case: that, with regard to runoff elections, Alabama is in violation of UOCAVA's requirement that States transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office. For reasons that will be discussed, the court will enter summary judgment finding in favor of the United States and holding that part of Alabama's runoff-election statute, 1975 Ala. Code § 17-13-18, violates UOCAVA.

I. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and

the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view the admissible evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Here, the parties agree that, because the issues presented by the remaining claim are legal ones, the claim is appropriate for resolution on summary judgment.

I. BACKGROUND

A.

The initial question posed by the remaining claim is whether UOCAVA's 45-day transmittal requirement applies to federal runoff elections conducted by States. Because the answer to this question turns on a close analysis of UOCAVA, the court will begin with an overview of some of the act's relevant provisions. The court divides this

overview into four parts with a focus on primarily four UOCAVA provisions.

THE GENERAL PURPOSE PROVISION: UOCAVA was passed in 1986 to protect the voting rights of military members, their families, and other United States citizens living overseas, that is, UOCAVA voters. Section 1973ff-1 of 42 U.S.C. contains a number of provisions setting forth "State responsibilities" under UOCAVA. Subsection (a)(1) of § 1973ff-1 provides that "Each State shall-- ... permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." This section sets forth UOCAVA's general purpose as to the States: to guarantee to UOCAVA voters the right to use absentee registration procedures and to vote by absentee ballot in federal elections. And this section (as do all the other sections that follow § 1973ff-1(a)'s "Each State shall" language) places the implementation of that guarantee on

the States. Accordingly, this court has held that Alabama bears full responsibility to ensure statewide compliance with § 1973ff-1 of UOCAVA. United States v. Alabama, 857 F.Supp. 2d 1236, 1238-39 (M.D. Ala. 2012) (Thompson, J.) (UOCAVA provides an "explicit statutory directive that Alabama bears full responsibility" for statutory compliance).

THE 45-DAY TRANSMITTAL REQUIREMENT: So as to effect UOCAVA's guarantee to UOCAVA voters more fully, Congress amended § 1973ff-1 of UOCAVA in 2009 with passage of the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, 123 Stat. 2190, 2318-35 (2009). With this amendment, Congress intended "a complete renovation of UOCAVA that brings it into the twenty-first century and streamlines the process of absentee voting for military and overseas voters through a series of common sense, straightforward fixes." 156 Cong. Rec. S4517 (daily ed. May 27, 2010) (Sen. Schumer). Subsection (a)(8)(A), one of the provisions the 2009 amendment added to § 1973ff-1,

sets forth the 45-day transmittal requirement at issue. The subsection provides that, subject to a hardship exemption in another provision, States are required to transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office if those voters request absentee ballots by then. The subsection states in relevant part: "Each State shall-- ... transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter ..., except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election." 42 U.S.C. § 1973ff-1(a)(8)(A). UOCAVA explicitly states that "the purpose of [subsection (a)(8)(A)] is to allow absent uniformed services voters and overseas voters enough time to vote in an election for Federal office." 42 U.S.C. § 1973ff-1(g)(1)(A).

THE HARDSHIP EXEMPTION PROVISION: The hardship exemption mentioned in subsection (a)(8)(A)'s 45-day

transmittal requirement is, as stated, found in subsection (g) of § 1973ff-1. This provision states in relevant part that: "If the chief State election official determines that the State is unable to meet the requirement under subsection (a)(8)(A) with respect to an election for Federal office due to an undue hardship ... the chief State election officials shall request that the Presidential designee grant a waiver to the State." 42 U.S.C. § 1973ff-1(g)(1). In other words, under the hardship exemption, a Presidential designee is permitted to grant a State a waiver from the 45-day transmittal requirement in instances where undue hardships make it impossible for the State to meet the otherwise required advanced-transmittal deadline. Other parts of subsection (g) set forth conditions a State must meet to establish such hardship and be granted a waiver. 42 U.S.C. § 1973ff-1(g).

THE WRITTEN PLAN REQUIREMENT: In subsection (a)(9) which was also added to § 1973ff-1 in 2009, UOCAVA places

another responsibility on the States: to establish a written plan for federal runoff elections. It provides that, "Each State shall-- ... if the State declares or otherwise holds a runoff election for Federal office, establish a written plan that provides absentee ballots are made available to absent uniformed services voters and overseas voters in [a] manner that gives them sufficient time to vote in the runoff election." 42 U.S.C. § 1973ff-1(a)(9).

B.

The United States initially filed this case in 2012 because Alabama had failed to meet UOCAVA's 45-day transmittal requirement in federal general and primary elections. The State conceded that it failed to meet the requirement in each of the last three federal elections; the parties reached an agreement on the appropriate remedy for these past violations; and the court approved

their joint remedial order. United States v. Alabama, 2014 WL 200668 (M.D. Ala. 2014) (Thompson, J.).

As stated, the one remaining claim is the United States' claim that, with regard to federal runoff elections, Alabama is in violation of UOCAVA's requirement that States transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office. Section 17-13-18 of the 1975 Alabama Code provides that a runoff election, which is required when no candidate receives the majority of votes in a primary election, must occur exactly 42 days after a primary election. Alabama has not held a federal runoff election since Congress passed the 2009 amendment, which added the 45-day transmittal requirement to UOCAVA. Nevertheless, the United States claims that, on its face, the State's runoff statute, § 17-13-18, violates the 45-day transmittal requirement. Specifically, the United States argues, the 42-day schedule for runoff elections under state law makes it impossible for UOCAVA voters

from Alabama to receive ballots 45 days in advance of a federal election. The State responds that UOCAVA's 45-day transmittal requirement does not apply to federal runoff elections and that, in any event, the United States' claim is not ripe for resolution.

III. DISCUSSION

A.

A stated, the initial question is whether UOCAVA's 45-day transmittal requirement applies to federal runoff elections. In answering this question, this court's "starting point" is the plain language of the statute itself. United States v. DBB Inc., 180 F.3d 1277, 1281 (11th Cir. 1999). The court must "read the statute to give full effect to each of its provisions" and interpret words "as they are commonly and ordinarily understood." Id. The court does "not look at one word or term in isolation" and instead considers the "entire statutory

context." Id.; see also United States v. McClemore, 28 F.3d 1160, 1162 (11th Cir. 1994).

As stated, subsection (a)(8)(A)'s 45-day transmittal requirement requires each State to transmit a validly requested absentee ballot to UOCAVA voters at least 45 days before "an election for Federal office." 42 U.S.C. § 1973ff-1(a)(8)(A). The issue presented is whether the phrase "an election for Federal office" includes runoff elections. It does for several reasons.

1.

Congress's reference to "an election" indicates, on its face, its intent to refer to "any" kind of election for federal office. See Black's Law dictionary at 1 (6th ed. 1990) (The indefinite article "a" is often used in the sense of "any"). Because a primary runoff election falls within the reach of any kind of election, subsection (a)(8)(A) includes runoffs. Indeed, if the words "an election" were read otherwise to exclude a

runoff, the phrase would be meaningless, for the phrase also does not expressly mention "general," "special," or "primary" elections either and thus the phrase would exclude them as well, with the result that the phrase would illogically cover no federal elections at all.

2.

This interpretation of "an election" as covering all four types of election (general, special, primary, and runoff) is reinforced by UOCAVA's overall statutory scheme.

First, the word "election" first appears in UOCAVA's general purpose provision, subsection (a)(1), which requires each State to permit UOCAVA voters to vote by absentee ballot in "general, special, primary, and runoff elections for Federal office." 42 U.S.C. § 1973ff-1(a)(1). Later, in subsection (a)(2), the act requires each State to accept and process requests for absentee ballots from UOCAVA voters so long as the State receives

the request 30 days before "any federal election." 42 U.S.C. § 1973ff-1(a)(2). Surely, it cannot be argued that this broad-reaching provision does not cover runoff elections. This shows that, when Congress used the generic term "any election," it intended to refer to the four explicitly listed federal elections in subsection (a)(1), which includes runoff elections. The same intent would apply to the generic term "an election."

Second, UOCAVA's subsection (a)(3) requires that States accept federal "write-in" absentee ballots but limits this requirement to "general elections for federal office." 42 U.S.C. § 1973ff-1(a)(3) (emphasis added). Subsection (a)(3)'s reference to one type of federal election for write-in ballots, in contrast to subsection (a)(2)'s reference to any federal election for the acceptance and processing of absentee ballots in general, shows that when Congress wanted to highlight or exclude a particular kind of federal election it made that intention explicit and clear. See United States v.

Georgia, 952 F. Supp. 2d 1318, 1327 (N.D. Ga. 2013) (Jones, J.), appeal pending No. 13-14065 (11th Cir. Sept. 6, 2013) (stating with respect to UOCAVA that, "Where Congress intended to refer to a specific type of election, it left no doubt of its intent").

Third, and perhaps most compellingly, the cross-reference between two other UOCAVA subsections clearly reveals Congress's intent to use the term "an election" to encompass all federal elections, including runoffs. Subsection (a)(7) requires each State to establish procedures for transmitting ballots to UOCAVA voters in federal elections. The subsection explicitly requires these procedures to be used in "general, special, primary, and runoff elections for Federal office." 42 U.S.C. § 1973ff-1(a)(7). It then directs States to turn to and follow subsection (f) for the explicit rules to be applied for transmittal procedures. However, in subsection (f), rather than restate the four categories of federal elections as listed in subsection (a)(7), Congress instead uses the phrase "an election for Federal

office." 42 U.S.C. § 1973ff-1(f). It is therefore obvious from the explicit connection between the two subsections that Congress intended the generic phrase "an election" in subsection (f) to refer to any of the four kinds of elections explicitly listed in subsection (a)(7). See Georgia, 952 F. Supp. 2d 1327. It then follows that, if Congress intended the phrase "an election" in subsection (f) to include runoff elections, the identical phrase in subsection (a)(8)(A), the 45-day requirement provision, does as well, for the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." Gustafason v. Alloyd Co., 513 U.S. 561, 570 (1995) (internal citation omitted).

Finally, UOCAVA's 45-day transmittal requirement has its own explicit limitation: the hardship exemption provided in subsection (g). As stated, under the hardship exemption, a Presidential designee is permitted to grant a State a waiver in instances where undue hardship makes it impossible for the State to meet the

advanced-transmittal deadline and the State can demonstrate that it meets the listed requirements. 42 U.S.C. § 1973ff-1(g)(1). Because the 45-day transmittal requirement contains an explicit exception within the language itself ("except as provided in subsection (g)"), it logically follows that Congress intended that subsection (g) would be the only exception.

3.

Because it is apparent from the face of UOCAVA's 45-day requirement as well as from the act's overall structure that the requirement covers runoff elections, the court need not turn to legislative history. See United States v. Rojas-Contreras, 474 U.S. 231, 235 ("extrinsic materials are only required where a statute is ambiguous, its plain meaning renders an absurdity, or there is evidence of contrary legislative intent"). Nevertheless, the legislative history, in particular that for the recent 2009 amendment, provides additional support for the court's reading of the requirement. In

the House Conference Report for the 2009 amendment, Congress's only reference to an exception to the 45-day transmittal requirement is when "a hardship exception is approved." H.R. No. 111-288 at 744 (2009) (Conf. Rep.). In all other instances, the history reflects Congress's intent that States transmit requested absentee ballots "at least 45 days before an election for federal office." For example, the history shows that through the 2009 amendment Congress sought specifically to address the "unacceptable" situation of delayed absentee ballots to voters. 156 Cong. Rec. S4514 (daily ed. May 27, 2010) (Sen. Schumer statement). The Congressional Record is replete with references to evidence of barriers UOCAVA voters face in voting in time for federal elections and Congress's desire to take steps beyond UOCAVA's original provisions to address this challenge. Id. (39 % of UOCAVA voters who requested absentee ballots in the 2008 election received them too late to return the ballots for election day counting).

In light of Congress's focus on solving what it considered to be the particular and substantial problem of delayed arrival of absentee ballots from military members, their families, and other United States citizens living overseas, it follows that, had Congress intended to exclude runoff elections from the solution to this great problem, there would be something in the legislative history reflecting that intent. Instead, there is nothing in the legislative history to undermine in any way the congressional intent reflected in the statute's plain language that the 45-day requirement applies to every kind of federal election.

Furthermore, the legislative history particularly emphasizes Congress's "compelling interest to protect the voting rights of American citizens ... when those very individuals who are sworn to defend that freedom are unable to exercise their right to vote." Id. at S4515. To imply an exception to the 45-day remedy to the substantial problem Congress recognized that overseas soldiers faced, where nothing in the statutory language

or legislative record supports such an exception, would be contrary to Congress's expressed intent to protect vigorously the voting rights of these persons. See 155 Cong. Rec. S7965 (July, 23, 2009) (Sen. Schumer and Sen. Chambliss joint statements) ("They can risk their lives for us, we can at least allow them to vote."). There is nothing in the legislation to indicate that, for our military, solving the problem of delayed transmittal of ballots from overseas military is any less worthy of remedy in runoffs than in general, special, and primary elections.

Indeed, because runoff elections are so compressed and because, as a result, the likelihood of delayed transmittal is greater than in other elections, it would seem to follow that, for our military, the need for the 45-day remedy is actually greater in runoffs than in other elections. As the court will discuss later, runoffs therefore need, and UOCAVA provides, more, not less, protection than for other elections.

Finally, this court finds noteworthy that Alabama criticizes any reliance on legislative history with this quote from Justice Scalia: "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment). True though this may be, it is ironic that Alabama relies on it, for, with regard to UOCAVA's legislative history, that history would be plumbed to no avail if one were looking for even one "friend" among the guests confirming Alabama's view that the 45-day transmittal requirement exempts runoff elections.

4.

Nevertheless, Alabama argues that the phrase "an election for Federal office" in subsection (a)(8)(A) of § 1973ff-1 reflects a congressional attempt to distinguish federal elections from state ones and that

the phrase does not seek to define "which" federal elections (general, primary, special, and runoff) are covered by the provision. Defs. Brief (Doc. No. 92) at 24. The court rejects this argument for several reasons.

First, it is true that the phrase is aimed at only federal elections. But the State's interpretation signals out only one word ("federal") and fails to reach the full breadth of the phrase, which has five words, including in particular, as discussed previously, the two words "an election." If the entire phrase (including its use of the word "an," which, as stated, is commonly understood to mean "any") is considered, it is clear that, while the phrase does limit itself to "federal" elections, the phrase also reaches "any" kind of federal elections, which includes a federal runoff election.

Second, that UOCAVA is aimed at only federal elections is an obvious given: the title of the subchapter in which the act is codified is "Registration and Voting by Absent Uniformed Services Voters and

Overseas Voters in Elections for Federal Office," 42 U.S.C. Chapter 20, Subchapter 1-G (emphasis added), and the word "federal" modifies the term "election" in many phrases throughout § 1973ff-1, not just in subsection (a)(8)(A). Alabama does not contend that the word, when used in phrases throughout § 1973ff-1, limits those phrases to only one purpose, to distinguish federal elections from state ones. Absent a universal limitation for every time the word is used in other phrases, the State has not explained why subsection (a)(8)(A) should be singled out for that limitation.

Finally, as stated, the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." Gustafason, 513 U.S. at 570 (internal citation omitted). Therefore, because, as demonstrated above, Congress intended the phrase "an election" in subsection (f) (which sets forth the rules States must follow in carrying out the transmittal procedures placed on them by subsection (a)(7)) to include "federal" runoff elections,

its use of the identical phrase in subsection (a)(8)(A) (the 45-day requirement provision) does as well.

The State further argues that subsection (a)(9) of § 1973ff-1 excludes federal runoff elections from UOCAVA's 45-day transmittal requirement. Subsection (a)(9) reads:

> "Each State shall--- ... if the State declares or otherwise holds a runoff election for Federal office, establish a written plan that provides absentee ballots are made available to absent uniformed services voters and overseas voters in [a] manner that gives them sufficient time to vote in runoff elections."

42 U.S.C. § 1973ff-1(a)(9). The State argues that the phrase "sufficient time to vote" creates an alternative time requirement for transmitting ballots in the instance of a federal runoff election. It further argues that, because subsection (a)(9) creates this supposed new or different time requirement for runoff elections, subsection (a)(8)(A)'s 45-day requirement cannot also apply to runoffs. According to the State, reading both provisions to apply to federal runoff elections renders

subsection (a)(9) superfluous and results in an absurd reading of the statute. See Durr v. Shinseki, 638 F.3d 1342, 1349 (11th Cir. 2011) ("a statute should ... be read so as to avoid an unjust or absurd conclusion"). The court disagrees on all counts.

First, subsection (a)(9) does not create any substantive transmittal requirement at all. In this subsection, Congress merely requires each State to "establish" a written plan setting forth its overall views on how UOCAVA voters can be assured to receive ballots in "sufficient time to vote" in federal runoff elections. It does not require the State to do anything other than that, for most notably it does not even require the State to implement the plan. As a result, UOCAVA sets up this statutory scheme: On the one hand, there is subsection (a)(9), which is essentially nothing more than precatory, and, on the other hand, there is the 45-day transmittal requirement, which is expressly mandatory ("Each State shall") and is expressly recognized in the statute as needed "to allow absent

uniformed services voters and overseas voters enough time to vote in an election for Federal office." 42 U.S.C. § 1973ff-1(g)(1)()A). It would be illogical to conceive the precatory former as a reasonable substitute for the mandatory latter, which is at the heart of UOCAVA. The only reasonable reading of subsection (a)(9) is that it is a supplemental, an additional, remedy, not a substitute.

This conclusion is reinforced when other factors are considered. First, there is the fact that Congress recognized as a particular and substantial problem the delayed transmittal of absentee ballots from UOCAVA voters. Second, there is the fact that Congress enacted subsection (a)(2)(8) to remedy to that problem, for, as observed, UOCAVA explicitly states that "the purpose of [subsection (a)(8)(A)] is to allow absent uniformed services voters and overseas voters enough time to vote in an election for Federal office." 42 U.S.C. § 1973ff-1(g)(1)(A)"). Third, there is nothing in the statute or its legislative history to indicate that federal runoffs

do not suffer from the same transmittal problem as do other federal elections. And, fourth, there is the obvious fact that, because runoff elections typically occur on a compressed time schedule, States are actually more likely to make logistical errors and fail to meet their UOCAVA obligations in runoffs than in other elections. It follows that, when these last two facts are considered against the backdrop of the first two, subsection (a)(9) merely reflects that Congress wisely saw the need to provide an additional remedy when it comes to runoffs: to require States to develop a written plan that would help to protect further against UOCAVA violations that will more likely occur under the time constraints of a runoff election. This requirement, while only a paper one, embodies an apparent congressional recognition that runoff elections are logistically more demanding and that States need an added nudge to meet the 45-day transmittal requirement.

Indeed, the fact that an additional remedy is warranted is more than amply demonstrated by the very

record before this court. Alabama concedes that it has failed to meet the 45-day requirement and thus provide what Congress considered to be needed for the timely transmittal of ballots with regard to, comparatively speaking, the logistically less demanding general and primary elections in each of the last three federal elections. Moreover, this court has found that, "The record before [it] ... amply demonstrates that the State of Alabama has consistently and substantially violated UOCAVA's 45–day requirement." United States v. Alabama, 2014 WL 200668 at *2 (M.D. Ala. 2014). That an additional requirement is needed for logistically more demanding runoff elections is self-evident.

Therefore, subsection (a)(9) neither creates a new substantive transmittal deadline nor dictates an exception to the substantive transmittal deadline in subsection (a)(8)(A). Subsection (a)(9) merely reflects the fact that States should go the extra mile to protect the voting rights of military members, their families and

other United States citizens living overseas when it comes to runoff elections--nothing more.

(The parties have spilt much virtual ink disputing the meaning of the phrase "sufficient time to vote" in subsection (a)(9). Because the United States has not asserted a separate claim that Alabama has failed to comply with subsection (a)(9)'s requirement that the States "establish a written plan that provides absentee ballots are made available to absent uniformed services voters and overseas voters in [a] manner that gives them sufficient time to vote in the runoff election," the court does not address or resolve this dispute.)

5.

Finally, the court rejects Alabama's argument that the issue--whether the 45-day transmittal requirement applies to federal runoff elections--is not ripe for adjudication because Alabama has not held a runoff election since Congress enacted the requirement with the 2009 amendment to UOCAVA.

UOCAVA authorizes the United States Attorney General "to bring a civil action ... for such declaratory or injunctive relief as may be necessary" to enforce UOCAVA. 42 U.S.C. § 1973ff-4(a). Therefore, the United States is expressly authorized, and thus has standing, to challenge Alabama's runoff statute on the ground that it violates UOCAVA's 45-day transmittal requirement. Nevertheless, Alabama questions the timing of the United States' claim. It argues that, because a runoff election has not yet occurred, the United States' facial attack is not yet ripe.

The ripeness doctrine provides that, for a court to have jurisdiction, a claim must be "sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decisionmaking by the court." Cheffer v. Reno, 55 F.3d 1517, 1524 (11th Cir. 1995). Ripeness depends on two factors: (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. Harrell v. The Florida Bar, 608 F.3d 1241, 1258 (11th Cir. 2000). The fitness

portion of the analysis focuses on "the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." Id. (internal citation omitted). However, where a claim presents a purely legal issue, additional fact development is not necessary because the claim is that the law operates unlawfully on its face regardless of any other facts. Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1308 (11th Cir. 2009) ("a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record"). In other words, a purely legal challenge to a statute will succeed only if the statute can never be applied in a lawful manner. Id. at 1308. The hardship prong of the ripeness test examines the costs of delaying review until conditions for deciding a controversy are further developed. Harrell, 608 F.3d at 1258.

The United States' claim is ripe for review because it is a facial challenge to the State's runoff statute and therefore presumptively fit for judicial review. The

court does not need facts surrounding a runoff election to determine whether the State's statute violates UOCAVA. As written, Alabama's current runoff statute, 1975 Ala. Code § 17-13-18, requires that a runoff election occur exactly 42 days after a primary election. Unless the State can hold a runoff election 42 days after the primary while still transmitting ballots to UOCAVA voters 45 days in advance of that election, its runoff statute violates UOCAVA on its face. The State has not put forth, and the court is unaware of, a way that the State could meet both the 45-day requirement under UOCAVA and still hold a primary runoff election 42 days after a primary election. Indeed, because of other related tasks that necessarily occur between the primary and runoff election--such as election certification and ballot printing--the transmittal of UOCAVA ballots would likely occur at least a week, if not substantially longer, after even the 45th day before the runoff election.

Moreover, although there is no guarantee of when a runoff election will occur, it is certain that one will

occur, for, as the State admits, "in Alabama, runoff elections are held as a matter of course." Defs. Brief (Doc. No. 92) at 36.

Thus, it is all but certain that a federal runoff election will soon occur, and it is certain that, when that election occurs, Alabama will violate UOCAVA if it follows state law, which the court presumes the State will--indeed, must--do in the absence of either the repeal or invalidation of that law. And other than this litigation there is no indication that a repeal or invalidation is in works.

The United States' claim also satisfies the hardship requirement of the ripeness test, for, if the court waits to assess this claim until after the State holds its next federal runoff election in accordance with state law and thus in violation of UOCAVA, UOCAVA voters will be denied the 45 days UOCAVA has recognized as logistically needed to cast their votes and they therefore will be irreparably harmed. There is no way that the issue of the application of the 45-day transmittal requirement to

federal runoff elections could be litigated between a primary and a runoff election in time for the requirement to be applied to that runoff. Indeed, the State joined the United States in asking this court, should it find in favor of the United States, to expedite and resolve this issue by no later than mid-February in order for State to meet the logistical demands of implementing the requirement four months later, in June of this year.

B.

For the foregoing reasons, the court holds that UOCAVA's 45-day transmittal requirement applies to federal runoff elections.

The next issue, therefore, is whether Alabama is in violation of UOCAVA. As stated in the preceding section of this opinion, the court is unaware of a way that the State could meet both the UOCAVA's 45-day transmittal requirement under UOCAVA and still hold a primary runoff election 42 days after a primary election as it is required to do by state law, that is, 1975 Ala. Code

§ 17-13-18. As further stated, it is certain that a federal runoff election will occur in Alabama and that when it does the State will violate UOCAVA. The court, therefore, further holds that Alabama's runoff statute, § 17-13-18, violates UOCAVA to extent the state statute requires that a federal runoff election occur within 42 days of a primary.

****

An appropriate judgment will therefore be entered as follows: (1) granting the United States' motion for summary judgment; (2) denying the State of Alabama and its Secretary of State's motion for summary judgment; (3) entering summary judgment in favor of the United States and against the State of Alabama and its Secretary of State; (4) declaring that UOCAVA's 45-day transmittal requirement, 42 U.S.C. § 1973ff-1(a)(8)(A), applies to federal runoff elections; (5) declaring that Alabama's runoff statute, 1975 Ala. Code § 17-13-18, violates UOCAVA's 45-day transmittal requirement to extent the state statute requires that a federal runoff election

occur within 42 days of a primary; and (6) giving the parties 14 days to propose or request any addition relief.

DONE, this the 11th day of February, 2014.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:12-cv-00179-MHT-WC
	)	
STATE OF ALABAMA and	)	
HONORABLE JIM BENNETT,	)	
Secretary of State, in her official capacity,	)	
	)	
Defendants.	)	

CONSENT ORDER

This matter concerns the State of Alabama's obligations under the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff *et seq.* ("UOCAVA"). This Order sets out relief related to federal runoff elections, consistent with the Court's findings in its earlier Memorandum Opinion and Order (doc. 120).

The Court finds and orders as follows:

1) This Court earlier held that UOCAVA requires that Alabama must transmit absentee ballots to UOCAVA voters (who timely filed a valid request for such ballots) 45 days before federal runoff elections (doc. 120).

2) Under Alabama law, federal runoff elections, when needed, are held 42 days after the primary election.

3) Alabama's next primary elections for a federal office will be held on June 3, 2014.

4) Based on the number of candidates who have qualified to run in party primaries, there is the potential for a runoff election for only one federal race in 2014—the Republican

primary for the 6th Congressional District, for which seven candidates have reportedly qualified. (There will be no other federal primary races in the 6th Congressional District.)

5) Alabama has indicated that if it is to transmit UOCAVA ballots 45 days before a federal runoff election, there should be 9 weeks, instead of the current 6 weeks, between the primary and the runoff election.

6) The Court invited the parties to propose remedies. The State Defendants, while reserving their appellate rights, have proposed a remedy that they contend complies with this Court's order and is the most reasonable under the circumstances and considering the interests of voters, elections officials, and candidates. The United States did not oppose the State Defendants' proposal. This order therefore reflects the State Defendants' proposal.

7) The Court below will order that, notwithstanding any other provision of Alabama law, beginning in the 2016 election cycle, Alabama shall hold any federal runoff elections 9 weeks/ 63 days after the primary election.

8) To impose that date change in 2014, however, would (as the State Defendants contend) cause certain hardships to non-UOCAVA voters. Runoffs for State and local officials would remain governed by Alabama law, and thus there is the potential that voters in the 6th Congressional District would face one runoff election 42 days after a primary, and a second runoff 63 days after the primary. Such a circumstance could (as the State Defendants contend) cause voter confusion, negatively impact voter turnout, and burden election officials and candidates.

9) Thus, in this 2014 election cycle, the Court will authorize the use of election tools that will permit UOCAVA compliance with respect to a potential federal runoff election without

moving the date of that election. Namely, the Court will authorize the use of an instant runoff system such as was used by Alabama in a 2013 special election in the 1st Congressional District.

IT IS HEREBY ORDERED AS FOLLOWS:

For purposes of the 6th Congressional District Republican primary and (potential) primary runoff in 2014 only:

1) The Secretary of State will assume responsibility for transmitting, receiving, and counting separate federal ballots transmitted electronically or by mail to applicable UOCAVA voters in the Republican primary and / or runoff election in the 6th Congressional District[1], and, for that election only, will assume the various duties outlined below that, under state law, are normally performed by county election officials.

2) The Secretary of State will transmit to 6th Congressional District Republican UOCAVA voters instant runoff ballots for the primary election in a form substantially similar to that attached as Exhibit A to this Court's order. The instant runoff ballot will allow these voters to rank the candidates in order of preference. In the primary election, each validly cast vote will be counted for the first choice candidate. In the event of a primary runoff election, each validly cast vote will be counted for whichever of the runoff candidates is ranked higher on the ballot.[2]

3) In order to fully facilitate the conduct of any federal runoff election in compliance with UOCAVA and other applicable election laws, for the 2014 Republican primary and (potential) primary runoff election for the 6th Congressional District only, the Secretary of State is expressly authorized and ordered as follows:

---

[1] As previously noted, the Republican primary for the 6th Congressional District is the only federal race with the potential for a primary runoff election, and no other federal race will occur at the primary stage for 6th Congressional District voters (that is, there will not be a primary race for Senate or a Democratic primary for the 6th Congressional District).

[2] The general election is not impacted by this Order.

A. To exercise all duties relating to the transmission, receipt, and counting of ballots that are currently performed by local election officials under state law, including duties performed by Probate Judges, Absentee Election Managers, and the Board of Registrars.[3] Without regard to provisions of state law, the State shall bear any and all costs and expenses incident to or incurred pursuant to this election which arise out of this court order and/or the UOCAVA voting requirements for Republican UOCAVA voters residing in the 6th Congressional District.

B. To contract with a vendor for the preparation and ordering of the instant runoff ballots (both printed and electronic ballots) and election supplies.

C. To prepare and approve the instant runoff ballots in the form substantially similar to the ballot attached as Exhibit A and to create a ballot record in *Power Profile*.

D. To determine ballot style for instant runoff ballots to be issued to each Republican UOCAVA voter residing in the 6th Congressional District, such ballots being authorized to differ in style from the ballots issued to non-UOCAVA voters.

E. To order and receive instant runoff ballots (both printed and electronic ballots) and supplies directly from the printer.

F. To assume and exercise the duties of the county absentee election manager to receive UOCAVA absentee ballot applications directly from

[3] The duties of local election officials with respect to State and local races in the 6th Congressional District are not impacted by this Order.

Republican UOCAVA voters residing in the 6th Congressional District and transmit both mailed and electronic ballots.

G. To exercise the duties of the county absentee election manager to process absentee ballot applications from Republican UOCAVA voters residing in the 6th Congressional District and to transmit both mailed and electronic ballots to those voters.

H. To perform the Board of Registrars' voter registration duties for those Republican UOCAVA voters residing in the 6th Congressional District who request an absentee ballot by filling out the Federal Postcard Application form pursuant to UOCAVA and the *Code of Alabama* § 17-11-3(b), and otherwise perform registration duties for Alabama citizens residing in the 6th Congressional District who fall under UOCAVA and who are not already registered to vote.

I. To publicly post the list of Republican UOCAVA voters residing in the 6th Congressional District who have requested absentee ballots in accordance with *Code of Alabama* § 17-11-5(c)—such posting to appear on the Secretary of State's website.

J. To transmit instant runoff ballots either by mail or electronically in accordance with the means of transmission requested by the voter.

K. To communicate with Republican UOCAVA voters residing in the 6th Congressional District regarding the ballots and procedure for voting in this election utilizing press releases, public service announcements to the extent practicable, and email or telefacsimile notifications to those

Republican voters residing in the 6th Congressional District who have provided or will provide email or telefacsimile contact information. The Secretary of State shall also seek the assistance of the FVAP in notifying Republican UOCAVA voters residing in the 6th Congressional District of the changes to election procedure authorized by this order for 2014, and coordinate with the FVAP as necessary to facilitate such notice. The Secretary may adopt additional means of communicating with UOCAVA voters (including all the State's UOCAVA voters), as appropriate.

L. To deliver to the Board of Registrars on the day following the primary election a copy of the list of all UOCAVA voters who participated in the 6th Congressional District Republican primary *via* absentee ballot.

M. To deliver to the Board of Registrars on the day following the primary runoff election a copy of the list of all UOCAVA voters who participated in the 6th Congressional District Republican primary runoff election *via* absentee ballot.

N. To utilize a voting tabulation machine for counting the instant runoff ballots received from Republican UOCAVA voters residing in the 6th Congressional District.

O. To create procedures, and to provide a copy of those procedures to counsel for the United States, designed to ensure that instant runoff ballots cast by Republican UOCAVA voters residing in the 6th Congressional District are properly counted and to ensure there is no duplication in counting the voters' ballots.

P. To receive voted ballots from Republican UOCAVA absentee voters residing in the 6th Congressional District and to secure such voted ballots until the time provided by law to count absentee ballots.

Q. To implement as necessary provisional balloting with regard to the instant runoff ballots as provided in *Code of Alabama*, § 17-10-2, to include (1) a determination of which instant runoff ballots shall be converted to provisional ballots, (2) determination of which provisional ballots shall be counted, upon review of all provisional ballot documentation and other relevant information, and (3) the counting of those provisional ballots which have been approved for counting.

R. To appoint absentee poll workers to count the instant runoff ballots and certify the results of said count at the times for counting and certification prescribed by Alabama law. The certified results shall be provided to the Chair of the Alabama Republican Party immediately upon certification, either by hand delivery or by electronic transmission, for inclusion in the party's canvass of its primary and (potential) primary runoff elections.

4) Poll watchers shall be permitted to observe and monitor and otherwise act in accordance with their usual duties in connection with the vote counting by the Secretary of State.

5) The Secretary of State is ordered to perform any and all other duties and functions as may be necessary to effectuate the UOCAVA voting in any runoff election in the 6th Congressional District Republican race and to effectuate this court's order.

6) In the event a UOCAVA voter makes a valid and timely request for an absentee ballot to participate in the Democratic primary, and also makes a valid and timely request for an

absentee ballot to participate in the Republican primary *runoff* (such cross-over voting being allowed by the rules of the Republican party), that voter shall be sent both ballots. The ballot to participate in the Democratic primary shall be sent no later than 45 days before the primary election, and the ballot to participate in the Republican primary runoff shall be sent separately, at a later date, but no more than 45 days before the Republican primary runoff election.

IT IS FURTHER ORDERED that beginning in the 2016 election cycle,

Notwithstanding any provision of Alabama law, should a runoff election be necessary for any federal office, said runoff election shall occur on the 63rd day following the State's primary elections.

IT IS FURTHER ORDERED that defendants shall provide notice to UOCAVA voters residing in the 6th Congressional District as follows:

A. Notify the Director of the Federal Voting Assistance Program (FVAP) of the United States Department of Defense of the entry of this Order, and request assistance in notifying impacted voters of the relief afforded in this Order. Coordinate with the FVAP as necessary to facilitate such notice.

B. Issue a press statement concerning the relief afforded in this Order. The press statement is to be posted on the Secretary's website, and distributed to national and local wire services, to radio and television broadcast stations, and to daily newspapers of general circulation in the 6th Congressional District. The press statement shall also be distributed to the FVAP, the International Herald Tribune (http://www.iht.com), USA

Today International (http://www.usatoday.com), the Military Times Media Group (cvinch@militarytimes.com), Stars and Stripes (www.estripes.com), and the Overseas Vote Foundation (http://www.overseasvotefoundation.org/intro/).

C. For applicable UOCAVA voters residing in the 6th Congressional District who provide an email address, the Secretary shall notify the voter of the relief afforded in this order by email communication.

IT IS FURTHER ORDERED that the defendants shall provide a copy of this Court's Order to the Probate Judges, Absentee Election Managers, the Boards of Registrars, and the Chair of the Republican Party County Executive Committee in each of the Alabama Counties that comprise the 6th Congressional District. Defendants shall also provide a copy of this Court's Order to the Chair of the Republican Party State Executive Committee.

IT IS FURTHER ORDERED that the State Defendants shall, by no later than April 2, 2014, develop a "written plan" pursuant to 42 U.S.C. § 1973ff-1(a)(9).

Done this 4th day of March, 2014.

/s/ Myron H. Thompson
United States District Judge

Case 2:12-cv-00179-MHT-WC Document 124-1 Filed 03/04/14 Page 1 of 1

RCV DEMO LAYOUT
MERCURY TEST ELECTION 1

COUNTY CLERK
VOTE FOR ONE (1) ONLY

- RICHARD G. LUGAR — REPUBLICAN
- DENNIS BYRD — DEMOCRATIC
- STEVE OSBORN — LIBERTARIAN

COUNTY COMMISSIONER
DISTRICT 3
ONE TO BE ELECTED

Designate the desired candidates in order of preference

	1st	2nd	3rd
TODD ROKITA — REPUBLICAN	⬭	⬭	⬭
JOE PEARSON — DEMOCRATIC	⬭	⬭	⬭
MIKE KOLE — LIBERTARIAN	⬭	⬭	⬭
Write-In	⬭	⬭	⬭

COUNTY AUDITOR
VOTE FOR ONE (1) ONLY

- TIM BERRY — REPUBLICAN
- JUDY ANDERSON — DEMOCRATIC

COUNTY TREASURER
VOTE FOR ONE (1) ONLY

- RICHARD E. MOURDOCK — REPUBLICAN
- MICHAEL W. GRIFFIN — DEMOCRATIC

WARD ALDERMAN AT LARGE
TWO TO BE ELECTED

Designate the desired candidates in order of preference

	1st	2nd	3rd	4th	5th	6th
MIKE SODREL — REPUBLICAN	⬭	⬭	⬭	⬭	⬭	⬭
CHRISTOPHER BYRD — REPUBLICAN	⬭	⬭	⬭	⬭	⬭	⬭
PAUL J. ROBERTSON — DEMOCRATIC	⬭	⬭	⬭	⬭	⬭	⬭
BARON HILL — DEMOCRATIC	⬭	⬭	⬭	⬭	⬭	⬭
D. ERIC SCHANSBERG — LIBERTARIAN	⬭	⬭	⬭	⬭	⬭	⬭
ANNA PATRICK — LIBERTARIAN	⬭	⬭	⬭	⬭	⬭	⬭

ALDERMAN WARD 2
VOTE FOR ONE (1) ONLY

- BRIAN THOMAS — REPUBLICAN
- RICHARD D. YOUNG, JR — DEMOCRATIC

SCHOOL BOARD MEMBER
TWO TO BE ELECTED

Designate the desired candidates in order of preference

	1st	2nd	3rd	4th	5th	6th	7th	8th
DEBRA L. ADAMS	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
KENNY BARTLEY	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
DR. JOHN A. GONZABA	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
KAREN LOPP	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
JOE MILLER	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
CHARLIE PHILLIPS	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
ROGER WINDELL	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
JOYCE BLISS	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
N. DIANE SHEWMAKER	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
KERRY J. CHUMLEY	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭
CAROL UESSELER	⬭	⬭	⬭	⬭	⬭	⬭	⬭	⬭

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:12-cv-00179-MHT-WC
	)	(WO)
STATE OF ALABAMA and	)	
HONORABLE JIM BENNETT,	)	
Secretary of State, in his official capacity,	)	
	)	
Defendants.	)	

CONSENT ORDER

Before the Court is the State Defendants' Unopposed Motion to Amend this Court's Remedial Order. For good cause shown, it is ORDERED that the Motion to Amend (doc. 126) is granted.

The Court finds and orders as follows:

1) On January 17, 2014, this Court entered a Remedial Order (doc. 119) on the joint motion of the parties. The Remedial Order resolved all claims in this litigation except for a claim related to federal runoff elections which the Court resolved separately (*see* docs. 120, 121, and 124).

2) Section I of the Remedial Order makes changes to Alabama's election calendar, altering the dates for events such as candidate qualification, resolution of election contests, candidate certification by elections officials, and distribution of election materials. (Doc. 119).

3) On February 10, 2014, Alabama Governor Robert Bentley signed into law legislation which amended the Alabama statutes affected by this Court's Remedial Order. Ala. Act No. 2014-006. In that Act, the Alabama Legislature adopted, as a matter of Alabama law, the

same election calendar imposed by this Court's Remedial Order. The State Defendants assert, and the United States agrees, that Alabama's election calendar will be the same whether governed by the Remedial Order or by Alabama law, as amended by the recent legislation.

4) Rule 60 of the Federal Rules of Civil Procedure provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" if "(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

5) The Court finds that that the State Defendants have met their burden under Rule 60 to seek an amendment to the Remedial Order that vacates Section I. Because the Alabama Legislature has adopted the same election calendar imposed by the Remedial Order, the provisions in Section I of the Remedial Order are no longer necessary for Alabama to comply with federal law.

6) The Court notes that the State Defendants have not moved for relief from other provisions of the Remedial Order, sections II-IX. All provisions of the Remedial Order other than Section I shall remain in effect until they expire on December 31, 2016.

It is therefore ORDERED that this Court's Remedial Order entered January 17, 2014 (doc. 119) is **amended** to vacate the requirements of Section I of that Remedial Order, and Section I only, with all other Sections therein remaining in full effect until they expire on December 31, 2016.

Done this 14th day of March, 2014.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

State of Georgia

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

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January 06, 2014

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Appeal Number: 13-14065-EE
Case Style: USA v. State of Georgia, et al
District Court Docket No: 1:12-cv-02230-SCJ

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Lois Tunstall, EE
Phone #: (404) 335-6224

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-14065-EE

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

STATE OF GEORGIA,
SECRETARY, STATE OF GEORGIA,

Defendants - Appellants.

Appeal from the United States District Court for the
Northern District of Georgia

BEFORE: TJOFLAT, WILSON, and MARTIN, Circuit Judges.

BY THE COURT:

Appellants' motion to stay the district court's orders pending disposition of this appeal is DENIED.

State of New York

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
ALBANY DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 1:10-CV-1214 (GLS/RFT)
	)	
v.	)	
	)	
STATE OF NEW YORK and THE NEW YORK STATE BOARD OF ELECTIONS,	)	
	)	
Defendants.	)	
	)	
	)	

SUPPLEMENTAL REMEDIAL ORDER

WHEREAS the January 27, 2012 Order of this court granted a Permanent Injunction to the United States upon its application to bring the State of New York into compliance with the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986, 42 U.S.C. §§1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment (MOVE) Act, Pub. L. No. 111-84, subtitle H, §§575-589, 123 Stat. 2190, 2318-235 (2009). The January 27, 2012 Order set the 2012 federal non-presidential primary date at June 26, 2012 and provided

that in subsequent even-numbered years, New York's non-presidential federal primary date shall be the fourth Tuesday of June, unless and until New York enacts legislation resetting the non-presidential federal primary for a date that complies fully with all UOCAVA requirements, and is approved by the court (Decretal Paragraphs "1" and "2").

WHEREAS by Order dated February 9, 2012, this court adopted a political calendar for the implementation of the 2012 federal non-presidential primary and general election. Such calendar was specific to 2012. (ECF Document No. 64, pp. 2-3, 5-6).

WHEREAS as of this date the State of New York has not amended the New York State Election Law to change the date of the federal primary with respect to this court's Order of January 27, 2012 and until such action has occurred this application is necessary.

WHEREAS the instant application requests that the court supersede various sections of the Elections Law;

WHEREAS no party to this action objects to the issuance of this Supplemental Remedial Order; and

WHEREAS it is the judgment of this court that the enumerated sections of New York State law must be superseded to provide for a MOVE Act compliant election in New York for the year 2014, now therefore, it is hereby

ORDERED that the following sections of New York State law be and same hereby are superseded for the 2014 election of federal offices in New York:

Schedule of State Law Provisions Superseded for Compliance with MOVE Act

Section	Subject	Change
§1-106	Timeliness of filing for federal offices	For the 2014 Federal Primary and General Elections, that certificates and petitions of designation or nomination, certificates of acceptance or declination of such designations and nominations, certificates of authorization for such designations, certificates of disqualification, certificates of substitution for such designations or nominations and objections and specifications of objections to such certificates and petitions required to be filed with the state board of elections or a board of elections outside of the city of New York shall be deemed timely filed and accepted for filing if sent by mail or overnight delivery service (as defined in CPLR §2103(b)(6)) in an envelope postmarked or showing receipt by the overnight delivery service prior to midnight of the last day of filing, and received no later than one business day after the last day to file such certificates, petitions, objections or specifications.
§4-110	Date of Certification of Primary Ballot by NYSBOE for federal candidates	from 36 to 54 days pre-primary

§4-114	Date of Certification of Ballot by Counties for federal candidates	from 35 to 53 days pre-primary or general
§4-112(1)	Date of Certification of General Election Ballot by NYSBOE for federal candidates	from 36 to 54 days pre-general
§6-158(1)	Filing of Designating Petitions for federal primary	from nine to ten weeks to to eleven to twelve weeks pre- federal primary
§6-158(4)	Filing of Opportunity to Ballot Petitions federal primary	from 8th Thursday to 10th Thursday pre-federal primary
§6-158(4)	Filing of Opportunity to Ballot Petitions federal primary upon declination	7th to 9th Thursday preceding federal primary
§6-158(6)	Last day to file Certificate of Nomination to fill vacancy in federal office pursuant to §6-116	from 7 to 21 days after federal primary
§6-158(9)	Filing dates for Independent Nominations for federal office	from eleven to twelve to thirteen to fourteen weeks prior to general election

§6-158(11)	Last day to accept or decline Independent Nomination for federal office	from the eleventh to thirteenth Thursday prior to general election for acceptance, and 3 days after the thirteenth Tuesday preceding such general election for declination
§6-158(12)	Last day to fill a vacancy after a declination to a federal independent nomination	from eleventh to thirteenth Tuesday preceding such general election
§10-108(1) §11-204(4)	Deadline to transmit Military/Special Federal absentee ballots for Federal Primary to voters with valid application on file	from thirty-two days to forty-five days before a primary or general election for federal offices

ORDERED that nothing herein shall prohibit the State of New York from making statutory changes in its federal office election process to put New York in compliance with the MOVE Act and that such changes, if made, may be implemented in 2014 upon the determination of this

court that such changes render the 2014 election of federal office MOVE Act compliant.

December 12, 2013

Gary L. Sharpe

GARY L. SHARPE
United States District Court Judge

III. Enforcement Activity by the Attorney General in 2014

C. Other Enforcement Activity Memorialized in Letters

State of Vermont

U.S. Department of Justice
Civil Rights Division

Voting Section - NWB
950 Pennsylvania Ave, NW
Washington, DC 20530

January 28, 2014

The Honorable Jim Condos
Secretary of State
128 State Street
Montpelier, Vermont 05633

Dear Secretary Condos:

We write to you as the chief elections official for the State of Vermont concerning Vermont's compliance with the requirements of the Uniformed and Overseas Citizens' Absentee Voting Act (UOCAVA), 42 U.S.C. §§1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009) ("MOVE Act"). As we have discussed, we remain concerned that the late federal primary election date in Vermont, scheduled for the fourth Tuesday in August, does not provide enough time to ensure transmission of UOCAVA ballots by the 45th day prior to the November federal general election as UOCAVA requires.

As you are aware, UOCAVA guarantees active-duty members of the uniformed services, and their spouses and dependents, and United States citizens residing overseas the right "to vote by absentee ballot in general, special, primary, and runoff elections for federal office." 42 U.S.C. § 1973ff-1(a)(1). To give those voters sufficient time to vote, the MOVE Act amended UOCAVA to require that states transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office. 42 U.S.C. § 1973ff-1(g)(1)(A) ("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."); 42 U.S.C. § 1973ff-1(g)(1)(A) ("the purpose [of the 45-day requirement] is to allow absent uniformed services and overseas voters enough time to vote"); *see*156 Cong. Rec. at S4518 (discussing development of 45-day advance transmission requirement based upon evidence before Congress.)

Under UOCAVA, Vermont is responsible for ensuring that validly-requested absentee ballots are sent in accordance with its terms. 42 U.S.C. §§ 1973ff-1, 1973ff-6(6). Vermont has a decentralized system in which it has delegated to its 246 municipalities the responsibility to transmit absentee ballots to UOCAVA voters. Thus it is critical that the federal election calendar provide election officials enough time between the primary date and the UOCAVA transmission deadline before the general election to certify the election results, resolve any election challenges, finalize, print, proofread, and deliver ballots to each municipality for transmittal to the voters.

In 2012, Vermont was not able to transmit all of its UOCAVA ballots by the 45-day deadline before the federal general election. Subsequent to the August 28 primary election, the Vermont Superior Court in Washington County ordered a recount because of a dispute

concerning the results of the gubernatorial primary election for the Progressive Party.[1] On September 18, 2012, the Superior Court announced the results of the recount and declared a winner of the gubernatorial primary election. After the recount results were announced, your office had approximately three days to prepare ballots for Vermont voters who were serving in the military or living overseas.

On October 11, 2012, the United States filed a lawsuit to enforce the rights of Vermont's UOCAVA voters to vote in the 2012 federal general election. *See United States v. State of Vermont*, No. 5:12-cv-236 (D. Vt. 2012). As alleged in the Complaint, 45.3 percent of cities and townships with UOCAVA ballots to transmit for the 2012 general election sent them after the September 22 transmittal deadline. On October 12, 2012, the parties filed a Settlement Agreement, which was approved by the federal court on October 22, 2012. The agreement extended the ballot receipt deadline by ten days to ensure that UOCAVA ballots could be counted, and included a notice provision to let UOCAVA voters know of the extension. Paragraph eight of the agreement provides that the United States will not take steps to recommence the action against Vermont "unless Vermont fails to take adequate steps to ensure that future qualified UOCAVA voters receive the opportunity to vote in elections for Federal office that is provided by UOCAVA." In the agreement, you expressed support for legislation that would remedy the late primary date.

We understand that a change in Vermont's late primary date is currently under consideration by the state legislature. The Senate passed an omnibus elections bill (S. 86) that is currently being considered by the House Committee on Government Operations in the Vermont House of Representatives. As introduced in the Senate, the bill contained a change in the State's primary date to the first Tuesday in August in each even-numbered year. Although that change was deleted from the final version passed by the Senate, we understand that it may be added back during the House's consideration of the bill. We also understand that some members of the legislature have opposed moving the primary date because other states have late primary dates.

As you know, after the MOVE Act was passed, a number of states voluntarily moved their federal primary election dates to ensure UOCAVA compliance. Where states have had difficulties meeting the UOCAVA deadline due to structural or administrative impediments, we have sought to work cooperatively with state officials to identify the necessary changes to their election calendars and other associated requirements. Where such barriers have impeded UOCAVA compliance without resolution, the Department also has initiated litigation in federal court to obtain the structural changes sufficient to ensure that UOCAVA voters will have the full 45 days prior to federal elections to receive, cast and return their ballots. For example, in *United States v. State of New York*, No. 1:10-cv-1214, (N.D.N.Y. Jan. 27, 2012), after failures to meet the 45-day deadline, the court concluded that New York's late federal primary date violated UOCAVA because it did not allow for timely transmission of UOCAVA ballots by the 45th day before the November general election and ultimately ordered New York to implement a new earlier federal primary date. The Department did not advocate for adoption of any particular primary election date, so long as it allowed sufficient time for the state to comply with the UOCAVA ballot transmission deadline. And while that judgment must be made in the context of each state's procedures, in the New York case the court found that the federal primary election

[1] A similar recount also occurred during the gubernatorial primary election in 2010.

date needed to be no later than 35 days in advance of the 45-day UOCAVA transmittal date before the federal general election, i.e., at least 80 days before the federal general election, in order to complete all necessary election administration procedures under New York law and still meet the 45-day deadline.

We greatly appreciate your cooperation in our continuing efforts to ensure that Vermont's military and overseas voters are afforded the full voting opportunities guaranteed by UOCAVA. For the reasons discussed above, we believe it is important that Vermont consider moving its primary election date, beginning with the August 26, 2014 primary election, to a date that will ensure timely transmittal of its UOCAVA ballots by the 45th day before the November general election. Please feel free to call Deputy Chief Tim Mellett in the Voting Section at (202) 353-0099 if you have any questions about this correspondence.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section
Civil Rights Division

cc: Will Senning, Director of Elections and Campaign Finance

State of Mississippi

U.S. Department of Justice
Civil Rights Division

Voting Section - NWB
950 Pennsylvania Ave, NW
Washington, DC 20530

March 5, 2014

VIA ELECTRONIC AND FIRST-CLASS MAIL

The Honorable Delbert Hosemann
Secretary of State
401 Mississippi Street
Jackson, Mississippi 39201

Dear Secretary Hosemann:

I write to follow up on our February 25, 2014 telephone conversation. As we discussed, it is our view that the procedures the State of Mississippi has in place for absentee voting in federal primary runoff elections are inconsistent with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. §§ 1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment Act ("MOVE Act"), Pub. L. No. 111-84, 123 Stat. 2190 (2009).

UOCAVA guarantees absent uniformed services voters and overseas voters the right "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office". 42 U.S.C. § 1973ff-1(a)(1). The MOVE Act amended UOCAVA to require that states transmit absentee ballots to UOCAVA voters at least 45 days before a Federal election. 42 U.S.C. § 1973ff-1(a)(8). Under Mississippi law, a "second [federal] primary election" or primary runoff election, when one is necessary, is held only three weeks after the initial primary election. *See* Miss. Code Ann. § 23-15-1031. Under this timetable for its primary and primary runoff elections, Mississippi law would conflict with UOCAVA's 45-day transmission deadline in future federal runoff elections.

Mississippi has provided us with the written plan for runoff elections that the state devised pursuant to UOCAVA, 42 U.S.C. § 1973ff-1(a)(9). The plan states that county registrars "shall follow the process set forth in Miss. Code Ann. Section 23-15-683." Pursuant to that code provision, in the event of a primary runoff, Mississippi does not send UOCAVA voters a ballot that contains only the names of the candidates who will compete in the primary runoff election. *See id.* Instead, prior to the first primary election, registrars are directed to send UOCAVA voters two identical ballots to use to vote in the first primary and primary runoff elections, if a runoff election is held. Both ballots contain the names of all candidates who originally qualified for the first primary election. The ballots are printed in different colors and styled to indicate the applicable election. *Id.* In a primary runoff election, if a UOCAVA voter votes for a candidate who did not actually make it into the runoff election, "his vote for that office shall be disregarded." *Id.* The plan also indicates that registrars will transmit a notice that includes the names of the candidates participating in a runoff, but only to those voters who have provided an email address. Due to the runoff election schedule, even this notice can be sent no earlier than

21 days before the runoff election (and likely even later taking into account the post-primary election certification process).

Because Mississippi's election code requires that a federal primary runoff election be held 21 days after the first primary election, it precludes timely transmission of a runoff ballot that contains only the names of the candidates who will compete in the primary runoff election. Instead, Mississippi sends UOCAVA voters a runoff ballot that in fact contains candidates who are not participating in the runoff election. Mississippi's procedure creates a real risk that UOCAVA voters will cast a ballot in the runoff election that will not in fact be counted, thus denying them an effective opportunity to participate in the runoff election. *See United States v. Georgia*, 952 F. Supp. 2d 1318, 1329 (N.D. Ga. 2013), *appeal pending* No. 13-14065 (11th Cir. Sept. 6, 2013); *United States v. Alabama,* 2014 WL 545193 (M.D. Ala. Feb. 11, 2014).

For the reasons discussed above, we believe Mississippi's current election calendar and procedures will impede the State's transmission of absentee ballots in accordance with UOCAVA in the event of a primary runoff election for federal office. We appreciate your cooperation in our continuing efforts to ensure that military and overseas voters are afforded the voting opportunities guaranteed under UOCAVA. We look forward to continuing our discussions regarding the steps Mississippi can take to ensure UOCAVA compliance in all future federal elections. As always, if you have any questions or concerns or if the United States can be of any assistance, please contact me or Abel Gomez at (202) 305-1582.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

cc: Kimberly P. Turner, Asst. Secretary of State, Elections
Drew Snyder, Asst. Secretary of State, Policy and Research

952 F.Supp.2d 1318
(Cite as: 952 F.Supp.2d 1318)

H

United States District Court,
N.D. Georgia,
Atlanta Division.
UNITED STATES of America, Plaintiff,
v.
The State of GEORGIA and Brian P. Kemp, Secretary of State of Georgia, in his official capacity, Defendants.

Civil Action No. 1:12–cv–2230–SCJ.
April 30, 2013.

Background: Federal government brought action against State of Georgia and its Secretary of State, seeking declaratory and injunctive relief in relation to state's runoff absentee voting scheme and Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), as amended by Military and Overseas Voter Empowerment Act (MOVE Act). Parties moved and cross-moved for summary judgment.

Holdings: The District Court, Steve C. Jones, J., held that:
(1) Georgia's practice for providing absentee voters with runoff ballots did not comply with UOCAVA, and
(2) factors weighed in favor of permanent injunctive relief.

Federal government's motion granted.

West Headnotes

[1] Injunction 212 ⚿1032

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(B) Factors Considered in General
212k1032 k. Grounds in general; multiple factors. Most Cited Cases

Permanent injunctive relief may be awarded only upon a showing of: (1) irreparable harm; (2) an inadequacy of legal remedies to compensate for the harm; (3) a balance of the hardships in favor of an equitable remedy; and (4) an absence of disservice to the public interest.

[2] Statutes 361 ⚿1079

361 Statutes
361III Construction
361III(A) In General
361k1078 Language
361k1079 k. In general. Most Cited Cases

Statutes 361 ⚿1368

361 Statutes
361III Construction
361III(M) Presumptions and Inferences as to Construction
361k1366 Language
361k1368 k. Plain language; plain, ordinary, common, or literal meaning. Most Cited Cases

Starting point of statutory interpretation is the language of the statute itself, and the governing assumption is that Congress used the words in a statute as they are commonly and ordinarily understood.

[3] Election Law 142T ⚿403

142T Election Law
142TVII Conduct of Election
142TVII(D) Time, Place, and Manner of Voting
142Tk398 Absentee Ballots
142Tk403 k. Absentee voting from abroad. Most Cited Cases
(Formerly 144k216.1 Elections)

Term "an election for Federal office," as used in provision of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) section governing state responsibilities to absent uniformed

services voters or overseas voters, denotes any election for federal office, including a runoff election; not only was indefinite article "an" commonly understood to mean "one" or "any," but also, where Congress intended UOCAVA provisions to apply only to certain elections, it specifically referred to those types of elections, whereas in subject provision Congress chose to use more general term. Uniformed and Overseas Citizens Absentee Voting Act, § 102(a)(8)(A), 42 U.S.C.A. § 1973ff–1(a)(8)(A).

[4] Election Law 142T ⚿403

142T Election Law
142TVII Conduct of Election
142TVII(D) Time, Place, and Manner of Voting
142Tk398 Absentee Ballots
142Tk403 k. Absentee voting from abroad. Most Cited Cases
(Formerly 144k216.1 Elections)

Requirement of Uniformed and Overseas Citizens Absentee Voting Act's (UOCAVA) that the states provide absent uniformed services voters or overseas voters with "sufficient time" to vote in runoff elections is not a carve-out from the requirement that the states transmit validly-requested absentee ballot at least 45 days prior to an election for federal office; there was no indication that Congress intended that the sufficient time requirement be a substitute for the 45–day ballot transmittal requirement, which could be reasonably read as establishing an additional requirement that the states create a written plan for such transmission, and states could be reasonably expected to comply with both 45–day ballot transmittal requirement and written plan requirement. Uniformed and Overseas Citizens Absentee Voting Act, § 102(a)(8)(A), (a)(9), 42 U.S.C.A. § 1973ff–1(a)(8)(A), (a)(9).

[5] Election Law 142T ⚿403

142T Election Law
142TVII Conduct of Election
142TVII(D) Time, Place, and Manner of Voting
142Tk398 Absentee Ballots
142Tk403 k. Absentee voting from abroad. Most Cited Cases
(Formerly 144k216.1 Elections)

Georgia's practice of automatically transmitting state write-in absentee ballot (SWAB), which did not contain candidates' names and thus was not official runoff ballot, along with instructions for how to use SWAB in event of runoff election, with each official absentee ballot mailed to absent uniformed services voters or overseas voters did not comply with requirement of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) that states provide ballots to such voters at least 45 days prior to election; although UOCAVA did not specifically require transmission of official runoff absentee ballot, absentee voters were entitled to ballot allowing them to effectively exercise their right to vote in runoff elections and to have same information on their ballot that any stateside voter had. Uniformed and Overseas Citizens Absentee Voting Act, § 102(a)(8)(A), (a)(9), 42 U.S.C.A. § 1973ff–1(a)(8)(A), (a)(9).

[6] Election Law 142T ⚿403

142T Election Law
142TVII Conduct of Election
142TVII(D) Time, Place, and Manner of Voting
142Tk398 Absentee Ballots
142Tk403 k. Absentee voting from abroad. Most Cited Cases
(Formerly 144k216.1 Elections)

Injunction 212 ⚿1346

212 Injunction
212IV Particular Subjects of Relief
212IV(J) Elections, Voting, and Political Rights
212k1346 k. Conduct of elections. Most Cited Cases

State of Georgia's failure to comply with

requirement of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), that states provide absent uniformed services voters or overseas voters with official ballots at least 45 days prior to runoff election constituted irreparable harm, as required for federal government to obtain permanent injunction against Georgia's practice; right to vote was essential to nation's form of government, and UOCAVA's 45–day ballot transmittal requirement protected franchise of American citizens overseas. Uniformed and Overseas Citizens Absentee Voting Act, § 102(a)(8)(A), (a)(9), 42 U.S.C.A. § 1973ff–1(a)(8)(A), (a)(9).

[7] Injunction 212 ⚿1346

212 Injunction
212IV Particular Subjects of Relief
212IV(J) Elections, Voting, and Political Rights
212k1346 k. Conduct of elections. Most Cited Cases

Balance of harms weighed in favor of granting federal government's request for permanent injunction against Georgia's practice of automatically transmitting state write-in absentee ballot (SWAB), along with instructions for how to use SWAB in event of runoff election, with each official absentee ballot mailed to absent uniformed services voters or overseas voters, which did not comply with requirement of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) that states provide ballots to such voters at least 45 days prior to election; potential harms to Georgia amounted to expenditures of time and money and inconvenience to election officials, but threatened injury to absentee voters was deprivation of their right to vote, which was essential to effective democracy. Uniformed and Overseas Citizens Absentee Voting Act, § 102(a)(8)(A), (a)(9), 42 U.S.C.A. § 1973ff–1(a)(8)(A), (a)(9).

[8] Election Law 142T ⚿40

142T Election Law
142TIII Voters
142TIII(A) In General; Right of Suffrage
142Tk40 k. In general. Most Cited Cases
(Formerly 144k1 Elections)

No right is more precious than the right to vote; even the most basic of other rights are illusory if the right to vote is undermined.

[9] Injunction 212 ⚿1346

212 Injunction
212IV Particular Subjects of Relief
212IV(J) Elections, Voting, and Political Rights
212k1346 k. Conduct of elections. Most Cited Cases

Public interest weighed in favor of granting federal government's request for permanent injunction against Georgia's practice of automatically transmitting state write-in absentee ballot (SWAB), along with instructions for how to use SWAB in event of runoff election, with each official absentee ballot mailed to absent uniformed services voters or overseas voters, which did not comply with requirement of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) that states provide ballots to such voters at least 45 days prior to election, in light of Congress's strong desire, as evinced in UOCAVA, to protect integrity of democratic process. Uniformed and Overseas Citizens Absentee Voting Act, § 102(a)(8)(A), (a)(9), 42 U.S.C.A. § 1973ff–1(a)(8)(A), (a)(9).

***1320** Abel Gomez, Janie Allison (Jaye) Sitton, Thomas Christian Herren, Jr., Thomas E. Perez, U.S. Department of Justice, Washington, DC, Sharon Douglas Stokes, Office of United States Attorney, Atlanta, GA, for Plaintiff.

Dennis Robert Dunn, Stefan Ernst Ritter, Office of State Attorney General, Julia B. Anderson, State of Georgia Law Department, Atlanta, GA, for Defendants.

ORDER

STEVE C. JONES, District Judge.

This matter comes before the Court on the parties' cross-motions for summary judgment [Doc. No. 24 and 25].

I. Factual Background [FN1]

FN1. In accordance with the Local Rules of the Northern District of Georgia, both parties have submitted proposed statements of material facts and have had the opportunity to respond to the opposing party's submission. LR 56.1, NDGa. The Court has thoroughly reviewed all submissions, as well as the record. The Court resolves all objections and opposing responses to the statements of material facts through entry of the following factual background.

This case concerns the State of Georgia's runoff absentee voting scheme and *1321 the federal laws that remedy the historical disenfranchisement of American citizens serving and living abroad who have been unable to vote because of logistical barriers. On June 27, 2012, the United States filed this action for declaratory and injunctive relief against the State of Georgia and its Secretary of State, Brian P. Kemp, in his official capacity, (collectively "Georgia" or "Defendants") to enforce the right of absent uniformed services voters and overseas voters to vote by absentee ballot in Georgia's general, special, primary, and runoff elections for federal office, which right is guaranteed by the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), 42 U.S.C. §§ 1973ff *et seq.*, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111–84, Subtitle H, §§ 575–589, 123 Stat. 2190, 2318–2335 (2009) ("MOVE Act").

The jurisdiction of this Court is invoked pursuant to 42 U.S.C. § 1973ff–4 (authorizing the Attorney General to bring a UOCAVA enforcement action for declaratory or injunctive relief) and 28 U.S.C. §§ 1345 and 2201 (providing for original jurisdiction in the district court where the United States is a plaintiff and for jurisdiction over declaratory judgment actions). [FN2]

FN2. The Court agrees that said statutory provisions establish that jurisdiction is proper in this Court. The Court also recognizes that the issue set forth herein rests upon the contingency of future runoff elections being held in Georgia. The Court finds that there is a substantial likelihood of said contingency occurring; therefore, the present case is justiciable. *Browning–Ferris Indus. of Ala. Inc. v. Ala. Dept.of Envtl. Mgmt.*, 799 F.2d 1473, 1478 (11th Cir.1986) ("It is clear that in some instances a declaratory judgment is proper even though there are future contingencies that will determine whether a controversy ever actually becomes real.... [T]he practical likelihood that the contingencies will occur and that the controversy is a real one should be decisive in determining whether an actual controversy exists.").

As this Order details, over the years, the State of Georgia has made great strides and demonstrated an honest and meritorious effort to comply with federal law and ensure that overseas voters can effectively exercise their right to vote. This is illustrated, for example, through Georgia's recent legislative enactments and technological enhancements of its voting resources. The United States and Georgia now disagree as to how federal law should be interpreted and applied to Georgia's efforts with regard to the timing and methodology of Georgia's runoff absentee voting scheme. Despite their differences of opinion, there is no doubt that both parties share the same fundamental, *and most important,* end goal of ensuring that overseas voters are able to effectively exercise their right to vote in United States elections.

UOCAVA specifically guarantees uniformed services and overseas voters ("UOCAVA voters")

the right "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 42 U.S.C. § 1973ff–1. In 2009, the MOVE Act amended UOCAVA to require that "[e]ach 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...." 42 U.S.C. § 1973ff–1(a)(8)(A). [FN3] The State of Georgia's responsibilities*1322 under UOCAVA are set forth in 42 U.S.C. § 1973ff–1 and include ensuring that validly requested absentee ballots are transmitted in accordance with the provisions of UOCAVA. As Secretary of State, Brian Kemp is Georgia's chief election officer and is responsible for performing the duties imposed under Georgia's electoral laws. O.C.G.A. § 21–2–50(b).

> FN3. This provision of the UOCAVA applies to all absentee ballot requests received by the state at least forty-five days prior to the election. For all requests received less than forty-five days prior to the election, the State must transmit the absentee ballot in accordance with state law and if practicable, "in a manner that expedites the transmission of such absentee ballot." 42 U.S.C. § 1973ff–1(a)(8)(B).

Georgia was also a defendant in a 2004 action in which the United States alleged that UOCAVA voters from a substantial number of Georgia's 159 counties had not been mailed absentee ballots in time to receive and return them through United States postal mail for the July 20, 2004 federal primary election or the runoff on August 10, 2004. Compl. at pp. 4–5, *United States v. Georgia,* No. 1:04–CV–2040–CAP (N.D.Ga. July 13, 2004). In that case, on July 16, 2004, the Court entered a temporary restraining order and preliminary injunction, providing for several forms of relief. Thereafter, the Georgia General Assembly passed Act No. 53 (H.B. 244 of the 2005 Regular Session), which amended a number of sections of Georgia's Election Code. This Act, signed into law on April 22, 2005, included provisions designed to ensure long-term compliance with the UOCAVA by the State of Georgia and its counties [Doc. No. 2–3, p. 7]. The United States and Georgia also entered into a Memorandum of Understanding (containing various provisions and reporting requirements) ("the Memorandum") that was annexed to the stipulation and order of dismissal of the 2004 civil action [Doc. No. 25–8, pp. 7–13]. The Memorandum and the amended statutory law provided for the creation of a State Write-in Absentee Ballot ("SWAB") for federal and statewide offices [*Id.*].

The Memorandum's reporting requirements expired in 2008. As stated above, in 2009, Congress passed the MOVE Act, amending UOCAVA and requiring states to transmit absentee ballots to UOCAVA voters at least forty-five days before an election for federal office. 42 U.S.C. § 1973ff–1(a)(8)(A). In 2010 and 2012, Georgia's General Assembly passed legislation related to UOCAVA; however, Georgia has not passed legislation that provides for a forty-five day transmittal period for runoff election absentee ballots.

Under Georgia law, a runoff election is required when no candidate receives a majority of the votes cast in the initial election. O.C.G.A. § 21–2–501(a). A runoff election is held twenty-one days following a regular or special primary election (and twenty-eight days following a regular or special general election), including an election for federal office, in which a candidate failed to receive a majority of the votes cast. O.C.G.A. § 21–2–501(a). An official runoff absentee ballot is transmitted to a UOCAVA voter "as soon as possible prior to a runoff." O.C.G.A. § 21–2–384(a)(2).

UOCAVA requires a state to establish a written plan that provides for absentee ballots to be made available to UOCAVA voters in a manner that

gives them sufficient time to vote in the runoff election. 42 U.S.C. § 1973ff–1(a)(9). The United States requested Georgia's plan after the March 6, 2012 Presidential Preference Primary [Doc. No. 8, p. 10]. Pursuant to the parties' agreement, Georgia provided said plan on April 20, 2012 [Doc. No. 17, p. 18].

A review of Georgia's written plan shows that Georgia has made provisions for both mail and electronic delivery of official absentee ballots [Doc. No. 24–8, pp. 3–4]. If a UOCAVA voter chooses to receive a ballot by mail, a SWAB is automatically included with each official absentee ***1323** ballot mailed to a UOCAVA voter for the initial election preceding the corresponding runoff election [*Id.*]. The mailing with the SWAB does not include a certified list of runoff candidates [*Id.*]. The mailing notifies UOCAVA voters that in the event of a runoff, they will be able to electronically access the appropriate ballot and instructions once the official ballots have been prepared and made available [Doc. No. 24–6, p. 2]. Georgia's written plan further provides that a UOCAVA voter may choose between a SWAB, a Federal Write-in Absentee Ballot ("FWAB"),[FN4] or the official absentee ballot, to vote in the federal runoff election [Doc. No. 24–8, p. 3]. In addition, Georgia allows a UOCAVA voter who submits a write-in ballot and later receives an official absentee ballot to also submit the official absentee ballot; however, the voter "should make every reasonable effort to inform the appropriate board of registrars that [he or she] has submitted more than one ballot" [*Id.* at p. 4]. Voted ballots may only be returned by mail [*Id.*].

> FN4. As stated in Georgia's written plan: "On both the FWAB and SWAB, a voter may write in the name of a candidate or candidates for state offices that are elected on a statewide basis and for all federal offices in a runoff election. On the FWAB, the elector has the option of designating a candidate by writing in a party preference for each office, the names of specific candidates for each office, or the name of the person who the elector prefers for each office" [Doc. No. 24–8, p. 4]. There is no dispute that the FWAB is treated and processed by election officials in the same manner as the SWAB [Doc. No. 26–1, p. 17, ¶ 22].

Georgia's Secretary of State maintains a website that contains information for the UOCAVA voter [Doc. No. 24–2, p. 5, ¶¶ 15–16].

Georgia notes that its Secretary of State does not wait until the results of an election are certified, but posts the *unofficial* results of an election on his website within one day after the date of the election [Doc. No. 26–1, p. 19, ¶ 23].

Both parties agree that official election results are "generally" certified by the Secretary of State within a day after receipt of the certified results from the county election officials—said receipt must occur by 5 p.m. on the Monday following the election [Doc. No. 28–1, p. 12, ¶ 19]. O.C.G.A. § 21–2–493(k).[FN5]

> FN5. In previous briefings by the parties, the Court was cited to a fourteen-day certification period under O.C.G.A. § 21–2–499(b); however, the parties now agree that the fourteen-day time line of § 21–2–499(b) does not apply to all federal elections and only applies to certain presidential elections for which there is no runoff [Doc. No. 28–1, p. 12]. Accordingly, § 21–2–499(b) is not relevant and has no application to the present case.

Georgia law also provides that runoff absentee ballots from overseas voters must be postmarked by the date of the election and received within the three (3) day period following the runoff in order to be counted and included in certified election results. O.C.G.A. § 21–2–386(a)(1)(G).

On June 27, 2012, the United States filed a Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction, asserting that emergency relief was necessary to remedy the imminent deprivation of the right to vote as guaranteed under UOCAVA because of Georgia's failure to ensure the transmission of absentee ballots to qualified UOCAVA voters at least forty-five days before the State's August 21, 2012 federal primary runoff election [Doc. No. 2]. At issue was whether Georgia's federal primary runoff scheme complies with the requirements of UOCAVA and if not, what remedial relief should be ordered to preserve the statutory rights of UOCAVA voters. The Court *1324 held a hearing on July 3, 2012 [Doc. No. 9].[FN6] After due consideration, the Court granted the United States' Motion for TRO/ Preliminary Injunction and ordered remedial relief for the August 21, 2012 federal primary runoff election in the form of extended ballot receipt deadlines, mandatory website content, outgoing express ballot transmission, electronic and express ballot return, ballot counting procedures and notice, training of election officials, coordination with the Federal Voting Assistance Program, a press statement, and statistical reporting to the United States [Doc. No. 10].

> FN6. In its summary judgment brief, the United States notes that Georgia has changed its arguments/position since the July 3, 2012 hearing. [Doc. No. 25–2, pp. 4–5]. For purposes of the present summary judgment analysis, the Court will only consider the arguments raised in the parties' summary judgment briefs. The Court will not incorporate the preliminary injunction positions/arguments into the present order.

After the August 21, 2012 federal primary runoff election and November 6, 2012 general election (for which a runoff was not necessary), the parties submitted a joint preliminary report and discovery plan, representing that "there presently are no genuine disputes as to any material facts" and proposing that the "Court consider their cross-motions for summary judgment prior to any discovery being conducted" [Doc. No. 20, p. 10]. The Court granted the proposed request and allowed each party to file and extensively brief their motions for summary judgment.[FN7] Now before the Court are the parties' cross-motions for summary judgment.

> FN7. The Court has also permitted and considered a surreply filed by Georgia [Doc. No. 30].

II. Legal Standard

As noted above, Plaintiff brings this action for declaratory and injunctive relief.

The Declaratory Judgment Act provides: "in a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such determination, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

[1] Permanent injunctive relief may be awarded only upon a showing of: (1) irreparable harm; (2) an inadequacy of legal remedies to compensate for the harm; (3) a balance of the hardships in favor of an equitable remedy; and (4) an absence of disservice to the public interest. *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 130 S.Ct. 2743, 2756, 177 L.Ed.2d 461 (2010); *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.,* 522 F.3d 1200 (11th Cir.2008).[FN8]

> FN8. The Court notes that the Eleventh Circuit has applied a permanent injunction test that varies somewhat from the test applied by the Supreme Court in *Monsanto;* for instance, the test applied in *Thomas v. Bryant,* 614 F.3d 1288 (11th Cir.2010), calls for the plaintiff to establish success on the merits and does not require a balancing of the harm. *Thomas,* 614 F.3d

at 1317 ("To obtain a permanent injunction, a party must show: (1) that he has prevailed in establishing the violation of the right asserted in his complaint; (2) there is no adequate remedy at law for the violation of this right; (3) irreparable harm will result if the court does not order injunctive relief; and (4) if issued, the injunction would not be adverse to the public interest."). Here, as is apparent from the discussion below, the element of irreparable harm and the element of success on the merits are inextricably linked.

> Georgia argues that to prevail at summary judgment on its claim for injunctive relief, the United States must establish each of the four elements necessary for a permanent injunction [Doc. No. 29, p. 1–2]. The United States contends that Federal Rule of Civil Procedure 56(a) provides the standard applicable at summary judgment, and, thus, to prevail at summary judgment the movant must show that there are no genuine disputes of material facts and that the movant is entitled to judgment as a matter of law [Doc. No. 27, p. 4–5]. Because the United States seeks summary judgment on its claim for permanent injunctive relief, it must be shown that the United States is entitled to judgment as a matter of law based on undisputed facts, upon consideration of the permanent injunction factors. *See O'Connor v. Smith,* 427 Fed.Appx. 359, 367–68 (5th Cir.2011) (upholding grant of summary judgment where "[t]here was no genuine dispute of any material fact, and the plaintiffs were entitled to judgment as a matter of law because they established the necessary elements for a permanent injunction"); *H. v. Montgomery Cnty. Bd. of Educ.,* 784 F.Supp.2d 1247, 1268–69 (M.D.Ala.2011). Although the United States has not applied the permanent injunction standard in arguing for summary judgment in its favor and against Georgia, the record is sufficiently developed to inform the Court's consideration of each of the factors, and Georgia, the party to be enjoined, has had full opportunity to present its arguments under the standard.

***1325** Federal Rules of Civil Procedure 56(a) provides, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FN9

> FN9. On December 1, 2010, an amended version of Rule 56 of the Federal Rules of Civil Procedure became effective. The amendments to Rule 56 "are intended to improve the procedures for presenting and deciding summary-judgment motions" and "are not intended to change the summary-judgment standard or burdens." *Farmers Ins. Exchange v. RNK, Inc.,* 632 F.3d 777, 782 n. 4 (1st Cir.2011) (internal quotation marks and emphasis omitted). "[B]ecause the summary judgment standard remains the same, the amendments 'will not affect continuing development of the decisional law construing and applying' the standard now articulated in Rule 56(a). Accordingly, while the Court is bound to apply the new version of Rule 56, the undersigned will, where appropriate, continue to cite to decisional law construing and applying prior versions of the Rule." *Murray v. Ingram,* No. 3:10–CV–348–MEF, 2011 WL 671604, *2 (M.D.Ala. Feb. 3, 2011) (internal quotation marks and citations omitted).

A factual dispute is genuine if the evidence

would allow a reasonable jury to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir.1997).

Here, the dispositive issue is a legal one, and each party seeks summary judgment in its favor based on its position regarding the applicability of the UOCAVA provisions at issue. The questions for the Court's consideration in the declaratory judgment context are whether 42 U.S.C. § 1973ff–1(a)(8)(A) applies to federal runoff elections and, if so, whether Georgia's election scheme for federal runoff elections complies with this section. If § 1973ff–1(a)(8)(A) does not apply to federal runoff elections, the Court must analyze whether Georgia's runoff election scheme complies with § 1973ff–1(a)(9). If, on the other hand, § 1973ff–1(a)(8)(A) does apply and Georgia's runoff elections scheme is non-compliant, the Court must determine whether the United States is entitled to summary judgment on its request for a permanent injunction, requiring Georgia to take all actions necessary to ensure compliance with the UOCAVA in future federal runoff elections. The United States would be entitled to summary judgment as to the permanent injunctive relief it seeks if the above-listed four elements are established.

***1326 III. Legal Analysis**

a. Declaratory Judgment and Irreparable Harm Considerations

1. Section 1973ff–1(a)(8)(A) Applies to Runoff Elections

As set forth in the analysis below, the Court finds that § 1973ff–1(a)(8)(A)'s forty-five day advanced mailing requirement for absentee ballots applies to federal runoff elections. Moreover, the United States has shown that Georgia's current runoff election scheme fails to comply with this requirement, as it does not provide for the timely transmittal of either the official absentee ballots or the SWAB along with a list of necessary candidate information to UOCAVA voters who wish to vote in federal runoff elections.

As noted above, UOCAVA requires each State to "transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter ... in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election ...." § 1973ff–1(a)(8)(A). Given Georgia's election schedule, the official absentee ballot will necessarily be transmitted less than forty-five days before a runoff election.[FN10]

> FN10. The Court will address Georgia's arguments regarding use of the word "official," *infra*.

Georgia argues that § 1973ff–1(a)(8)(A)'s forty-five day deadline does not apply to runoff elections. Georgia first contends that Congress's use of the term "an election" rather than the phrase "general, specific, primary, and runoff elections" signifies that Congress intended to refer to less than all of the types of possible federal elections in § 1973ff–1(a)(8)(A). Next, Georgia relies on § 1973ff–1(a)(9)'s requirement that "the States ... establish a written plan that provides absentee ballots are made available to absent uniformed services voters and overseas voters in [a] manner that gives them sufficient time to vote in the runoff election." Georgia argues that while § 1973ff–1(a)(8)(A) does not specifically address runoff elections § 1973ff–1(a)(9) does. And, in specifically addressing runoff elections, § 1973ff–1(a)(9) requires that the states provide UOCAVA voters only "sufficient time" to vote in federal runoff elections. Georgia notes that it has a written plan in place for allowing UOCAVA voters sufficient time to vote.

[2][3] The plain meaning of the term "an election" supports the conclusion that §

1973ff–1(a)(8)(A) applies to runoff elections. The "starting point" of statutory interpretation is "the language of the statute itself," and the governing assumption is "that Congress used the words in a statute as they are commonly and ordinarily understood...." *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1212 (11th Cir.2010) (internal quotation marks omitted). The commonly understood meaning of the indefinite article "an" is "one" or "any." *See Black's Law Dictionary* (6th ed. 1990); *see also Lee v. Weisman* 505 U.S. 577, 615 n. 2, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (Souter, J.) (noting that the First Amendment's prohibition against " **an** establishment of religion" evidences the intent to proscribe "**any** kind of establishment" of religion) (emphasis added). Thus, the term "an election" for federal office denotes any election for federal office, including a runoff election.

Moreover, this interpretation finds further support when the term is considered in "the entire statutory context." ***1327***Harrison*, 593 F.3d at 1212 (internal quotation marks omitted). The first instance of the use of the word "election" in § 1973ff–1 is in reference to "general, special, primary, and runoff elections for Federal office." § 1973ff–1(a)(1). The second time that term is used, in § 1973ff–1(a)(2), it is preceded by the word "any." There is little doubt that the general reference to "any election" in § 1973ff–1(a)(2) is but a substitute for the specific reference to the four types of elections listed in § 1973ff–1(a)(1). Where Congress intended to refer to a specific type of election, it left no doubt of its intent. For example, § 1973ff–1(a)(3) expressly requires the states to permit UOCAVA voters to use FWABs in "general elections for Federal office."

To the extent there is doubt as to the breadth of the term "an election," it is settled by looking to the interplay between § 1973ff–1(a)(7) and § 1973ff–1(f). Section 1973ff–1(a)(7) addresses the transmittal of blank absentee ballots for "general, special, primary, and runoff elections for Federal office" and requires that transmittal procedures be established in accordance with § 1973ff–1(f). Notably, § 1973ff–1(f)' s transmittal procedures apply to "an election for Federal office." Thus, considering § 1973ff–1(f) together with § 1973ff–1(a)(7), it is apparent that the reference to "an election for Federal office" is applicable to any of the four types of elections listed in § 1973ff–1(a)(7).

The term "an election," used in § 1973ff–1(f) to signify any of the four types elections that are the subject of UOCOVA, is also present in § 1973ff–1(a)(8)(A). The meaning that attaches to the term in § 1973ff–1(f) also applies to the term in § 1973ff–1(a)(8)(A). This is so because the presumption is "that the same term has the same meaning when it occurs here and there in a single statute...." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007). The Court recognizes that this presumption should not be applied rigidly and that "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Id.* However, the conclusion that "an election" means any election out of the four possible types of elections recognized in § 1973ff–1 remains unaltered.

When considered in the context of § 1973ff–1 as a whole, a reference to "an election" in § 1973ff–1(a)(8)(A) has no further or different meaning than it has in § 1973ff–1(f). Section 1973ff–1 deals with four different types of elections, and a general reference within the section to an election, in the absence of language narrowing the focus of the term, is best construed as a reference to any of the four types of elections identified in the section. Both in § 1973ff–1(f) and in § 1973ff–1(a)(8)(A), the term is used in setting the parameters for the transmittal of absentee ballots. In the context of § 1973ff–1(f), the term pertains to the circumstance under which the states are obliged to transmit blank absentee ballots to

UOCAVA voters—that is, § 1973ff–1(f) explains that the states are required to transmit absentee ballots to UOCAVA voters "for an election for Federal office." As used in § 1973ff–1(a)(8)(A), the term pertains to the time frame for the transmittal of absentee ballots—that is, § 1973ff–1(a)(8)(A) provides that where valid ballot requests are received ahead of time, the absentee ballots must be transmitted forty-five days before "an election for Federal office."

As noted above, the plain meaning of the term "an election" is "any election," and § 1973ff–1(a)(8)(A) itself contains no language limiting the application of the term "an election" to elections other than runoff ***1328** elections.[FN11] Georgia, however, argues that when read together with § 1973ff–1(a)(9) it is apparent that "an election" in § 1973ff–1(a)(8)(A) does not encompass federal runoff elections, as § 1973ff–1(a)(9) establishes an alternate standard for runoff elections, requiring the states to provide only "sufficient time" for UOCAVA voters to vote in runoff elections.

> FN11. As also noted above, where Congress intended to make a reference to a specific type of election in § 1973ff–1, it did so by referring to the type of election it intended to address. *See* § 1973ff–1(a)(3) (addressing the use of the FWAB in general elections).

[4] The "sufficient time" requirement in § 1973ff–1(a)(9) is not a carve-out from the forty-five day requirement in § 1973ff–1(a)(8)(A). First, there is no indication that the sufficient time referred to is a substitute for the forty-five day ballot transmittal requirement.[FN12] Second, § 1973ff–1(a)(9) can be reasonably read as establishing an additional requirement the states must comply with, that of establishing a written plan. Considering the logistical complexities of preparing for runoff elections, which are not held as a matter of course during every election season, the usefulness of a written plan, detailing in advance the practices to be implemented in the event a runoff election becomes necessary, is apparent. And there is no inherent conflict between the forty-five day provision of § 1973ff–1(a)(8)(A) and the written plan provision of § 1973ff–1(a)(9). It is possible for a state to comply with the requirements of both § 1973ff–1(a)(8)(A) and § 1973ff–1(a)(9) in the event a runoff election is declared. A state can transmit absentee ballots to UOCAVA voters forty-five days before a federal runoff election and have in place a written plan to ensure that its practices will provide UOCAVA voters sufficient time to vote. As such, § 1973ff–1(a)(8)(A) applies to federal runoff elections and § 1973ff–1(a)(9) merely establishes an additional requirement for runoff elections.

> FN12. As noted below in Part III.a.2., UOCAVA does not define the term "sufficient time." For the reasons detailed in footnote 16 of this order, the Court accepts that "sufficient time" under UOCAVA means a forty-five day round trip period (from the transmittal of the absentee ballot to the UOCAVA voter to its return receipt by state election officials).

2. Georgia's Current Practices for the Transmittal of Ballots to UOCAVA Voters in the Event of a Runoff Election Do Not Comply With § 1973ff–1(a)(8)(A)

[5] Georgia also argues that under the plain language of § 1973ff–1(a)(8)(A) its practice of automatically transmitting the SWAB with each official absentee ballot mailed forty-five days prior to the initial election (along with instructions for how to use the SWAB in the event of a runoff) and its treatment of the SWAB as an official absentee ballot in terms of casting and counting renders Georgia compliant with UOCAVA.

More specifically, Georgia argues that UOCAVA does not require it to transmit an official absentee ballot as it relates to the administration of runoff elections, and it notes that Congress included

the word "official" in one section of the statute (when referring to the Federal Post Card Application in § 1976ff–1(a)(4)) but that it excluded it from the absentee ballot sections, *i.e.*, §§ 1973ff–1(a)(8)(A) and (a)(9) [Doc. No. 24–1, pp. 16–17]. Georgia argues that when words are included in one section of a statute and excluded in another, it is presumed, per the rules of statutory construction, that the exclusion is intentional and purposeful [*Id.* (citing ***1329***United States v. Alabama,* 691 F.3d 1269, 1289 (11th Cir.2012))].

Georgia is correct that UOCAVA does not specify that the "official" runoff absentee ballot has to be transmitted to the UOCAVA voter; however, it would seem to frustrate the purpose of UOCAVA for this Court to read the statute so narrowly as to conclude that the UOCAVA voter is not entitled to an official absentee ballot. It appears to this Court that even if UOCAVA does not specifically provide for an official ballot to be transmitted to the UOCAVA voter, the UOCAVA voter is, at the very least, entitled to a ballot that allows the voter to *effectively* exercise his or her right to vote in a runoff election, as well as to have the same information on his or her ballot that the voter who is stateside has.

Thus, the issue becomes whether a SWAB constitutes a sufficient absentee ballot so as to allow a UOCAVA voter to effectively exercise his or her right to vote.

Although UOCAVA does not explicitly discuss state write-in absentee ballots (*e.g.*, the SWAB), the statute does provide for the FWAB. 42 U.S.C. § 1973ff–2. While there are minor differences between the SWAB and the FWAB, they share one key and fundamental similarity: they are, by definition, write-in ballots that do not list the candidates for whom votes can be placed; instead, voters must obtain candidate lists from other sources and then write in the candidates' names on the blank ballots.[FN13] *See, e.g.,* Doc. No. 24–4, p. 4; Dep't of Def. Fed. Voting Assistance Program, *Federal Write-in Absentee Ballot* (2012), *available at* http:// www. fvap. gov/ resources/ media/ fwab. pdf.

> FN13. At the preliminary injunction hearing and in its summary judgment briefs, Georgia distinguished the SWAB from the FWAB on the ground that the SWAB is transmitted by the state (without request from the UOCAVA voter and in advance of the runoff election)—by mail and electronically—along with instructions that direct the voter to access the additional candidate information on the Secretary of State's website, whereas the FWAB is not transmitted by Georgia and does not instruct a voter on how to obtain candidate information [Doc. Nos. 17, p. 28; 24–1, p. 19; and 26, p. 9]. These differences, however, are of no legal consequence. As correctly noted by the United States, in the absence of a certified candidate list being transmitted along with the SWAB, the SWAB does not provide sufficient information, standing alone, to cast an effective vote [Doc. No. 27, p. 15]. The SWAB also places a burden on the UOCAVA voter to seek out critical information, relies on the UOCAVA voter's ability to check a website, and ignores the situation of a voter who does not have regular internet access [*Id.*].

At least one court has found that the FWAB is a fail-safe that cannot substitute for timely transmission of an official state absentee ballot. *United States v. Cunningham,* No. 08–cv–709, 2009 WL 3350028, at *8 (E.D.Va. Oct. 15, 2009); *see also* 156 Cong. Rec. S4513, 4519 (daily ed. May 27, 2010) (statement of Sen. Charles Schumer). The reasoning behind the holding in *Cunningham* applies with equal force to the SWAB. Among the FWAB's deficiencies discussed in *Cunningham,* the court focused on Congress's statement that the FWAB "is intended as an emergency back-up measure rather than as a replacement for the regular

ballot" and "the fact that regular absentee ballots list all offices, names, party affiliations, and ballot propositions, while the [FWAB] is blank and requires voters to be able to make choices based on complete and advance knowledge of their jurisdiction's ballot." *Cunningham,* 2009 WL 3350028, at *8 (internal quotation marks omitted); *see also* 42 U.S.C. § 1973ff–2(a)(2)(A) (stating that the FWAB is merely a "back-up measure to vote in election for Federal office"). Like the FWAB, the SWAB is merely an emergency measure that is no substitute for Georgia's official absentee ***1330** ballot for the runoff election. Indeed, the blank nature of the SWAB requires voters to have advance and separate knowledge of the runoff election in order to successfully fill out the SWAB and vote. Accordingly, the SWAB is merely a partial ballot that does not effectively allow the UOCAVA voter to exercise his or her right to vote in the absence of the necessary candidate information that is transmitted only weeks before the runoff. Accordingly, the Court finds that Georgia's transmission of the SWAB does not fulfill UOCAVA's forty-five deadline for transmitting a ballot.

The partial and deficient nature of the SWAB is readily apparent here. Georgia has two official methods for informing its overseas voters about runoff elections and the names of the runoff candidates: (1) listing the information on the Secretary of State's website, and (2) communicating the information through the official primary runoff absentee ballots, which are transmitted via the voters' preferred channels of communication [Doc. No. 2–2, p. 3]. *Cf.* 42 U.S.C. § 1973ff–1(f) (requiring states to transmit the ballots using the method requested by the voter, *i.e.* via mail or electronically). For those overseas voters who select mail delivery, there is a distinct possibility that they will be unable to vote in a runoff because they will not receive the candidate information until after the election. *See Cunningham,* 2009 WL 3350028, at *8 (finding that on average it takes seven to thirteen days to mail a ballot to Iraq, "not including the time it takes to reach a servicemember in the field" and that in "some remote, austere locations, it may take as long as thirty-five days just for mail to [reach] that location ... before the servicemember can even open and read that mail, much less send response mail back to the United States") (internal quotation marks omitted). And even those voters who opted for electronic transmission would likely have to wait until a week after the election to learn of the *official* results from the Secretary of State's website [FN14] and use the SWAB—leaving fourteen days to vote and return the ballot by mail in a runoff following a regular or special primary election (and twenty one days to vote and return the ballot by mail in a runoff of a regular or special general election) rather than the minimum forty-five day round trip (*i.e.,* transmittal, voting, and return) period required by UOCAVA. [FN15] Thus, the SWAB is deficient, despite Georgia's measures for providing the necessary candidate information.

> FN14. As previously noted, the parties agree that the Secretary of State generally certifies official election results within one day of receipt of the certified results from county election officials—said receipt must occur by 5 p.m. on the Monday following the election. O.C.G.A. § 21–2–493(k).
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> FN15. The Court acknowledges that Georgia law also provides that runoff absentee ballots from overseas voters must be postmarked by the date of the election and received within the three (3) day period following the runoff in order to be counted and included in certified election results. O.C.G.A. § 21–2–386(a)(1)(G).

Georgia also argues that the SWAB, with its instructions, satisfies the standard in § 1973ff–1(a)(9) that requires the states to ensure that absentee ballots are made available to UOCAVA voters in a manner that gives them sufficient time to vote in the runoff election [Doc. No. 24–1, p.

20].

There is no definition of the phrase "sufficient time" in UOCAVA.[FN16] As stated ***1331** above, the Court finds that the "sufficient time" requirement in § 1973ff–1(a)(9) is not a carve-out from the forty-five day requirement in § 1973ff–1(a)(8)(A) as there is no indication that the sufficient time referred to is a substitute for the forty-five day ballot transmittal requirement.

> FN16. UOCAVA in silent as to the designation of an entity to approve a state's written runoff plan. In contrast, as it pertains to the hardship exemption provision of UOCAVA, Congress vested in the presidential designee the authority to approve a state's request for a waiver from compliance with § 1973ff–1(a)(8)(a)'s requirements. 42 U.S.C. § 1973ff–1(g)(2). Section 1973ff–1(g)(2) provides that the presidential designee, after consultation with the Attorney General, must determine, among other things, that the plan put forward by the state provides UOCAVA voters sufficient time to receive and submit marked absentee ballots. No such provision is made for the approval of the written runoff plans submitted by the states. The Eleventh Circuit has held that "[w]hen a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute ... [b]ut the ordinary rule does not always apply" and "from that gap [in the statutory scheme left by Congress] springs executive discretion." *Gonzalez v. Reno,* 212 F.3d 1338, 1348–49 n. 11 (11th Cir.2000). "As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute ..., to choose how to fill such gaps." *Id.* Here, the United States Attorney General is charged with enforcing UOCAVA. 42 U.S.C. § 1973ff–4. The record shows that the Attorney General has utilized the guidance of the Federal Voting Assistance Program [Doc. No. 25–7] to conclude that a forty-five day time period applies to ballot transmittals to UOCAVA voters for runoff elections. To the extent the ordinary judicial construction rule may not apply, the Court accepts that this forty-five day policy determination is reasonable in light of UOCAVA's statutory scheme.

Accordingly, the transmission of the SWAB (without the necessary candidate information that allows the UOCAVA voter to effectively exercise his or her right to vote) does not satisfy the standard in § 1973ff–1(a)(9) that requires the state to ensure that absentee ballots are made available to UOCAVA voters in a manner that gives them sufficient time to vote in the runoff election to the extent that "sufficient time" means a forty-five day transmittal period.

On the whole, under its current election scheme, Georgia is noncompliant with § 1973ff–1(a)(8)(A)'s forty-five day absentee ballot transmittal requirement as it applies to runoff elections: the candidates for a primary runoff election will be determined less than forty-five days before the runoff, and the transmittal of the SWAB alone fails to provide UOCAVA voters with the necessary candidate information to satisfy the purpose of UOCAVA.

[6] Thus, considering the above, the Court finds that the United States is entitled to the declaratory judgment it seeks. The Court also find that the presence of irreparable harm, necessary for the entry of a permanent injunction. Irreparable harm occurs when a UOCAVA voter is denied the right to receive a sufficient absentee ballot in accordance with the provisions of § 1973ff–1(a)(8). The Supreme Court has consistently recognized that the right to vote is essential to the United States' form of government. *See, e.g., Bartlett v. Strickland,* 556 U.S. 1, 10, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (holding that the right to vote is

"fundamental"); *Williams v. Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (recognizing the right of voters "to cast their votes effectively," which "of course, rank[s] among our most precious freedoms"). The harm at issue in this case is a violation of UOCAVA's forty-five day deadline that protects the franchise of United States citizens overseas; the failure to comply with that deadline is an irreparable harm. *See United States v. Alabama,* 857 F.Supp.2d 1236, 1241–42 (M.D.Ala.2012); *see also Marchant v. N.Y. City Bd. of Elections,* 815 F.Supp.2d 568, 578 (E.D.N.Y.2011) (citing *Williams v. Salerno,* 792 F.2d 323, 326 (2d Cir.1986) (holding that an "infringement on the right to *1332 vote necessarily causes irreparable harm")).

b. Remedies Available at Law Are Inadequate

Georgia does not contend that adequate legal remedies are available. It is apparent that the harm visited on UOCAVA voters by Georgia's current runoff election scheme is of a type for which only an equitable remedy, in the form of an injunction requiring Georgia to take steps to come in compliance with the UOCAVA, is best suited.

c. Balance of the Harms Favors an Injunction

[7] Georgia has identified two discrete classes of hardships it will face upon the imposition of an injunction. The first class is monetary capital. Without a doubt, Georgia would bear all of the monetary costs inherent in modifying its current runoff election scheme. However, placing an actual value on the monetary hardship would be a matter of speculation because Georgia has not specified its anticipated costs. The second class of hardship is human capital. It is claimed that, to ensure compliance with the injunction, overtaxed Georgia election officials would see an addition to their current work load and available resources would be overburdened.

[8] The relevant question is whether the hardships that Georgia might experience are outweighed by the threatened injury to UOCAVA voters. "The right to vote is 'a fundamental political right.' " *United States v. Cunningham,* No. 3:08–cv–709, 2009 WL 3350028, at *4 (E.D.Va. Oct. 15, 2009) (quoting *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). No right is more precious than the right to vote; even the most basic of other rights are illusory if the right to vote is undermined. *Id.* (citing *Wesberry v. Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)). "For our citizens overseas, voting by absentee ballot may be the only practical means to exercise [their right to vote]. For the members of our military, the absentee ballot is a cherished mechanism to voice their political opinion." *Id.* (quoting *Bush v. Hillsborough Cnty. Canvassing Bd.,* 123 F.Supp.2d 1305, 1307 (N.D.Fla.2000)). "Given that how and where our servicemembers conduct their lives is dictated by the government, their right to vote is 'their last vestige of expression and should be provided no matter what their location.' " *Id.* (quoting *Bush,* 123 F.Supp.2d at 1307). Indeed, Congress introduced the MOVE Act because our legislators were alarmed by the fact that active military members, their families, and thousands of other American citizens who were overseas could not cast a ballot while they served our country or lived overseas. 156 Cong. Rec. S4513, 4514 (daily ed. May 27, 2010) (statement of Sen. Charles Schumer).

Here, the Court finds that the hardships that Georgia might experience are substantially outweighed by the threatened injury to UOCAVA voters. Contrary to Georgia's assertion that "[t]he interest of UOCAVA voters in their fundamental right to vote is not in question," [Doc. No. 24–1, p. 23], the absence of a requirement for the transmittal of a sufficient absentee ballot forty-five day prior to a runoff election in Georgia's current runoff absentee voting scheme does jeopardize UOCAVA voters' fundamental right to vote. The potential hardships that Georgia might experience are minor when balanced against the right to vote, a right that is essential to an effective democracy.

Ultimately, Georgia's potential harm amounts

to expenditures of time and money that will be incurred in performing *1333 UOCAVA remedial tasks, as well as the inconvenience that Georgia election officials might experience. In weighing the threatened injury to UOCAVA voters against the hardships that Georgia might suffer if the requested injunction were granted, the Court finds that the potential deprivation of the ability to vote, the most basic of American citizens' rights, outweighs the cost and the inconvenience that might be suffered by Georgia as a result of its present runoff election scheme, which does not comply with the forty-five day transmittal requirements of UOCAVA. *See United States v. Alabama,* 857 F.Supp.2d 1236, 1242 (M.D.Ala.2012) (holding that the potential harm caused to UOCAVA voters far outweighed the burden placed upon the state because of the state's legally mandated obligation to provide UOCAVA voters the ability to vote).

d. No Disservice to the Public Interest

[9] Finally, the requested permanent injunction will not be adverse to the public interest. The very nature of a statute such as UOCAVA evinces Congress's strong desire to protect the integrity of the democratic process. *See,* e.g.,156 Cong. Rec. S4513, 4514 (daily ed. May 27, 2010) (statement of Sen. Charles Schumer) ("Congress has a compelling interest to protect the voting rights of American citizens, and it is especially incumbent upon Congress to act when those very individuals who are sworn to defend that freedom are unable to exercise their right to vote."). Congress has recognized that the public is benefitted when voting rights are enforced. *See Torres v. Sachs,* 69 F.R.D. 343, 347 (S.D.N.Y.1975) (construing 42 U.S.C. § 1973*l*(e), voting rights enforcement proceedings). Indeed, "[n]othing is more critical to a vibrant democratic society than citizen participation in government through the act of voting. It is unconscionable to send men and women overseas to preserve our democracy while simultaneously disenfranchising them while they are gone." *United States v. New York,* No. 1:10–cv–1214, 2012 WL 254263, at *1 (N.D.N.Y. Jan. 27, 2012). Thus, there is no question that the requested permanent injunction, calling for Georgia to ensure that its federal runoff election scheme complies with UOCAVA, will not disserve the public interest.

IV. Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment [Doc. No. 24] is hereby **DENIED.**

Plaintiff's Motion for Summary Judgment [Doc. No. 25] is hereby **GRANTED.** The Court declares the rights of the parties as follows. The forty-five day deadline and transmittal period established in the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), as amended, specifically 42 U.S.C. § 1973ff–1(a)(8)(A), applies to all federal runoff elections. The additional requirement for runoff elections set forth in § 1973ff–1(a)(9) does not alter the forty-five day deadline established for runoff elections in § 1973ff–1(a)(8). Defendants' inability under Georgia's current electoral system to transmit absentee ballots (that standing alone allow the voter to cast a meaningful vote) in future federal runoff elections to qualified military and overseas voters (*i.e.,* UOCAVA voters) who have requested them by the forty-fifth day before such an election violates § 1973ff–1(a)(8)(A) of UOCAVA.

As to the matter of relief, the Court rules as follows. Within **twenty days (20)** of the issuance of this order, Defendants shall confer with Plaintiff and thereafter submit to the Court written proposed changes to Georgia's election laws that *1334 show full compliance with UOCAVA as to all future federal runoff elections. Plaintiff shall file a response **within twenty (20) days** of Defendants' filing. In the event that the Defendants fail to present a proposal that fully complies with all UOCAVA requirements, the Court will order an appropriate remedy that will govern all of Georgia's future runoff elections unless and until there is an enactment of changes to Georgia's election laws that fully comply with all UOCAVA requirements, as determined by this Court.

N.D.Ga.,2013.
U.S. v. Georgia
952 F.Supp.2d 1318

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	**CIVIL ACTION NO. 1:12-cv-2230-SCJ**
	:	
v.	:	
	:	
THE STATE OF GEORGIA; and BRIAN P. KEMP, SECRETARY OF STATE OF GEORGIA, in his official capacity,	:	
	:	
Defendants.	:	

ORDER

This matter appears before the Court after entry of summary judgment in Plaintiff's favor [Doc. No. 33] and on the Plaintiff's request for injunctive relief.

A review of the record shows that on April 30, 2013, this Court issued an order granting the Plaintiff's motion for summary judgment and declaring the rights of the parties as follows:

> The forty-five day deadline and transmittal period established in the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), as amended, specifically 42 U.S.C. § 1973ff-1(a)(8)(A), applies to all federal runoff elections. The additional requirement for runoff elections set forth in § 1973ff-1(a)(9) does not alter the forty-five day deadline established for runoff elections in § 1973ff-1(a)(8). Defendants' inability under Georgia's current electoral system to transmit absentee ballots (that standing alone allow the voter to cast a meaningful vote) in future federal runoff elections to qualified military and overseas voters (*i.e.*, UOCAVA voters) who have requested them by the forty-fifth day before such an election violates § 1973ff-1(a)(8)(A) of UOCAVA.

Doc. No. 33, p. 30.

In addition to this declaration of rights, Plaintiff seeks injunctive relief [Doc. No. 1, p. 9]. In its request for injunctive relief, Plaintiff asks the Court to order the above-named Defendants, their agents, successors in office, and all persons acting in concert with them, to take all such steps as are necessary to ensure that the State of Georgia conducts all future federal runoff elections in full compliance with UOCAVA.

In accordance with its April 30, 2013 summary judgment order, the Court finds that permanent injunctive relief is proper. Prior to issuing injunctive relief, the Court allowed the Defendants to submit written proposed changes to Georgia's election laws that show full compliance with UOCAVA as to all future federal runoff elections [Doc. No. 33, p. 30]. The Plaintiff was also given an opportunity to comment on the submission [*id.*] Both parties complied with the Court's order to this regard [Doc. Nos. 34, 35, and 37].

The Defendants submit that the rights of UOCAVA voters can be protected by maintaining the current election calendar,[1] but extending the voting period for UOCAVA voters after the scheduled date of any federal runoff election [Doc. No. 35, p. 4]. More specifically, Defendants propose that O.C.G.A. § 21-2-384 be amended so that "in the event of any federal runoff election, in addition to having a period of early voting, the law would provide for a period of voting after the scheduled date of any

[1]The present election calendar provides that any primary runoff election, if necessary, shall be held twenty-one days after the date of the primary election and any general runoff election, if necessary, shall be held twenty-eight days after the date of the general election. O.C.G.A. § 21-2-501(a).

federal primary runoff election or federal general runoff election during which ballots would continue to be accepted from UOCAVA voters until forty-five days after the [ballot] 'transmittal date'[2] as designated by the Secretary of State" [*id.* at p. 5]. Defendants also propose delaying certification of the results of a federal primary, special, or general runoff election until forty-five days after the ballot transmittal date to UOCAVA voters [*id.* at p. 8].

In response, Plaintiff states that the Defendants have failed to present a proposal that would remedy the State's violation of § 1973ff-1(a)(8)(A) of UOCAVA. The Court agrees in that Defendants' proposal essentially amounts to an extension of the ballot receipt deadline for a time period after Election Day; however, an extension of the ballot receipt deadline does not comply with UOCAVA's mandate that each state shall "transmit a validly requested absentee ballot . . . not later than 45 days *before* an election for Federal office." 42 U.S.C. § 1973ff-1(a)(8)(A) (emphasis added). An extension of the ballot receipt deadline is not an appropriate permanent substitute for the compliance with the advance transmittal requirements of UOCAVA.

As correctly noted by Plaintiff, Defendants' proposal is also problematic on three other grounds. First, the proposal recommends an amendment to the Official Code of Georgia; however, no legislation to this regard was introduced during the

[2]Defendants state that "[t]he 'transmittal date' would be designated by the Secretary of State for any federal primary runoff election or federal general runoff election based on the determination of the date that the official absentee ballots will be delivered to the county election superintendents." Doc. No. 35, p. 5.

State of Georgia's 2013 General Assembly[3] and the Defendants have offered no assurance that corrective legislative action is imminent or likely to be adopted (and signed into law by the Governor) in time for the next regularly scheduled 2014 Federal elections [Doc. No. 37, p. 3]. Second, the Defendants' proposal "cuts against bedrock democratic principles that votes should not be cast after Election Day and that voters should have equal access to information about the election" [*id.* at p. 5]. Under Defendants' proposal, UOCAVA voters could have as many as thirty-five days after Election Day (and unofficial results are publicized, though not certified) to cast their votes [*id.* at p. 6]. If a candidate appears to have won from the unofficial results, UOCAVA voters could be discouraged from sending in their ballots - under a misapprehension that their votes will not matter [*id.*]. Third, Defendants' proposal lacks any assurance that county officials will be required to transmit the absentee ballots to UOCAVA voters on the "transmittal date" designated by the Secretary of State [*id.* at p. 7].

In the absence of a defense proposal that fully complies with the requirements of UOCAVA, this Court must issue its own form of appropriate relief.

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[3]This case has been pending since June 27, 2012 and the Court entered a temporary restraining order and preliminary injunction (in Plaintiff's favor and against Defendants) on July 5, 2012 [Doc. Nos. 1, 10]. Defense Counsel has expressed an understanding that "members of the General Assembly were aware of the Court's initial July 5, 2012 Order and that no legislation relevant to the issues in this action was introduced during the 2013 legislative session" [Doc. No. 35, p. 4].

Prior to issuing injunctive relief, the Court notes that it has a strong preference for the Georgia General Assembly and the Georgia Secretary of State to set the State's election calendar. This is because the setting of an election calendar is a task best handled by elected representatives in whose hands voters have placed their trust to handle such matters – as opposed to an unelected federal judge. *See Bodker v. Taylor*, No. 1:02-CV-999, 2002 WL 32587312, at * 5 (N.D. Ga. June 5, 2002) (presenting a similar school of thought in the context of redistricting litigation). However, as noted above, the Georgia General Assembly failed to act in its 2013 session and the Court has not received reasonable assurance that there will be legislative action in 2014.

In addition, the Secretary of State (while apparently well-intentioned) has not presented a proposal that satisfies UOCAVA advance ballot transmittal requirements.

In considering the relevant facts and circumstances, the Court has no choice but to act, and to act swiftly, so that the requirements of UOCAVA are carried out and so that military and overseas citizens will have a chance to vote in accordance with applicable law. More specifically, state law must now yield in accordance with the Supremacy Clause of the United States Constitution. *See* U.S. Const., art VI, cl. 2; *Kurns v. R.R. Friction Prods.Corp.*, 132 S. Ct. 1261, 1265 (2012) ("The Supremacy Clause provides that federal law 'shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'"); *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 1092 (1962) ("any state law, however clearly within

a State's acknowledged power, which interferes with or is contrary to federal law, must yield."); and *United States v. New York*, No. 1:10-cv-1214 (N.D. N.Y. Feb. 9, 2012) (recognizing the effect of the Supremacy Clause prior to issuing a court sanctioned election calendar that complied with UOCAVA).

In issuance of the injunctive relief, the Court has been guided by the doctrine of minimum change, which it borrows from the redistricting case law. Said doctrine provides that a district court should not preempt the legislative task nor intrude upon state policy any more than necessary. *Upham v. Seamon*, 456 U.S. 37, 41–42, 102 S. Ct. 1518 (1982) (internal citations and punctuation omitted). To this regard, the Court has not disturbed Georgia's policy decision to hold federal primary and general runoff elections – as that is a decision best left to the General Assembly. The Court finds that the plan presented by the United States, which expands Georgia's current election calendar to provide the time necessary for transmission of UOCAVA ballots forty-five days before federal runoff elections and hews as closely as possible to the current election calendar, is an appropriate UOCAVA-compliant plan [Doc. No. 37, p. 10]. The Court adopts said plan, with the addition of a qualifying period, as follows.

In all regular federal election in 2014 and beyond, Georgia's federal election calendar shall be configured as follows:

1. The State's qualification period for federal offices shall occur during the eleventh week prior to the primary election.

2. The State's federal primary election shall be held on the Tuesday nine weeks before the federal primary runoff election, and twenty-two (22) weeks before the federal general election.

3. The State's federal primary runoff election shall be held thirteen (13) weeks before the federal general election.

4. As required by federal law, the State's federal general election shall be held on the Tuesday following the first Monday in November. *See* 3 U.S.C. § 1; *see also* O.C.G.A. §§ 21-2-2(15), 21-2-9(a).

5. The State's federal general runoff election shall be held on the Tuesday nine (9) weeks after the federal general election.[4]

In the event of a special federal election to fill a vacancy, the date of any special runoff election, if held, shall be nine weeks after the special election necessitating the runoff election.

The 2014 election calendar is attached hereto, as Exhibit A. Within **twenty (20) days** of the Court's order, Defendants shall submit to the Court (for review and approval) a proposed calendar for all statutory and administrative election-related deadlines based upon the election dates set by the Court.

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[4]The Court recognizes that this configuration will result in a delay of the January 3rd seating of Georgia's newly elected federal legislators (pursuant to the Twentieth Amendment of the United States Constitution), as well as a vacancy in the seats from January 3rd until such time as the general election runoff can be held and the results certified; however, the above-stated dates are the earliest and most practicable UOCAVA-complaint dates available to maintain Georgia's policy of holding runoff elections – as the only other alternative is to hold elections during the December holiday season – something, this Court is not willing to order, for fear of chilled voter turnout.

The Court further notes that the proposal submitted by Defendants (i.e., of allowing absentee ballots to be returned up to and including December 30, 2014) would likely yield a similar delay in seating of the federal legislators, considering the additional time period after December 30, 2014 (*i.e,* up to seven days) that the Secretary of State will need to certify the election.

The Defendants shall be responsible for establishing future federal election dates (and administrative election-related deadlines) in accordance with the above-stated election calendar configuration. The Defendants shall also engage in a public information campaign of the date changes so that all potential candidates may become aware of the revised election calendar.

For any federal runoff election held through January 6, 2015, Defendants shall submit a report, in a format agreed to by the parties, to the United States. Said report shall detail whether all UOCAVA ballots for the runoff election were transmitted by that deadline. Said report is due on or before March 1, 2015.

CONCLUSION

Plaintiff's request for injunctive relief is hereby **GRANTED**. The terms of the relief are as set forth herein and in Exhibit A. This Order shall govern all federal elections in 2014 and beyond; however, this order does not prohibit the State of Georgia from adopting its own UOCAVA-compliant election calendar in future legislative sessions.

As there are no other issues pending before this Court, the Clerk is **DIRECTED** to terminate this civil action. The Court retains jurisdiction for purposes of enforcement of its orders.

IT IS SO ORDERED, this 11th day of July, 2013.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

Exhibit A

2014 Federal Election Calendar for the State of Georgia
(as established by Court order, Civil Action No. 1:12-CV-2230 (N.D. Ga 2013)

Monday, March 17, 2014 - Friday, March 21, 2014: qualifying period for candidates seeking federal offices

Saturday, April 19, 2014: deadline to transmit UOCAVA ballots (for the federal primary election)

Tuesday, June 3, 2014: federal primary election

Saturday, June 21, 2014 : deadline to transmit UOCAVA ballots (for the federal primary runoff election)

Tuesday, August 5, 2014: federal primary runoff election

Saturday, September 20, 2014: deadline to transmit UOCAVA ballots (for the federal general election)

Tuesday, November 4, 2014: federal general election

Saturday, November 22, 2014: deadline to transmit UOCAVA ballots (for the federal general runoff election)

Tuesday, January 6, 2015: federal general runoff election

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO.
	:	1:12-cv-2230-SCJ
v.	:	
	:	
THE STATE OF GEORGIA; and	:	
BRIAN P. KEMP, SECRETARY OF	:	
STATE OF GEORGIA, in his	:	
official capacity,	:	
	:	
Defendants.	:	

ORDER

This matter appears before the Court on Defendants' Unopposed Motion to Alter Judgment [Doc. No.43].

On June 27, 2012, the United States of America ("United States") filed a Complaint against the State of Georgia and Brian Kemp, Secretary of State (collectively "Georgia" or "Defendants"). The United States alleged a violation of Section 102(a)(8)(A) of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") of 1986, 42 U.S.C. §§ 1973ff-1(a)(8)(A). In addition, the United States filed a motion for temporary restraining order and for preliminary injunction, requesting that Defendants be required to transmit absentee ballots to UOCAVA voters forty-five days in advance of any federal runoff election.

On July 5, 2012, the Court granted the United States's motion for temporary restraining order and for preliminary injunction [Doc. No. 10]. Thereafter, the issue

of Defendants' UOCAVA compliance, as it pertains to the transmission of absentee ballots for federal runoff elections, came before the Court for a final adjudication on cross-motions for summary judgment. Concluding that the United States had established its case of a UOCAVA violation on the part of the State of Georgia, the Court granted summary judgment in favor of the United States [Doc. No. 33]. Based on the plan proposed by the United States, the Court then entered an order governing all federal elections held in Georgia in 2014 and beyond [Doc. No. 38]. Following the entry of final judgment and the termination of the civil action, Defendants moved to stay the permanent injunction pending appeal. Shortly thereafter, Defendants filed an unopposed motion to alter the clerk's judgment.[1]

In their motion, Defendants requests that the Court's July 11, 2013 judgment be amended to require that the federal primary and runoff elections be held two weeks earlier than the dates provided in the Court's original judgment. Defendants seeks this change in an effort to avoid having to conduct advance voting (pursuant to O.C.G.A. § 21-2-385) during the Saturday of the Memorial Day weekend. As noted above, the United States does not oppose altering the original judgment to allow for said election date changes.

[1]Defendants do not specify the procedural rule under which their motion seeks relief. Therefore, the Court construes Defendants' motion as a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6).

Accordingly, for good cause shown, the Court hereby **GRANTS** the Defendants' Motion. The Court's July 11, 2013 judgment [Doc. Nos. 38, 39] is hereby altered as follows. (*All changes are shown in bold print.*)

In all regular federal elections in 2014 and beyond, the State of Georgia's federal election calendar shall be configured as follows:

1. The State's qualification period for federal offices shall occur during the eleventh week prior to the primary election.

2. The State's federal primary election shall be held on the Tuesday nine weeks before the federal primary runoff election, and **twenty-four (24)** weeks before the federal general election.

3. The State's federal primary runoff election shall be held **fifteen (15)** weeks before the federal general election.

4. As required by federal law, the State's federal general election shall be held on the Tuesday following the first Monday in November. *See* 3 U.S.C. § 1; *see also* O.C.G.A. §§ 21-2-2(15), 21-2-9(a).

5. The State's federal general runoff election shall be held on the Tuesday nine (9) weeks after the federal general election.

In the event of a special federal election to fill a vacancy, the date of any special runoff election, if held, shall be nine weeks after the special election necessitating the runoff election.

The 2014 election calendar (as amended) is attached hereto, as Exhibit A. Within **twenty (20) days** of the Court's order, Defendants shall submit to the Court (for review and approval) a proposed calendar for all statutory and administrative election-related deadlines based upon the election dates set by the Court.

The Defendants shall be responsible for establishing future federal election dates (and administrative election-related deadlines) in accordance with the above-stated election calendar configuration. The Defendants shall also engage in a public information campaign of the date changes so that all potential candidates may become aware of the revised election calendar.

For any federal runoff election held through January 6, 2015, Defendants shall submit a report, in a format agreed to by the parties, to the United States. Said report shall detail whether all UOCAVA ballots for the runoff election were transmitted by that deadline. Said report is due on or before March 1, 2015.

CONCLUSION

Defendants' Unopposed Motion to Alter Judgment [Doc. No.43] is hereby **GRANTED**. The Court's July 11, 2013 judgment [Doc. Nos. 38 and 39] is **AMENDED** as stated herein. The amendments are as set forth herein and in Exhibit A. This Order shall govern all federal elections in 2014 and beyond; however, this Order does not prohibit the State of Georgia from adopting its own UOCAVA-compliant election calendar in future legislative sessions.

Except as amended herein, the remainder of the Court's July 11, 2013 judgment [Doc. Nos. 38 and 39] remains *in full force and effect*.

IT IS SO ORDERED, this 20th day of August, 2013.

Steve C. Jones

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

Exhibit A

AMENDED
2014 Federal Election Calendar for the State of Georgia

(as established by August 20, 2013 Court order granting the State of Georgia's unopposed motion to alter judgment, Civil Action No. 1:12-CV-2230 (N.D. Ga. 2013))

Monday, March 3, 2014 - Friday, March 7, 2014: qualifying period for candidates seeking federal offices

Saturday, April 5, 2014: deadline to transmit UOCAVA ballots (for the federal primary election)

Tuesday, May 20, 2014: federal primary election

Saturday, June 7, 2014 : deadline to transmit UOCAVA ballots (for the federal primary runoff election)

Tuesday, July 22, 2014: federal primary runoff election

Saturday, September 20, 2014: deadline to transmit UOCAVA ballots (for the federal general election)

Tuesday, November 4, 2014: federal general election

Saturday, November 22, 2014: deadline to transmit UOCAVA ballots (for the federal general runoff election)

Tuesday, January 6, 2015: federal general runoff election

H

Only the Westlaw citation is currently available.

United States District Court,
M.D. Alabama,
Northern Division.
UNITED STATES of America, Plaintiff,
v.
The State of ALABAMA and Jim Bennett, in his official capacity as Secretary of State of Alabama, Defendants.

Civil Action No. 2:12cv179–MHT.
Feb. 11, 2014.

Background: Federal government brought cause of action under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) challenging Alabama's alleged failure to transmit absentee ballots in timely fashion to UOCAVA voters. In particular, the government challenged Alabama statute which, by requiring that runoff election be conducted within 42 days of any primary election in which no candidate received majority of the vote, prevented state from transmitting absentee ballots to UOCAVA voters at least 45 days before runoff elections. Parties cross-moved for summary judgment.

Holdings: The District Court, Myron H. Thompson , J., held that:
(1) 45-day transmittal requirement applied to runoff elections, such that Alabama runoff statute violated the UOCAVA, and
(2) government's facial challenge to Alabama's runoff election statute did not depend on facts surrounding specific runoff election, and was presumptively fit for judicial review.

Federal government's motion granted; state's motion denied.

West Headnotes

[1] Statutes 361 ⚿0

361 Statutes

Starting point on issues of statutory interpretation is plain language of statute itself.

[2] Statutes 361 ⚿0

361 Statutes

Court must read statute to give full effect to each of its provisions and interpret words of statute as they are commonly and ordinarily understood.

[3] Statutes 361 ⚿0

361 Statutes

In interpreting statute, court does not look at one word or term in isolation, but instead considers entire statutory context.

[4] Election Law 142T ⚿0

142T Election Law

Requirement under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) that, subject only to "hardship" exception, the states "transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office," applied to each of four types of federal elections dealt with by the UOCAVA, general, special, primary, and runoff elections, such that Alabama statute, by requiring that runoff election be conducted within 42 days of primary election in which no candidate receives a majority of the vote, violated the UOCAVA as preventing the State from timely transmitting absentee ballots in connection with any runoff election; that 45-day transmittal requirement applied to runoff elections was apparent from Congress's use of the broad phrase "an election for federal office" in connection with transmittal requirement, while limiting types of elections to which other UOCAVA provisions applied, as well as from fact that Congress recognized only a single "hardship" exception to 45-day transmittal requirement. 42 U.S.C.A. § 1973ff–1(a)(8)(A); Code 1975, § 17–13–18.

[5] Statutes 361 ⚿0

361 Statutes

Normal rule of statutory construction is that identical words used in different parts of the same act are intended to have the same meaning.

[6] Federal Courts 170B ⚿0

170B Federal Courts

Ripeness doctrine provides that, in order for federal court to have jurisdiction, a claim must be sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decisionmaking by court.

[7] Federal Courts 170B ⚿0

170B Federal Courts

Ripeness of matter for adjudication by federal court depends upon two factors: (1) the fitness of issues for judicial decision, and (2) the hardship to parties of withholding court consideration.

[8] Federal Courts 170B ⚿0

170B Federal Courts

"Fitness" portion of ripeness inquiry focuses on extent to which resolution of matter depends upon facts that may not yet be sufficiently developed.

[9] Federal Courts 170B ⚿0

170B Federal Courts

When claim presents a purely legal issue, additional fact development is not necessary in order for claim to be ripe for adjudication.

[10] Federal Courts 170B ⚿0

170B Federal Courts

"Hardship" prong of ripeness inquiry examines the costs of delaying review until conditions for deciding a controversy are further developed.

[11] Election Law 142T ⚿0

142T Election Law

Facial challenge to Alabama's runoff election statute which required that runoff election be conducted within 42 days of any primary election in which no candidate received majority of the vote, as preventing the State from complying with its obligation under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office, did not depend on facts surrounding specific runoff election, and was presumptively fit for judicial review, though, at time the United States commenced its cause of action under UOCAVA, Alabama had not yet held a runoff election since the time when the UOCAVA was amended to add this 45-day transmittal requirement. 42 U.S.C.A. § 1973ff–1(a)(8)(A); Code 1975, § 17–13–18.

Stephen Michael Doyle, United States Attorney's Office, Montgomery, AL, Anna Baldwin, Erin M. Velandy, Richard Dellheim, U.S. DOJ–Civil Rights Division–Voting Section, Spencer Ross Fisher, Department of Justice Civil Rights Division, Victor J. Williamson, Amanda Hine, Elizabeth M. Ryan, Ernest Alan McFarland, Thomas Christian Herren, Jr., U.S. Department of Justice, Washington, DC, for Plaintiff.

James William Davis, State of Alabama, Misty Shawn Fairbanks Messick, Office of the Attorney General, Montgomery, AL, for Defendants.

OPINION

MYRON H. THOMPSON, District Judge.

***1** In this lawsuit, plaintiff United States of America named as defendants the State of Alabama and its Secretary of State and asserted claims based on the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), as amended, 42 U.S.C. § 1973ff. The United States sought to enforce the right of military members, their families, and other United States citizens living overseas ("UOCAVA voters") to vote by absentee ballot in Alabama's federal elections. Jurisdiction is proper under 42 U.S.C. § 1973ff–4 and 28 U.S.C.

§§ 1345 and 2001.

This matter is now before the court on cross-motions for summary judgment on the one remaining claim in this case: that, with regard to runoff elections, Alabama is in violation of UOCAVA's requirement that States transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office. For reasons that will be discussed, the court will enter summary judgment finding in favor of the United States and holding that part of Alabama's runoff-election statute, 1975 Ala.Code § 17–13–18, violates UOCAVA.

I. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The court must view the admissible evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Here, the parties agree that, because the issues presented by the remaining claim are legal ones, the claim is appropriate for resolution on summary judgment.

I. BACKGROUND

A.

The initial question posed by the remaining claim is whether UOCAVA's 45–day transmittal requirement applies to federal runoff elections conducted by States. Because the answer to this question turns on a close analysis of UOCAVA, the court will begin with an overview of some of the act's relevant provisions. The court divides this overview into four parts with a focus on primarily four UOCAVA provisions.

THE GENERAL PURPOSE PROVISION: UOCAVA was passed in 1986 to protect the voting rights of military members, their families, and other United States citizens living overseas, that is, UOCAVA voters. Section 1973ff–1 of 42 U.S.C. contains a number of provisions setting forth "State responsibilities" under UOCAVA. *Subsection (a)(1)* of § 1973ff–1 provides that "Each State shall—... permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." This section sets forth UOCAVA's general purpose as to the States: to guarantee to UOCAVA voters the right to use absentee registration procedures and to vote by absentee ballot in federal elections. And this section (as do all the other sections that follow § 1973ff–1(a)'s "Each State shall" language) places the implementation of that guarantee on the States. Accordingly, this court has held that Alabama bears full responsibility to ensure statewide compliance with § 1973ff–1 of UOCAVA. *United States v. Alabama*, 857 F.Supp.2d 1236, 1238–39 (M.D.Ala.2012) (Thompson, J.) (UOCAVA provides an "explicit statutory directive that Alabama bears full responsibility" for statutory compliance).

***2** THE 45–DAY TRANSMITTAL REQUIREMENT: So as to effect UOCAVA's guarantee to UOCAVA voters more fully, Congress amended § 1973ff–1 of UOCAVA in 2009 with passage of the Military and Overseas Voter Empowerment Act, Pub.L. No. 111–84, 123 Stat. 2190, 2318–35 (2009). With this amendment, Congress intended "a complete renovation of UOCAVA that brings it into the twenty-first century and streamlines the process of absentee voting for military and overseas voters through a series of common sense, straightforward fixes." 156 Cong. Rec. S4517 (daily ed. May 27, 2010) (Sen.Schumer). *Subsection (a)(8)(A)*, one of the provisions the 2009 amendment added to § 1973ff–1, sets forth the 45–day transmittal

requirement at issue. The subsection provides that, subject to a hardship exemption in another provision, States are required to transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office if those voters request absentee ballots by then. The subsection states in relevant part: "Each State shall—... transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter ..., except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election." 42 U.S.C. § 1973ff–1(a)(8)(A) . UOCAVA explicitly states that "the purpose of [subsection (a)(8)(A)] is to allow absent uniformed services voters and overseas voters enough time to vote in an election for Federal office." 42 U.S.C. § 1973ff–1 (g)(1)(A).

THE HARDSHIP EXEMPTION PROVISION: The hardship exemption mentioned in subsection (a)(8)(A)'s 45–day transmittal requirement is, as stated, found in *subsection (g)* of § 1973ff–1. This provision states in relevant part that: "If the chief State election official determines that the State is unable to meet the requirement under subsection (a)(8)(A) with respect to an election for Federal office due to an undue hardship ... the chief State election officials shall request that the Presidential designee grant a waiver to the State." 42 U.S.C. § 1973ff–1(g)(1). In other words, under the hardship exemption, a Presidential designee is permitted to grant a State a waiver from the 45–day transmittal requirement in instances where undue hardships make it impossible for the State to meet the otherwise required advanced-transmittal deadline. Other parts of subsection (g) set forth conditions a State must meet to establish such hardship and be granted a waiver. 42 U.S.C. § 1973ff–1 (g).

THE WRITTEN PLAN REQUIREMENT: In *subsection (a)(9)* which was also added to § 1973ff–1 in 2009, UOCAVA places another responsibility on the States: to establish a written plan for federal runoff elections. It provides that, "Each State shall—... if the State declares or otherwise holds a runoff election for Federal office, establish a written plan that provides absentee ballots are made available to absent uniformed services voters and overseas voters in [a] manner that gives them sufficient time to vote in the runoff election." 42 U.S.C. § 1973ff–1 (a)(9).

B.

***3** The United States initially filed this case in 2012 because Alabama had failed to meet UOCAVA's 45–day transmittal requirement in federal general and primary elections. The State conceded that it failed to meet the requirement in each of the last three federal elections; the parties reached an agreement on the appropriate remedy for these past violations; and the court approved their joint remedial order. *United States v. Alabama,* 2014 WL 200668 (M.D.Ala.2014) (Thompson, J.).

As stated, the one remaining claim is the United States' claim that, with regard to federal runoff elections, Alabama is in violation of UOCAVA's requirement that States transmit absentee ballots to UOCAVA voters at least 45 days before an election for federal office. Section 17–13–18 of the 1975 Alabama Code provides that a runoff election, which is required when no candidate receives the majority of votes in a primary election, must occur exactly 42 days after a primary election. Alabama has not held a federal runoff election since Congress passed the 2009 amendment, which added the 45–day transmittal requirement to UOCAVA. Nevertheless, the United States claims that, on its face, the State's runoff statute, § 17–13–18, violates the 45–day transmittal requirement. Specifically, the United States argues, the 42–day schedule for runoff elections under state law makes it impossible for UOCAVA voters from Alabama to receive ballots 45 days in advance of a federal election. The State responds that UOCAVA's 45–day transmittal requirement does not apply to federal runoff elections and that, in any event, the United States' claim is not ripe for

resolution.

III. DISCUSSION

A.

[1][2][3] A stated, the initial question is whether UOCAVA's 45–day transmittal requirement applies to federal runoff elections. In answering this question, this court's "starting point" is the plain language of the statute itself. *United States v. DBB Inc.*, 180 F.3d 1277, 1281 (11th Cir.1999). The court must "read the statute to give full effect to each of its provisions" and interpret words "as they are commonly and ordinarily understood." *Id.* The court does "not look at one word or term in isolation" and instead considers the "entire statutory context." *Id.; see also United States v. McClemore*, 28 F.3d 1160, 1162 (11th Cir.1994).

[4] As stated, subsection (a)(8)(A)'s 45–day transmittal requirement requires each State to transmit a validly requested absentee ballot to UOCAVA voters at least 45 days before "an election for Federal office." 42 U.S.C. § 1973ff–1 (a)(8)(A). The issue presented is whether the phrase "an election for Federal office" includes runoff elections. It does for several reasons.

1.

Congress's reference to "an election" indicates, on its face, its intent to refer to "any" kind of election for federal office. *See* Black's Law dictionary at 1 (6th ed. 1990) (The indefinite article "a" is often used in the sense of "any"). Because a primary runoff election falls within the reach of any kind of election, subsection (a)(8)(A) includes runoffs. Indeed, if the words "an election" were read otherwise to exclude a runoff, the phrase would be meaningless, for the phrase also does not expressly mention "general," "special," or "primary" elections either and thus the phrase would exclude them as well, with the result that the phrase would illogically cover no federal elections at all.

2.

***4** This interpretation of "an election" as covering all four types of election (general, special, primary, and runoff) is reinforced by UOCAVA's overall statutory scheme.

First, the word "election" first appears in UOCAVA's general purpose provision, subsection (a)(1), which requires each State to permit UOCAVA voters to vote by absentee ballot in "general, special, primary, and runoff elections for Federal office." 42 U.S .C. § 1973ff–1 (a)(1). Later, in subsection (a)(2), the act requires each State to accept and process requests for absentee ballots from UOCAVA voters so long as the State receives the request 30 days before "any federal election." 42 U.S.C. § 1973ff–1 (a)(2). Surely, it cannot be argued that this broad-reaching provision does not cover runoff elections. This shows that, when Congress used the generic term "any election," it intended to refer to the four explicitly listed federal elections in subsection (a)(1), which includes runoff elections. The same intent would apply to the generic term "an election."

Second, UOCAVA's subsection (a)(3) requires that States accept federal "write-in" absentee ballots but limits this requirement to " *general* elections for federal office." 42 U.S.C. § 1973ff–1 (a)(3) (emphasis added). Subsection (a)(3)'s reference to one type of federal election for write-in ballots, in contrast to subsection (a)(2)'s reference to any federal election for the acceptance and processing of absentee ballots in general, shows that when Congress wanted to highlight or exclude a particular kind of federal election it made that intention explicit and clear. *See United States v. Georgia*, 952 F.Supp.2d 1318, 1327 (N.D.Ga.2013) (Jones, J.), appeal pending No. 13–14065 (11th Cir. Sept. 6, 2013) (stating with respect to UOCAVA that, "Where Congress intended to refer to a specific type of election, it left no doubt of its intent").

[5] Third, and perhaps most compellingly, the cross-reference between two other UOCAVA subsections clearly reveals Congress's intent to use

the term "an election" to encompass all federal elections, including runoffs. Subsection (a)(7) requires each State to establish procedures for transmitting ballots to UOCAVA voters in federal elections. The subsection explicitly requires these procedures to be used in "general, special, primary, and runoff elections for Federal office." 42 U.S.C. § 1973ff–1(a)(7). It then directs States to turn to and follow subsection (f) for the explicit rules to be applied for transmittal procedures. However, in subsection (f), rather than restate the four categories of federal elections as listed in subsection (a)(7), Congress instead uses the phrase "an election for Federal office." 42 U.S.C. § 1973ff–1(f). It is therefore obvious from the explicit connection between the two subsections that Congress intended the generic phrase "an election" in subsection (f) to refer to any of the four kinds of elections explicitly listed in subsection (a)(7). *See Georgia,* 952 F.Supp.2d 1327. It then follows that, if Congress intended the phrase "an election" in subsection (f) to include runoff elections, the identical phrase in subsection (a)(8)(A), the 45–day requirement provision, does as well, for the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafason v. Alloyd Co.,* 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (internal citation omitted).

*5 Finally, UOCAVA's 45–day transmittal requirement has its own explicit limitation: the hardship exemption provided in subsection (g). As stated, under the hardship exemption, a Presidential designee is permitted to grant a State a waiver in instances where undue hardship makes it impossible for the State to meet the advanced-transmittal deadline and the State can demonstrate that it meets the listed requirements. 42 U.S.C. § 1973ff–1(g)(1). Because the 45–day transmittal requirement contains an explicit exception within the language itself ("except as provided in subsection (g)"), it logically follows that Congress intended that subsection (g) would be the only exception.

3.

Because it is apparent from the face of UOCAVA's 45–day requirement as well as from the act's overall structure that the requirement covers runoff elections, the court need not turn to legislative history. *See United States v. Rojas–Contreras,* 474 U.S. 231, 235, 106 S.Ct. 555, 88 L.Ed.2d 537 ("extrinsic materials are only required where a statute is ambiguous, its plain meaning renders an absurdity, or there is evidence of contrary legislative intent"). Nevertheless, the legislative history, in particular that for the recent 2009 amendment, provides additional support for the court's reading of the requirement. In the House Conference Report for the 2009 amendment, Congress's only reference to an exception to the 45–day transmittal requirement is when "a hardship exception is approved." H.R. No. 111–288 at 744 (2009) (Conf.Rep.). In all other instances, the history reflects Congress's intent that States transmit requested absentee ballots "at least 45 days before an election for federal office." For example, the history shows that through the 2009 amendment Congress sought specifically to address the "unacceptable" situation of delayed absentee ballots to voters. 156 Cong. Rec. S4514 (daily ed. May 27, 2010) (Sen. Schumer statement). The Congressional Record is replete with references to evidence of barriers UOCAVA voters face in voting in time for federal elections and Congress's desire to take steps beyond UOCAVA's original provisions to address this challenge. *Id.* (39% of UOCAVA voters who requested absentee ballots in the 2008 election received them too late to return the ballots for election day counting).

In light of Congress's focus on solving what it considered to be the particular and substantial problem of delayed arrival of absentee ballots from military members, their families, and other United States citizens living overseas, it follows that, had Congress intended to exclude runoff elections from the solution to this great problem, there would be

something in the legislative history reflecting that intent. Instead, there is nothing in the legislative history to undermine in any way the congressional intent reflected in the statute's plain language that the 45–day requirement applies to every kind of federal election.

Furthermore, the legislative history particularly emphasizes Congress's "compelling interest to protect the voting rights of American citizens ... when those very individuals who are sworn to defend that freedom are unable to exercise their right to vote." *Id.* at S4515. To imply an exception to the 45–day remedy to the substantial problem Congress recognized that overseas soldiers faced, where nothing in the statutory language or legislative record supports such an exception, would be contrary to Congress's expressed intent to protect vigorously the voting rights of these persons. *See* 155 Cong. Rec. S7965 (July, 23, 2009) (Sen. Schumer and Sen. Chambliss joint statements) ("They can risk their lives for us, we can at least allow them to vote."). There is nothing in the legislation to indicate that, for our military, solving the problem of delayed transmittal of ballots from overseas military is any less worthy of remedy in runoffs than in general, special, and primary elections.

*6 Indeed, because runoff elections are so compressed and because, as a result, the likelihood of delayed transmittal is greater than in other elections, it would seem to follow that, for our military, the need for the 45–day remedy is actually greater in runoffs than in other elections. As the court will discuss later, runoffs therefore need, and UOCAVA provides, more, not less, protection than for other elections.

Finally, this court finds noteworthy that Alabama criticizes any reliance on legislative history with this quote from Justice Scalia: "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S.Ct. 1562, 123 L.Ed.2d 229 (1993) (Scalia, J., concurring in judgment). True though this may be, it is ironic that Alabama relies on it, for, with regard to UOCAVA's legislative history, that history would be plumbed to no avail if one were looking for even one "friend" among the guests confirming Alabama's view that the 45–day transmittal requirement exempts runoff elections.

4.

Nevertheless, Alabama argues that the phrase "an election for Federal office" in subsection (a)(8)(A) of § 1973ff–1 reflects a congressional attempt to distinguish *federal* elections from *state* ones and that the phrase does not seek to define "which" federal elections (general, primary, special, and runoff) are covered by the provision. Defs. Brief (Doc. No. 92) at 24. The court rejects this argument for several reasons.

First, it is true that the phrase is aimed at only federal elections. But the State's interpretation signals out only one word ("federal") and fails to reach the full breadth of the phrase, which has five words, including in particular, as discussed previously, the two words "an election." If the entire phrase (including its use of the word "an," which, as stated, is commonly understood to mean "any") is considered, it is clear that, while the phrase does limit itself to "federal" elections, the phrase also reaches "any" kind of federal elections, which includes a federal runoff election.

Second, that UOCAVA is aimed at only federal elections is an obvious given: the title of the subchapter in which the act is codified is "Registration and Voting by Absent Uniformed Services Voters and Overseas Voters in Elections for *Federal* Office," 42 U.S.C. Chapter 20, Subchapter 1–G (emphasis added), and the word "federal" modifies the term "election" in many phrases throughout § 1973ff–1, not just in subsection (a)(8)(A). Alabama does not contend that the word, when used in phrases throughout § 1973ff–1, limits those phrases to only one purpose,

to distinguish federal elections from state ones. Absent a universal limitation for every time the word is used in other phrases, the State has not explained why subsection (a)(8)(A) should be singled out for that limitation.

***7** Finally, as stated, the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafason,* 513 U.S. at 570 (internal citation omitted). Therefore, because, as demonstrated above, Congress intended the phrase "an election" in subsection (f) (which sets forth the rules States must follow in carrying out the transmittal procedures placed on them by subsection (a)(7)) to include "federal" runoff elections, its use of the identical phrase in subsection (a)(8)(A) (the 45–day requirement provision) does as well.

The State further argues that subsection (a)(9) of § 1973ff–1 excludes federal runoff elections from UOCAVA's 45–day transmittal requirement. Subsection (a)(9) reads:

> "Each State shall—... if the State declares or otherwise holds a runoff election for Federal office, establish a written plan that provides absentee ballots are made available to absent uniformed services voters and overseas voters in [a] manner that gives them sufficient time to vote in runoff elections."

42 U.S.C. § 1973ff–1 (a)(9). The State argues that the phrase "sufficient time to vote" creates an alternative time requirement for transmitting ballots in the instance of a federal runoff election. It further argues that, because subsection (a)(9) creates this supposed new or different time requirement for runoff elections, subsection (a)(8)(A)'s 45–day requirement cannot also apply to runoffs. According to the State, reading both provisions to apply to federal runoff elections renders subsection (a)(9) superfluous and results in an absurd reading of the statute. *See Durr v. Shinseki,* 638 F.3d 1342, 1349 (11th Cir.2011) ("a statute should ... be read so as to avoid an unjust or absurd conclusion"). The court disagrees on all counts.

First, subsection (a)(9) does not create any substantive transmittal requirement at all. In this subsection, Congress merely requires each State to "establish" a written plan setting forth its overall views on how UOCAVA voters can be assured to receive ballots in "sufficient time to vote" in federal runoff elections. It does not require the State to do anything other than that, for most notably it does not even require the State to implement the plan. As a result, UOCAVA sets up this statutory scheme: On the one hand, there is subsection (a)(9), which is essentially nothing more than precatory, and, on the other hand, there is the 45–day transmittal requirement, which is expressly mandatory ("Each State shall") and is expressly recognized in the statute as needed "to allow absent uniformed services voters and overseas voters enough time to vote in an election for Federal office." 42 U.S.C. § 1973ff–1 (g)(1)(A). It would be illogical to conceive the precatory former as a reasonable substitute for the mandatory latter, which is at the heart of UOCAVA. The only reasonable reading of subsection (a)(9) is that it is a supplemental, an additional, remedy, not a substitute.

***8** This conclusion is reinforced when other factors are considered. First, there is the fact that Congress recognized as a particular and substantial problem the delayed transmittal of absentee ballots from UOCAVA voters. Second, there is the fact that Congress enacted subsection (a)(2)(8) to remedy to that problem, for, as observed, UOCAVA explicitly states that "the purpose of [subsection (a)(8)(A)] is to allow absent uniformed services voters and overseas voters enough time to vote in an election for Federal office." 42 U.S.C. § 1973ff–1 (g)(1)(A) "). Third, there is nothing in the statute or its legislative history to indicate that federal runoffs do not suffer from the same transmittal problem as do other federal elections.

And, fourth, there is the obvious fact that, because runoff elections typically occur on a compressed time schedule, States are actually more likely to make logistical errors and fail to meet their UOCAVA obligations in runoffs than in other elections. It follows that, when these last two facts are considered against the backdrop of the first two, subsection (a)(9) merely reflects that Congress wisely saw the need to provide an additional remedy when it comes to runoffs: to require States to develop a written plan that would help to protect further against UOCAVA violations that will more likely occur under the time constraints of a runoff election. This requirement, while only a paper one, embodies an apparent congressional recognition that runoff elections are logistically more demanding and that States need an added nudge to meet the 45–day transmittal requirement.

Indeed, the fact that an additional remedy is warranted is more than amply demonstrated by the very record before this court. Alabama concedes that it has failed to meet the 45–day requirement and thus provide what Congress considered to be needed for the timely transmittal of ballots with regard to, comparatively speaking, the *logistically less demanding* general and primary elections in each of the last three federal elections. Moreover, this court has found that, "The record before [it] ... amply demonstrates that the State of Alabama has consistently and substantially violated UOCAVA's 45–day requirement." *United States v. Alabama,* 2014 WL 200668 at *2 (M.D.Ala.2014). That an additional requirement is needed for *logistically more demanding* runoff elections is self-evident.

Therefore, subsection (a)(9) neither creates a new substantive transmittal deadline nor dictates an exception to the substantive transmittal deadline in subsection (a)(8)(A). Subsection (a)(9) merely reflects the fact that States should go the extra mile to protect the voting rights of military members, their families and other United States citizens living overseas when it comes to runoff elections—nothing more.

(The parties have spilt much virtual ink disputing the meaning of the phrase "sufficient time to vote" in subsection (a)(9). Because the United States has not asserted a separate claim that Alabama has failed to comply with subsection (a)(9)Is requirement that the States "establish a written plan that provides absentee ballots are made available to absent uniformed services voters and overseas voters in [a] manner that gives them sufficient time to vote in the runoff election," the court does not address or resolve this dispute.)

5.

***9** Finally, the court rejects Alabama's argument that the issue—whether the 45–day transmittal requirement applies to federal runoff elections—is not ripe for adjudication because Alabama has not held a runoff election since Congress enacted the requirement with the 2009 amendment to UOCAVA.

UOCAVA authorizes the United States Attorney General "to bring a civil action ... for such declaratory or injunctive relief as may be necessary" to enforce UOCAVA. 42 U.S.C. § 1973ff–4 (a). Therefore, the United States is expressly authorized, and thus has standing, to challenge Alabama's runoff statute on the ground that it violates UOCAVA's 45–day transmittal requirement. Nevertheless, Alabama questions the timing of the United States' claim. It argues that, because a runoff election has not yet occurred, the United States' facial attack is not yet ripe.

[6][7][8][9][10] The ripeness doctrine provides that, for a court to have jurisdiction, a claim must be "sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decisionmaking by the court." *Cheffer v. Reno,* 55 F.3d 1517, 1524 (11th Cir.1995). Ripeness depends on two factors: (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Harrell v. The Florida Bar,* 608 F.3d 1241, 1258 (11th Cir.2000). The fitness portion of the analysis focuses on "the extent to which resolution of the challenge depends

upon facts that may not yet be sufficiently developed." *Id.* (internal citation omitted). However, where a claim presents a purely legal issue, additional fact development is not necessary because the claim is that the law operates unlawfully on its face regardless of any other facts. *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir.2009) ("a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record"). In other words, a purely legal challenge to a statute will succeed only if the statute can never be applied in a lawful manner. *Id.* at 1308. The hardship prong of the ripeness test examines the costs of delaying review until conditions for deciding a controversy are further developed. *Harrell*, 608 F.3d at 1258.

[11] The United States' claim is ripe for review because it is a facial challenge to the State's runoff statute and therefore presumptively fit for judicial review. The court does not need facts surrounding a runoff election to determine whether the State's statute violates UOCAVA. As written, Alabama's current runoff statute, 1975 Ala.Code § 17–13–18, requires that a runoff election occur exactly 42 days after a primary election. Unless the State can hold a runoff election 42 days after the primary while still transmitting ballots to UOCAVA voters 45 days in advance of that election, its runoff statute violates UOCAVA on its face. The State has not put forth, and the court is unaware of, a way that the State could meet both the 45–day requirement under UOCAVA and still hold a primary runoff election 42 days after a primary election. Indeed, because of other related tasks that necessarily occur between the primary and runoff election—such as election certification and ballot printing—the transmittal of UOCAVA ballots would likely occur at least a week, if not substantially longer, after even the 45th day before the runoff election.

*10 Moreover, although there is no guarantee of when a runoff election will occur, it is certain that one will occur, for, as the State admits, "in Alabama, runoff elections are held as a matter of course." Defs. Brief (Doc. No. 92) at 36.

Thus, it is all but certain that a federal runoff election will soon occur, and it is certain that, when that election occurs, Alabama will violate UOCAVA if it follows state law, which the court presumes the State will—indeed, must—do in the absence of either the repeal or invalidation of that law. And other than this litigation there is no indication that a repeal or invalidation is in works.

The United States' claim also satisfies the hardship requirement of the ripeness test, for, if the court waits to assess this claim until after the State holds its next federal runoff election in accordance with state law and thus in violation of UOCAVA, UOCAVA voters will be denied the 45 days UOCAVA has recognized as logistically needed to cast their votes and they therefore will be irreparably harmed. There is no way that the issue of the application of the 45–day transmittal requirement to federal runoff elections could be litigated between a primary and a runoff election in time for the requirement to be applied to that runoff. Indeed, the State joined the United States in asking this court, should it find in favor of the United States, to expedite and resolve this issue by no later than mid-February in order for State to meet the logistical demands of implementing the requirement four months later, in June of this year.

B.

For the foregoing reasons, the court holds that UOCAVA's 45–day transmittal requirement applies to federal runoff elections.

The next issue, therefore, is whether Alabama is in violation of UOCAVA. As stated in the preceding section of this opinion, the court is unaware of a way that the State could meet both the UOCAVA's 45–day transmittal requirement under UOCAVA and still hold a primary runoff election 42 days after a primary election as it is required to do by state law, that is, 1975 Ala.Code § 17–13–18. As further stated, it is certain that a federal runoff

election will occur in Alabama and that when it does the State will violate UOCAVA. The court, therefore, further holds that Alabama's runoff statute, § 17–13–18, violates UOCAVA to extent the state statute requires that a federal runoff election occur within 42 days of a primary.

* * *

An appropriate judgment will therefore be entered as follows: (1) granting the United States' motion for summary judgment; (2) denying the State of Alabama and its Secretary of State's motion for summary judgment; (3) entering summary judgment in favor of the United States and against the State of Alabama and its Secretary of State; (4) declaring that UOCAVA's 45–day transmittal requirement, 42 U.S.C. § 1973ff–1 (a)(8)(A), applies to federal runoff elections; (5) declaring that Alabama's runoff statute, 1975 Ala.Code § 17–13–18, violates UOCAVA's 45–day transmittal requirement to extent the state statute requires that a federal runoff election occur within 42 days of a primary; and (6) giving the parties 14 days to propose or request any addition relief.

JUDGMENT

***11** In accordance with the opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Plaintiff United States of America's motion for summary judgment (doc. no. 83) is granted.

(2) Defendants State of Alabama and Alabama Secretary of State's motion for summary judgment (doc. no. 81) is denied.

(3) Summary judgment is entered in favor of plaintiff United States of America and against defendants State of Alabama and Alabama Secretary of State.

(4) It is DECLARED that UOCAVA's 45–day transmittal requirement, 42 U.S.C. § 1973ff–1 (a)(8)(A), applies to federal runoff elections.

(5) It is DECLARED that Alabama's runoff statute, 1975 Ala.Code § 17–13–18, violates UOCAVA's 45–day transmittal requirement to extent the state statute requires that a federal runoff election occur within 42 days of a primary.

(6) The parties are allowed 14 days from the date of this judgment to propose or request any additional relief.

It is further ORDERED that costs are taxed against defendants State of Alabama and Alabama Secretary of State, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

This case is closed.

M.D.Ala.,2014.
U.S. v. Alabama
--- F.Supp.2d ---, 2014 WL 545193 (M.D.Ala.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:12-cv-00179-MHT-WC
	)	
STATE OF ALABAMA and	)	
HONORABLE JIM BENNETT,	)	
Secretary of State, in her official capacity,	)	
	)	
Defendants.	)	

CONSENT ORDER

This matter concerns the State of Alabama's obligations under the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff *et seq.* ("UOCAVA"). This Order sets out relief related to federal runoff elections, consistent with the Court's findings in its earlier Memorandum Opinion and Order (doc. 120).

The Court finds and orders as follows:

1) This Court earlier held that UOCAVA requires that Alabama must transmit absentee ballots to UOCAVA voters (who timely filed a valid request for such ballots) 45 days before federal runoff elections (doc. 120).

2) Under Alabama law, federal runoff elections, when needed, are held 42 days after the primary election.

3) Alabama's next primary elections for a federal office will be held on June 3, 2014.

4) Based on the number of candidates who have qualified to run in party primaries, there is the potential for a runoff election for only one federal race in 2014—the Republican

primary for the 6th Congressional District, for which seven candidates have reportedly qualified. (There will be no other federal primary races in the 6th Congressional District.)

5) Alabama has indicated that if it is to transmit UOCAVA ballots 45 days before a federal runoff election, there should be 9 weeks, instead of the current 6 weeks, between the primary and the runoff election.

6) The Court invited the parties to propose remedies. The State Defendants, while reserving their appellate rights, have proposed a remedy that they contend complies with this Court's order and is the most reasonable under the circumstances and considering the interests of voters, elections officials, and candidates. The United States did not oppose the State Defendants' proposal. This order therefore reflects the State Defendants' proposal.

7) The Court below will order that, notwithstanding any other provision of Alabama law, beginning in the 2016 election cycle, Alabama shall hold any federal runoff elections 9 weeks/ 63 days after the primary election.

8) To impose that date change in 2014, however, would (as the State Defendants contend) cause certain hardships to non-UOCAVA voters. Runoffs for State and local officials would remain governed by Alabama law, and thus there is the potential that voters in the 6th Congressional District would face one runoff election 42 days after a primary, and a second runoff 63 days after the primary. Such a circumstance could (as the State Defendants contend) cause voter confusion, negatively impact voter turnout, and burden election officials and candidates.

9) Thus, in this 2014 election cycle, the Court will authorize the use of election tools that will permit UOCAVA compliance with respect to a potential federal runoff election without

moving the date of that election. Namely, the Court will authorize the use of an instant runoff system such as was used by Alabama in a 2013 special election in the 1st Congressional District.

IT IS HEREBY ORDERED AS FOLLOWS:

For purposes of the 6th Congressional District Republican primary and (potential) primary runoff in 2014 only:

1) The Secretary of State will assume responsibility for transmitting, receiving, and counting separate federal ballots transmitted electronically or by mail to applicable UOCAVA voters in the Republican primary and / or runoff election in the 6th Congressional District[1], and, for that election only, will assume the various duties outlined below that, under state law, are normally performed by county election officials.

2) The Secretary of State will transmit to 6th Congressional District Republican UOCAVA voters instant runoff ballots for the primary election in a form substantially similar to that attached as Exhibit A to this Court's order. The instant runoff ballot will allow these voters to rank the candidates in order of preference. In the primary election, each validly cast vote will be counted for the first choice candidate. In the event of a primary runoff election, each validly cast vote will be counted for whichever of the runoff candidates is ranked higher on the ballot.[2]

3) In order to fully facilitate the conduct of any federal runoff election in compliance with UOCAVA and other applicable election laws, for the 2014 Republican primary and (potential) primary runoff election for the 6th Congressional District only, the Secretary of State is expressly authorized and ordered as follows:

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[1] As previously noted, the Republican primary for the 6th Congressional District is the only federal race with the potential for a primary runoff election, and no other federal race will occur at the primary stage for 6th Congressional District voters (that is, there will not be a primary race for Senate or a Democratic primary for the 6th Congressional District).

[2] The general election is not impacted by this Order.

A. To exercise all duties relating to the transmission, receipt, and counting of ballots that are currently performed by local election officials under state law, including duties performed by Probate Judges, Absentee Election Managers, and the Board of Registrars.[3] Without regard to provisions of state law, the State shall bear any and all costs and expenses incident to or incurred pursuant to this election which arise out of this court order and/or the UOCAVA voting requirements for Republican UOCAVA voters residing in the 6th Congressional District.

B. To contract with a vendor for the preparation and ordering of the instant runoff ballots (both printed and electronic ballots) and election supplies.

C. To prepare and approve the instant runoff ballots in the form substantially similar to the ballot attached as Exhibit A and to create a ballot record in *Power Profile*.

D. To determine ballot style for instant runoff ballots to be issued to each Republican UOCAVA voter residing in the 6th Congressional District, such ballots being authorized to differ in style from the ballots issued to non-UOCAVA voters.

E. To order and receive instant runoff ballots (both printed and electronic ballots) and supplies directly from the printer.

F. To assume and exercise the duties of the county absentee election manager to receive UOCAVA absentee ballot applications directly from

[3] The duties of local election officials with respect to State and local races in the 6th Congressional District are not impacted by this Order.

Republican UOCAVA voters residing in the 6th Congressional District and transmit both mailed and electronic ballots.

G. To exercise the duties of the county absentee election manager to process absentee ballot applications from Republican UOCAVA voters residing in the 6th Congressional District and to transmit both mailed and electronic ballots to those voters.

H. To perform the Board of Registrars' voter registration duties for those Republican UOCAVA voters residing in the 6th Congressional District who request an absentee ballot by filling out the Federal Postcard Application form pursuant to UOCAVA and the *Code of Alabama* § 17-11-3(b), and otherwise perform registration duties for Alabama citizens residing in the 6th Congressional District who fall under UOCAVA and who are not already registered to vote.

I. To publicly post the list of Republican UOCAVA voters residing in the 6th Congressional District who have requested absentee ballots in accordance with *Code of Alabama* § 17-11-5(c)—such posting to appear on the Secretary of State's website.

J. To transmit instant runoff ballots either by mail or electronically in accordance with the means of transmission requested by the voter.

K. To communicate with Republican UOCAVA voters residing in the 6th Congressional District regarding the ballots and procedure for voting in this election utilizing press releases, public service announcements to the extent practicable, and email or telefacsimile notifications to those

Republican voters residing in the 6th Congressional District who have provided or will provide email or telefacsimile contact information. The Secretary of State shall also seek the assistance of the FVAP in notifying Republican UOCAVA voters residing in the 6th Congressional District of the changes to election procedure authorized by this order for 2014, and coordinate with the FVAP as necessary to facilitate such notice. The Secretary may adopt additional means of communicating with UOCAVA voters (including all the State's UOCAVA voters), as appropriate.

L. To deliver to the Board of Registrars on the day following the primary election a copy of the list of all UOCAVA voters who participated in the 6th Congressional District Republican primary *via* absentee ballot.

M. To deliver to the Board of Registrars on the day following the primary runoff election a copy of the list of all UOCAVA voters who participated in the 6th Congressional District Republican primary runoff election *via* absentee ballot.

N. To utilize a voting tabulation machine for counting the instant runoff ballots received from Republican UOCAVA voters residing in the 6th Congressional District.

O. To create procedures, and to provide a copy of those procedures to counsel for the United States, designed to ensure that instant runoff ballots cast by Republican UOCAVA voters residing in the 6th Congressional District are properly counted and to ensure there is no duplication in counting the voters' ballots.

P. To receive voted ballots from Republican UOCAVA absentee voters residing in the 6th Congressional District and to secure such voted ballots until the time provided by law to count absentee ballots.

Q. To implement as necessary provisional balloting with regard to the instant runoff ballots as provided in *Code of Alabama*, § 17-10-2, to include (1) a determination of which instant runoff ballots shall be converted to provisional ballots, (2) determination of which provisional ballots shall be counted, upon review of all provisional ballot documentation and other relevant information, and (3) the counting of those provisional ballots which have been approved for counting.

R. To appoint absentee poll workers to count the instant runoff ballots and certify the results of said count at the times for counting and certification prescribed by Alabama law. The certified results shall be provided to the Chair of the Alabama Republican Party immediately upon certification, either by hand delivery or by electronic transmission, for inclusion in the party's canvass of its primary and (potential) primary runoff elections.

4) Poll watchers shall be permitted to observe and monitor and otherwise act in accordance with their usual duties in connection with the vote counting by the Secretary of State.

5) The Secretary of State is ordered to perform any and all other duties and functions as may be necessary to effectuate the UOCAVA voting in any runoff election in the 6th Congressional District Republican race and to effectuate this court's order.

6) In the event a UOCAVA voter makes a valid and timely request for an absentee ballot to participate in the Democratic primary, and also makes a valid and timely request for an

absentee ballot to participate in the Republican primary *runoff* (such cross-over voting being allowed by the rules of the Republican party), that voter shall be sent both ballots. The ballot to participate in the Democratic primary shall be sent no later than 45 days before the primary election, and the ballot to participate in the Republican primary runoff shall be sent separately, at a later date, but no more than 45 days before the Republican primary runoff election.

IT IS FURTHER ORDERED that beginning in the 2016 election cycle,

Notwithstanding any provision of Alabama law, should a runoff election be necessary for any federal office, said runoff election shall occur on the 63rd day following the State's primary elections.

IT IS FURTHER ORDERED that defendants shall provide notice to UOCAVA voters residing in the 6th Congressional District as follows:

A. Notify the Director of the Federal Voting Assistance Program (FVAP) of the United States Department of Defense of the entry of this Order, and request assistance in notifying impacted voters of the relief afforded in this Order. Coordinate with the FVAP as necessary to facilitate such notice.

B. Issue a press statement concerning the relief afforded in this Order. The press statement is to be posted on the Secretary's website, and distributed to national and local wire services, to radio and television broadcast stations, and to daily newspapers of general circulation in the 6th Congressional District. The press statement shall also be distributed to the FVAP, the International Herald Tribune (http://www.iht.com), USA

Today International (http://www.usatoday.com), the Military Times Media Group (cvinch@militarytimes.com), Stars and Stripes (www.estripes.com), and the Overseas Vote Foundation (http://www.overseasvotefoundation.org/intro/).

C. For applicable UOCAVA voters residing in the 6th Congressional District who provide an email address, the Secretary shall notify the voter of the relief afforded in this order by email communication.

IT IS FURTHER ORDERED that the defendants shall provide a copy of this Court's Order to the Probate Judges, Absentee Election Managers, the Boards of Registrars, and the Chair of the Republican Party County Executive Committee in each of the Alabama Counties that comprise the 6th Congressional District. Defendants shall also provide a copy of this Court's Order to the Chair of the Republican Party State Executive Committee.

IT IS FURTHER ORDERED that the State Defendants shall, by no later than April 2, 2014, develop a "written plan" pursuant to 42 U.S.C. § 1973ff-1(a)(9).

Done this 4th day of March, 2014.

/s/ Myron H. Thompson
United States District Judge

RCV DEMO LAYOUT
MERCURY TEST ELECTION 1

COUNTY CLERK
VOTE FOR ONE (1) ONLY

- RICHARD G. LUGAR — REPUBLICAN
- DENNIS BYRD — DEMOCRATIC
- STEVE OSBORN — LIBERTARIAN

COUNTY COMMISSIONER
DISTRICT 3
ONE TO BE ELECTED

Designate the desired candidates in order of preference

	1st	2nd	3rd
TODD ROKITA — REPUBLICAN	○	○	○
JOE PEARSON — DEMOCRATIC	○	○	○
MIKE KOLE — LIBERTARIAN	○	○	○
Write-In	○	○	○

COUNTY AUDITOR
VOTE FOR ONE (1) ONLY

- TIM BERRY — REPUBLICAN
- JUDY ANDERSON — DEMOCRATIC

COUNTY TREASURER
VOTE FOR ONE (1) ONLY

- RICHARD E. MOURDOCK — REPUBLICAN
- MICHAEL W. GRIFFIN — DEMOCRATIC

WARD ALDERMAN AT LARGE
TWO TO BE ELECTED

Designate the desired candidates in order of preference

	1st	2nd	3rd	4th	5th	6th
MIKE SODREL — REPUBLICAN	○	○	○	○	○	○
CHRISTOPHER BYRD — REPUBLICAN	○	○	○	○	○	○
PAUL J. ROBERTSON — DEMOCRATIC	○	○	○	○	○	○
BARON HILL — DEMOCRATIC	○	○	○	○	○	○
D. ERIC SCHANSBERG — LIBERTARIAN	○	○	○	○	○	○
ANNA PATRICK — LIBERTARIAN	○	○	○	○	○	○

ALDERMAN WARD 2
VOTE FOR ONE (1) ONLY

- BRIAN THOMAS — REPUBLICAN
- RICHARD D. YOUNG, JR — DEMOCRATIC

SCHOOL BOARD MEMBER
TWO TO BE ELECTED

Designate the desired candidates in order of preference

	1st	2nd	3rd	4th	5th	6th	7th	8th
DEBRA L. ADAMS	○	○	○	○	○	○	○	○
KENNY BARTLEY	○	○	○	○	○	○	○	○
DR. JOHN A. GONZABA	○	○	○	○	○	○	○	○
KAREN LOPP	○	○	○	○	○	○	○	○
JOE MILLER	○	○	○	○	○	○	○	○
CHARLIE PHILLIPS	○	○	○	○	○	○	○	○
ROGER WINDELL	○	○	○	○	○	○	○	○
JOYCE BLISS	○	○	○	○	○	○	○	○
N. DIANE SHEWMAKER	○	○	○	○	○	○	○	○
KERRY J. CHUMLEY	○	○	○	○	○	○	○	○
CAROL UESSELER	○	○	○	○	○	○	○	○

DELBERT HOSEMANN
Secretary of State

March 28, 2014

Chris Herren
Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
1800 G St., N.W.
Washington, DC 20006

Dear Mr. Herren:

As you know and we have discussed, the State of Mississippi is making changes to its UOCAVA runoff voting procedures to ensure UOCAVA voters have ample time to receive and return a runoff ballot. Enclosed you will a copy of the Emergency Administrative Rule filed Wednesday. This rule went into effect upon filing. I have also enclosed a copy of the State of Mississippi's revised written plan for UOCAVA runoff elections. Finally, I am including examples of the ranked choice runoff ballot UOCAVA voters will use for the runoff elections.

If you have any questions concerning our efforts, please feel free to contact me.

Sincerely,

Delbert Hosemann
Secretary of State

CDH,JR/me

Enclosures

401 Mississippi Street
Post Office Box 136
Jackson, Mississippi 39205

telephone (601) 359-1350
facsimile (601) 359-1499
www.sos.ms.gov

PLAN FOR PREPARATION AND DISTRIBUTION OF ABSENTEE BALLOTS TO UNIFORMED AND OVERSEAS CITIZENS FOR FIRST AND SECOND ELECTIONS

Pursuant to existing Mississippi law, federal primary runoff and special runoff elections are held twenty-one (21) days after the primary or special election is conducted if no candidate receives a majority of the votes cast for an office.

In the event three or more candidates qualify in a race and a runoff election is possible, the Circuit Clerk of the voter's county of residence shall follow the process set forth in the Mississippi Secretary of State's temporary administrative rule. *See* Exhibit "A" attached hereto and incorporated herein by reference.

Runoff Election Absentee Ballots

The Circuit Clerk of the voter's county of residence shall transmit a ranked choice runoff absentee ballot simultaneously with the primary or special election absentee ballot to UOCAVA voters who submit a valid absentee ballot application.

A. The runoff election ranked choice absentee ballot shall allow the voter to rank candidates in the order of his/her preference.
B. UOCAVA voters requesting receipt of absentee ballots by e-mail shall receive the same by e-mail attachment in the format of a PDF fillable document to enable UOCAVA voters to either mark the ballots on-line or print the ballots to mark by hand.
C. UOCAVA voters requesting receipt of absentee ballots by facsimile shall receive the same by facsimile and mark the ballots by hand.
D. UOCAVA voters requesting receipt of absentee ballots by mail shall receive the same by mail and mark the ballot by hand. Pursuant to Mississippi law, the runoff election absentee ballot shall be printed on paper of a different tint to distinguish it from the first primary or special election.
E. Additional instructions shall be provided to UOCAVAs voter with transmittal of the primary or special election ballot and runoff election absentee ballot to explain the ranked choice voting process, and on-line at sos.ms.gov.
F. In the event a runoff election is conducted, the UOCAVA voter's runoff election absentee ballot shall be counted in accordance with the order in which the voter has ranked the candidates. If no runoff election is conducted, the UOCAVA voter's runoff election absentee ballot shall remain sealed.

Instructions to Voters

Upon transmitting absentee ballots to a UOCAVA voter, the Circuit Clerk of the voter's county of residence shall provide instructions to the voter regarding the marking and return of the absentee ballots pursuant to administrative procedure and Miss. Code Ann. Sections 23-15-683. *See* Exhibit "A" attached hereto and incorporated herein by reference.

Means of Transmittal

The Circuit Clerk, in accordance with state law, shall transmit and receive absentee ballots for first and second elections in accordance with the voter's preference, i.e., facsimile, e-mail or mail.

Part 10 Chapter 4: Assistance for Military and Overseas Voters

Rule ___ Secretary of State's Exercise of Emergency Powers. Pursuant to the Military and Overseas Voter Empowerment Act of 2009 ("MOVE Act"), Congress amended the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") to require the transmittal of absentee ballots at least forty-five (45) days prior to an election to every UOCAVA voter who has submitted a valid absentee ballot application.

Pursuant to existing Mississippi law, federal primary runoff and special runoff elections are held twenty-one (21) days after the primary or special election is conducted if no candidate receives a majority of the votes cast for an office.

Under the Secretary of State's authority to exercise emergency powers concerning absentee voting by Mississippi armed services and overseas voters, the Secretary of State promulgates the following temporary administrative rule:

I. *Runoff Election Absentee Ballots Provided Electronically to UOCAVA Voters.* To ensure UOCAVA voters are afforded sufficient time within which to vote in a federal runoff election, the Circuit Clerk of the voter's county of residence shall transmit a ranked choice runoff absentee ballot simultaneously with the primary or special election absentee ballot to those UOCAVA voters who submit a valid absentee ballot application therefor, specifying receipt of the voter's absentee ballot by electronic means.
   A. The runoff election ranked choice ballot shall be in the format of a PDF fillable document to enable UOCAVA voters to mark the same on-line and shall be styled so as to distinguish its use for the runoff election only.
   B. Upon indication of the UOCAVA voter of his/her intention to return the absentee ballot(s) by mail, the Circuit Clerk of the UOCAVA voter's county of residence electronically shall provide to the voter separate official envelopes for the return of each absentee ballot.
   C. The runoff election ranked choice ballot shall allow the voter to rank candidates in order of preference. To indicate the order of preference for each candidate for each office, the voter shall mark the corresponding oval beside the candidate's name under the appropriate number, indicating the number of the voter's preference for each candidate. The voter shall mark the oval under "1" next to the name of the candidate who is the voter's first choice, the oval under "2" for the voter's second choice, and so forth.
      i. If a voter marks the same numbered oval for more than one (1) candidate, his or her ballot may not be counted.
      ii. The voter shall not be required to indicate his or her preference for more than one (1) candidate.
   D. Additional instructions shall be provided to the UOCAVA voter with the transmittal of the primary or special election absentee ballot and runoff absentee ballot to explain the ranked choice voting process.
   E. Only one ballot shall be sent to the UOCAVA voter for the runoff election. It is the UOCAVA voter's choice as to when he/she votes and electronically

returns his/her voted runoff election absentee ballot; however, absentee ballots returned electronically must be received by the Circuit Clerk of the voter's county of residence by 7:00 p.m. on the date of the election in order to be counted.

F. In the event a runoff election is conducted, the UOCAVA voter's runoff election ballot shall be counted in accordance with the order in which the voter has ranked the candidates. The candidate ranked "1" by the voter will be counted if that candidate is included in the runoff election. If the candidate ranked "1" by the voter is not included in the runoff election, the candidate ranked "2" by the voter will be counted if that candidate is included in the runoff election, and so forth.

II. *Runoff Election Absentee Ballots Provided by Mail to UOCAVA Voters.* To ensure UOCAVA voters are afforded sufficient time within which to vote in a federal runoff election, the Circuit Clerk of the voter's county of residence shall transmit a ranked choice runoff absentee ballot simultaneously with the primary or special election absentee ballot to those UOCAVA voters who submit a valid absentee ballot application therefor, specifying receipt of the voter's absentee ballot by mail or not specifying a means by which to receive an absentee ballot.

A. The runoff election ranked choice ballot shall be printed on paper of a different tint or color and shall be styled so as to show distinguish its use for the runoff election only.

B. Upon indication of the UOCAVA voter of his/her intention to return the absentee ballot(s) by mail, the Circuit Clerk of the UOCAVA voter's county of residence shall send to the voter separate official envelopes for the return of each absentee ballot in accordance with Section 23-15-683, Miss. Code Ann.

C. The runoff election ranked choice ballot shall allow the voter to rank candidates in order of preference. To indicate the order of preference for each candidate for each office, the voter shall mark the corresponding oval beside the candidate's name under the appropriate number, indicating the number of the voter's preference for each candidate. The voter shall mark the oval under "1" next to the name of the candidate who is the voter's first choice, the oval under "2" for the voter's second choice, and so forth.
    i. If a voter marks the same numbered oval for more than one (1) candidate, his or her ballot may not be counted.
    ii. The voter shall not be required to indicate his or her preference for more than one (1) candidate.

D. Additional instructions shall be provided to the UOCAVA voter with the transmittal of the primary or special election absentee ballot and runoff absentee ballot to explain the ranked choice voting process.

E. No additional ballot shall be sent to the UOCAVA voter for the runoff election. It is the UOCAVA voter's choice as to when he/she votes and returns his/her voted runoff election absentee ballot; however, absentee ballots returned by mail must be received by the Circuit Clerk of the voter's county of residence by 7:00 p.m. on the date of the election in order to be counted.

F. In the event a runoff election is conducted, the UOCAVA voter's runoff election ballot shall be counted in accordance with the order in which the voter has ranked the candidates. The candidate ranked "1" by the voter will be counted if that candidate is included in the runoff election. If the candidate ranked "1" by the voter is not included in the runoff election, the candidate ranked "2" by the voter will be counted if that candidate is included in the runoff election, and so forth.

III. *Runoff Election Absentee Ballots Returned Electronically to the Circuit Clerk*. Upon electronic receipt of a federal runoff election ballot, the Circuit Clerk shall place the runoff election ballot in an absentee ballot envelope and note on the envelope the ballot was received pursuant to Section 23-15-699, Miss. Code Ann., and the signatures across the flap of the envelope are not required. The envelope containing the runoff election absentee ballot shall be placed into a sealed ballot box designated for runoff election absentee ballots only. Such ballot box shall remain sealed and secured in the office of the Circuit Clerk (or such other designated location) until the day before the runoff election, or the time at which the absentee ballots are separated by precinct ballot boxes and distributed to the individual polling places for the runoff election.

IV. *Runoff Election Absentee Ballots Returned by Mail to the Circuit Clerk*. Upon receipt by mail of a federal runoff election ballot, the Circuit Clerk shall place the envelope containing the runoff election absentee ballot into a sealed ballot box designated for runoff election absentee ballots only. Such ballot box shall remain sealed and secured in the office of the Circuit Clerk (or such other designated location) until the day before the runoff election, or the time at which the absentee ballots are separated by precinct ballot boxes and distributed to the individual polling places for the runoff election.

Source: Miss. Code Ann. § 23-15-701 and § 25-43-1.101, *et seq.* (1972).

UOCAVA Runoff Ballot Only

Official Election Ballot
STATE OF MISSISSIPPI

Republican 2014 Primary Election
Tuesday, June 03, 2014

This ballot is to be completed at the same time as voting your primary election ballot, and it will be counted ONLY in the event there is a runoff election. Rank the candidates of your choice by darkening the corresponding circle beside the candidate's name. Indicate your first choice by darkening the circle "1" next to the candidate's name, indicate your second choice by darkening number "2" and so on.

For United States Senate

DESIGNATE THE DESIRED CANDIDATES IN ORDER OF PREFERENCE

	1	2	3	4
Thomas L. Carey	◯	◯	◯	◯
Thad Cochran	◯	◯	◯	◯
Chris McDaniel	◯	◯	◯	◯
Write-In	◯	◯	◯	◯

Write-In Candidate _____

For US House of Representatives 4th Congressional District

DESIGNATE THE DESIRED CANDIDATES IN ORDER OF PREFERENCE

	1	2	3	4	5	6
Tom Carter	◯	◯	◯	◯	◯	◯
Tavish C. Kelly	◯	◯	◯	◯	◯	◯
Steven McCarty Palazzo	◯	◯	◯	◯	◯	◯
Gene Taylor	◯	◯	◯	◯	◯	◯
Ron Vincent	◯	◯	◯	◯	◯	◯
Write-In	◯	◯	◯	◯	◯	◯

Write-In Candidate _____

UOCAVA Runoff Ballot Only

Official Election Ballot

STATE OF MISSISSIPPI

Democratic 2014 Primary Election

Tuesday, June 03, 2014

This ballot is to be completed at the same time as voting your primary election ballot, and it will be counted ONLY in the event there is a runoff election. Rank the candidates of your choice by darkening the corresponding circle beside the candidate's name. Indicate your first choice by darkening the circle "1" next to the candidate's name, indicate your second choice by darkening number "2" and so on.

For United States Senate

DESIGNATE THE DESIRED CANDIDATES IN ORDER OF PREFERENCE

	1	2	3	4	5
Travis W. Childers	○	○	○	○	○
William Bond Compton, Jr.	○	○	○	○	○
Bill Marcy	○	○	○	○	○
Jonathan Rawl	○	○	○	○	○
Write-In	○	○	○	○	○

_____

Write-In Candidate