

**United States Department of Justice  
Uniformed and Overseas Citizens Absentee Voting Act  
Annual Report to Congress  
2013**

**I. Summary**

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 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 2013.

Protecting the voting rights of military and overseas voters remains one of the highest priorities of the Department of Justice (“Department”). In 2013, the Department’s UOCAVA enforcement activities continued in a highly active “off-year” election cycle. In addition to conducting extensive discovery and briefing in previously filed cases, the Department’s 2013 work included monitoring UOCAVA compliance in several States that held special elections to fill Congressional vacancies. We requested that these States confirm to the Department that local election offices transmitted UOCAVA ballots 45 days before the special elections.<sup>1</sup> During these Federal special elections, the Department had to take three enforcement actions to ensure UOCAVA compliance: a lawsuit filed against Illinois, an unopposed order entered in an ongoing case in Alabama, and a letter agreement with South Carolina. Further information about each of these actions is provided herein.<sup>2</sup>

In addition, apart from our enforcement efforts, the Department continued to advocate for legislation to provide even stronger protections for military and overseas voters. 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 May 2013 as part of the Defense Department’s 2013 National Defense Authorization Act proposals,<sup>3</sup> and are similar to a set of proposals transmitted to Congress by the Department of Justice in 2011. In November 2013, a bipartisan group of 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

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<sup>1</sup> The MOVE Act amended UOCAVA to require States to transmit UOCAVA ballots by the 45<sup>th</sup> day before any Federal election, including special elections. *See* 42 U.S.C. § 1973ff-1(a)(8)(A).

<sup>2</sup> In 2013, no jurisdiction sought an undue-hardship waiver from compliance with the 45-day deadline pursuant to the Act, 42 U.S.C. §1973ff-1(g).

<sup>3</sup> *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>.

that would implement several reforms advocated in the Department of Justice's legislative proposals. These provisions would enhance the Department's 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 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 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 has authority to 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. 42 U.S.C. § 1973ff(a); 42 U.S.C. § 1973ff-4(a). The Attorney General has assigned responsibility for prosecuting violations 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. 42 U.S.C. § 1973ff-4(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.<sup>4</sup>

## III. Enforcement Actions by the Attorney General in 2013

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<sup>4</sup> For the 2010 general election, the Department obtained court orders, court-approved consent decrees, or out-of-court agreements in 14 jurisdictions, ensuring that those jurisdictions either met the MOVE Act's 45-day ballot transmission deadline or that they used expedited mailing or other procedures to allow voters a sufficient opportunity to return ballots in time to be counted. *See* U.S. Department of Justice, UOCAVA Annual Report to Congress, 2010.

For the 2012 Federal primary, special, and general election cycle, the Department's UOCAVA enforcement activities resulted in lawsuits filed against seven jurisdictions to remedy delayed ballot transmissions and other violations by those jurisdictions. In the 2012 actions, the Department reached consent agreements with five of the jurisdictions and obtained preliminary injunctions after contested litigation in the other two cases. In other UOCAVA enforcement efforts in 2012, the Department participated as amicus in two cases, and memorialized enforcement activities in letters sent to two other States. *See* U.S. Department of Justice, UOCAVA Annual Report to Congress, 2012.

As noted above, in 2013, the Department's work to ensure compliance with UOCAVA resulted in three enforcement actions in Federal special elections. In addition, in 2013 the Department obtained a final judgment in a case filed in 2012. Copies of the complaints, orders, and letter referenced below are attached to this report.

#### **A. Enforcement Actions Taken to Enforce UOCAVA in Special Elections**

In 2013, the Department took the following enforcement actions to ensure timely transmission of UOCAVA ballots in Federal special elections:

- Illinois: On January 10, 2013, the Department filed a lawsuit against Illinois for failure to provide for transmittal of ballots to UOCAVA voters by the 45<sup>th</sup> day prior to the February 26, 2013 and April 9, 2013 primary and then general special elections for the Second Congressional District. *United States v. Illinois*, No. 13-cv-00189 (N.D. Ill.). The case was resolved by a Consent Decree entered by the Federal district court on January 11, 2013. For both special elections, the Consent Decree mandated the deadlines for transmitting and returning UOCAVA ballots; required Illinois to provide express mail, facsimile, and e-mail options for the delivery and return of UOCAVA ballots; and provided notice, ballot counting, and reporting requirements. The Consent Decree also required Illinois to take actions needed to prevent any future UOCAVA violations arising from Illinois law governing the State's special election calendar. Although legislation was introduced in the Illinois legislature in 2013, the bill was not called for a vote. On October 31, 2013, the Federal district court entered a Supplemental Consent Decree submitted by the parties that requires that the Illinois State Board of Elections recommend legislation and take any administrative actions necessary to fully remedy the potential UOCAVA violations arising from the State's special election calendar. The Supplemental Consent Decree remains in effect until July 31, 2014.
- Alabama: In 2013, the Department took enforcement action regarding a special vacancy election for a congressional seat, in the course of an already pending UOCAVA lawsuit brought by the Department in Alabama.

On February 24, 2012, the Department filed a lawsuit against Alabama for failure to transmit ballots to UOCAVA voters at least 45 days prior to the March 13, 2012 Federal primary election and failure to ensure ballots would be transmitted by the 45<sup>th</sup> day before any Federal primary runoff election that would be needed. *United States v. Alabama*, No. 2: 12-cv-179 (M.D. Ala.). The court granted the Department's motions for preliminary injunctive relief in 2012. See U.S. Department of Justice, UOCAVA Annual Report to Congress, 2012.

As the parties were conducting discovery in 2013, a vacancy arose in Alabama's First Congressional District. On July 26, 2013, following discussions with the Department, Alabama filed an unopposed motion seeking an order in the pending case approving a special election calendar and certain new procedures for conducting

the special election. The court entered the requested order on the same date it was filed, finding that, absent an order of the Court, UOCAVA violations would occur if Alabama conducted the special Federal election on the State's existing schedule. The order provided that the Secretary of State would assume responsibility for transmitting, receiving, and counting all UOCAVA ballots; transmit instant and standard primary run-off ballots for the special primary election; transmit the special general election ballots 45 days before the special general election, and provide for express mailing and pre-paid express receipt of ballots. The order also provided for notice, ballot counting, and reporting procedures.

In addition, during 2013, in the Alabama case, the United States and the State have filed motions for summary judgment regarding the UOCAVA compliance issues that initially led to the Department filing the case in 2012. The motions have not yet been decided and the case remains pending in the district court.

- South Carolina: On March 22, 2013, the Department reached an agreement with South Carolina to ensure that UOCAVA voters were able to receive and return their ballots in time for them to be counted in the State's May 7, 2013 special general election for the First Congressional District. Because a special primary runoff election for the Republican nomination was held on April 2, 2013, a final ballot with the final list of candidates for the May 7, 2013 special election could not be transmitted to UOCAVA voters by the 45-day deadline of March 23, 2013.

Under the agreement, the State agreed to transmit a special ballot to UOCAVA voters on or before March 23, 2013. The ballot devised by the State contained the two Republican party candidates in the runoff election and the other party nominees, and an option of voting a straight Republican ticket or voting for a write-in candidate. Additionally, the State agreed to transmit, by expedited means, the final special general election ballot to all UOCAVA voters as soon as the results of the runoff were certified on April 5, 2013, and to inform voters of the option to return their ballots by express delivery at no cost to the voters. The State agreed to develop instructions, and notice and ballot counting procedures, to effectuate the balloting options for UOCAVA voters in the special election.

In the letter confirming the agreed to procedures, the Department urged South Carolina to seek a permanent legislative solution to ensure that the special election calendar established by state law was compliant with UOCAVA in all circumstances.

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

The Department obtained a final judgment and order in its 2012 litigation against Georgia to obtain compliance with UOCAVA in Federal runoff elections.

- Georgia: On June 27, 2012, the Department filed a lawsuit against Georgia for failure to comply with UOCAVA in runoff elections for Federal office. *United States v.*

*Georgia*, No. 1:12-cv-02230 (N.D. Ga.); *see* U.S. Department of Justice, UOCAVA Annual Report to Congress, 2012.

On February 7, 2013, the Department and Georgia filed cross-motions for summary judgment. On April 30, 2013, the court granted the Department's motion and denied Georgia's cross-motion, finding that the 45-day deadline for transmission of absentee ballots established in 42 U.S.C. § 1973ff-1(a)(8)(A) applies to Federal runoff elections. After providing Georgia an opportunity to submit proposed changes to its election calendar, the court determined that Georgia's proposal to remedy the violation failed to ensure compliance with UOCAVA in Federal runoff elections and issued a final order on July 11, 2013. That order adjusted the dates of Georgia's Federal primary election and Federal general runoff election, beginning in 2014, to allow sufficient time for the State to comply with the 45-day deadline in Federal runoff elections. The final order also permits Georgia to adopt a different election schedule, so long as it complies with UOCAVA. On September 6, 2013, Georgia filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. On October 16, 2013, the district court denied Georgia's motion to stay the final order pending appeal. That appeal remains pending. *See Georgia v. United States*, No. 13-14065 (11th Cir.).

# **Attachment**

### **III. A. Enforcement Actions Taken to Enforce UOCAVA in Special Elections**

# **State of Illinois**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA, )  
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 Plaintiff, )  
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 v. )  
 )  
 THE STATE OF ILLINOIS; )  
 THE ILLINOIS STATE BOARD OF )  
 ELECTIONS; and RUPERT T. )  
 BORGSMILLER, )  
 Executive Director of the Illinois State )  
 Board of Elections, )  
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 )  
 Defendants. )  
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 )  
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Case No. 13-cv-\_\_\_\_  
Judge:

**COMPLAINT**

The United States of America alleges:

1. This action is brought by the Attorney General on behalf of the United States pursuant to 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, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) (“MOVE Act”). 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.” 42 U.S.C. § 1973ff-1.

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4, and brings this enforcement action to ensure that Illinois’s absent uniformed services voters and overseas voters (“UOCAVA voters”) have sufficient opportunity to receive absentee

ballots they have requested in accordance with federal law and submit marked absentee ballots in time to be counted for the February 26, 2013 Federal special primary election and April 9, 2013 Federal special election recently scheduled to fill a vacated seat in the State's 2nd Congressional District. Certain provisions of Illinois law prevent the Defendants from transmitting absentee ballots to UOCAVA voters by the 45th day before these elections for Federal office, as required by Section 102(a)(8)(A) of UOCAVA. Accordingly, UOCAVA voters will not be provided the time specified under Federal law to receive, mark, and submit their ballots and have those ballots counted in those Federal elections.

3. This Court has jurisdiction pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

4. UOCAVA requires Defendant State of Illinois to comply with UOCAVA and to ensure that validly requested absentee ballots are transmitted to UOCAVA voters in accordance with its terms. 42 U.S.C. §1973ff-1.

5. Defendant Illinois State Board of Elections ("Board") is the state body with general supervisory powers over the administration of election laws in Illinois and is comprised of eight members appointed by the Governor. 10 Ill. Comp. Stat. 5/1A-1. Election authorities are the elected officers of the county clerk or Board of Election Commissioners, which are appointed by the Circuit Court in the respective jurisdictions and are responsible for the conduct of the elections, including the administration of absentee voting in their respective jurisdictions. 10 Ill. Comp. Stat. 5/1-1 et seq.

6. Defendant Rupert T. Borgsmiller is the Executive Director of the Illinois State Board of Elections and is sued in his official capacity.

7. 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. 42 U.S.C. § 1973ff-1(a)(8)(A).

8. Pursuant to the Illinois election code, when a vacancy occurs in the office of a representative in Congress from the State (more than 180 days before the next general election), the Governor shall issue a writ within five days following the vacancy setting a date within 115 days to hold a special election to fill the vacancy. 10 Ill. Comp. Stat. 5/25-7(a). On November 21, 2012, Representative Jesse Jackson, Jr. resigned from Congress. The Governor initially set February 26, 2013 as the date for the special primary election and March 19, 2013 as the date for the special election.

9. Public Act 097-1134 of the Illinois General Assembly, signed by the Governor on December 2, 2012, amended the State's special election statute to require the special primary election to be held on February 26, 2013 and to require the date of the special election to be changed from March 19, 2013 to April 9, 2013. Pursuant to the amended statute, the Defendants issued a Special Election Calendar establishing deadlines related to the special primary election and special election.

10. The deadline for transmission of absentee ballots to UOCAVA voters who request them at least 45 days before the February 26, 2013 special primary election for Federal office is January 12, 2013.

11. For the February 26, 2013 special primary election, the Election Calendar permits objections to candidate nominating papers to be filed until January 14, 2013. Although not stated in the Election Calendar, information from State officials indicates that it could take at least two weeks to adjudicate all such objections.

12. The amended State statute requires that, by January 12, 2013, blank state write-in absentee ballots (SWABs) be sent to UOCAVA voters (without an accompanying list of qualified candidates) because a printed ballot will not be available by that date. 10 Ill. Comp. Stat. 5/25-7(b).

13. Defendants' inability to transmit absentee ballots containing or including a final certified list of candidates for the February 26, 2013 special primary election to UOCAVA voters who have validly requested them by January 12, 2013, the 45th day before the special primary election, constitutes a violation of Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A).

14. The deadline for transmission of absentee ballots to UOCAVA voters for the April 9, 2013 special election for Federal office is February 23, 2013. The special primary election will not take place until after this deadline, and the Election Calendar does not require the primary results to be certified until March 12, 2013, and does not require ballots to be sent to UOCAVA voters until March 14, 2013.

15. Defendants' inability to transmit absentee ballots containing or including a final certified list of candidates for the April 9, 2013 special election to UOCAVA voters by February 23, 2013, the 45th day before the special election, constitutes a violation of Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A).

16. An order of this Court is necessary to require Defendants to take corrective action in order to protect the rights granted by UOCAVA and to ensure that Illinois's UOCAVA voters have sufficient opportunity to receive, mark, and submit their ballots in time to have them counted for the February 26, 2013 special primary election and April 9, 2013 special election for Federal office.

WHEREFORE, Plaintiff asks this Court to hear this action pursuant to 42 U.S.C.

§ 1973ff-4 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 containing or including a final certified list of candidates are transmitted to UOCAVA voters at least 45 days in advance of the February 26, 2013 special primary election for Federal office violates Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A);
- (2) Issue a declaratory judgment under 28 U.S.C. § 2201 that the failure of Defendants to ensure that absentee ballots containing or including a final certified list of candidates are transmitted to UOCAVA voters at least 45 days in advance of the April 9, 2013 special election for Federal office violates Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A); and
- (3) 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 UOCAVA voters have sufficient opportunity to receive, mark, and submit their ballots in time to have them counted in the February 26, 2013 special primary election and April 9, 2013 special election for Federal office;
  - (b) To take such steps as are necessary to afford UOCAVA voters who are eligible to participate in Illinois's February 26, 2013 special primary election and April 9, 2013 special election for Federal office a reasonable opportunity to learn of this Court's order;

- (c) To provide reports concerning the transmission, receipt, and counting of ballots for the February 26, 2013 special primary election and April 9, 2013 special election for Federal office pursuant to this Court's order; and
- (d) To take such other steps as are necessary to ensure that Illinois conducts its elections in compliance with UOCAVA in future Federal elections, including special elections.

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.

Date: January 10, 2013

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. )  
)  
THE STATE OF ILLINOIS; )  
THE ILLINOIS STATE BOARD OF )  
ELECTIONS; and RUPERT )  
BORGSMILLER, Executive Director )  
of the Illinois State Board of Elections, )  
)  
Defendants. )  
\_\_\_\_\_ )

Case No. 13-cv-00189  
Judge: Norgle

**CONSENT DECREE**

Plaintiff United States of America initiated this action against the State of Illinois, the Illinois State Board of Elections, and Rupert Borgsmiller, the Executive Director of the Illinois State Board of Elections, in his official capacity (collectively, "Defendants"), to enforce the requirements of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. §§ 1973ff to 1973ff-7. The United States' complaint alleges a violation of UOCAVA arising from certain provisions of Illinois law that prevent the Defendants from transmitting absentee ballots to absent uniformed services voters and overseas voters ("UOCAVA voters") by the 45th day before the recently scheduled special primary election and special election for Federal office, as required by Section 102(a)(8)(A) of UOCAVA. In particular, the State will not be able to transmit ballots to UOCAVA voters 45 days prior to the scheduled February 26, 2013 special primary election and April 9, 2013 special election to fill a vacated seat in the State's 2nd Congressional District. Accordingly, UOCAVA voters will not be provided the time specified under Federal law to receive, mark, and submit their ballots and have those ballots counted in

those Federal elections.

The United States and Defendants, through their respective counsel, have conferred and agree that this action should be settled without the delay and expense of litigation. The parties share the goal of providing UOCAVA voters with sufficient opportunity under Federal law to participate in the February 26, 2013 special primary election and April 9, 2013 special election and future special elections for Federal office. The parties have negotiated in good faith and hereby agree to the entry of this Consent Decree as an appropriate resolution of the UOCAVA violations 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 pursuant to UOCAVA, 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”). 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.” 42 U.S.C. § 1973ff-1.

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4, and this Court has jurisdiction of this action pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

3. UOCAVA requires the State of Illinois to comply with UOCAVA and to ensure that validly requested absentee ballots are transmitted to UOCAVA voters in accordance with the statute’s requirements. 42 U.S.C. §§ 1973ff-1 & 1973ff-6. Defendant Illinois State Board of Elections (“Board”) is the state body with general supervisory powers over the administration of election laws in Illinois and is comprised of eight members appointed by the Governor. 10 Ill.

Comp. Stat. 5/1A-1. Rupert Borgsmiller is the Executive Director of the Illinois State Board of Elections and is sued in his official capacity.

4. Election authorities are the elected officers of the county clerk or Board of Election Commissioners, which are appointed by the Circuit Court in the respective jurisdictions and are responsible for the conduct of the elections, including the administration of absentee voting in their respective jurisdictions. 10 Ill. Comp. Stat. 5/1-1 et seq. Election authorities transmit ballots to UOCAVA voters, receive ballots returned by UOCAVA voters, and count the ballots as part of the election process. The State of Illinois, however, retains responsibility for ensuring compliance with UOCAVA. For purposes of this decree, the parties understand that although the local election authorities will continue to send, receive and count UOCAVA ballots as provided for in state law, as well as provide individual notice to voters as referenced in paragraph 1 of the Order, the State bears the responsibility for ensuring that the requirements of UOCAVA and this consent decree are met.

5. Pursuant to amendments made by the MOVE Act, 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 hardship exemption is obtained pursuant to Section 102(g) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(8)(A).

6. Pursuant to the Illinois election code, when a vacancy occurs in the office of a representative of Congress from the State (more than 180 days before the next general election), the Governor shall issue a writ within five days following the vacancy setting a date within 115 days to hold a special election to fill the vacancy. 10 Ill. Comp. Stat. 5/25-7(a). On November 21, 2012, Representative Jesse Jackson, Jr. resigned from Congress. The Governor initially set

February 26, 2013 as the date for the special primary election and March 19, 2013, as the date for the special election.

7. Public Act 097-1134 of the Illinois General Assembly, signed by the Governor on December 2, 2012, amended the State's special election statute to require the special primary election to be held on February 26, 2013, and to require the date of the special election to be changed from March 19 to April 9, 2013. Pursuant to the amended statute, the Defendants issued a Special Election Calendar establishing deadlines related to the special primary election and special election ("Election Calendar").

8. The deadline for transmission of absentee ballots to UOCAVA voters who request them at least 45 days before the February 26, 2013 special primary election for Federal office is January 12, 2013.

9. The State's current Election Calendar requires that ballots for the February 26, 2013 special primary election be transmitted by January 12, 2013. Candidates were required to file for the open congressional seat by 5 pm on January 7, 2013. The State expects challenges to candidate petitions to be filed, and January 14, 2013, is the deadline to file such challenges. The State has represented that it will certify a ballot to go out to UOCAVA voters on January 15, 2013. Absent an order from this court, the ballot the election authorities would send to UOCAVA voters on that date, in accordance with the amended State statute, would be a blank state write-in absentee ballots (SWABs) (without an accompanying list of qualified candidates) instead of an official printed ballot, 10 Ill. Comp. Stat. 5/25-7(b). Blank SWABs will not satisfy UOCAVA's 45-day transit requirement, Section 102(a)(8)(A) of UOCAVA; 42 U.S.C. § 1973ff-1(a)(8)(A).

10. Under Illinois law, ballots from UOCAVA voters postmarked by midnight on the day before the election will be counted if they are received by the 14th day following Election Day. *See* 10 Ill. Comp. Stat. 5/20-2; 10 Ill. Comp. Stat. 5/20-2.1. Accordingly, for the February 26, 2013 special primary election, ballots from UOCAVA voters must be postmarked by February 25, 2013 and received by March 12, 2013 in order to be counted.

11. Under Illinois law, UOCAVA voters must return marked ballots (i) by mail, (ii) by delivery in person (or by a spouse, parent, child, brother, or sister), or (iii) via delivery by a licensed commercial carrier. 10 Ill. Comp. Stat. 5/20-5, 5/20-6. Illinois law does not expressly allow UOCAVA voters to return ballots by electronic means (by email or facsimile).

12. The deadline for transmission of absentee ballots to UOCAVA voters who request them at least 45 days before the April 9, 2013 special election is February 23, 2013. The State's Election Calendar requires ballots to be sent by March 14, 2013, which is 26 days before the special election. Even if the State's 14-day ballot return deadline is counted, a transmittal deadline of March 14 will not allow UOCAVA voters 45 days to receive, mark, and return their ballots for the April 9 special election.

13. The failure to transmit absentee ballots to UOCAVA voters who requested them by the 45th day before a Federal primary or general election, constitutes a violation of Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A).

14. To avoid the burdens, delays, and uncertainties of litigation and to efficiently and expeditiously promote the parties' shared goal of ensuring that Illinois's UOCAVA voters will have sufficient opportunity under Federal law to participate in the February 26, 2013 special primary election and April 9, 2013 special election for Federal office, the parties agree that this Court should enter an order setting forth amendments to the Special Election Calendar,

including: (1) changing the ballot transmission deadline for the special primary election from January 12 to January 15, 2013; (2) establishing January 31, 2013, as the last day to transmit expedited, individual notice of the final list of official candidates who qualify to appear on the ballot as determined by the State Board of Elections for the special primary election; (3) changing the ballot receipt deadline for the special primary from March 12, 2013 to March 6, 2013; and (4) establishing March 8, 2013, as the last day to transmit the official ballot for the special election. Under this calendar, for the February 26 special primary election ballots would be transmitted to UOCAVA voters no less than 42 days before the date of the election and 49 days before the ballot receipt deadline, and for the April 9 special election, ballots would be transmitted to UOCAVA voters no less than 32 days before the date of the election and 46 days before the ballot receipt deadline.

15. The parties further agree that this Court should enter an order requiring that:

- (a) by January 15, 2013, the State ensure transmittal of an official absentee ballot to each UOCAVA voter who has applied for an absentee ballot on or before January 15, 2013, accompanied by a notice identifying the candidate challenges that have been filed by the January 14, 2013 challenge deadline, stating that such challenges will be adjudicated by the State Board of Elections by no later than January 30, 2013, and advising voters of possible judicial review of any such challenges;
- (b) by January 31, 2013, the State ensure expedited transmittal to each UOCAVA voter of a notice of the final list of candidates who will appear on the ballot for the February 26, 2013 special primary election according to the determination of the State Board of Elections;

- (c) by March 8, 2013, the State ensure transmittal of ballots to each UOCAVA voter who has applied for an absentee ballot;
- (d) the State ensure expedited transmittal of all UOCAVA ballots for both the February 26, 2013 special primary election and April 9, 2013 special election according to the preference of the voter (by mail, email, or facsimile). For those voters who requested that their ballot be sent by mail, the State shall send the ballot by express mail delivery; and
- (e) the State permit all UOCAVA voters the option of returning their marked ballots by express mail at no expense to the voter, or by electronic means, including electronic mail, facsimile, and the on-line marking and return system available to UOCAVA voters in the City of Chicago and Cook County.

The parties reserve the right to modify this agreement as necessary, subject to approval from the Court. For example, the deadline to file challenges to candidate petitions (January 14) has not yet passed. The parties will confer after that deadline and, if it appears that due to the number or complexity of the challenges the process for resolving petition challenges will not be completed by January 30, 2012, the parties may seek appropriate modification of this decree or other relief from the Court. The parties also reserve the right to seek additional supplemental relief if information regarding additional UOCAVA violations is discovered.

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) Defendants shall, upon entry of this decree, ensure that all UOCAVA voters who, on or before January 15, 2013, request absentee ballots for

the February 26, 2013 special primary election for Federal office are transmitted ballots by January 15, 2013 by the requested method. The ballots shall be official ballots identifying the candidates certified on January 15, 2013, and the information provided with the ballots shall include: (a) a notice identifying any candidate challenges that have been filed by January 14, 2013, stating that such challenges will be adjudicated by the State Board of Elections by no later than January 30, 2013, advising that the Board will provide notice to voters of the outcome of those challenges by January 31, 2013, and advising voters of possible judicial review of any such challenges; and (b) appropriate instructions explaining the ballot return deadlines, and the options and procedures for returning a ballot in order for it to be counted. By no later than January 31, 2013, Defendants shall transmit by expedited means to all UOCAVA voters an individual notice of the final list of names of certified candidates who qualify to appear on the ballot for the February 26, 2013 special primary election according to the determination of the State Board of Elections.

- (2) To ensure that Illinois's UOCAVA voters will have sufficient opportunity under Federal law to receive absentee ballots they have requested and to submit marked absentee ballots in time to be counted for the February 26, 2013 special primary election, Illinois shall count as validly cast ballots in the February 26, 2013 special primary election all ballots, including Federal Write-In Absentee Ballots, that

are postmarked on or before February 25, 2013, are received by March 6, 2013 and are otherwise valid; or if received electronically (by email, facsimile, or an online ballot marking and return system) by 7:00 p.m. CST on Election Day.

- (3) Defendants shall, upon entry of this decree, ensure that all UOCAVA voters who, on or before March 8, 2013, request absentee ballots for the April 9, 2013 special election for Federal office are transmitted their ballots by the requested method. The ballots shall be official ballots, and the information provided with the ballots shall include appropriate instructions explaining the ballot return deadlines and the options and procedures for returning a ballot in order for it to be counted.
- (4) To ensure that Illinois's UOCAVA voters will have sufficient opportunity under Federal law to receive absentee ballots they have requested and to submit marked absentee ballots in time to be counted for the April 9, 2013 special election, Illinois shall count as validly cast ballots in the April 9, 2013 special election all ballots, including Federal Write-In Absentee Ballots, that are postmarked on or before April 8, 2013, are received by April 23, 2013, and are otherwise valid; or if received electronically (by email, facsimile, or an online ballot marking and return system) by 7:00 p.m. CST on Election Day.
- (5) The State shall ensure expedited transmittal of all UOCAVA ballots for both the February 26, 2013 special primary election and April 9,

2013 special election according to the preference of the voter (by mail, email, facsimile, or an online ballot marking and return system). For those voters who requested that their ballot be sent by mail, the State shall send the ballot by express mail delivery.

- (6) The State shall provide an option for express mail delivery service and electronic return (the voter may choose either one) for the marked ballots for all UOCAVA voters at no expense to those voters for both the special primary and the special election.
- (7) For purposes of this Decree, the term "postmark" shall include the date contained on the express mail delivery packaging for ballots returned by express mail delivery (or absent a postmark, the date inserted on the certification, as provided in 10 Ill. Comp. Stat. 5/20-8(c)).
- (8) Upon entry of this Consent Decree, the Defendants shall issue a press statement for immediate release, posted immediately on the Illinois's State Board of Elections website and distributed to the Federal Voting Assistance Program (FVAP); International Herald Tribune (<http://www.ihf.com>); USA Today International (<http://www.usatoday.com>); Military Times Media Group ([cvinch@militarytimes.com](mailto:cvinch@militarytimes.com)); Overseas Vote Foundation (<http://www.overseasvotefoundation.org/intro/>); Stars and Stripes (<http://www.estripes.com>); and any other Illinois newspaper or news media Defendants choose to reach UOCAVA voters in the 2nd Congressional district. The news release shall, at a minimum: (a)

summarize this order, including a notice of the specific deadlines for receipt of the ballot for the special primary and special elections; (b) identify the contests for Federal office that will be on the ballot for the February 26, 2013 special primary election and April 9, 2013 special election; and (c) provide appropriate contact information for the State Board of Elections for assistance.

(9) The Defendants shall provide a report to the United States Department of Justice no later than January 16, 2013, concerning the transmittal of UOCAVA ballots for the February 26, 2013 special primary election by local election jurisdictions. The report shall:

a. Certify that absentee ballots were transmitted no later than January 15, 2013, to all qualified UOCAVA voters whose applications for ballots were received and approved by that date; and

b. Indicate, by local election jurisdiction, the number of requests received and the number of UOCAVA absentee ballots transmitted by January 15, 2013, and the method of transmittal thereof.

(10) The Defendants shall provide a report to the United States Department of Justice no later than February 1, 2013, confirming that each UOCAVA voter has been provided individual notice electronically or through other means of the final list of names of certified candidates who qualify to appear on the ballot for the

February 26, 2013 special primary.

(11) The Defendants shall file a report with the United States

Department of Justice no later than March 11, 2013, concerning the transmittal of UOCAVA ballots for the April 9, 2013, special election for Federal office. The report shall:

- a. Certify that absentee ballots were transmitted no later than March 8, 2013, to all qualified UOCAVA voters whose applications for ballots were received and approved by that date; and
- b. Indicate, by local election jurisdiction, the number of requests received and the number of UOCAVA absentee ballots transmitted by March 8, 2013, and the method of transmittal thereof.

(12) The Defendants shall take such actions as are necessary to assure that UOCAVA voters shall have a fair and reasonable opportunity to participate in future Federal elections, including proposing legislation and taking any administrative actions needed to fully remedy the potential UOCAVA violations arising from Illinois law governing the State's special election calendar. Specifically, the State Board of Elections will recommend an amendment to Section 25-7 of the Election Code, providing additional time to schedule special primary elections and special elections to fill vacancies in the office of U.S. Representative in Congress taking into account

the 45 day advance ballot transmittal requirements of UOCAVA.

The parties agree to confer on the progress of these efforts, and

Defendants shall provide a status report to the United States

Department of Justice by June 3, 2013.

The Court shall retain jurisdiction over this action through October 31, 2013, within which the parties may file motions to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree and to enter such relief as may be necessary to abate any UOCAVA violation with respect to future Federal elections.

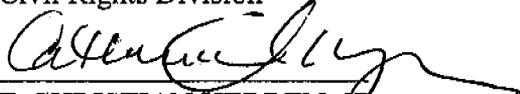
The undersigned agree to entry of this Consent Decree.

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Date: January 10, 2013

For the Defendants:

State Board of Elections

By: *Robert Bergman*

Title: *Executive Director*

Date: *1/10/13*

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SO ORDERED this *11* day of *JAN*, 2013.

*Charles R. Norgle*  
United States District Judge

MA

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. )  
)  
THE STATE OF ILLINOIS; )  
THE ILLINOIS STATE BOARD OF )  
ELECTIONS; and RUPERT )  
BORGSMILLER, Executive Director )  
of the Illinois State Board of Elections, )  
)  
Defendants. )  
\_\_\_\_\_ )

Case No. 13-cv-00189  
Judge: Norgle

**SUPPLEMENTAL CONSENT DECREE**

Plaintiff United States of America initiated this action on January 10, 2013, against the State of Illinois, the Illinois State Board of Elections, and Rupert Borgsmiller, the Executive Director of the Illinois State Board of Elections, in his official capacity (collectively, “Defendants”), to enforce the requirements of the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. §§ 1973ff to 1973ff-7. The next day, this Court entered a Consent Decree (ECF No. 9), finding violations of UOCAVA and ordering the State to take certain actions as an appropriate remedy of those violations of federal law. The Consent Decree put in place deadlines by which ballots were required to be sent to absent uniformed services voters and overseas voters (“UOCAVA voters”) through expedited transmittal and return. It also provided an opportunity for the UOCAVA voters to receive, mark and cast ballots for a special primary and special election which had been scheduled to fill a vacated seat in the State’s 2nd Congressional District. The Consent Decree also required the Defendants to “take such actions as are necessary to assure that UOCAVA voters shall have a fair and reasonable opportunity to

participate in future Federal elections, including proposing legislation and taking any administrative actions needed to fully remedy the potential UOCAVA violations arising from Illinois law governing the State's special election calendar." The Decree specifically required the State Board of Elections to "recommend an amendment to Section 25-7 of the Election Code, providing additional time to schedule special primary elections and special elections to fill vacancies in the office of U.S. Representative in Congress taking into account the 45 day advance ballot transmittal requirements of UOCAVA." The Decree further required the parties agree to confer on the progress of this permanent relief.

On May 31, 2013, the Illinois State Board of Elections submitted a status report stating that legislation amending the State's special election statute had been introduced in the Illinois House of Representatives on February 26, 2013, but that the bill was not called for a vote.

As required by the Consent Decree, the United States and Defendants, through their respective counsel, have conferred on the terms of future relief. In doing so, the parties have been guided by the following principles:

1. Defendant State of Illinois is obligated to comply with UOCAVA in conducting special elections for Federal office;
2. The current State Election Code establishes deadlines that, if adhered to, would prevent the State from complying with UOCAVA in the administration of any special election needed to fill a vacancy in the U.S. House of Representatives;
3. Continued jurisdiction by the Court is appropriate to enter a permanent remedy in this case should Illinois fail to enact legislation to ensure ongoing compliance with UOCAVA in future special elections to fill a vacancy in the U.S. House of Representatives.

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. The Defendants shall take such actions as are necessary to assure that UOCAVA voters shall have a fair and reasonable opportunity to participate in future Federal elections. The Illinois SBOE shall continue recommending legislation and taking any administrative actions needed to fully remedy the potential UOCAVA violations arising from the scheduling of special primary elections and special elections to fill vacancies in the office of U.S. Representative in Congress. In particular, the SBOE will urge changes in the Illinois law governing special election schedules that take into account the 45 day advance ballot transmittal requirements of UOCAVA. The parties agree to confer as needed on the progress of these efforts, and Defendants shall provide a written status report to the United States Department of Justice by June 2, 2014. If curative legislation has not been adopted, then the United States will seek permanent relief from this Court.
2. If there is a vacancy for the office of U.S. Representative in Congress prior to the expiration of this Decree and curative legislation has not been adopted, the United States may move for injunctive relief to remedy the violation of UOCAVA prior to the election. In the case of such a violation, the parties agree that appropriate relief may include, but is not limited to, one or more of the following remedial measures, depending upon the circumstance presented:

- a. An appropriately tailored extension of the deadline for receipt of absentee ballots beyond the fourteen-day extension effectuated by Illinois law, provided that those ballots have been postmarked by election day.
  - b. A requirement that the State ensure expedited transmittal of all UOCAVA ballots for a special primary election and special election according to the preference of the voter (by mail, email, or facsimile).
  - c. A requirement that the State permit all UOCAVA voters the option of returning their marked ballots by express mail at no expense to the voter, or by electronic means.
  - d. Appropriate reporting requirements concerning ballot transmissions for the special election.
3. The Court shall retain jurisdiction over this action through July 31, 2014, within which time the parties may file motions to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree and to enter such relief as may be necessary to abate any UOCAVA violation with respect to future Federal elections.

The undersigned agree to entry of this Consent Decree.

For the Plaintiff:

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Civil Rights Division

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Date: October 29, 2013

For the Defendants:

State Board of Elections

By:   
Title: Executive Director  
Date: 10/29/13

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/s/ Thomas A. Ioppolo  
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SO ORDERED this 31 day of October, 2013.

  
United States District Judge

# **State of Alabama**

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

RECEIVED

2012 FEB 24 P 4: 36

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. )  
)  
THE STATE OF ALABAMA and )  
BETH CHAPMAN, )  
SECRETARY OF STATE )  
OF ALABAMA, in her official capacity, )  
)  
Defendants. )  
)  
)  
)  
\_\_\_\_\_ )

DEBRA P. HACKETT, CLK  
U.S. DISTRICT COURT  
MIDDLE DISTRICT ALA  
Case No.

COMPLAINT

The United States of America alleges:

1. This action is initiated by the Attorney General on behalf of the United States pursuant to 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 Act (“MOVE Act”) of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009).

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4, and brings this action for declaratory and injunctive relief to ensure that absent uniformed services voters and overseas voters (“UOCAVA voters”) will have the opportunity to vote guaranteed by UOCAVA in Alabama’s 2012 elections for Federal office and in future elections for Federal office.

3. This Court has jurisdiction pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

4. Defendant State of Alabama is charged with the responsibility of complying with UOCAVA, and ensuring that validly-requested absentee ballots are transmitted to UOCAVA voters in accordance with its terms. 42 U.S.C. § 1973ff-1.

5. Defendant Beth Chapman is sued in her official capacity as the Secretary of State of the State of Alabama. The Secretary of State is Alabama's chief election officer. Ala. Code § 17-1-3(a); *see* Ala. Code §§ 17-11-5, 17-11-40, 17-11-41, 17-11-50, 17-11-51 (designating rule-making authority and other UOCAVA implementation responsibilities to Secretary of State). The Secretary of State is, among other things, charged with receiving the results of Federal elections from the officials of each county and certifying the results. *See* Ala. Code §§ 17-12-9, 17-12-17, 17-12-21.

6. The principal office of the Secretary of State's Elections Division is in Montgomery, Alabama.

7. In 2009, Congress passed the MOVE Act, which amended UOCAVA to require 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).

8. UOCAVA requires that states establish procedures for at least one method of electronic transmission of blank ballots to UOCAVA voters who request electronic transmission of their ballots. *See* 42 U.S.C. § 1973ff-1(f)(1).

9. UOCAVA requires that states transmit all validly-requested ballots to UOCAVA voters by mail or electronically, in accordance with the voter's designation, 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 hardship exemption waiver is obtained pursuant to Section 102(g) of

UOCAVA. *See* 42 U.S.C. §§ 1973ff-1(a)(8) & (g). The State of Alabama neither sought nor received a hardship exemption waiver under UOCAVA for any Federal election in 2012.

10. Alabama will hold a Federal primary election on March 13, 2012.

11. The 45th day before the March 13, 2012 Federal primary election was January 28, 2012.

12. Under Alabama law, ballots from UOCAVA voters must be postmarked the day before Election Day and received by 12:00 p.m. on Election Day to be counted in the election. *See* Ala. Code § 17-9-51. For the upcoming Federal primary election, this means UOCAVA ballots must be postmarked by March 12, 2012, and received by 12:00 p.m. on March 13, 2012 to be counted.

13. Under Alabama law, primary runoff elections are held on the sixth Tuesday following the primary election. Ala. Code § 17-13-3. Accordingly, in 2012, Alabama will hold a Federal primary run-off election, if necessary, on April 24, 2012.

14. Under Alabama law, the results of the Federal primary election must be certified by March 23, 2012, just 32 days before the scheduled April 24 primary runoff election. Ala. Code §§ 17-13-17, 17-12-15.

15. Under Alabama law, if a primary runoff election is held in 2012, UOCAVA ballots must be postmarked by April 24, 2012 and received by 12:00 p.m. on May 1, 2012 to be counted. Ala. Code § 17-11-18.

16. Despite UOCAVA's 45-day advance ballot transmission requirement for all Federal elections, Alabama law provides less than 45 days between the Federal primary and primary runoff elections.

17. Upon information and belief, Alabama did not provide eligible UOCAVA voters a ballot that could be voted in a Federal primary runoff election, if one is necessary, when it transmitted UOCAVA ballots for the March 13, 2012 Federal primary election, or subsequently.

18. Alabama's administration of Federal primary runoff elections does not comply with UOCAVA's 45-day advance ballot transmission requirement.

19. Under UOCAVA, states must "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).

20. The United States has repeatedly sought to engage the State in discussions about its UOCAVA compliance in the time leading to the 2012 Federal elections.

21. By letter dated November 4, 2011, the United States contacted the Secretary of State requesting the opportunity to discuss with state election officials the State's plans and preparation for UOCAVA compliance during the 2012 Federal elections. Letter from T. Christian Herren, Jr., Chief, Voting Section, U.S. Dep't of Justice, to Beth Chapman, Ala. Sec'y of State (Nov. 4, 2011), attached as Ex. A. The United States received no information in response to that letter.

22. On January 9, 2012, the United States followed up on its November 2011 letter, requesting by telephone to schedule a telephonic conference call with state election officials to inquire about the State's plans and preparation for UOCAVA compliance during the 2012 Federal elections. The State declined this second request.

23. As a result of the State's refusal to provide any information as to its UOCAVA compliance, beginning on February 6, 2012, the United States contacted several Alabama counties directly to inquire whether they timely transmitted validly-requested ballots to UOCAVA voters. County election officials in some counties refused to provide any information sought by the United States. In some cases, election officials stated that the Secretary of State

had advised them not to provide the Department of Justice with any information and told the United States to submit all information requests to the Secretary of State's office.

24. Some county officials, however, admitted that their UOCAVA ballots were transmitted to voters after January 28, 2012, the 45-day advance mailing deadline for the 2012 Federal primary election. Upon information and belief, some counties transmitted ballots more than 8 days after the January 28, 2012 deadline.

25. The Secretary of State has posted a "Notice to UOCAVA Voters" on her website that advises voters that "[t]he Secretary of State has received information indicating that transmission of some UOCAVA ballots for the March 13, 2012 primary election has been delayed." *See* Ala. Sec'y of State, Notice to UOCAVA Voters, <http://www.sos.state.al.us/Elections/Default.aspx> (last visited February 24, 2012), attached as Ex. B.

26. Due to Defendants' failure to ensure the timely transmission of all UOCAVA ballots, on February 7, 2012, the Secretary of State adopted an emergency rule, Ala. Emergency Admin. Rule Ch. 820-2-8-.10-.10ER, which extended the ballot receipt deadline for UOCAVA ballots for the March 13 primary election by eight days, to March 21, 2012, to give UOCAVA voters more time to receive, mark, and return their ballots.

27. On February 15, 2012, the United States transmitted to the State by electronic mail, telefacsimile, and first class mail, a letter reiterating the previous requests for information about the State's UOCAVA compliance and, in particular, requesting information about the circumstances leading to the Notice to UOCAVA Voters published by the Secretary of State. Letter from T. Russell Nobile, Trial Attorney, Voting Section, U.S. Dep't of Justice, to Winfield Sinclair, Ala. Assistant Attorney General (Feb. 15, 2012), attached as Ex. C. The letter also

requested a copy of the State's written plan for providing UOCAVA voters with ballots for runoff elections, as required by UOCAVA. 42 U.S.C. § 1973ff-1(a)(9).

28. On February 21, 2012, the Secretary of State's chief legal advisor responded to the United States' February 15, 2012 letter on behalf of the Secretary of State. The letter contained the admission that "the Secretary has received reports that not all Alabama counties have been able to transmit UOCAVA absentee ballots by the 45<sup>th</sup> day before the March 13, 2012 Primary Election." Letter from Jean Brown, Chief Legal Advisor to Ala. Sec'y of State, to T. Russell Nobile, Trial Attorney, Voting Section, U.S. Dep't of Justice (Feb. 21, 2012), attached as Ex. D [hereinafter "Brown Letter"].

29. Despite this admission, the Secretary of State refused to provide any other information concerning the State's late transmission of UOCAVA ballots. *Id.* at 2.

30. Defendants' failure to ensure that election officials in Alabama transmitted timely-requested absentee ballots to all qualified UOCAVA voters by mail or electronically, in accordance with the voter's designation, not later than 45 days in advance of the March 13, 2012 Federal primary election violates Section 102(a)(8)(A) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(8)(A). This failure will deprive UOCAVA voters of the full opportunity to vote in the March 13, 2012 Federal primary election, as guaranteed by UOCAVA.

31. Defendants similarly failed to ensure absentee ballots were transmitted by mail or electronically to UOCAVA voters 45 days in advance of the November 2, 2010, Federal general election.

32. Accordingly, in each of the two Federal elections held since UOCAVA was amended by the MOVE Act to include a 45-day advance ballot transmission requirement, Defendants failed to ensure that all qualified overseas and military voters who had made timely requests for

absentee ballots in fact had their ballots transmitted by that deadline. *See* 42 U.S.C. § 1973ff-1(a)(8)(A).

33. The Secretary of State's February 21, 2012 response attached a copy of Alabama Emergency Administrative Rule Ch. 820-2-8-.11-.11ER. This rule is entitled "Second Primary Election Written Plan Pursuant to 42 U.S.C. § 1973ff-1(a)(9)," and was adopted by the Secretary of State on February 21, 2012, the same date the State responded to the United States' February 15, 2012 letter. *See* Brown Letter, attached as Ex. D.

34. Alabama Emergency Admin. Rule Ch. 820-2-8-.11-.11ER does not provide any new balloting procedures or modifications to the existing electoral calendar deadlines that preclude Alabama from complying with UOCAVA's 45-day advance ballot transmission requirement for the April 24, 2012 Federal primary runoff election, or for any subsequent Federal primary runoff election.

35. Defendants' failure to promulgate a written plan that ensures that UOCAVA ballots will be made available to Alabama's UOCAVA voters in a manner that provides sufficient time for them to vote in runoff elections violates Section 102(a)(9) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(9).

36. Accordingly, an order of this Court is necessary to require Defendants to take corrective action to protect rights granted by UOCAVA and to ensure that Alabama's affected military and overseas voters have sufficient time to receive, mark, and return their ballots in time to have them counted for the March 13, 2012 Federal primary election, and in all subsequent elections for Federal office, including the April 24, 2012 Federal primary runoff election.

WHEREFORE, the United States asks this Court to hear this action pursuant to 42 U.S.C. §1973ff-4 and 28 U.S.C. §§ 1345 & 2201, and:

(1) Issue a declaratory judgment under 28 U.S.C. § 2201 that the Defendants violated Sections 102(a)(8)(A) and 102(a)(9) of UOCAVA, 42 U.S.C. §§ 1973ff-1(a)(8)(A) and (a)(9), by failing to ensure that absentee ballots were transmitted to UOCAVA voters by January 28, 2012 for the March 13, 2012 Federal primary election, and by failing to provide for transmittal of absentee ballots to UOCAVA voters at least 45 days before primary runoff elections for Federal office when they are held; 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 UOCAVA voters shall have sufficient time to receive, mark, and submit their ballots in time to have them counted in the March 13, 2012 primary election for Federal office and the scheduled April 24, 2012 Federal primary runoff election, if one is required;

(b) To take such steps as are necessary to afford affected UOCAVA voters who are eligible to participate in the March 13, 2012 primary election for Federal office, and the April 24 primary runoff election for Federal office, if one is required, a reasonable opportunity to learn of this Court's order;

(c) To report to the United States and the Court concerning the transmission, receipt and counting of UOCAVA ballots, and related notice procedures, for the March 13, 2012 primary election for Federal office pursuant to this Court's order within 45 days after the primary election; and within 45 days after the scheduled April 24, 2012 Federal primary runoff election, if one is required; and

(d) To take such other steps as are necessary to assure that the State conducts all of its future Federal elections in full compliance with UOCAVA, including requiring

Defendants to provide pre- and post-election reports to the United States as to its UOCAVA compliance efforts for future Federal elections.

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.

Date: February 24, 2012

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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
	)	(WO)
STATE OF ALABAMA and	)	
HONORABLE BETH CHAPMAN,	)	
Secretary of State, in her official capacity,	)	
	)	
Defendants.	)	

**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”). Pursuant to amendments made by the MOVE Act, 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. 42 U.S.C. § 1973ff-1(a)(8)(A). Some issues in this case, though under discussion, remain in dispute. However, as set forth more fully within, the defendants have requested that this Court enter a decree to ensure Alabama’s compliance with UOCAVA in an upcoming special Congressional election. Absent such relief, UOCAVA violations will occur in connection with that election if it is conducted on the proposed schedule. The United States does not oppose this request to the extent it pertains to the upcoming special election only. The Defendants have shown, and the United States does not dispute, that:

- 1) Congressman Jo Bonner, who represents Alabama’s 1<sup>st</sup> Congressional District, has publicly announced his resignation effective August 2, 2013.

2) Pursuant to U.S. Const. Art. I § 2, the vacancy will be filled by a special election called by Governor Robert Bentley.

3) The State of Alabama, particularly the voters of the 1st Congressional District, has a strong interest in seating a new Congressman before Congress returns in early January, 2014.

4) The parties share a commitment that UOCAVA voters be allowed a full opportunity to participate in the special election.

5) To allow transmittal of UOCAVA special primary ballots 45 days before the special primary election, the earliest that the special primary election may reasonably be held is on or about September 24, 2013. The 45th day before September 24, 2013 is August 10, 2013.

6) Because of the number of people who have expressed an interest in qualifying for the special primary election, there is a reasonable likelihood that a special primary runoff election will be necessary in addition to the special primary and the special general election.

7) Allowing time for necessary canvassing of ballots and certification of the results, it would not be possible to complete the special election before Congress returns in January if UOCAVA voters were sent standard ballots 45 days before the special primary runoff and special general election.

8) However, there exist tools in election law, such as the “instant runoff ballot” discussed below, that would allow UOCAVA voters to receive timely ballots for each phase of the special election.

9) With the understanding that these tools will be authorized by the Court, as proposed herein, Governor Bentley has indicated that the special elections shall be held to fill the

vacancy in Alabama's 1st Congressional District following the resignation of U.S. Congressman Jo Bonner on the following dates:

Special Primary Election: September 24, 2013

Special Primary Runoff: November 5, 2013

Special General Election: December 17, 2013

The chart below delineates the various election activities required:

<b>Activity</b>	<b>Date</b>
Proclamation announcing election	Friday, August 02, 2013
Qualifying opens with political parties for the special primary election	Friday, August 02, 2013
Qualifying closes for the special primary election	Monday, August 05, 2013
Political parties certify special primary election candidates to the Secretary of State by noon	Tuesday, August 06, 2013
Secretary of State submits candidate list to ES&S for UOCAVA Instant Runoff Ballots for the special primary election by 5:00 p.m.	Tuesday, August 06, 2013
Secretary of State certifies special primary election candidates to counties	Tuesday, August 06, 2013
ES&S delivers UOCAVA Instant Special Primary Ballots to Secretary of State for special primary election	Thursday, August 08, 2013
Secretary of State mails or electronically transmits, in accordance with the voter's preference UOCAVA Instant Special Primary Ballots to UOCAVA voters who have submitted applications by August 9, 2013	Saturday, August 10, 2013(45 days before the September 24, 2013 special primary election)
<b>SPECIAL PRIMARY ELECTION</b>	<b>Tuesday, September 24, 2013</b>
Counting of provisional ballots for special primary election commencing at noon	Tuesday, October 01, 2013
County executive committee meets immediately after counting of provisional ballots to receive, canvass, and tabulate returns by precinct and publicly declare results for the special primary election	Tuesday, October 01, 2013
County executive committee transmits special primary election results electronically to the state political parties immediately upon conclusion of county-level canvass	Tuesday, October 01, 2013
Secretary of State transmits electronically to the state political parties the count of the UOCAVA Instant Special Primary Ballots	Tuesday, October 01, 2013

Activity	Date
Chairman of state executive committee must meet not later than noon this day to certify to Secretary of State names of candidates to be placed on special primary runoff ballot	Wednesday, October 02, 2013
Secretary of State submits candidate list to ES&S for UOCAVA special primary election ballots by 5:00 p.m.	Wednesday, October 02, 2013
Secretary of State certifies special primary runoff election candidates to counties	Wednesday, October 02, 2013
ES&S delivers UOCAVA ballots to Secretary of State for special primary runoff election	Friday, October 04, 2013
Secretary of State mails or electronically transmits, in accordance with the voter's preference, standard primary runoff ballots to UOCAVA voters who have submitted applications by October 8, 2013. Standard primary runoff ballots shall be transmitted to UOCAVA voters outside of the United States who requested mail transmission of their ballot by express mail.	Tuesday, October 08, 2013
Secretary of State submits candidate list to ES&S for special general election ballot for UOCAVA voters	Friday, October 25, 2013
ES&S delivers special general election ballots for UOCAVA voters	Tuesday, October 29, 2013
Secretary of State mails or electronically transmits, in accordance with the voter's preference Special General Election Ballots to UOCAVA voters who have submitted applications by November 2, 2013	Saturday, November 02, 2013 (45 days before the December 17, 2013 special general election)
<b>SPECIAL PRIMARY RUNOFF</b>	<b>Tuesday, November 05, 2013</b>
Counting of provisional ballots for special primary runoff election commencing at noon	Tuesday, November 12, 2013
County executive committee meets immediately after counting of provisional ballots to receive, canvass, and tabulate returns by precinct and publicly declare results for the special primary runoff election	Tuesday, November 12, 2013
County executive committee transmits special primary runoff election results electronically to the state political parties immediately upon conclusion of county-level canvass	Tuesday, November 12, 2013
Secretary of State transmits electronically to the state political parties the count of the UOCAVA special primary runoff ballots	Tuesday, November 12, 2013
Chairman of state executive committee must meet not later than noon this day to certify to Secretary of State names of candidates to be placed on special general election ballot	Wednesday, November 13, 2013
Secretary of State submits candidate list to ES&S for UOCAVA special general election ballots by 5:00 p.m.	Wednesday, November 13, 2013

<b>Activity</b>	<b>Date</b>
Secretary of State certifies special general election candidates to counties	Wednesday, November 13, 2013
ES&S delivers UOCAVA ballots to Secretary of State for special general election	Friday, November 15, 2013
Secretary of State mails or electronically transmits, in accordance with the voter's preference, standard general election ballots to UOCAVA voters who have submitted applications by November 19, 2013. Standard general election ballots shall be transmitted to UOCAVA voters outside of the United States who requested mail transmission of their ballot by express mail.	Tuesday, November 19, 2013
<b>SPECIAL GENERAL ELECTION</b>	<b>Tuesday, December 17, 2013</b>
Counting of provisional ballots for special general election commencing at noon	Monday, December 23, 2013
County canvassing board meets immediately after counting of provisional ballots to receive, canvass, and tabulate returns by precinct and public declare results for the special general election	Monday, December 23, 2013
County canvassing board transmits special general election results to the Secretary of State immediately upon conclusion of county-level canvass	Monday, December 23, 2013
Last day to receive UOCAVA ballots for the special general election; ballots must be received by noon	Friday, December 27, 2013
Commencing at noon, state canvassing board meets to receive, canvass and tabulate returns and publicly declare the results for the special general election	Friday, December 27, 2013

10) Absent an order of this Court, UOCAVA violations will occur in connection with the upcoming special federal election to fill the expected Congressional vacancy occasioned by Congressman Bonner's announced resignation, if the election is conducted on the proposed schedule.

11) In light of the compressed schedule, the use of election procedures that have not before been used in Alabama, difficulties with UOCAVA compliance in prior elections, and the fact that relief from this Court is necessary to avoid certain UOCAVA violations in connection with the upcoming special federal election if it is conducted on the proposed schedule, it is in the best interest of UOCAVA voters that the Alabama Secretary of State perform certain election

duties, in the special Congressional election only, that are normally performed by local election officials.

**IT IS HEREBY ORDERED** that the defendants' motion for entry of an order concerning a special election (doc. no. 69) is granted as follows:

For purposes of the upcoming special Congressional election only,

1) The Secretary of State will assume responsibility for transmitting, receiving, and counting ballots transmitted electronically or by mail for all UOCAVA voters and, for the 2013 special Congressional election only, will assume the various duties outlined below that, under state law, are performed by county election officials.

2) The Secretary of State will transmit to UOCAVA voters instant run-off ballots for the special primary election ("Instant Primary Ballot") in a form substantially similar to that attached as Exhibit A to this Court's order. The Instant Primary Ballot will allow UOCAVA voters to rank all candidates from one political party in the special primary election in order of preference. In the special primary election, each validly cast vote will be counted for the first choice candidate. In the event of a special primary run-off election between candidates, each validly cast vote will be counted for whichever of the run-off candidates is ranked higher on the ballot.

3) The Instant Primary Ballot will be supplemented by the standard primary runoff ballot, which is the ballot provided all non-UOCAVA voters in the 1st Congressional District ("Standard Primary Runoff Ballot"). This ballot will be mailed or electronically transmitted, in accordance with the voter's preference, to all UOCAVA voters from Alabama's 1st Congressional District (with pending valid requests for such ballots) after certification of the special primary election results. UOCAVA voters outside of the United States who have requested to receive their ballots by mail will have their Standard Primary Runoff Ballot sent by

express mail and will be provided with a pre-paid express mail envelope to return this ballot. UOCAVA voters who did not vote in the special primary election will be able to use this ballot to exercise their right to vote in the special primary runoff. UOCAVA voters who did submit the Instant Primary Ballot may change their votes by voting on the Standard Primary Runoff Ballot, which will supersede the Instant Primary Ballot upon timely receipt. UOCAVA voters who submitted an Instant Primary Ballot and do not wish to change their choice need not submit a Standard Primary Runoff Ballot; their votes will be tabulated according to the preferences ranked on the Instant Primary Ballot.

4) UOCAVA voters will also be transmitted a special election ballot for the special general election (“Special General Ballot”), which will be mailed a minimum of 45 days in advance of the special election date, in a form substantially similar to that attached as Exhibit B to this Court’s order. The Special General Ballot will contain the names of the candidates certified for the special primary runoff election and the names of any qualified independent or third party candidates. The purpose of the Special General Ballot is to provide UOCAVA voters with a ballot that can be transmitted at least 45 days in advance of the special general election, even though candidates must still be finalized following the certification of the results of the special primary runoff. Along with the Special General Ballot, the Secretary of State shall provide detailed instructions for UOCAVA voters from the 1<sup>st</sup> Congressional district to determine the certified results of the special primary runoff election and to cast a vote for their candidate of choice using the Special General Ballot. The Secretary of State shall further instruct such voters of their option to cast a vote for the eventual nominee of their political party of choice. The Special General Ballot will be mailed or transmitted electronically in accordance

with the voter's preference as early as possible following certification of the special primary election results, but not later than November 2, 2013.

5) The Special General Ballot will be supplemented by the standard general election ballot used by all non-UOCAVA voters in the 1st Congressional District ("Standard General Ballot"), which will be mailed or electronically transmitted, in accordance with the voter's preference, to all UOCAVA voters upon certification of the special primary runoff election results. UOCAVA voters outside of the United States receiving their ballots by mail will be provided with their Standard General Ballot sent by express mail and will be provided with a pre-paid express mail envelope to return this ballot.

6) Further, the Secretary of State will communicate with UOCAVA voters utilizing press releases, public service announcements to the extent practicable, and email or telefacsimile notifications to those voters who have provided or will provide email or telefacsimile contact information. In addition, Defendants shall notify the Director of the Federal Voting Assistance Program of the United States Department of Defense ("FVAP") no later than one business day from the date of entry of this Order to request assistance in notifying military and overseas eligible voters of the relief afforded in this Order, and coordinate with the FVAP as necessary to facilitate such notice. This information will ensure that, to the fullest extent possible, UOCAVA voters receive sufficient notification of the special election and of the corresponding absentee ballots. The Secretary may adopt additional means of communicating with UOCAVA voters, as appropriate.

7) In order to fully facilitate the conduct of this special election in compliance with UOCAVA and other applicable election laws, for this special election only, the Secretary of State is expressly authorized and ordered as follows:

- A. To exercise all duties relating to the transmission, receipt, and counting of UOCAVA 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. The State shall bear any and all costs and expenses incident to or incurred pursuant to this special election which arise out of this court order and/or the UOCAVA voting requirements without regard to provisions of state law.
- B. To contract with a vendor for the preparation and ordering of the UOCAVA ballots (both printed and electronic ballots) and election supplies. This specifically includes the ballots unique to UOCAVA voters for this special election.
- C. To prepare and approve the ballots in the forms substantially similar to the ballots attached as Exhibits A and B and all other official UOCAVA ballots required in the special election and to create a ballot record in *Power Profile*.
- D. To determine ballot style for ballots to be issued to each UOCAVA voter, such ballots being authorized to differ in style from the ballots issued to non-UOCAVA voters.
- E. To order and receive UOCAVA 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 UOCAVA voters and transmit both mailed and electronic ballots.

- G. To exercise the duties of the county absentee election manager to process UOCAVA absentee ballot applications and transmit both mailed and electronic ballots.
- H. To perform the Board of Registrars' voter registration duties for those UOCAVA voters who request an absentee ballot by filling out the Federal Postcard Application form pursuant to Federal law and the *Code of Alabama* § 17-11-3(b), and otherwise perform registration duties for any Alabama citizen falling under UOCAVA who is not already registered to vote.
- I. To publicly post the list of UOCAVA voters 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 ballots either by mail or electronically in accordance with the means of transmission requested by the UOCAVA voter. The Secretary of State is further authorized to transmit and receive mailed ballots by express mail.
- K. To communicate with UOCAVA voters regarding the ballots and procedure for voting in this special election utilizing press releases, public service announcements to the extent practicable, and email or telefacsimile notifications to those voters who have provided or will provide email or telefacsimile contact information. As noted above, the Secretary of State shall also seek the assistance of the FVAP in notifying military and overseas eligible voters of the relief afforded in this Order, and coordinate

with the FVAP as necessary to facilitate such notice. The Secretary may adopt additional means of communicating with UOCAVA voters, as appropriate.

- L. To deliver to the Board of Registrars on the day following the special election a copy of the list of all UOCAVA absentee voters.
- M. To utilize a voting tabulation machine for counting the ballots received from UOCAVA voters.
- N. To create procedures, and to provide a copy of those procedures to counsel for the United States, designed to ensure that ballots cast by UOCAVA voters are properly counted and to ensure there is no duplication in counting the UOCAVA voters' ballots in connection with either receipt of both an Instant Primary Ballot and a Standard Primary Runoff Ballot, or in connection with receipt of both a Special General Ballot and a Standard General Ballot.
- O. To receive voted ballots from UOCAVA absentee voters and to secure such voted ballots until the time provided by law to count absentee ballots.
- P. To implement as necessary provisional balloting with regard to the UOCAVA absentee ballots as provided in *Code of Alabama*, § 17-10-2, to include (1) a determination of which UOCAVA absentee 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.

Q. To appoint absentee poll workers to count the UOCAVA absentee ballots on election day and certify the results of said count on 1) the seventh day after the special primary and special primary runoff, and 2) on the tenth day after the special general election (or sooner, if the number of outstanding UOCAVA ballots for the special general election could not mathematically alter the outcome of the election, subject to amendment or re-certification to add any valid UOCAVA ballots returned by the extended receipt deadline).

1. For the special primary and special primary runoff elections, the certified results shall be provided to the chairs of the state political parties immediately upon certification, either by hand delivery or by electronic transmission, for inclusion in each political party's canvass of its special primary and special primary runoff election.
2. For the special general election, the certified results shall be provided to the Secretary of State immediately upon certification for inclusion in the State canvassing board's canvass of the special general election results.

8) The Secretary of State is authorized and directed to count as validly-cast ballots in the special general election any UOCAVA ballots which are executed and post-marked or show a dated endorsement of receipt by another agency of the United States, or other reliable indicia of posting, by the date of the respective election and received no later than noon on the 10<sup>th</sup> day following the election, so long as the ballot is otherwise valid. Election results for the special general election may be certified sooner than December 27, 2013 if the number of outstanding

UOCAVA ballots could not mathematically alter the outcome of the election, subject to amendment or re-certification to add any valid UOCAVA ballots returned by the extended receipt deadline.

9) The Defendants are to report to the Court and to counsel for the United States, as soon as practical, if local election officials or any other responsible party in the 1<sup>st</sup> Congressional District fail to do any of the following:

- A. Provide the Secretary of State a list of all UOCAVA voters who have current absentee ballot applications on file so that the Secretary may process the ballot requests.
- B. Advise the Secretary of State within one (1) business day of any additional UOCAVA registrations, including the name, requested method of transmission, and requested address of delivery, all so that the Secretary may timely process the ballot requests.
- C. Transmit to the Secretary of State within one (1) business day any UOCAVA ballots received, including any UOCAVA ballots cast in-person by UOCAVA voters, so that the Secretary may timely count the ballot.
- D. Certify each county's election results on the seventh day following the special primary election and the special primary run-off election, and immediately on the same date transmit such results to the chair of each state political party *via* facsimile, electronic transmission, or hand delivery, so that the state parties can certify to the Secretary of State their

respective election results and the names to be printed on subsequent ballots and so those ballots may be timely prepared and printed.

- E. Certify each county's election results on the sixth day following the special general election, and immediately on the same date transmit such results to the Secretary of State *via* facsimile, electronic transmission, or hand delivery, so that the state canvassing board can certify the results of the special general election.

10) Defendants shall take all legal and practicable steps to ensure that local election officials and all other responsible persons and entities perform all acts necessary to meet all deadlines set out in this Order.

11) 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.

12) 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 this special election and to effectuate this court's order.

**IT IS FURTHER ORDERED** that defendants shall provide counsel for the United States the following information in a format to be jointly negotiated by the parties:

- A. No later than August 13, 2013, the defendants shall report on the number of UOCAVA ballots requested, the date of transmission, and the method of transmission for all Instant Primary Ballots.
- B. No later than October 11, 2013, the defendants shall report on the number of UOCAVA ballots requested, the date of transmission, and the method

of transmission for all Standard Primary Runoff Ballots sent to UOCAVA voters.

- C. No later than November 4, 2013, the defendants shall report on the number of UOCAVA ballots requested, the date of transmission, and the method of transmission for all Special General Ballots.
- D. No later than November 21, 2013, the defendants shall report on the number of UOCAVA ballots requested, the date of transmission, and the method of transmission for all Standard General Ballots sent to UOCAVA voters. Defendants shall further report by this date the number of UOCAVA ballots returned and counted for the November 5, 2013 Primary Runoff Election, as well as the total number of UOCAVA ballots returned but not counted, including the date of receipt for each and the reason why not counted.
- E. No later than January 6, 2014, the defendants shall report the number of UOCAVA ballots returned and counted for the December 17, 2013 General Election, as well as the total number of UOCAVA ballots returned but not counted, including the date of receipt for each and the reason why not counted.

**IT IS FURTHER ORDERED** that defendants shall provide notice to UOCAVA voters 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 UOCAVA 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 1<sup>st</sup> 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](mailto:cvinch@militarytimes.com)), Stars and Stripes ([www.estripes.com](http://www.estripes.com)), and the Overseas Vote Foundation (<http://www.overseasvotefoundation.org/intro/>).
- C. For UOCAVA voters who provide an email address, email communications.

**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 Chairs of both County Party Executive Committees in each of the six Alabama Counties that comprise the 1<sup>st</sup> Congressional District: Baldwin, Escambia, Mobile, Monroe, Washington and Clarke County (partially within the Congressional District). Defendants shall also provide a copy of this Court's Order to the Chairs of the State Party Executive Committees.

Done this 26th day of July, 2013.

/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 his official capacity,	)	
	)	
Defendants.	)	

**NOTICE CONCERNING SPECIAL ELECTION**

The State of Alabama and the Honorable Jim Bennett, Secretary of State,<sup>1</sup> (the State Defendants) hereby notify the Court as follows:

1. This litigation arises under the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff *et seq.* (“UOCAVA”), as amended.
2. On July 26, 2013, this Court entered an Order concerning the special election to fill the vacancy in Alabama’s 1<sup>st</sup> Congressional District.
3. That Order, *inter alia*, authorized and directed the State Defendants to use an Instant Primary Ballot to enable UOCAVA voters to participate in any special primary runoff election that may be necessary.

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<sup>1</sup> The Secretary of State is an official capacity defendant. Secretary Bennett is automatically substituted for his predecessor pursuant to Fed. R. Civ. P. 25(d).

4. Only two candidates will be competing in the Democratic special primary election set for September 24, 2013. Because one of the two Democratic candidates will necessarily receive a majority of the vote, a Democratic special primary election runoff will not occur.

5. The Secretary of State will send a traditional ballot to UOCAVA voters participating in the Democratic special primary election. Because there will be no Democratic special primary election runoff, these voters will not thereafter receive a Standard Primary Runoff Ballot, and both the Special General Ballot and the Standard General Ballot will contain the name of the Democratic nominee based on the special primary election results.

6. The Order further requires that “[n]o later than August 13, 2013, the defendants shall report on the number of UOCAVA ballots requested, the date of transmission, and the method of transmission for all Instant Primary Ballots.”

7. The Democratic special primary election ballots will be included in the August 13, 2013 reporting, even though the Instant Primary Ballot format will not be used for that primary.

8. An Instant Primary Ballot will be used for UOCAVA voters participating in the Republican special primary election.

9. The United States is aware of the changes of procedure outlined in this Notice and has no objection.

Respectfully submitted,

LUTHER STRANGE (ASB-0036-G42L)  
*Attorney General*

BY:

s/ Misty S. Fairbanks Messick  
James W. Davis (ASB-4063-I58J)  
Misty S. Fairbanks Messick (ASB-1813-T71F)  
*Assistant Attorneys General*

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*Attorneys for the State Defendants*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6<sup>th</sup> day of August, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record: Victor J. Williamson, Amanda Hine, Anna Baldwin, Elizabeth M. Ryan, Erin M. Velandy, Ernest McFarland, Richard Dellheim, Spencer R. Fisher, Stephen M. Doyle, and T. Christian Herren, Jr.

s/ Misty S. Fairbanks Messick  
Of Counsel

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

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

ORDER

It is ORDERED that the notice of amended procedure for special election (doc. no. 72) is approved.

DONE, this the 8th day of August 2013.

          /s/ Myron H. Thompson            
UNITED STATES DISTRICT JUDGE

# **State of South Carolina**



U.S. Department of Justice

Civil Rights Division

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

March 22, 2013

**BY EMAIL AND FIRST CLASS MAIL**

The Honorable Alan Wilson  
Attorney General  
State of South Carolina  
P.O. Box 11549  
Columbia, South Carolina 29211

Dear Attorney General Wilson:

This letter confirms the steps that the State of South Carolina has indicated it will take to remedy the potential violation of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. §§ 1973ff to 1973ff-7, for the May 7, 2013 special general election for Federal office. UOCAVA provides 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." 42 U.S.C. § 1973ff-1(a)(1). Pursuant to amendments 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"), Section 102(a)(8)(A) of UOCAVA also provides that UOCAVA voters who request an absentee ballot at least 45 days prior to a federal election are to be sent ballots (by mail or electronically) no later than 45 days before the election. 42 U.S.C. § 1973ff-1(a)(8)(A). For the May 7, 2013 special Federal general election, the 45-day deadline for sending UOCAVA ballots falls on March 23, 2013. However, due to a runoff election for the Republican nomination, to be held on April 2, 2013, the final ballot for the May 7, 2013 special Federal general election with the final list of candidates cannot be transmitted to UOCAVA voters by the 45-day deadline of March 23, 2013.

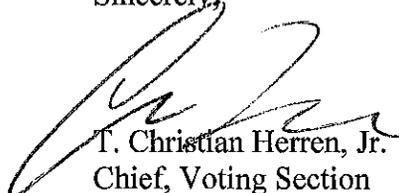
Following inquiries from the Department of Justice regarding South Carolina's compliance with Section 102(a)(8)(A) of UOCAVA, your office reported that county elections officials will transmit to UOCAVA voters on or before March 23, 2013, a special ballot for the May 7, 2013 special general election containing the two Republican party candidates in the runoff election, the Democratic party nominee, the Green party nominee, the Working Families party nominee, and options to vote a straight Republican ticket or vote for a write-in candidate. Additionally, because that special ballot will not contain the final Republican candidate and will not count if marked for the Republican candidate who does not win the April 2 runoff election, the State has agreed to also transmit, by expedited means, the final special general election ballot to UOCAVA voters as soon as the results of the runoff are certified on April 5, 2013. If both the special ballot and the final ballot are returned by a UOCAVA voter, the state has developed procedures to ensure that only the final ballot will be counted.

The information included with the special ballot transmitted by March 23, 2013 will notify UOCAVA voters of the April 2 runoff and the options for voting in the special general election. It will include instructions for voting the special general election ballot and identify the options of downloading a final ballot from the State's elections website on or after April 5, or waiting until the final ballot is transmitted once the results are certified on April 5, 2013. Additionally, the State has agreed to transmit by Federal Express delivery on April 5 the final ballots to UOCAVA voters who requested transmission by mail, and to inform all UOCAVA voters of the option to return their ballots via Federal Express delivery to the county elections office using the State's Federal Express billing number. Additionally, the State has submitted the voting changes associated with the special ballot procedures to the Attorney General for administrative review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

Finally, as we have discussed, the existing state law provisions governing the scheduling of special elections for Federal office fail to ensure compliance with Section 102(a)(8)(A) of UOCAVA. First, when there is a primary runoff election, the required schedule prevents compliance with the 45-day transmittal deadline in the special general election. The conflict results because the runoff must occur two weeks after the primary election, with the special general election to follow just five weeks or 35 days later. *See* S.C. Code Ann. § 7-13-190(B). Second, depending on the date of the vacancy, the State may be unable to comply with Section 102(a)(8)(A) of UOCAVA for the special primary election. If a vacancy occurs on a Friday, Saturday, Sunday or Monday, the special primary election will occur 43 days after the candidate filing period ends and thus there is not enough time to transmit ballots 45 days before the special primary election as required by UOCAVA.

We greatly appreciate the assistance of Assistant Attorney General J.C. Nicholson and State Elections Director Marci Andino in crafting a remedy for the upcoming special general Federal election. However, it is only a temporary solution. We urge the State to seek a permanent legislative solution that will ensure that its special elections calendar complies with UOCAVA for all special primary and special general elections for Federal office, and would request that your office keep us informed of any progress towards that end.

Sincerely,



T. Christian Herren, Jr.  
Chief, Voting Section

cc: J.C. Nicholson, III  
Assistant Attorney General

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

# **State of Georgia**

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Case No.
v.	)	
	)	
THE STATE OF GEORGIA; and	)	<b><u>COMPLAINT</u></b>
BRIAN P. KEMP,	)	
SECRETARY OF STATE	)	
OF GEORGIA, in his official capacity,	)	
	)	
Defendants.	)	
	)	
_____	)	

The United States of America alleges:

1. This action is initiated by the Attorney General on behalf of the United States pursuant to 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 Act (“MOVE Act”) of 2009, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009). 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).

2. The Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. §1973ff-4, and brings this action for declaratory and injunctive relief to ensure that absent uniformed services voters and overseas voters (“UOCAVA voters”) will have the opportunity to vote guaranteed by UOCAVA in Georgia’s 2012 runoff elections for Federal office and in future runoff elections for Federal office.

3. This Court has jurisdiction pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201.

4. Defendant State of Georgia is charged with the responsibility of complying with UOCAVA and ensuring that validly requested absentee ballots are transmitted to UOCAVA voters in accordance with its terms. 42 U.S.C. § 1973ff-1.

5. Defendant Brian P. Kemp is sued in his official capacity as the Secretary of State of the State of Georgia. The Secretary of State is Georgia’s chief election official. Ga. Code Ann. § 21-2-50(b). The Secretary of State is, among other things, responsible for performing the duties imposed under Georgia’s electoral laws. Ga. Code Ann. § 21-2-50(a).

6. The principal office of the Secretary of State's Elections Division is in Atlanta, Georgia.

7. Georgia law requires that a runoff election be held 21 days following a regular or special primary election in which a candidate, including those in elections for Federal offices, failed to receive a majority of the votes cast. *See* Ga. Code Ann. § 21-2-501(a). Similarly, Georgia holds a runoff election 28 days following a regular or special general election in which a candidate, including those in elections for Federal offices, failed to receive a majority of the votes cast. *See* Ga. Code Ann. § 21-2-501(a).

8. On July 31, 2012, the State will conduct a Federal primary election for its delegation to the U.S. House of Representatives. In the event that a candidate for nomination to that Federal office fails to receive a majority of the votes cast, Georgia will hold a primary runoff election 21 days thereafter, on August 21, 2012. *See* Ga. Code Ann. § 21-2-501(a). According to the list of candidates who qualified for the primary election ballot, there are three or more candidates seeking the nomination of one of the two main political parties in 6 of Georgia's 14 Congressional districts.

9. On November 6, 2012, Georgia will conduct a Federal general election for its delegation to the U.S. House of Representatives. In the event a candidate for

that Federal office fails to receive a majority of the votes cast, Georgia will hold a runoff election 28 days thereafter, on December 4, 2012. *See* Ga. Code Ann. § 21-2-501(a).

10. Section 102(a)(8) of UOCAVA requires that states transmit all 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 hardship exemption is obtained pursuant to Section 102(g) of UOCAVA. *See* 42 U.S.C. §§ 1973ff-1(a)(8) & (g). The State of Georgia did not seek or obtain a hardship exemption for the August 21, 2012 Federal primary runoff election.

11. Counties of the State already have received timely requests for absentee ballots before the 45th day prior to the August 21, 2012 Federal primary runoff election and the December 4, 2012 Federal general runoff election from voters who are entitled to vote pursuant to the provisions of UOCAVA.

12. The deadline for transmission of absentee ballots to UOCAVA voters who have requested them at least 45 days before the August 21, 2012 Federal primary runoff election will be July 7, 2012. The deadline for transmission of absentee ballots to UOCAVA voters who have requested them at least 45 days before the December 4, 2012 Federal general runoff election will be October 20, 2012.

13. Georgia law requires that absentee ballots from UOCAVA voters must be received no later than three days after a Federal election, so long as the ballot is postmarked by the date of the election. *See* Ga. Code Ann. § 21-2-386(a)(1)(G). Thus, for the August 21, 2012 Federal primary runoff election, UOCAVA ballots must be received by August 24, 2012. For the December 4, 2012 Federal general runoff election, UOCAVA ballots must be received by December 7, 2012.

14. The Georgia Secretary of State's office has provided to the United States its written plan for Federal runoff elections, established as required by Section 102(a)(9) of UOCAVA, 42 U.S.C. §1973ff-1(a)(9). *See* Attachment A, UOCAVA Written Plan for Federal Runoff Elections ("Written Plan").

15. Georgia law requires that official absentee ballots for runoff elections be transmitted "as soon as possible prior to a runoff." *See* Ga. Code Ann. § 21-2-384(a)(2). According to the Written Plan, when they become available, official absentee ballots for the runoff election are transmitted to UOCAVA voters by the method of transmission they requested for the primary or general election, unless they requested a different method for the runoff election. *See* Written Plan at 2. For voters who requested to receive their absentee ballot electronically without specifying an alternative means of transmission, official absentee ballots are transmitted through the Secretary of State's Electronic Ballot Delivery ("EBD")

system, which is “an automated, overnight delivery process whereby each voter is notified that his/her ballot is available for download.” *See id.*

16. Although not stated in the Written Plan, information from State officials indicates that the list of candidates for a runoff election typically is certified one week following the initial election, since the deadline for counties to certify their results is 5:00 p.m. on the Monday following a Tuesday election, *see* Ga. Code Ann. § 21-2-493(k), with the State generally certifying a final list the next day. However, under Georgia law, the Secretary of State could wait as long as one additional week before certifying election results, *see* Ga. Code Ann. § 21-2-499(b), further delaying the availability of the information necessary for the State to prepare and transmit official absentee ballots for the runoff election.

17. Thus, Georgia’s UOCAVA voters will be sent official absentee ballots no earlier than 14 days before a Federal primary runoff election. For a Federal general runoff election, the information necessary to prepare a ballot potentially would be available one week earlier, but still no more than 21 days before the runoff election.

18. Prior to the transmission of the official absentee ballot for the runoff election, the State sends voters who have requested to receive their absentee ballots by mail a State Write-in Absentee Ballot (“SWAB”) for use in the event of a runoff

election along with their primary or general election absentee ballot. *See* Written Plan at 2-3; Ga. Code Ann. § 21-2-381.2); Ga. Comp. R. & Regs. § 183-1-14-.05(b). For Georgia’s Federal primary election, this mailing will occur no later than June 16, 2012, 45 days before the election. For Georgia’s Federal general election, this mailing will occur no later than September 22, 2012, 45 days before the election. However, because it is not yet available, no list of certified candidates participating in the runoff election is included in these mailings.

19. In addition, voters who requested electronic transmission of absentee ballots can download a SWAB from the Secretary of State’s website or receive a SWAB by email or fax by the 45<sup>th</sup> day before the initial election. *See* Written Plan at 2-3. As with the SWABs sent by mail, the electronic transmission does not include confirmation that a runoff election will be held or a certified list of candidates competing in the runoff election, since no such list is available at the time of the SWAB transmission.

20. According to Georgia’s Written Plan, voters using a SWAB are directed to a website on which the State posts a list of certified candidates “[a]s soon as practicable after an election for which a runoff election will be held . . . .” *See* Written Plan at 2. However, based on information from State officials, the list of certified candidates is not posted on the State’s website until at least 14 days before

a primary runoff election and 21 days before a general runoff election. Thus, for Georgia's August 21 primary runoff election, that information would not be available until August 7, 2012, at the earliest, and for the December 4 general runoff election, the information would not be available before November 13, 2012, at the earliest.

21. Defendants' inability to transmit official absentee ballots – or its SWAB with information identifying the contesting candidates – to UOCAVA voters who have requested them by July 7, 2012, the 45th day before the August 21, 2012 Federal primary runoff election, if held, constitutes a violation of Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A). Defendants' inability to transmit absentee ballots to UOCAVA voters who have requested them by October 20, 2012, the 45th day before the December 4, 2012 Federal general runoff election, if held, constitutes a violation of Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A).

22. An order of this Court is necessary requiring Defendants to take corrective action to protect the rights granted by UOCAVA and to ensure that the State's UOCAVA voters have the opportunities derived from the requirements of UOCAVA with regard to the August 21, 2012 Federal primary runoff election, if held, and the December 4, 2012 Federal general runoff election, if held.

WHEREFORE, the United States asks this Court to hear this action pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. §§ 1345 and 2201, and:

(1) Issue a declaratory judgment under 28 U.S.C. § 2201 that Georgia's failure to ensure that absentee ballots are transmitted to UOCAVA voters by July 7, 2012 for the August 21, 2012 Federal primary runoff election and by October 20, 2012 for the December 4, 2012 Federal general runoff election constitutes a violation of Section 102(a)(8)(A) of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A).

(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 UOCAVA voters are afforded the opportunities derived from the requirements of UOCAVA with regard to the August 21, 2012, Federal primary runoff election, if held, and the December 4, 2012 Federal general runoff election , if held;

(b) To take such steps as are necessary to afford UOCAVA voters who are eligible to participate in Federal runoff elections scheduled for August 21, 2012 and December 4, 2012 a reasonable opportunity to learn of this Court's order;

(c) To report to the United States and the Court concerning the transmission, receipt, and counting of UOCAVA ballots, by county, and related procedures, for the August 21, 2012 and December 4, 2012 Federal runoff elections; and

(d) To take all such other steps as are necessary to assure that the State conducts all future Federal runoff elections in full compliance with UOCAVA.

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.

Respectfully submitted,

Date: June 27, 2012

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

**I. Factual Background<sup>1</sup>**

This case concerns the State of Georgia's runoff absentee voting scheme and 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

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<sup>1</sup> 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.

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).<sup>2</sup>

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<sup>2</sup> 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 Env'tl. 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).<sup>3</sup> The State of Georgia's responsibilities

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<sup>3</sup> 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

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).

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

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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).

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 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"),<sup>4</sup> or the official absentee ballot, to vote in the

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<sup>4</sup> 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

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.*].

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).<sup>5</sup>

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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].

<sup>5</sup> 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].

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 held a hearing on July 3, 2012 [Doc. No. 9].<sup>6</sup> 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,

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Accordingly, § 21-2-499(b) is not relevant and has no application to the present case.

<sup>6</sup> 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.

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].

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.<sup>7</sup> Now before the Court are the parties’ cross-motions for summary judgment.

## 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

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<sup>7</sup> The Court has also permitted and considered a surreply filed by Georgia [Doc. No. 30].

interested party seeking such determination, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

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*, 130 S. Ct. 2743, 2756 (2010); *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200 (11th Cir. 2008).<sup>8</sup>

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<sup>8</sup> 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 F. App’x 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

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.”<sup>9</sup>

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 (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

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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.

<sup>9</sup> 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).

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.

### **III. Legal Analysis**

#### **a. Declaratory Judgment and Irreparable Harm Considerations**

##### **1. Section 1973f-(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.<sup>10</sup>

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)

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<sup>10</sup> The Court will address Georgia’s arguments regarding use of the word “official,” *infra*.

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.

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 (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.” *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 UOCAVA, 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 (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 elections.<sup>11</sup> 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.

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.<sup>12</sup> 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

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<sup>11</sup> 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).

<sup>12</sup> 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).

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.

**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)**

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 *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.<sup>13</sup> 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>.

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

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<sup>13</sup> 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.*].

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 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<sup>14</sup> 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

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<sup>14</sup> 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).

special general election) rather than the minimum forty-five day round trip (*i.e.*, transmittal, voting, and return) period required by UOCAVA.<sup>15</sup> Thus, the SWAB is deficient, despite Georgia's measures for providing the necessary candidate information.

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].

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<sup>15</sup> 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).

There is no definition of the phrase “sufficient time” in UOCAVA.<sup>16</sup> As stated 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.

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

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<sup>16</sup> UOCAVA is 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.

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.

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 (2009) (holding that the right to vote is “fundamental”); *Williams v. Rhodes*, 393 U.S. 23, 30 (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 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**

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.

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*, 188 U.S. 356, 370 (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 *Westberry v. Sanders*, 376 U.S. 1, 17 (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 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**

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. § 19731(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.

## VII. 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 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.

**IT IS SO ORDERED**, this 30th day of April, 2013.

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

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,<sup>1</sup> 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

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<sup>1</sup>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’<sup>2</sup> 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

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<sup>2</sup>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<sup>3</sup> 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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<sup>3</sup>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.<sup>4</sup>

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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<sup>4</sup>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 11<sup>th</sup> 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’ Motion to Stay Permanent Injunction Pending Appeal [Doc. No. 41].

**I. Factual Background**

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 [Doc. Nos. 24, 25]. Concluding that the United States had established its case of a UOCAVA violation on the part of the State of Georgia, on April 30, 2013, the Court granted summary judgment in favor of the United States [Doc. No. 33]. Based on the plan proposed by the United States, on July 11, 2013, the Court entered an order for permanent injunctive relief and judgment, which expanded Georgia's current election calendar to provide the time necessary for transmission of UOCAVA ballots forty-five days before federal runoff elections and hewed as closely as possible to the current election calendar [*Id.* at p. 6]. Said order governs all federal elections in 2014 and beyond; however, it does not prohibit the State of Georgia from adopting its own UOCAVA-compliant election calendar in future legislative sessions [*Id.* at p. 8].

On August 20, 2013, Defendants filed an unopposed motion to alter judgment to provide that the federal primary runoff election shall be held two weeks earlier than the date set forth in the Court's original judgment (*i.e.*, thirteen weeks before the federal general election) [Doc. No. 43]. Defendants sought 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 [*Id.*]. The Court granted the motion and altered the judgment in accordance with the Defendants' request [Doc. No. 44].

On September 6, 2013, Defendants filed their official Notice of Appeal of the Court's orders on the motion for summary judgment, request for injunctive relief, and the motion to alter the judgment [Doc. No. 46].

Defendants have also moved to stay implementation of the permanent injunction (and leave the status quo in place) pending appeal [Doc. No. 41]. *See* Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court for . . . (A) a stay of the judgment or order of a district court pending appeal . . . [or] (C) an order suspending . . . an injunction while an appeal is pending."). After full briefing by both parties, this motion is now ripe for review.

## II. Legal Standard

Federal Rule of Civil Procedure 62(c) governs the granting of a stay of an injunction pending appeal and provides in relevant part:

While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citing *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). "It is instead 'an exercise of judicial discretion,' and '[t]he

propriety of its issu[uan]ce] is dependent upon the circumstances of the particular case.” *Id.* (internal citations omitted). The Court’s discretion is guided by sound legal principles that have been distilled into consideration of the following four factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The movant bears a “heavy burden” and must establish each of these four elements in order to prevail.” *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (citing *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)); see also *Nken*, 556 U.S. at 433–34 (2009) (“The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.”).

In addition, “[a]lthough the first factor (*i.e.*, a strong showing of likelihood of success on the merits) is generally the most important, the movant need not always show that [it] probably will succeed on the merits of [the] appeal.” *Gonzalez ex rel. Gonzalez v. Reno*, No. 00-11424, 2000 WL 381901, at \*1 (11th Cir. Apr. 19, 2000) (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)). When the balance of the equities weighs in favor of granting the stay, the movant need only show a substantial case on the merits. *Larios*, 305 F. Supp 2d at 1337. On the other hand, “[t]he more the balance of equities (represented by the other three factors) tilts in [the opposing

party's] favor, the greater the movant's burden to shown a likelihood of success on the merits." *Id.*

In addition, the latter two factors (*i.e.*, harm to the opposing party and weighing the public interest) merge when the Government is the opposing party, such as in the case *sub judice*. *Nken*, 556 U.S. at 435.

### III. Analysis

#### A. Likelihood of success on the merits of the appeal

##### 1. Statutory interpretation

The Defendants argue a likelihood of success on the merits on the ground that the Court erred in concluding that 42 U.S.C. § 1973ff-1(a)(8)(A), rather than 42 U.S.C. § 1973ff-1(a)(9) governs federal runoff elections – an important legal issue of first impression [Doc. Nos. 41-1, p. 5; 45, p. 5].<sup>1</sup>

Defendants argue that the Court's statutory interpretation failed to give full effect to Congress' language in § 1973ff-1(a)(9) [Doc. No. 41-1, p. 5]. According to Defendants, in concluding that the term "an election" for federal office in § 1973ff-

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<sup>1</sup> The Court acknowledges that Defendants now (and at the summary judgment stage of the case) take the position that § 1973ff-1(a)(8)(A) does not apply to federal runoff elections; however, at the July 3, 2012 hearing on the TRO/preliminary injunction, Defendants led the Court to believe that Georgia conceded that § 1973ff-1(a)(8)(A) applied to federal runoff elections [Doc. No. 17, p. 39:03-11]. In the absence of authority from which the Court could conclude that Georgia was bound by those concession in later stages of the case, the Court considered the entirety of the arguments presented at the summary judgment stage of the case.

1(a)(8) denotes “any” election for federal office, including a runoff election, the Court failed to explain why Congress included the term “runoff” to modify the term “election” in §§ 1973ff-1(a)(6) and (a)(7), but excluded that modifier from § 1973ff-1(a)(8)(A) [Doc. No. 45, p. 4]. In support of their argument, Defendants cite a recent United States Supreme Court opinion in which the Court held that “[w]ords that can have more than one meaning are given content . . . by their surroundings.” *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2254 (2013) (citing *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 466 (2001)).

In response to Defendants’ motion, the United States argues that Defendants have merely restated arguments that have already been considered and rejected by this Court [Doc. No. 42, p. 5].

The Court agrees and adheres to the statutory construction analysis detailed in its April 30, 2013 order [Doc. No. 33]. The standard set forth in *Arizona* is not new, and the Court did not overlook it in performing its analysis. For example, the Court considered the statutory context in its entirety and it recognized that a “given term in the same statute may take on distinct characters from association with distinct statutory objects . . .” [Doc. No. 33, pp. 14, 16 (citing *Envtl. Def. v. Duke Energy Corp.*, 547 U.S. 564, 674 (2007))]. Thus, this standard informed “the conclusion that ‘an election’ means any election out of the four possible types of elections recognized in § 1973ff-1 remains unaltered” [Doc. No. 33, p. 16]. As to Defendants’ arguments

concerning the use of the word “runoff” in §§ 1973ff-1(a)(6) and (a)(7) and its absence from § 1973ff-1a(8)(A), the Court has applied the canons of statutory construction as a means of determining the reach of §§ 1973ff-1(a)(8)(A) and (9). Here, the Court considered the term “an” (used in § 1973ff-1(a)(8)(A)) to mean “any” and, as the term “an election” is used elsewhere in § 1973ff-1 to collectively refer to all four types of federal elections, it was unable to conclude that the use of the term “an election” in § 1973ff-1(a)(8)(A) rather than the identification of one or more of the four types of federal elections was intended to exclude runoff elections from the reach of §1973ff-1(a)(8)(A).

Furthermore, even if the Court were to accept Defendants’ argument that *only* § 1973ff-1(a)(9) governs runoff elections, as discussed *infra*, the analysis does not end there.

Lastly, Defendants failed to address the entirety of the merits of this case in their briefing on the pending motion to stay. As stated in the April 30, 2013 order:

The questions for the Court’s consideration in the declaratory judgment context [were] [1] whether 42 U.S.C. § 1973ff-1(a)(8)(A) applies to federal runoff elections and, [2] if so, whether Georgia’s election scheme for federal runoff elections complies with this section[;] [3] [i]f § 1973ff-1(a)(8)(A) does not apply to federal runoff elections, . . . whether Georgia’s runoff election scheme complies with § 1973ff-1(a)(9)[; and] [4] [i]f, on the other hand, § 1973ff-1(a)(8)(A) does apply and Georgia’s runoff elections scheme is non-compliant, . . . 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.

[Doc. No. 33, pp. 11–12]. Defendants’ motion only addresses questions one and four. A thorough analysis of Defendants’ likelihood of success on the merits of the case also requires consideration of questions two and three. As to question two (*i.e.*, whether Georgia’s election scheme for federal runoff elections complies with this §1973ff-1(a)(8)(A)), at summary judgment, Defendants argued that Georgia’s transmittal of the State Write-in Absentee Ballot (“SWAB”) at least forty-five days prior to any primary or general election for use in the event of a runoff election complied with the forty-five day transmittal period of § 1973ff-1(a)(8)(A). The Court adheres to its previous analysis concluding that the SWAB is merely an emergency measure (of a partial and deficient nature) that does not contain the necessary candidate information that allows UOCAVA voters to effectively exercise their right to vote in runoff elections – and accordingly, does not satisfy UOCAVA’s forty-five day transmittal requirement.

As to question three (*i.e.*, if § 1973ff-1(a)(8)(A) does not apply to federal runoff elections, whether Georgia’s runoff election scheme complies with § 1973ff-1(a)(9)), at summary judgment, Defendants argued that Georgia’s Written Plan for Federal Runoff Elections (which requires transmittal of a SWAB at least forty-five days prior to any primary or general election for use in the event of a runoff election) complied with the “sufficient time” requirement of § 1973ff-1(a)(9) as a matter of law [Doc. Nos. 24, p. 3; 27, p. 16; and 29, p. 9].

Section § 1973ff-1(a)(9) provides in relevant part:

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 manner<sup>2</sup> that gives them sufficient time to vote in the runoff election . . . .

As stated in the Court's prior order, there is a gap in the statutory scheme in that UOCAVA is silent as to the designation of an entity to approve a state's written runoff plan and as to what constitutes "sufficient time" to vote in the runoff election [Doc. No. 33, p. 24, n.16].

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. The Court accepted the forty-five day policy

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<sup>2</sup> So in original. It appears that this sentence should read "in a manner."

determination as reasonable to the extent that the ordinary judicial construction rule may not apply [Doc. No. 33, p. 24, n.16].

Furthermore, even if the “sufficient time” requirement were not deemed to be forty-five days, for those overseas voters who select mail delivery of their ballots, under Georgia’s codified election and results certification time line,<sup>3</sup> 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 [Doc. Nos. 10, p. 16; 33, p. 22]. Thus, the “sufficient time” receipt requirement would still not be met by Georgia’s measures.

Georgia does not meet the requirements under §§ 1973ff-1(a)(8)(A) or (a)(9), as a matter of law. Thus, Defendants have not satisfied their burden of showing a likelihood of success on the merits or a substantial case on the merits.

## **2. Relief granted**

Defendants further argue a substantial likelihood of success on the merits in terms of the scope of relief granted. According to Defendants, the Court crafted a remedy that fails to comply with the doctrine of minimum change and that results in “an excessive and undue burden [placed] on the Defendants to comply with UOCAVA” [Doc. No. 41-1, pp. 5, 7]. Defendants maintain that the Court’s plan results in a substantial change in Georgia law, while the proposed plan submitted by Defendants would have “required only a minimal change” in Georgia law and still

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<sup>3</sup> See O.C.G.A. § 21-2-501(a) (setting forth procedures for runoff elections).

protected the rights of UOCAVA voters [Doc. No. 41-1, p. 3, n.2].<sup>4</sup> Defendants further argue that by changing the date of federal elections, the Court “pre-empted” the Georgia General Assembly’s expressed intent to conduct State and federal elections on the same date [*Id.* at p. 7]. Relying on *Upham v. Seamon*, 456 U.S. 37 (1982) – a case considered by the Court in ordering permanent injunctive relief – Defendants argue that “[i]n fashioning [relief] or in choosing among plans, a district court should not pre-empt the legislative task nor intrude upon state policy any more than necessary” [Doc. No. 38, p. 6].<sup>5</sup>

To remedy Georgia’s UOCAVA violation, some intrusion on state policy was necessary. In issuing the injunctive relief, the Court recognized that the setting of the election calendar is a task best handled by elected representatives; however, in the

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<sup>4</sup> Defendants also contend that the Court rejected their proposed plan, in part, because it would have required a change in Georgia law, while the Court’s resulting order, “substantially” changed Georgia law [Doc. No. 41-1, p. 3]. This is an incomplete statement as to the Court’s order. Defendants’ proposal was rejected on four different grounds [Doc. No. 38, p. 4]. The second ground, which is at issue in Defendants’ present argument, was that Defendants’ proposal recommended an amendment to the Official Code of Georgia, while offering “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. 38, p. 4 (emphasis added)]. Corrective legislative action also seemed unlikely by Defense Counsel’s representation to the Court of an understanding that “members of the [Georgia] General Assembly were aware of the Court’s initial July 5, 2012 Order and . . . no legislation relevant to the issues in this action was introduced during the 2013 legislative session” [Doc. No. 38, p. 4, n.3]. To be clear, as stated above, there is no way to remedy the UOCAVA violations without changing Georgia law as to the dates of federal elections. Defendants’ plan was deficient in that it contained proposals to change Georgia law, without reasonable assurances (or even a likelihood) that there would be requisite legislative action (or even legislative consideration) on the proposed changes.

<sup>5</sup> As noted in the Court’s prior order, in considering the matter of injunctive relief the Court was guided by the doctrine of minimum change, which it borrowed from redistricting case law [Doc. No. 38, p. 6].

face of the Georgia General Assembly's failure to act in its 2013 legislative session and in the absence of reasonable assurances of action in the 2014 legislative session, the Court was forced to act swiftly to prevent future UOCAVA violations. Contrary to Defendants' arguments, the Court could not adopt Defendants' proposed remedy/plan because, while it called for an extension of the ballot receipt deadline, the plan did not comply with the UOCAVA mandate that validly requested absentee ballots be transmitted no later than forty-five days **before** a federal election [Doc. No. 38, p. 3].

In addition, as stated by the United States in its brief, it is important to consider fully the guidance offered by *Upham*:

Whenever a district court is faced with entering an interim [relief] order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution [or federal statute] with the goals of state political policy." An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect.

456 U.S. at 43. The Court's order reconciled the requirements of UOCAVA and Georgia political policy in the form of federal election date changes that remedied the statutory defect, satisfying the doctrine of minimum change.

As such, Defendants have failed to demonstrate a substantial likelihood of success on the merits as to the matter of injunctive relief.

## B. Balancing of the Equities

Defendants argue that they will suffer irreparable harm if their Motion to Stay the permanent injunction pending appeal is not granted. The cited irreparable harm encompasses (1) “substantial costs” incurred in conducting separate State and federal elections; (2) unnecessary logistical challenges associated with the administration of two separate primary elections; and (3) the undue burden on Georgia voters in having to vote in two elections, rather than one [Doc. No. 41-1, p. 7]. Defendants further state that “[t]he cost in terms of both the time and financial expense to implement the changes to Georgia’s election calendar are inestimable at this time” [*Id.*].

As stated in the Court’s summary judgment order, “[w]ithout 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” [Doc. No. 33, p. 26]. Accordingly, this ground does not weigh in favor of a stay.

As to the Defendants’ logistical challenges arguments, the Court notes that its original injunctive relief order was issued on July 11, 2013 [Doc. No. 38], just a little under eleven months in advance of the first federal primary election to be held on June 3, 2014 [*See* Doc. No. 38, p. 9]. Thus, there is sufficient time to plan for any logistical challenges in holding 2014 Georgia elections.

As to the Defendants' burden arguments, the Court is unable to conclude that allowing all voters a full and fair opportunity to vote, even if it requires them to venture to the polls more than once, is an undue burden, such as a poll tax or a literacy test; it maybe an inconvenience but it is not an obstacle to the right to vote. *See Black's Law Dictionary* 223 (9th ed. 2009) (defining "undue burden" as "[a] substantial and unjust obstacle to the performance of a duty or enjoyment of a right.>").

To lessen the inconvenience to in-state voters, the State of Georgia has enacted convenience features (such as absentee voting and advance voting), providing the voters with a variety of options for exercising their right to vote and lightening any perceived burdens. *See* O.C.G.A. § 21-2-385.

Defendants further argue that there will be irreparable harm in the event of a federal general runoff election because that election will not be held until after the start of the next Congressional session. *See* U.S. Const. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day."). According to the Defendants, the voters of Georgia will not be properly represented until after Congress has already commenced its work, as a result of the delay in the seating of Georgia's elected representatives in Congress [Doc. No. 41-1, p. 8]. Defendants argue that Georgia voters have a strong interest in preventing any delay in the seating of their elected representatives in Congress [Doc. No. 45, p. 7].

The Court recognizes this interest, as indicated in the injunctive relief order [Doc. No. 38, p. 7, n.4], and has heavily pondered the matter of alternative election dates. However, there appears to be no feasible work-around, as the calendar proposed by Georgia (*i.e.*, allowing UOCAVA ballots to be returned up to and including December 30, 2014) would likely yield a similar result (after including the time period necessary for results certification) and shifting the general runoff election date to an earlier time in December will likely chill voter turnout as the election would occur during the height of the December holiday season [*Id.*].

Ultimately, as Defendants' themselves have stated, "[t]he instances in which federal runoff elections occur in a primary election are rare. The instances in which federal runoff elections occur in a general election are even rarer" [Doc. No. 29, p. 12 (emphasis added)]. In light of this rarity, the Court finds that the balance of the equities favors allowing the ordered injunctive relief to stand, in the absence of a stay.<sup>6</sup>

Defendants further argue that if they succeed on appeal they will have suffered an irreparable injury because in the interim they will have had to completely change their entire election calendar and election practices to comply with the Court's July

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<sup>6</sup> The Court recognizes the Defendants' citation to *United States v. Alabama*, 2:12-cv-00179-MHT-WC (M.D. Ala. July 26, 2013), in which the district court recognized Alabama's "strong interest in seating a new Congressman before Congress returns in early January, 2014" [Doc. No. 41-3, p. 3, ¶ 3]. The *Alabama* court recognized that there exists tools in election law, such as the "instant runoff ballot," that allow for timely receipt of ballots by UOCAVA voters [Doc. No. 41-3, p. 3, ¶ 8]. Said order was presented by the State of Alabama, without opposition from the United States. No such proposal has been presented to this Court.

11, 2013 order) [Doc. No. 45, p.6]. The Court is not persuaded by this argument. In the event Defendants are successful on appeal, they can revert to the election calendars and practices that they had established prior to the Court's July 11, 2013 injunctive relief order.

The Court must next consider the harm to the United States as a result of a stay. As stated above, this consideration merges with the public interest analysis because the United States is the opposing party. *Nken*, 556 U.S. at 435. Defendants argue that a stay would not result in any harm to the public interest but rather would ease public confusion. According to Defendants, "the Court's Order will likely result in confusion since the Court ordered that the State of Georgia hold different federal and state political party primary elections while keeping runoff elections for federal and state political party primaries and nonpartisan elections on the same date" [Doc. No. 41-1, p. 9]. This is a mischaracterization of the Court's order, which addressed only federal elections to be held in the State of Georgia. In the absence of a constitutional or a federal statutory basis, the Court has no authority to alter the state and local political party elections. It appears that the essence of the Defendants' argument is that the Court's order *results* in different federal and state political party primary election dates. The Court thoroughly considered this matter in issuing its ruling; however, federal election dates must be moved to ensure UOCAVA compliance and, in the absence of the Georgia Legislature moving the date for the state political party

elections to the same date as the Court-ordered federal election dates, the resulting difference in federal and state election dates is unavoidable.

It also appears that there is a likelihood that the Georgia General Assembly will change state election dates to coincide with the federal election dates in the near future. More specifically, Defendants state in their reply brief:

Defendants expect that the Georgia General Assembly will consider legislation during the 2014 session to amend Georgia law so that the State primary election and State primary runoff election shall be held on the same date as the State federal primary election and the State federal primary runoff election. This will minimize the financial and logistical issues for the elections officials who administer the State and federal elections and decrease potential voter confusion.

[Doc. No. 45, pp. 7-8]. The anticipated legislative action will make the matter of public confusion essentially moot. Even if the expected legislative action does not materialize, in accordance with the injunctive relief order, Defendants will be required to engage in a public information campaign of the date changes [Doc. No. 38, p. 8]. A public information campaign will lessen the potential for voter confusion.

On the other hand, the effect of a stay will be that the State of Georgia will conduct 2014 federal elections under its current election scheme, which the Court has found does not satisfy the forty-five day UOCAVA transmittal requirement and which may hinder the ability of UOCAVA voters to effectively exercise their right to vote. As noted in the Court's prior order, Congress introduced the Military and Overseas Voter Empowerment Act ("MOVE Act") because our legislators were

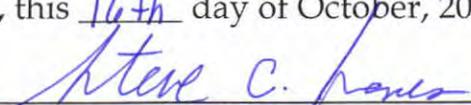
alarmed by the fact that active military members, their families, and thousands of other American citizens who were overseas could not cast a ballot while they served our country or lived overseas. 156 Cong. Rec. S4513, 4514 (daily ed. May 27, 2010) (statement of Sen. Charles Schumer). No right is more precious than the right to vote; even the most basic of other rights are illusory if the right to vote is undermined. *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*, 188 U.S. 356, 370 (1886)). Thus, the public interest will be disserved if a stay is granted because UOCAVA voters will be subject to one more election cycle that does not provide the requisite forty-five day ballot transmittal period.

On the whole, the Court declines to sanction another election cycle that does not comply with UOCAVA. Here, the equities do not weigh in favor of granting a stay.

### Conclusion

The Court finds that Defendants have not met their heavy burden of establishing that a stay of the permanent injunction is warranted pending appeal. Accordingly, Defendants' Motion to Stay Permanent Injunction Pending Appeal [Doc. No. 41] is hereby **DENIED**.

IT IS SO ORDERED, this 16<sup>th</sup> day of October, 2013.

  
HONORABLE STEVE C. JONES  
UNITED STATES DISTRICT JUDGE