

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

v.

State of Arizona, et al.,

Defendants.

No. CV-18-00505-PHX-DLR

CONSENT DECREE

Before the Court is the parties' Joint Motion Requesting Expedited Entry of Consent Decree. (Doc. 2.)

Plaintiff United States of America initiated this action against the State of Arizona ("State"); and Michele Reagan, the Secretary of State of Arizona, in her official capacity (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' inability to transmit final or corrected absentee ballots to some of Arizona's absent uniformed services voters and overseas voters ("UOCAVA voters") by the 45th day before the February 27, 2018 special primary election for the United States House of Representatives, as required by Section 102(a)(8)(A) of UOCAVA, 52 U.S.C. § 20302(a)(8).

The United States and Defendants, through their respective counsel, have

1 conferred and agree that this action should be settled without the delay and expense of
2 litigation. The parties share the goal of providing eligible UOCAVA voters with
3 sufficient opportunity under Federal law to receive, cast and have their absentee ballots
4 counted in the February 27, 2018 special primary election for Arizona's Eighth
5 Congressional District. The parties recognize that the Defendants' inability to transmit
6 final or corrected absentee ballots to the UOCAVA voters at least 45 days before the
7 special primary election resulted from the truncated special election schedule established
8 by state law, specifically the application of deadlines for challenges to candidates'
9 nominating signature petitions, and did not result from willful or unintentional negligence
10 by the state and local election officials responsible for implementing federal and state
11 election laws. The parties have negotiated in good faith and agree to the entry of this
12 Consent Decree as an appropriate resolution of the UOCAVA violation asserted by the
13 United States. Accordingly, the United States and Defendants stipulate and agree that:

14 1. This action is brought by the Attorney General on behalf of the United States
15 of America under UOCAVA. 52 U.S.C. § 20301 *et seq.* UOCAVA provides that
16 UOCAVA voters shall be permitted "to use absentee registration procedures and to vote
17 by absentee ballot in general, special, primary, and runoff elections for Federal office."
18 52 U.S.C. § 20302.

19 2. The Attorney General is authorized to enforce the provisions of UOCAVA, 52
20 U.S.C. § 20307, and this Court has jurisdiction of this action pursuant to 52 U.S.C.
21 § 20307 and 28 U.S.C. §§ 1345 and 2201.

22 3. Defendant State of Arizona is responsible for complying with UOCAVA and
23 ensuring that validly requested absentee ballots are transmitted to UOCAVA voters in
24 accordance with the statute's terms. 52 U.S.C. § 20302.

25 4. Defendant Michele Reagan is the Arizona Secretary of State and is sued in her
26 official capacity. The Arizona Secretary of State is the chief state election officer and
27 responsible for the coordination of state responsibilities under UOCAVA. Ariz. Rev.
28 Stat. § 16-142.

1 5. Section 102(a)(8)(A) of UOCAVA requires that states transmit validly
2 requested ballots to UOCAVA voters not later than 45 days before an election for Federal
3 office when the request is received at least 45 days before the election. 52 U.S.C.
4 § 20302(a)(8)(A).

5 6. Pursuant to the Arizona election code, when a vacancy occurs in the office of a
6 representative in Congress more than six months prior to the next general election, the
7 governor shall call a special primary election and special general election for at least 80
8 and no more than 90 days from the date of the occurrence of the vacancy. Ariz. Rev.
9 Stat. § 16-222(B). On December 8, 2017, Representative Trent Franks resigned from
10 Congress. Representative Franks represented the Eighth Congressional District, which is
11 located entirely within Maricopa County. The governor set February 27, 2018 as the date
12 for the special primary election and April 24, 2018 as the date for the special general
13 election.

14 7. Under Arizona's election code, candidates were required to file nominating
15 petitions for the special primary election by January 10, 2018, and the deadline to file
16 challenges to such nominating petitions was January 18, 2018. Ariz. Rev. Stat. § 16-
17 222(B).

18 8. The deadline for transmission of absentee ballots to UOCAVA voters who
19 requested them at least 45 days before the special primary election was January 13, 2018.
20 The deadline for transmission of absentee ballots to UOCAVA voters who requested
21 them at least 45 days before the special general election is March 10, 2018.

22 9. On or about January 8, 2018, recognizing that petition challenges might occur
23 after the deadline to transmit UOCAVA ballots, the Defendants contacted the Department
24 of Defense and inquired about the possibility of obtaining a waiver of UOCAVA's 45-
25 day transmission requirement under 52 U.S.C. § 20302(g). On or about January 10,
26 2018, the Department of Defense contacted the Defendants and explained that the state
27 was not eligible to seek a UOCAVA waiver under the circumstances presented.
28

1 10. On January 12, 2018, the day before the UOCAVA transmission deadline,
2 Maricopa County election officials transmitted ballots (the “original ballots”) to all
3 eligible UOCAVA voters who had requested them by that date.

4 11. Because of the possibility that changes to the ballot could result from
5 challenges to a candidate’s nominating petition, Maricopa County election officials
6 included a notice with the original ballots explaining that the list of candidates was not
7 yet final due to potential candidate nomination petition challenges, and the final list of
8 candidates would not be confirmed until January 25, 2018. The notice advised that an
9 updated official ballot would be sent on that date. It further advised that voters could
10 choose to vote the enclosed ballot, or wait for the updated ballot; but, if they voted the
11 enclosed ballot and cast their vote for a candidate who was subsequently disqualified,
12 they would not be able to vote a second ballot or change their vote. A copy of this notice
13 is attached as Exhibit 1.

14 12. Some of the UOCAVA voters to whom original ballots were sent on January
15 12, 2018 received Republican Party, Libertarian Party, or Green Party ballots. No
16 challenges were ultimately filed by the January 18, 2018 deadline to the candidates on the
17 Republican Party, Libertarian Party, or Green Party ballots. Accordingly, on January 19,
18 2018, Maricopa County election officials sent a second notice to those voters explaining
19 that no candidate petition challenge had been filed for the Republican, Libertarian or
20 Green Party nomination. Therefore, eligible UOCAVA voters were notified that the
21 ballot transmitted on January 12, 2018 had not changed and voters should cast that
22 original ballot. The notice further advised that the UOCAVA voters should return their
23 voted ballot so that it is received no later than 7:00 p.m. on election day, February 27,
24 2018. A copy of this notice is attached as Exhibit 2.

25 13. Some of the UOCAVA voters to whom original ballots were sent on January
26 12, 2018 received Democratic Party ballots. These ballots (the “original Democratic
27 ballots”) included the names of three candidates who had filed timely nominating
28 petitions. Challenges were ultimately filed by January 18, 2018 to two of these three

1 candidates. On January 23, 2018, a challenge to one of the Democratic Party candidates
2 was sustained by a state court, and the candidate was ordered removed from the ballot.
3 On January 23, 2018, Maricopa County election officials sent corrected ballots reflecting
4 this change (the “corrected Democratic ballots”) to UOCAVA voters who had received
5 original Democratic ballots. Along with the corrected Democratic ballots, election
6 officials included a notice explaining that one of the candidates listed on the ballot mailed
7 on January 12, 2018 had been removed pursuant to a court order. Therefore, the notice
8 explained that the voter should cast a corrected ballot for the Democratic Party nominee,
9 which was enclosed with the notice. The notice further advised the UOCAVA voters to
10 vote the corrected ballot included with the notice and to return it so that it is received by
11 7:00 p.m. on Election Day, February 27, 2018. A copy of this notice is attached as
12 Exhibit 3.

13 14. The corrected Democratic ballots were transmitted either electronically or by
14 postal mail based on the voters’ preferred transmittal method. All UOCAVA voters have
15 the option to return their ballots by electronic upload, facsimile, or mail, regardless of
16 their previously requested transmittal method.

17 15. Under Arizona law, ballots returned by UOCAVA voters must be received by
18 7:00 p.m. on Election Day to be counted. *See* Ariz. Rev. Stat. §§ 16-547(C) and
19 16-551(C). Accordingly, in order to be counted, the corrected Democratic ballots must
20 be received by 7:00 p.m. on February 27, 2018, which is 35 days after the date of
21 transmittal of the corrected ballots.

22 16. The truncated special election schedule established by Arizona law precluded
23 the Defendants from transmitting final or corrected ballots to UOCAVA voters receiving
24 a Democratic Party ballot by the 45th day before the February 27, 2018 special primary
25 election for the House of Representatives, as required by Section 102(a)(8)(A) of
26 UOCAVA, 52 U.S.C. § 20302(a)(8).

27 17. Furthermore, the notice sent to all UOCAVA voters for all parties on January
28 12 along with the original ballots encouraged voters to await further notice to submit their

1 ballots, and to await receipt of an “updated official ballot.” However, UOCAVA voters
2 who received Republican Party, Libertarian Party, or Green Party ballots were never sent
3 an “updated official ballot,” and a second notice advising that there was no change to the
4 ballot was not transmitted until January 19, 2018. To be counted, these original ballots
5 must be received by February 27, 2018, which is 39 days after the date of transmittal of
6 the second notice. As a result, the Defendants were unable to provide these UOCAVA
7 voters the meaningful opportunity to cast a ballot that UOCAVA’s 45-day transmission
8 deadline seeks to ensure. 52 U.S.C. § 20302(a)(8).

9 18. By agreeing to this consent decree, the Defendants seek to ensure that
10 UOCAVA voters are not prejudiced because of the truncated special election schedule
11 required by Arizona law.

12 19. To avoid the burdens, delays, and uncertainties of litigation and to efficiently
13 and expeditiously promote the parties’ shared goal of ensuring that Arizona’s UOCAVA
14 voters will have sufficient opportunity under Federal law to receive, mark and return their
15 absentee ballots in time to be counted for the February 27, 2018 special primary election
16 for the House of Representatives, the parties agree that this Court should enter an order as
17 set forth below.

18 20. The parties reserve the right to modify this agreement as necessary, subject to
19 approval from the Court. For example, Arizona law allows for the possibility of an
20 automatic recount in a close election. Ariz. Rev. Stat. § 16-661. The parties will confer
21 promptly after the special primary election is held and, if necessary, seek appropriate
22 modification of this decree or other relief from the Court.

23 Accordingly, the parties having freely given their consent, and the terms of the
24 Decree being fair, reasonable, and consistent with the requirements of UOCAVA,

25 **IT IS ORDERED** as follows:

- 26 (1) To ensure that all eligible UOCAVA voters will have sufficient
27 opportunity to receive absentee ballots they have requested and
28 to submit marked absentee ballots in time to be counted for the

1 February 27, 2018 special primary election for the House of
2 Representatives, the Defendants shall ensure that Maricopa
3 County election officials count: (a) all those original ballots
4 transmitted to UOCAVA voters on January 12, 2018, but only if
5 that ballot is the only ballot returned by the UOCAVA voter, (b)
6 all those corrected ballots transmitted to UOCAVA voters on
7 January 23, 2018, and (c) any Federal Write-In Absentee Ballots.
8 In order for any ballot described in sections (a) – (c) above to be
9 counted, the ballot must be otherwise valid under state law and
10 meet the following transmittal criteria:

11 a. For ballots returned by postal or express mail: the ballot
12 must be *executed and sent* by February 27, 2018 and be
13 *received* by March 9, 2018 at 12:00 Noon Arizona time.

14 b. For ballots returned via any electronic submittal, including
15 e-mail, facsimile, or electronic upload: the ballot must be
16 received by February 27, 2018 at 7:00 p.m. Arizona time.

17 (2) Defendants shall take such steps as are necessary to afford those
18 eligible UOCAVA voters who have not already returned a final
19 ballot for this election (i.e., a Republican, Green, or Libertarian
20 ballot, or a corrected Democratic ballot) an opportunity to learn
21 of this Court's order and to ensure that all such voters receive
22 appropriate instructions explaining ballot return deadlines and the
23 options and procedures for returning a ballot. Maricopa County
24 election officials have valid email addresses for all 375
25 UOCAVA voters eligible to vote in this special primary election
26 and will transmit such notice by email no later than the next
27 business day following entry of this Order by the Court. If any
28 such emailed notice to a voter is returned as undeliverable, the

1 notice shall be sent to the voter by United States Postal Service
2 Express Overnight mail or other overnight delivery method if the
3 voter is overseas, or by postal mail if the voter is not overseas.
4 Such notice shall, at minimum: (a) ask UOCAVA voters who
5 received Democratic Party ballots to confirm that they have
6 received corrected Democratic ballots and no impediments exist
7 for a timely return of the corrected ballot; (b) ask UOCAVA
8 voters who received Republican Party, Libertarian Party, or
9 Green Party ballots to confirm that they have received their
10 original ballot and the additional notice regarding its finality and
11 no impediments exist for a timely return of the original ballot; (c)
12 explain the relevant deadlines for executing and returning all
13 original and corrected ballots by electronic upload, facsimile, and
14 postal mail; (d) explain to any voter who identifies impediments
15 to a timely return of the ballot that it may be returned by the
16 electronic upload and facsimile return options, or by United
17 States Postal Service Express Overnight mail or other overnight
18 delivery method with prepaid postage; and (e) provide
19 appropriate contact information for additional assistance. A copy
20 of Maricopa County election officials' planned notice is attached
21 as Exhibit 4.

22 (3) The Defendants shall provide a report no later than two business
23 days after entry of this Order by the Court in an agreed-upon
24 format to the United States Department of Justice, confirming
25 that each UOCAVA voter has been provided the individualized
26 notice described in paragraph (2) above. If any UOCAVA voters
27 have not been contacted by that date, Defendants shall continue
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1 to attempt to contact such voters and shall provide the United
2 States updates on an agreed upon schedule.

3 (4) Defendants shall file a report with this Court no later than March
4 31, 2018, in a format agreed upon by the parties, concerning the
5 number of UOCAVA ballots received and counted for the
6 February 27, 2018 special primary election.

7 (5) If necessary to ensure compliance with UOCAVA's 45-day
8 transmission deadline of March 10 for the April 24, 2018 special
9 general election, election results for the February 27, 2018
10 special primary election may be formally canvassed and certified
11 in accordance with state law at any time prior to March 9, 2018 if
12 the number of outstanding absentee ballots from UOCAVA
13 voters that have not been returned could not mathematically alter
14 the outcome of the election, subject to amendment, re-canvass, or
15 re-certification to later add any votes from UOCAVA ballots
16 accepted in accordance with this Court's Order. Thus, under the
17 circumstances described in this paragraph, Maricopa County
18 election officials may transmit UOCAVA ballots for the April
19 24, 2018 special general election notwithstanding the possibility
20 that the results of the special primary election may be
21 subsequently re-canvassed and re-certified. These procedures are
22 designed to ensure that state and county election officials can
23 maintain existing canvassing and certification deadlines for the
24 special primary election and can timely transmit UOCAVA
25 ballots to voters by the March 10, 2018 45-day deadline before
26 the April 24, 2018 special general election.

27 (6) If, under the terms of paragraph (5), the results of the primary
28 election are canvassed and certified before March 9, 2018 and

1 there are outstanding UOCAVA ballots that have not been
2 received for a particular party's primary, and the canvassed and
3 certified results for that party's primary show a margin
4 sufficiently small so as to require an automatic recount under
5 Ariz. Rev. Stat. § 16-661, the recount may proceed immediately
6 under the procedures required by state law, and the results of the
7 recount shall include all UOCAVA ballots required to be counted
8 by this Order.

9 (7) If the transmission of UOCAVA ballots for the special general
10 election is delayed up to five days beyond the March 10, 2018
11 deadline due to a delay in canvassing and certifying, or
12 completing an automatic recount of, the results of the special
13 primary election due to the extension of the ballot receipt
14 deadline effected by this Order, the deadline for receipt of special
15 general election ballots returned by UOCAVA voters by postal or
16 express mail, and executed and sent by April 24, 2018, shall be
17 extended beyond April 24, 2018 by the number of days past
18 March 10, 2018 that the ballots were transmitted. No later than
19 two business days following the transmission of UOCAVA
20 ballots for the special general election, the Defendants shall
21 provide a report to the United States Department of Justice
22 specifying the date of transmission of UOCAVA ballots for the
23 special general election, the number of UOCAVA ballots
24 transmitted by method of transmission, and a copy of any notice
25 of receipt deadline extension provided to UOCAVA voters.

26 (8) In the event the ballot receipt deadline for the special general
27 election is extended beyond April 24, 2018 under the terms of the
28 preceding paragraph, election results for the special general

1 election may be formally canvassed and certified in accordance
2 with state law at any time prior to the ballot receipt deadline if
3 the number of outstanding absentee ballots from UOCAVA
4 voters could not mathematically alter the outcome of the election,
5 subject to amendment or re-certification to later add any votes
6 from UOCAVA ballots accepted in accordance with this Court's
7 Order.

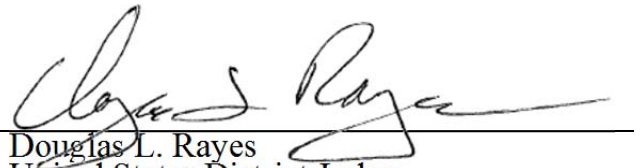
8 (9) Should it at any time appear that, due to a delay in canvassing
9 and certifying, or completing an automatic recount of, the results
10 of the special primary election due to the extension of the ballot
11 receipt deadline effected by this Order, Maricopa County election
12 officials will be unable to transmit UOCAVA ballots for the
13 special general election by March 15, 2018, the Defendants shall
14 promptly notify the United States of the circumstances causing
15 the expected delay, and the parties shall meet and confer to
16 discuss appropriate modification of this Order and other
17 necessary relief from this Court, such as express delivery and
18 return of UOCAVA ballots, alternative transmission methods for
19 UOCAVA ballots, additional notice to UOCAVA voters, and/or
20 other appropriate remedial measures.

21 (10) Defendants shall take such actions as are necessary to assure that
22 UOCAVA voters shall have a fair and reasonable opportunity to
23 participate in future Federal elections, including proposing
24 legislation and taking any administrative actions needed to fully
25 remedy potential UOCAVA violations arising from Arizona law
26 governing the State's special election calendar. The parties agree
27 to confer on the progress of these efforts, and Defendants shall
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1 provide a status report to the United States Department of Justice
2 by June 30, 2018.

3 The Court shall retain jurisdiction over this action through September 30, 2018, to
4 enter such further relief as may be necessary for the effectuation of the terms of this
5 Consent Decree, including entry of such other relief as may be necessary to abate any
6 violation of UOCAVA.

7 Dated this 15th day of February, 2018.

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12 Douglas L. Rayes
13 United States District Judge
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