

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

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

**CONSENT DECREE**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The undersigned agree to entry of this Consent Decree:

For the Plaintiff United States of America:

R. BOOTH GOODWIN II  
United States Attorney

VANITA GUPTA  
Acting Assistant Attorney General  
Civil Rights Division

By: /s/ Gary L. Call  
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Date: November 3, 2014



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

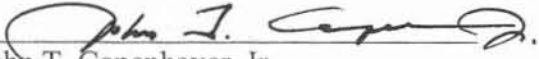
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***Counsel for Natalie E. Tennant, Secretary of State of the State of West Virginia***

Date: November 3, 2014

SO ORDERED this 3rd day of November, 2014.

  
\_\_\_\_\_  
John T. Copenhaver, Jr.  
United States District Judge

# Exhibit 1



PERSONNEL AND  
READINESS

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

OCT 20 2014

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

Dear Secretary Tennant:

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

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

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Jessica L. Wright".

Jessica L. Wright

Enclosure:  
As stated

## EXPLANATION AND RATIONALE

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

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

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

#### I. Background and Initial Findings

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

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

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

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

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

<sup>4</sup> *Formerly* 42 U.S.C. § 1973ff-1(g)(2)(B)(ii).

<sup>5</sup> *Formerly* 42 U.S.C. § 1973ff-1(a)(8)(A).

<sup>6</sup> 52 U.S.C. § 20302 (g)(2)(B) (*formerly* 42 U.S.C. § 1973ff-1(g)(2)(B)).

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

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

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

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

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

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

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<sup>7</sup> Formerly 42 U.S.C. § 1973ff-1(a)(8)(A)); see also 52 U.S.C. § 20302 (g)(2)(B)(i) (formerly 42 U.S.C. § 1973ff-1(g)(2)(B)(i)).

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

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

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

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

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

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

## II. The State Has Shown Undue Hardship

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

<sup>9</sup> 52 U.S.C. § 20302 (g)(1)(D) (formerly 42 U.S.C. § 1973ff-1(g)(1)(D)).

<sup>10</sup> Formerly 42 U.S.C. § 1973ff-1(g)(1)(A).

<sup>11</sup> State ex rel. McDavid, et al. v. Tennant, et al., No. 14-0939 (W. Va. Oct. 1, 2014), <http://www.courtswv.gov/supreme-court/memo-decisions/fall2014/14-0939memo.pdf>.

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

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

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

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

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

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

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<sup>12</sup> 52 U.S.C. § 20302 (g)(2)(A) (formerly 42 U.S.C. § 1973ff-1(g)(2)(A)).



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

#### **IV. Conclusion**

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

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

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<sup>13</sup> Formerly 42 U.S.C. § 1973ff-1(a)(8)(A).

<sup>14</sup> Formerly 42 U.S.C. § 1973ff-1(g)(2).

# Exhibit 2

**NOTICE FROM THE**  
**WEST VIRGINIA SECRETARY OF STATE**

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

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

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

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

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

Fax: (304)-357-0613  
Email: [voter@kanawha.us](mailto:voter@kanawha.us)

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