No. 14-11298-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

THE STATE OF ALABAMA and JIM BENNETT,
THE SECRETARY OF THE STATE OF ALABAMA,
in his official capacity,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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No. 14-11298-DD
United States v. *State of Alabama, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The United States hereby files this Certificate of Interested Persons And Corporate Disclosure Statement pursuant to Eleventh Circuit Rule 28-1(b). The United States certifies that it has reviewed the Certificate of Interested Persons And Corporate Disclosure Statement that Appellants filed on June 20, 2014. The United States agrees that Appellants' Statement accurately identifies the interested persons, with one exception. Jocelyn F. Samuels, formerly the Acting Assistant Attorney General for Civil Rights, is no longer employed by the Department of Justice. In addition to the persons included on Appellants' Certificate, the United States adds the following individual, whom it substitutes for Ms. Samuels as an interested person:

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Acting Assistant Attorney General for Civil Rights
United States Department of Justice.

s/ Jodi B. Danis
JODI B. DANIS
Attorney

Date: August 27, 2014

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument because it may assist the Court in determining whether the 45-day deadline for transmitting absentee ballots before a federal election, imposed by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. 1973ff-1(a)(8)(A), encompasses federal runoff elections. This is an issue of first impression among the federal courts of appeals,

and this Court is now considering this issue in *United States* v. *Georgia*, No. 13-14065 (11th Cir.), oral argument held June 13, 2014.

STATEMENT OF JURISDICTION

This is an appeal from the district court's final judgment in a case brought under UOCAVA. The district court had jurisdiction pursuant to 42 U.S.C. 1973ff-4 and 28 U.S.C. 1345.

On February 11, 2014, the district court entered its Final Judgment and Order granting summary judgment to the United States, and declaring that the State of Alabama's runoff election statute violates the 45-day advance ballot transmittal deadline of 42 U.S.C. 1973ff-1(a)(8)(A) (Subsection (a)(8)(A)). On March 4, 2014, the district court entered a Consent Order providing relief. Doc. 124. This Court has jurisdiction pursuant to 28 U.S.C. 1291 because, regardless of whether the February 11, 2014, Order or the Consent Order (as amended on March 14, 2014) constituted the final appealable order in this case (see Ala. Br. 13-14), Alabama's notice of appeal was timely. Doc. 128-129; Fed. R. App. P. 4(a)(B)(i).

STATEMENT OF THE ISSUES

1. Whether the 45-day advance ballot transmittal deadline of 42 U.S.C. 1973ff-1(a)(8)(A), which applies to "an election for Federal office" and explicitly

exempts only an election for which a State has received a waiver under 42 U.S.C. 1973ff-1(g), applies to runoff elections for federal office.

2. Whether, if the Court determines that only 42 U.S.C. 1973ff-1(a)(9) (Subsection (a)(9)) applies to federal runoff elections, it should remand this case so the parties can develop a record, and the district court can make findings, about whether Alabama has a written runoff election plan that ensures UOCAVA voters sufficient time to vote as Subsection (a)(9) requires.

STATEMENT OF THE CASE

1. Nature Of The Case

This case presents a dispute over which provisions of UOCAVA, 42 U.S.C. 1973ff *et seq.*, as amended by the Military and Overseas Voter Empowerment Act (MOVE Act), Pub. L. No. 111-84, Subtitle H §§ 575-589, 123 Stat. 2190, 2318-2335 (2009), apply to federal runoff elections. Doc. 120-121. The United States alleged that Alabama and its Secretary of State (collectively, Alabama) violated UOCAVA's 45-day advance ballot transmittal rule when conducting its 2012 federal primary elections, and would violate UOCAVA for any federal primary runoff elections. Doc. 1; 42 U.S.C. 1973ff-1(a)(8)(A) (Subsection (a)(8)(A)). A stipulated remedial order and subsequent state legislative amendments resolved the United States' claims regarding regularly scheduled federal elections. See *United*

States v. *Alabama*, No. 2:12-cv-00179-MHT, 2014 WL 200668, at *1 (M.D. Ala. Jan. 17, 2014). The sole issue remaining on appeal is Alabama's obligation to comply with Subsection (a)(8)(A)'s 45-day deadline for federal runoff elections. See *ibid.*

Alabama contends on appeal that 42 U.S.C. 1973ff-1(a)(9) (Subsection (a)(9)), which requires States to create a written runoff election plan, negates the 45-day deadline of Subsection (a)(8)(A) with respect to runoffs. It argues that Subsection (a)(9) uses the term "sufficient time" to define the applicable period for transmittal and receipt of runoff ballots. The United States contends that the plain language of UOCAVA dictates that both Subsection (a)(8) and Subsection (a)(9) apply to runoff elections and thus the advance ballot transmittal requirement for runoff elections is 45 days absent a waiver.

The United States further contends that if this Court were to disagree and to hold that only Subsection (a)(9) applies to runoff elections, a remand is required. Contrary to Alabama's assertion, the United States' Subsection (a)(9) claim is not moot. The only available evidence reflects the expiration of an emergency administrative rule Alabama enacted as its written plan. There is no evidence in the record about whether Alabama currently has a written runoff plan, or whether, under any reasonable definition of the term, Alabama's runoff election scheme

provides voters covered by UOCAVA (UOCAVA voters)[1] "sufficient time" to vote. The district court did not address that issue. On remand, if one is necessary, the Consent Order provision requiring Alabama to create a written runoff plan for the 2016 runoff elections should remain in place because there is no evidence that the State has complied with that provision or its independent statutory obligation pursuant to Subsection (a)(9).

2. Course Of Proceedings And Dispositions In The Court Below

The United States' February 24, 2012, complaint alleged that Alabama would violate Subsection (a)(8)(A) for any federal primary runoff election because state law sets runoff elections only 42 days after an initial election. Doc. 1, at 8-9. The complaint also alleged that Alabama violated Subsection (a)(9) by failing to promulgate a written plan that ensured that runoff ballots would be transmitted in sufficient time for UOCAVA voters to vote in runoff elections. Doc. 1, at 7-8. The complaint sought declaratory and injunctive relief. Doc. 1, at 8-9.

[1] UOCAVA covers only certain categories of absentee voters – United States citizens who are members of the uniformed services and are absent from the jurisdiction where they are qualified to vote because they are on active duty (or a qualifying spouse or dependent), or United States citizens who are qualified to vote and are currently overseas. See 42 U.S.C. 1973ff-6.

On February 27, 2012, the United States filed a motion for temporary restraining order and preliminary injunctive relief. Doc. 5-6. The district court granted injunctive relief that required Alabama to file county-specific reports on UOCAVA ballot activity and to meet and confer with the United States. Doc. 8, at 9-10. After Alabama filed reports reflecting widespread UOCAVA violations, the district court issued a preliminary injunction on March 7, 2012, requiring Alabama to take specific steps to comply with UOCAVA for the rest of the 2012 election cycle and to remedy its recent UOCAVA violations. Doc. 21, 23.

On November 5, 2013, Alabama moved for partial summary judgment regarding Subsection (a)(8)(A)'s application to federal runoff elections. The next day, the United States filed a cross-motion for summary judgment encompassing all of its claims. See Doc. 120, at 2.

On January 17, 2014, the court granted the parties' joint motion for a remedial order that resolved the United States' claims alleging UOCAVA violations during the 2012 initial primary and general elections. That order left the runoff claims unresolved. *Alabama*, 2014 WL 200668, at *3. On February 11, 2014, the district court granted the United States summary judgment on its claim that Alabama violates Subsection (a)(8)(A)'s 45-day rule for federal primary runoff elections. Doc. 120, at 34.

On February 25, 2014, Alabama filed an unopposed relief proposal. Doc. 122. On March 4, 2014, the district court entered a Consent Order that was amended on March 14, 2014, and included the proposed relief. Doc. 124, 127. Alabama's appeal followed. Doc. 129.

STATEMENT OF THE FACTS

1. UOCAVA And Alabama State Law

a. Primary Elections

In 2009, the MOVE Act amended UOCAVA to require States to transmit absentee ballots to UOCAVA voters no later than 45 days before "an election for Federal office," if those voters' requests for absentee ballots are received by that time, unless a State receives a waiver from the 45-day deadline under UOCAVA's undue hardship exemption. See 42 U.S.C. 1973ff-1(a)(8)(A) and (g). Subsection (a)(9) of UOCAVA requires States with federal runoff elections to "establish a written plan that provides absentee ballots are made available to [UOCAVA voters] in manner that gives them sufficient time to vote in the runoff election" (hereinafter "Subsection (a)(9)'s written plan requirement"). 42 U.S.C. 1973ff-1(a)(9).

Alabama law requires a "second" or runoff election[2] when no candidate receives the majority of votes in a primary election. Ala. Code § 17-13-18 (2014). In non-presidential election years, Alabama holds its federal primaries on the second Tuesday in June; it conducts federal primaries on the second Tuesday in March during presidential election years. Under state law a federal primary runoff election is held 42 days later, on the sixth Tuesday after the primary. Ala. Code § 17-13-3(a). The combination of Alabama laws governing elections currently makes it impossible for the State to comply with the 45-day advance ballot transmittal requirement of Subsection (a)(8)(A) for primary runoff elections.

b. Time Needed To Prepare Primary Runoff Ballots

The Secretary of State (Secretary) is Alabama's Chief Election Official, and probate judges serve as the chief election officials in each of Alabama's 67 counties. Ala. Code § 17-1-3 (2014).

[2] Alabama law appears to use the phrase "second primary" interchangeably with "runoff primary." See Ala. Code § 17-13-3(a). For consistency and clarity, the United States refers to such an election as a "primary runoff election."

Although Alabama law schedules primary runoff elections 42 days after primary elections (and extends the ballot receipt deadline for UOCAVA voters)[3], the actual time that UOCAVA voters are provided to receive and return primary runoff election ballots is much shorter. Alabama's political parties have ten days after the primary election to tabulate the election results and certify them to the Secretary. Ala. Code § 17-13-17 (2014). The political parties' certification deadline falls on a Friday, after which the Secretary has another two *business* days to make a final certification of the primary runoff candidates to each county's probate judge. Ala. Code § 17-13-18.[4] The Secretary's certification deadline, which falls on the second Tuesday after the primary, ends what amounts to a 14-day certification process for Alabama's primary elections under state law.

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[3] When the United States filed its Complaint, all ballots from UOCAVA voters, except for primary runoff election ballots, had to be received by noon on election day to be counted. See Ala. Code § 17-9-51 (2013). In response to this lawsuit, Alabama amended its law to permit receipt of UOCAVA ballots for all election types to be received by noon on the seventh day after the election. See 2014 Alabama Laws Act 2014-6 (H.B. 62). Alabama therefore counts UOCAVA voters' ballots that are postmarked by the date of the primary runoff election and are received by mail up until noon seven days after election day. Ala. Code § 17-11-19 (2014).

[4] Until recently, the Secretary had six total days to certify the names of primary runoff election candidates to the county probate judge. Doc. 84-1, at 28. That deadline was shortened to two business days (which can mean up to four total days) in response to this lawsuit. Doc. 84-1, Ex. 55; Doc. 126.

Alabama's process for creating official primary runoff election ballots therefore may not even *begin* until only *28 days* before the primary runoff election day (or even fewer days if primary election results are contested). The record contains little or no evidence about how long the primary election certification process typically takes, and whether it shortens or exceeds the 14 days allowed under Alabama law.

After the Secretary certifies the runoff candidates to a probate judge, see Ala. Code § 17-13-18(b), several steps must occur to prepare absentee ballots for transmission. County election officials give vendors[5] the election data necessary to create the ballot, and the vendors enter data into their systems to allow the ballot coding and layout that probate judges must approve. Doc. 84-1, at 14. Vendors give final ballot proofs to the probate judges for their approval. Doc. 84-1, at 14, 27. Vendors print the approved ballots and deliver them to probate judges. Doc. 84-1, at 14. The record does not reflect the specific number of days that each of these steps typically take, but it appears that, in combination, they would take a minimum of two or three days absent any errors or delays. See Doc. 84-5, at 235-

[5] Alabama and its counties have contracted with private vendors for paper and electronic ballot preparation, including for UOCAVA ballots, since before the 2010 Federal general election. Doc. 84-1, at 8-9, 14. See also Ala. Code § 17-11-19.

37; Doc. 84-1, at 27; cf. Doc. 84-4, at 54 (county typically needs two or three days *after* receiving its absentee ballot supplies to package them for mailing).

The probate judges then must deliver finalized approved runoff ballots to the Absentee Election Managers (AEMs) each county appoints to oversee the absentee voting process.[6] Doc. 84-1, at 7, 14; Ala. Code § 17-11-2. Probate judges have seven days after the primary election to deliver final ballots and related supplies to AEMs, *i.e.*, until 35 days before the primary runoff election. Ala. Code § 17-11-12. But there is no record evidence about how probate judges can deliver final primary runoff election ballots to AEMs within that deadline when the political parties and the Secretary have used more than seven days of the full 14-day certification period Alabama law provides. Compare Ala. Code § 17-11-12 (requiring delivery of runoff ballots to probate judges within seven days of the primary election) with Ala. Code § 17-13-17 (allowing political parties to certify results to the Secretary until noon on the Friday ten days after the primary election)

[6] With respect to UOCAVA voters, AEMs process UOCAVA ballot applications, enter UOCAVA voter information into a state electronic voter information system, prepare and mail UOCAVA absentee ballots, and deliver marked absentee ballots to county election officials on election day. Ala. Code §§ 17-11-5, 17-11-9, 17-11-10.

and Ala. Code § 17-13-18 (allowing Secretary two business days to certify runoff candidates). Alabama law thus appears internally inconsistent.

Once they receive their ballot supplies from probate judges, the AEMs package them and mail them to UOCAVA voters. Alabama law requires AEMs to mail absentee ballots to qualified voters who have requested mail transmission within *one business* day of the AEM receiving the ballot materials or receiving a voter's absentee ballot application, whichever is later. Ala. Code § 17-11-5; see also Doc. 84-1, at 14. If an AEM receives ballots on a Friday, it thus may take up to three calendar days before they are mailed. See, *e.g.*, Doc. 84-3, at 203 (documenting unavailability of workers to package ballots over the weekend and limited Saturday hours at post offices). The record contains little evidence about how long it typically takes AEMs to package the ballot materials for mailing, although there is evidence that one county historically has needed two or three days. See, *e.g.*, Doc. 84-4, at 54.

Preparing electronic absentee ballots for UOCAVA voters who have requested electronic transmission also requires several steps: (1) programming a secure electronic absentee ballot transmission system; (2) testing to ensure system operability and accessibility to AEMs; (3) importing e-mail addresses and other data for UOCAVA voters from a database into the electronic ballot transmission

system to generate the correct ballot for each voter; (4) uploading final absentee ballots to a secure website; (5) providing AEMs with passwords to access the electronic system so they can troubleshoot and track ballots; and (6) sending e-mails providing UOCAVA voters with a URL to download and print their ballot supplies. See Doc. 84-1, at 12-13, 16-17, 20. The record does not reflect how long each of those steps typically takes, but it amply demonstrates that they have proved highly problematic in past Alabama elections. See, *e.g.*, Doc. 84, at 19, 23-24; Doc. 84-4, at 42 ¶10, 55 ¶ 24.[7]

Combining all of Alabama's election certification deadlines and the ballot preparation procedures described above, it appears that state law authorizes a process that would allow a maximum of 31 days of roundtrip transit time for UOCAVA voters' runoff ballots (only 24 days of which are allocated for UOCAVA voters to receive, mark, and place their ballots in the mail). This estimate is based on the 14 days Alabama law allows for its election certification process and the four days minimally required to prepare final runoff election ballots for transmission; that equates to 18 days after a primary election that state

[7] Some of these steps to prepare for electronic ballot transmission typically occur only once during a federal primary election cycle, and would not need to be repeated for a primary runoff election.

law dedicates solely to the election certification and runoff ballot preparation steps that must precede the actual mailing of ballots to UOCAVA voters. Even adding the seven-day post-election window for receipt of marked UOCAVA ballots to the initial 42 day window between Alabama's primary and primary runoff elections, Alabama law thus authorizes a process affording a maximum of 31 days (49-18 = 31) of total roundtrip ballot transit time if officials comply with state law deadlines. But, because UOCAVA voters' ballots must be postmarked by election day, that 31 days includes only 24 days for UOCAVA voters to receive, mark, and place their ballots in the mail to be postmarked by election day, while allowing seven more post-election days for ballots to travel by mail back to the election officials. See Ala. Code § 17-11-19.

c. Alabama's Recent Election Cycles

In November 2011, the United States wrote Alabama a letter about its UOCAVA obligations for the 2012 election cycle. Doc. 1-1, Ex. A; Doc. 26, at 3 ¶ 10. The United States wrote to Alabama again on February 15, 2012, about UOCAVA violations leading up to Alabama's March 13, 2012, primary elections. Doc. 1-3, Ex. C.

The Secretary responded by extending the ballot receipt deadline for marked UOCAVA ballots for the March 13, 2012, primary election by eight days.[8] Doc. 1-4, Ex. D; Doc. 23, at 15; Doc. 26, at 3. In the 2012 primary election, *each one* of Alabama's 47 jurisdictions (comprising 46 counties) that had received timely UOCAVA ballot requests missed the 45-day ballot transmittal deadline, and some jurisdictions transmitted them as many as 18 days late. Doc. 23, at 10-11; Doc. 84-1, at 21, 30.[9]

Alabama's federal runoff election plan for the 2014 election cycle was mandated by the Consent Order (Doc. 127, at 10) that required Alabama to use a special "instant runoff" ballot that allowed UOCAVA voters to rank their candidate choices for the only federal primary runoff election that was anticipated

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[8] The Secretary took the same action in 2010, in a similar situation. Doc. 84-1, at 14.

[9] Despite a preliminary injunctive relief order intended to prevent UOCAVA violations for the rest of the 2012 election cycle (Doc. 21), Alabama violated UOCAVA's 45-day deadline for its November 2012 federal general election. At least 17 of Alabama's 59 counties that received requests for electronic transmittal of absentee ballots failed to timely transmit all of them, in part because the State failed to provide sufficient time and oversight to prevent and correct infrastructure, reliability, programming, and data entry problems with the electronic transmission system. Doc. 84, at 19, 23. In addition, at least five counties transmitted paper ballots after the deadline; one county did not receive ballot supplies from the vendor until after the 45-day deadline had passed. Doc. 84, at 19, 23.

in 2014. Alabama simply incorporated the requirements of the Consent Order into an emergency administrative rule promulgated on April 1, 2014 and titled "2014 UOCAVA State Written Plan For Federal Runoff Election"; that emergency rule expired by operation of state law in 120 days, on July 30, 2014. See pp. 50-52, *infra*; Addendum A-4.[10] There is no evidence that any written runoff plan is currently in place for Alabama's 2016 federal election cycle.

2. The District Court's Orders And Opinions

a. Preliminary Injunctive Relief

The district court first granted the United States limited preliminary injunctive relief on February 28, 2012, see p. 6, *supra*, because Alabama officials had "refused to cooperate with the United States." Doc. 8, at 7.[11] The court ordered Alabama to file county-specific reports on UOCAVA ballot transmissions and cooperate with the United States because "swift, deliberate action [was]

[10] References to "Addendum __" refer to the Secretary of State's emergency administrative rule appended to the back of this brief.

[11] The district court found that the United States was "pursuing a much less-intrusive means for effectuating compliance with the UOCAVA" than it might have done, by only seeking the information necessary to determine the appropriate substantive remedy and an opportunity for the parties to work collaboratively to "craft a remedy that vindicates the rights of UOCAVA voters in Alabama." Doc. 8, at 5.

necessary to counteract th[e] harm" to voters that was accruing each day (Doc. 8, at 4-5) and there was "substantial evidence" that Alabama was "poised to commit further UOCAVA violations" for any required primary runoff election. Doc. 8, at 7-8.

The district court's March 7, 2012, preliminary injunction ordered that Alabama (1) extend its UOCAVA federal primary ballot receipt deadline to March 31, 2012; (2) transmit to UOCAVA voters blank federal write-in ballots, candidate lists, and detailed instructions by March 10, 2012, for an April 24, 2012, runoff election in any district in which one might be required; (3) transmit official runoff ballots once available (albeit after the 45-day deadline) for any required federal primary runoff election; and (4) implement state- and county-wide surveying and reporting procedures before and after the remaining 2012 federal elections to promote UOCAVA compliance. Doc. 21.

The court's March 12, 2012, Opinion explained that it had granted the preliminary injunction because the United States was likely to prevail on the merits of its UOCAVA claim, given the undisputed failure of 47 Alabama jurisdictions to meet the UOCAVA ballot transmittal deadline for the 2012 primary election. Doc. 23, at 4, 9-10. The court held that the Secretary's eight-day extension of the ballot receipt deadline was "insufficient on its face" because at least 16 jurisdictions had

transmitted ballots more than eight days late, and some were more than 18 days late. Doc. 23, at 10-12. The court found a likelihood of irreparable harm to UOCAVA voters because of the obvious inadequacy of the eight-day extension, Alabama's previous denial of any State responsibility for UOCAVA compliance, and the State's failure despite its past violations to take any steps to prevent future ones. Doc. 23, at 15-16.

The court held that the potential harm to UOCAVA voters absent a preliminary injunction "far outweighs" the burden placed on Alabama, "which has a legally mandated obligation to vindicate the fundamental right of its [UOCAVA voters] to vote in federal elections." Doc. 23, at 16. Finally, the court held that issuing an injunction to "prevent disenfranchisement benefits the public." Doc. 23, at 17.

b. The Summary Judgment Opinion

The district court's February 11, 2014, Opinion granting summary judgment to the United States held that the 45-day advance transmittal requirement of Subsection (a)(8)(A), which applies to "an election for Federal office," includes federal runoff elections. Doc. 120, at 11.

Considering the statute's plain language, the court held that "Congress's reference in Subsection (a)(8)(A) to 'an election' indicates, on its face, its intent to

refer to 'any' kind of election for federal office." Doc. 120, at 11. Subsection (a)(8)(A) includes primary runoffs, the court held, because a primary runoff election "falls within the reach of any kind of election." Doc. 120, at 11.

The district court held that its interpretation of "an election" also "is reinforced by UOCAVA's overall statutory scheme." Doc. 120, at 12. The court stated that: (1) the inclusion of "general, special, primary and runoff elections for federal office" in Subsection (a)(1), and UOCAVA's references to "any election," reveal Congress' intent to encompass all federal elections when it uses language equivalent to "an election"; (2) other provisions of UOCAVA that specifically refer to only one particular federal election type demonstrate that "when Congress wanted to highlight or exclude a particular kind of federal election it made that intention explicit and clear"; (3) the "cross-reference between" 42 U.S.C. 1973ff-1(a)(7) (Subsection (a)(7)) (covering ballot transmittal procedures to be used in "general, special, primary and runoff elections for Federal office") and 42 U.S.C. 1973ff-1(f) (Subsection (f)) (using the shorthand phrase "an election for federal office" to delineate the elections to which those procedures apply) shows that the phrase "an election for Federal office" in Subsection (a)(8)(A) also includes all federal election types; and (4) the explicit exception to UOCAVA's 45-day rule – the Subsection (g) hardship exemption – established that "Congress intended that

subsection (g) would be the only exception" to the 45-day advance transmission rule for any election, including runoffs. Doc. 120, at 16.

Although the court found UOCAVA's language and structure clear (Doc. 120, at 16), it found additional support for its holding in the legislative history. The court saw "nothing in the legislative history to undermine in any way the congressional intent reflected in the statute's plain language that the 45-day requirement applies to every kind of federal election." Doc. 120, at 18. The court rejected Alabama's argument that Subsection (a)(9) creates an alternative timeframe for ballot transmittal because that subsection contains no "new substantive transmittal deadline nor dictates an exception" to the 45-day transmittal deadline of Subsection (a)(8)(A). The written plan requirement of Subsection (a)(9), the court held, "merely reflects the fact that States should go the extra mile to protect the voting rights of military members, their families and other United States citizens living overseas when it comes to runoff elections – nothing more." Doc. 27-28.

3. 2014 Consent Order

In response to the court's invitation for the parties to request or propose additional relief (Doc. 120, at 35) Alabama submitted an unopposed relief proposal that preserved its appellate rights. Doc. 124, at 2. Alabama's proposal therefore

formed the basis for the court's March 4, 2014, Consent Order. Doc. 124, at 2. The Consent Order requires Alabama to hold any federal runoff elections 63 days after its primary election, beginning with the 2016 election cycle. Doc. 124, at 2; Doc. 127, at 2. For the impending 2014 election cycle only, the court authorized Alabama to use an "instant runoff system" using ballots in which UOCAVA voters could numerically rank the primary election candidates to reflect the voters' preferences, as the court had authorized for a 2013 special election. Doc. 124, at 3; Doc. 127, at 3.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews the district court's interpretation of UOCAVA, and its summary judgment based on that interpretation, *de novo*. See *Williams* v. *Secretary, U.S. Dep't of Homeland Sec.*, 741 F.3d 1228, 1231 (11th Cir. 2014).

SUMMARY OF ARGUMENT

1. This Court can readily resolve this case using UOCAVA's plain language. Interpreting "an election for Federal office" in Subsection (a)(8)(A) to include federal runoff elections is consistent with the plain statutory language. Applying Subsection (a)(8)(A)'s 45-day rule to a federal runoff election, which is indisputably an election for Federal office, also is supported by the inclusive

meaning of that same language in the interrelated provisions of Subsection (a)(7) and Subsection (f). See 42 U.S.C. 1973ff-1(a)(7) and (f).

2. The United States' interpretation of Subsection (a)(9) as imposing a separate written plan requirement for runoff elections reads Subsections (a)(8)(A), (a)(9) and (g) harmoniously while giving each subsection meaning. In contrast, Alabama's proposed interpretation of Subsection (a)(9) to establish a free-standing "alternative standard" (Ala. Br. 32) for runoff elections requires the Court to create an artificial conflict between consonant statutory provisions. Alabama's interpretation not only renders Subsection (a)(9)'s "sufficient time" language ambiguous and subject to each State's discretion, but also ignores the fact that Subsection (a)(8)(A) provides only one exemption from its 45-day rule – elections for which a State receives a Subsection (g) waiver that permits a different time period. There is no reason for this Court to go beyond the explicit and exclusive exemption to create another one, thereby deviating from its steadfast refusal to infer an exemption that Congress did not include. See *Arcia* v. *Florida Sec'y of State*, 746 F.3d 1273 (11th Cir. 2014).

Treating Subsection (a)(9) as an additional written plan requirement makes sense because, unlike other UOCAVA-covered federal elections, runoffs are contingent events that occur on a compressed schedule that state officials have no

discretion to initiate. Alabama's argument that the phrase "sufficient time" in Subsection (a)(9) creates an "alternative" standard to Subsection (a)(8)(A)'s 45-day rule misreads the import of that language. Instead of creating the amorphous and undefined "alternative standard" for ballot transmittal that Alabama advocates, the phrase "sufficient time" in Subsection (a)(9) instead flexibly takes into account the different scenarios that may result in UOCAVA-compliant written plans for runoffs. In the vast majority of cases, a State's written plan will explain the methods a State will use to comply with Subsection (a)(8)(A)'s 45-day minimum of advance ballot transmittal time (or longer) and thereby provide sufficient time to vote. States also may have a written plan that provides sufficient time to vote, yet deviates from Subsection (a)(8)'s rule. A deviation that provides fewer than 45 days of ballot transmittal time before an election for federal office is lawful, however, only in two situations – where the State was granted an undue hardship waiver permitting either a different allocation of the 45-day period (with some days before and some after the election) or a different number of days, that the federal government has approved, as stated in Subsection (g), as providing "sufficient time to vote as a substitute for the requirements" of Subsection (a)(8)(A).

3. If this Court finds any ambiguity in the statutory language, alternate tools of statutory interpretation still confirm that Subsection (a)(8)(A) encompasses runoff elections. Nothing in the legislative history suggests a State should be permitted to avoid the 45-day rule for a runoff election. The federal agencies responsible for interpreting and enforcing UOCAVA, whose views are worthy of deference, also agree that Subsection (a)(8)(A)'s 45-day requirement encompasses runoff elections. The canon of statutory construction requiring liberal interpretation of legislation protecting military service members further confirms that an inclusive interpretation of Subsection (a)(8) is appropriate.

4. If this Court nevertheless determines that only Subsection (a)(9) applies to runoff elections, the United States' claim that Alabama violates Subsection (a)(9) must be resolved because it is not moot. The only available evidence reflects that Alabama had another emergency administrative rule that expired on July 30, 2014, as its most recent written plan. A remand is required to determine whether Alabama currently has a written runoff plan that provides sufficient time to vote, as Subsection (a)(9) requires; if not, the United States can obtain relief for violations of UOCAVA. Moreover, even if the Court holds that only Subsection (a)(9) applies to federal runoff elections, the Court should reject Alabama's request to vacate the Consent Order provision requiring the State to create a written runoff

plan because there is no evidence that Alabama currently has any such plan, let alone one that provides sufficient time to vote.

ARGUMENT

I

SUBSECTION (a)(8)(A) SHOULD BE INTERPRETED TO ENCOMPASS RUNOFF ELECTIONS BASED ON ITS PLAIN LANGUAGE AND THE OVERALL STATUTORY STRUCTURE

A. The Plain Language Of Subsection (a)(8)(A) Encompasses Runoff Elections

1. This Court "begin[s] the process of legislative interpretation" and "should end it as well" with the text of 42 U.S.C. 1973ff-1(a)(8)(A). *Harris* v. *Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), cert. denied, 532 U.S. 1065, 121 S. Ct. 2214 (2001). Subsection (a)(8)(A) contains a straightforward command: when a covered voter requests an absentee ballot, a State must transmit the ballot "not later than 45 days before the election" if the request was received "at least 45 days before *an election for Federal office*." See 42 U.S.C. 1973ff-1(a)(8)(A) (emphasis added).[12] The only exception in Subection (a)(8)(A) is when a waiver has been

[12] 42 U.S.C. 1973ff-1(a)(8) provides that States must:

> (8) transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter --

(continued...)

granted "as provided in subsection (g)." Under the plain language of the statute, because a federal runoff election is indisputably "an election for federal office," the 45-day requirement applies unless the State obtains an undue hardship waiver. See *Arcia* v. *Florida Sec'y of State*, 746 F.3d 1273, 1282-1283.

Although other subsections of 42 U.S.C. 1973ff-1 explicitly apply only to certain types of federal elections, see, *e.g.*, 42 U.S.C. 1973ff-1(c) (applying reporting requirement only to each "regularly scheduled general election for Federal office"), Subsection (a)(8)(A) neither limits its coverage to, nor exempts, any of the four types of federal elections (primary, general, special and runoff) covered by Section 1973ff-1. It instead applies to all federal elections. The only federal elections excepted from Subsection (a)(8)(A)'s 45-day deadline are

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> (A) except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election; and
>
> (B) in the case in which the request is received less than 45 days before an election for Federal office --
>
> > (i) in accordance with State law; and
> >
> > (ii) if practicable and as determined appropriate by the State, in a manner that expedites the transmission of such absentee ballot[.]

specified in the text of that provision: the deadline applies "*except as provided in subsection (g)*." 42 U.S.C. 1973ff-1(a)(8)(A) (emphasis added). Subsection (g) is the undue hardship exemption available only through a waiver application process for a particular federal election. See 42 U.S.C. 1973ff-1(g). The plain language of Subsection (a)(8)(A) therefore encompasses all elections for federal office.

The inclusive meaning of the plain language "an election for Federal office" in Subsection (a)(8)(A) is confirmed by examining the interplay between two other provisions of UOCAVA: 42 U.S.C. 1973ff-1(a)(7) and 1973ff-1(f). Subsection (a)(7) requires States to develop mail and electronic transmittal procedures for blank absentee ballots "with respect to general, special, primary *and runoff elections* for Federal office in accordance with subsection (f)." 42 U.S.C. 1973ff-1(a)(7) (emphasis added). The transmittal procedures of the cross-referenced Subsection (f), like Subsection (a)(8), expressly apply to "an election for Federal office." 42 U.S.C. 1973ff-1(f).

The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Commissioner of Internal Revenue* v. *Lundy*, 516 U.S. 235, 250, 116 S. Ct. 647, 655 (1996) (citations omitted); *Gustafson* v. *Alloyd Co. Inc.*, 513 U.S. 561, 570, 115 S. Ct. 1061, 1067 (1995). Subsection (a)(7) and its cross-reference to

Subsection (f) thus confirm the unremarkable fact that when Congress employs the phrase "an election for Federal office" without qualification, it means all federal elections, including federal runoff elections. See *United States* v. *Georgia*, 952 F. Supp. 2d 1318, 1326-1327 (N.D. Ga. 2013) (holding that the meaning of "an election" in Subsection (f) attaches to the same term in Subsection (a)(8)(A)). Contrary to Alabama's argument (Ala. Br. 52-53), consideration of those proximate and interrelated provisions provides a strong basis for affirming the district court's holding. See *Lundy*, 516 U.S. at 250, 116 S.Ct. at 655 (holding that interrelationship and close proximity of statutory provisions presented a "classic case" for applying the canon of statutory construction assigning identical words in different parts of the same act the same meaning) (citation omitted); see also Doc. 120, at 14-15; *Georgia*, 952 F. Supp. 2d at 1327.

B. A Harmonious Reading Of Subsections (a)(8)(A) And (a)(9) Offers The Most Reasonable Interpretation Of Subsection (a)(8)(A)

Subsection (a)(9)'s requirement for a State that holds a "runoff election for Federal Office" to "establish a written plan" to ensure compliance with UOCAVA during federal runoff elections supplements rather than supersedes Subsection (a)(8)(A)'s 45-day deadline for a runoff. See 42 U.S.C. 1973ff-1(a)(9). Congress's use of inclusive and general language to refer to covered elections in

Subsection (a)(8)(A), compared to its use of language explicitly addressing only runoff elections in Subsection (a)(9), is presumed to be purposeful. See *Russello* v. *United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983). It does not follow, however, as Alabama suggests, that the inclusion of only runoff elections in Subsection (a)(9) means that they are somehow excluded from Subsection (a)(8)(A); the more sensible reading is that only runoff elections are included in the written plan requirement that Subsection (a)(9) imposes. This interpretation of Subsections (a)(8)(A) and (a)(9) comports with well established canons of statutory construction.

1. This Court Should Read Subsections (a)(8)(A) And (a)(9) Harmoniously Rather Than Find Conflict Where It Need Not Exist

This Court can properly effectuate Congress's intent to protect UOCAVA voters' rights to participate fully in runoff elections by reading the plain language of Subsections (a)(8)(A) and (a)(9) cohesively. When two statutory provisions can be read in tandem, so that they comport with both the plain meaning of broad language and Congress's intent, this Court consistently reads the two provisions harmoniously, rather than finding conflict where it need not exist. As the Supreme Court held in *National Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, "[i]t is true that specific statutory language should control more general language when

there is a conflict between the two. Here, however, there is no conflict. The specific controls but only within its self-described scope." 534 U.S. 327, 335-336, 122 S. Ct. 782, 787-788 (2002); see also, *e.g.*, *United States* v. *Marion*, 562 F.3d 1330, 1339 (11th Cir. 2009) (finding no conflict between two statutes applicable to forfeiture proceedings, because they could be easily harmonized by interpreting the plain language of "an order of forfeiture" in 21 U.S.C. 853 broadly, so as to include the preliminary orders of forfeiture more specifically addressed in another statute), cert. denied, 558 U.S. 930, 130 S. Ct. 347 (2009). There is no inherent conflict between meeting a 45-day ballot transmission deadline for all federal elections and creating a written plan to ensure that a State does so in the admittedly far less usual circumstance of a federal runoff election.[13]

[13] Alabama misapplies a canon of statutory interpretation to argue that the more specific reference to runoff elections in Subsection (a)(9) controls the more general reference to federal elections in Subsection (a)(8)(A). Ala. Br. 35-36. That axiom applies only when two statutory provisions actually conflict. See *Gulf Power Co.*, 534 U.S. at 335-336, 122 S. Ct. at 787-788; see also *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228, 77 S. Ct. 787, 791 (1957) (emphasizing, before applying the canon, that both statutes at issue were clear and both applied to patent infringement actions, but that they created different rules for determining the proper venue for such an action). Because the two provisions at issue here are complementary, not conflicting, and the State can comply with both, the canon Alabama asserts does not support its position.

Contrary to Alabama's argument (Ala. Br. 28, 35), the phrase "sufficient time" in Subsection (a)(9) does not create a superseding alternative to the specific 45-day rule in Subsection (a)(8)(A). Rather, it incorporates the 45-day period before a federal election that Congress mandated as the minimum period of time that normally is sufficient for a UOCAVA voter to vote, as stated in the preceding Subsection (a)(8)(A), while still accounting for a State's potential receipt of a hardship waiver approving a different timeframe as "sufficient time" to vote in a runoff. See p. 23, *supra*. Accordingly, under Subsection (a)(9), a written plan for a runoff election allows "sufficient time" to vote if it ensures that absentee ballots will be mailed to voters at least 45 days before the runoff election, as Subsection (a)(8) requires. A lesser advance transmittal time suffices only if a State has met Subsection (g)'s explicit waiver criteria, and therefore has received a waiver based on an undue hardship.

2. Interpreting Subsection (a)(8)(A) To Encompass Runoffs Does Not Render Superfluous Any Other Statutory Provisions, And Gives Meaning To Every Word In Subsections (a)(9) And (g)

Interpreting Subsection (a)(8)(A) to encompass runoff elections neither conflicts with nor renders superfluous any aspect of Subsection (a)(9) or Subsection (g). The written plan is the only different and additional requirement Subsection (a)(9) imposes for runoff elections compared to the other federal

elections within Section 1973ff-1's ambit. See 42 U.S.C. 1973ff-1(a)(9). Alabama questions the need for a written plan to comply with Subsection (a)(8)(A) for a runoff election, as compared to any other election. Ala. Br. 40. This case itself shows the need. Alabama proved incapable of coordinating all of the steps and individuals necessary for timely UOCAVA ballot transmittal even for *regularly scheduled* federal elections that were certain to occur.[14] The likelihood of these problems cropping up following hotly contested primaries where the need for a runoff election is uncertain until the ballots are actually counted is predictably higher, and a written plan for these far less usual federal runoff elections that require ballot preparation on a more compressed schedule may offer the only hope of avoiding additional violations.[15]

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[14] See, *e.g.*, Doc. 84-1, at 9 ¶ 45 (citing failure to inform vendor of ballot supply delivery deadline necessary to meet UOCAVA transmittal deadline); Doc. 84-1, at 12 ¶ 78 (citing probate judges' failures to timely approve ballot styles and provide necessary information); Doc. 84-1, at 20 ¶ 131 (citing vendor reports of counties' failure to approve ballot proofs prior to UOCAVA deadline); Doc. 84-1, at 20 ¶ 135 (citing AEM's failure to receive passwords for electronic transmission system until after 45-day deadline).

[15] Alabama points to Texas, which also statutorily schedules potential runoff elections, to support its argument that runoff elections are also "scheduled" and commonplace. Ala. Br. 40 n.13. The more pertinent fact is that, to comply with the MOVE Act, Texas changed its runoff election calendar to create the 63-day window that Alabama agrees would facilitate compliance with Subsection

(continued...)

Alabama contends that there would be no administrative or logistical reason to require a written plan specific to UOCAVA compliance in runoff elections if Subsection (a)(8)(A) applies to them, and that special elections would be a "better candidate" for a written plan requirement. Ala. Br. 43-44. Unlike primary runoff elections, however, whose timing has to account for already scheduled upcoming general elections, state officials have significant control over when special elections will be held. See, *e.g.*, Ala. Code § 17-15-2 (2014) (the date of a special congressional election is set at the discretion of the Governor). That authority permits state officials to create a process that weighs competing state interests to determine the optimal timing for a special election, while still complying with UOCAVA's 45-day advance ballot transmittal rule.

Runoff elections generally allow no such control or repose. They are uncertain links in a chain of already-calendared elections held in rapid succession. As such, runoffs can present singular challenges to election officials, to the vendors upon whom election officials depend to prepare ballots, to state and local

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(a)(8)(A). See V.T.C.A., Election Code Ann. § 41.007 (West 2014); Texas Secretary of State, http://www.sos.state.tx.us/elections/laws/advisory2011-09.shtml (last visited August 27, 2014).

budgets, and, as Congress anticipated, to UOCAVA voters. The need for a federal runoff election is unknown before the initial election, and runoff elections typically allow a shorter timeframe for official ballot preparation and transmission than for long-scheduled primary or general elections. Congress's wisdom in requiring States to plan ahead regarding their intended methods of UOCAVA compliance for runoff elections is only confirmed by Alabama's repeated inability to engage in the planning necessary to ensure compliance with Subsection (a)(8)(A), even for regularly scheduled federal elections. See pp. 14-15, *supra*; pp. 55-56, *infra*.

Subsection (a)(9) of course requires a State to do more than simply write down that it "plans" to satisfy Subsection (a)(8)(A). Instead, a State must establish a written plan to demonstrate specifically *how* it will do so,[16] in part to enable

[16] The written plan requirement of Subsection (a)(9) also is not superfluous simply because a "comprehensive plan" is required to obtain a Subsection (g) waiver. That is because in most instances a State would provide the 45-day minimum of advance ballot transmittal time Subsection (a)(8)(A) requires and thus would not need to create a lengthy plan addressing all of the topics mandated in Subsection (g)(1)(D). A "comprehensive plan" demonstrating how proposed alternate procedures will provide UOCAVA voters "sufficient time to vote as a substitute for the requirements under [Subsection (a)(8)(A)]," which a State must submit with a Subsection (g) waiver application, may also satisfy the State's "written plan" obligation under Subsection (a)(9). Of course a State could choose to create a more streamlined written plan for internal use by state election officials for purposes of complying with Subsection (a)(9), after receiving an undue

(continued...)

enforcement of UOCAVA before violations occur in the course of a particular runoff election, when it may be too late to safeguard the voting rights of UOCAVA voters.

Alabama contends that applying Subsection (a)(8)(A)'s 45-day rule to runoff elections somehow makes them "operate exactly the same way mechanically" as any other regularly scheduled federal primary or general election, and thereby undercuts the rationales for requiring a written plan only for runoffs. See Ala. Br. 41-42. That is simply not the case. Applying Subsection (a)(8)(A)'s 45-day rule to potential runoff elections would not make them just like federal primary or general elections for a simple reason – both of those regularly scheduled election types are certain to occur, unlike primary runoffs which remain uncertain and contingent on the results of the initial primary. Regularly scheduled federal primary and general elections also do not involve the added obligations imposed by the back-to-back elections involved in a primary runoff. Creating a written plan for the relatively rare runoff in a federal primary election increases any State's likelihood of meeting the 45-day deadline in the event of an unexpected runoff.

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hardship waiver based on the comprehensive plan required under Subsection (g). See 42 U.S.C. 1973ff-1(g)(1)(D).

Alabama also argues that "sufficient time" has the same usage and meaning in Subsection (a)(9) as in Subsection (g), *i.e.*, fewer than 45 days of advance ballot transmittal time. Ala. Br. 32. Alabama's premise is incorrect; the phrase "sufficient time to vote" in Subsection (a)(9) is not identical to the longer phrase "sufficient time to vote as a substitute for the requirements of [Subsection (a)(8)(A)]" that appears in Subsection (g). See 42 U.S.C. 1973ff-1(g)(1)(D)(ii). Had Congress wanted to allow States with runoff elections to simply create their own "alternative" timeframes as a substitute for the 45-day rule, without requiring any federal waiver approval under Subsection (g), Congress likely would have incorporated the identical phrase "as a substitute for the requirements of [Subsection (a)(8)(A)]" in Subsection (a)(9) as it did in Subsection (g). Congress did *not* do that. The difference confirms that Subsection (a)(9) does not give a State the prerogative of creating its own timeframe as "sufficient time" to substitute for Subsection (a)(8)(A)'s 45-day rule.

A State's written plan affording fewer than 45 days of advance ballot transmittal time before a runoff election may, in very unusual circumstances, provide "sufficient time" to vote, but any reduction in the amount of time available to UOCAVA voters may be implemented *only* if the federal government has granted the State a waiver under Subsection (g). Such a waiver would reflect the

federal government's agreement that the State's intended deviation is due to an undue hardship, and that the proposed timeframe is indeed a substitute that provides "sufficient time to vote" in accordance with Subsection (g)'s explicit waiver criteria.

C. Alabama's Interpretation Of Section 1973ff-1(a)(9) Ignores The Statute's Hardship Exemption

Alabama spends a single paragraph addressing the critical fact that the *only* UOCAVA subsection that permits fewer than 45 days for advance ballot transmittal for any federal elections is Subsection (g). See Ala. Br. 54-55 (citation omitted). Indeed, Subsection (a)(8)(A) specifically and exclusively cross-references Subsection (g) as the *only* exception to the 45-day rule. If Congress wanted to exempt runoff elections totally from Subsection (a)(8)(A), it would have included a reference to Subsection (a)(9), along with Subsection (g), when it specified that Subsection (a)(8)(A)'s 45-deadline applies to "an election for Federal office" "except as provided" in Subsection (g)'s waiver provision. See *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 109, 100 S. Ct. 2051, 2056-2057 (1980); *Arcia*, 746 F.3d at 1283-1284.

Alabama's dismissal of this explicit and limited exemption to the 45-day rule as a mere "reminder" that Subsection (g) exists (Ala. Br. 54) is inconsistent

both with this Court's precedent and with common sense. This Court should adhere to its well-established precedent, recently reiterated in *Arcia*, that requires rejection of Alabama's invitation to create an implied judicial exemption by reading in exemption language that Congress did not write. 746 F.3d at 1283-1284 (refusing to imply an additional exception to the NVRA's 90 Day Provision when it was not expressly provided). As this Court explained in *Allstate Life Ins. Co.* v. *Miller*, 424 F.3d 1113, 1116 n.3 (11th Cir. 2005), "the doctrine of *expressio unis est exclusio alterius* counsels against judicial recognition of additional exceptions" to the ones expressly created by Congress. See also *Pugliese* v. *Pukka Dev., Inc.*, 550 F.3d 1299, 1303-1304 (11th Cir. 2008) (holding that because Congress demonstrated that it knew how to make specific exemptions in certain provisions of a statute but chose not to do so in the disputed provision, this Court would decline to create new exemptions).

D. Alabama Fails To Interject Ambiguity Into Subsection (a)(8)(A)

1. Alabama attempts to interject ambiguity into the plain meaning of "an election for Federal office" in Subsection (a)(8)(A). It argues that because the term "federal elections" does not have a consistently inclusive meaning in other, unrelated portions of UOCAVA, this Court should not assume that "an election for federal office" in Subsection (a)(8)(A) has an inclusive meaning. See Ala. Br. 52-

53 (comparing 42 U.S.C. 1973ff(b)(8) with 42 U.S.C. 1973ff-2a, and 42 U.S.C. 1973ff(b)(3) with 42 U.S.C. 1973ff-2). But Alabama cannot use inapposite observations about drafting inconsistencies and likely errors in unrelated UOCAVA sections to create uncertainty about the meaning of "an election for Federal office" in Subsection (a)(8)(A).

Even if this Court were to consider 42 U.S.C. 1973ff-2 and 2a in trying to construe Section 1973ff-1, the comparison only strengthens the conclusion that Subsection (a)(8)(A) applies to all the federal election types that UOCAVA covers. The language of 42 U.S.C. 1973ff(b)(3), which was not amended in the MOVE Act, requires the Presidential designee to "carry out section 1973ff-2" with respect to the Federal Write-In Absentee Ballot for UOCAVA voters "in general elections for Federal office." That older provision now directly conflicts with the MOVE Act's legislative history[17] and the broader plain language of 42 U.S.C. 1973ff-2(a), which the MOVE Act added to prescribe a Federal Write-In Absentee Ballot for

[17] See H.R. Rep. No. 288, 11th Cong. 1st Sess. 745 (2009) (describing the amendment of UOCAVA to require the Presidential designee "to prescribe a federal write-in absentee ballot for general, special, primary, and runoff elections for federal office and to require the Presidential designee to adopt procedures to promote and expand the use of the [Federal Write-In Absentee Ballot] as a back-up measure to vote in elections for federal office").

"use in general, special, primary, and runoff elections for Federal office" and expand its use as a back-up measure in "elections for Federal office." The other provision Alabama cites, 42 U.S.C. 1973ff(b)(8), requires the designee to "carry out section 1973ff-2a" procedures for collecting and delivering marked ballots for only a specified subgroup of UOCAVA voters (overseas uniformed service members) "in elections for Federal office." On its face, however, the cross-referenced Section 1973ff-2a appears to limit such procedures only to "regularly scheduled general elections for Federal office."

The conflicting language of those inapposite provisions, which likely reflect Congress's inadvertent failures to enact harmonizing amendments along with the MOVE Act, stands in stark contrast to the clear and consistent language of the UOCAVA provisions pertinent to this case. In contrast to 42 U.S.C. 1973ff(b)(3)'s or 42 U.S.C. 1973ff-2a's language singling out "general elections," the plainly inclusive language of the phrase "an election for Federal office" in Subsection (a)(8) is not contradicted by any directly applicable narrowing language in a cross-referenced provision or elsewhere. Unlike any of the irrelevant provisions Alabama cites, Subsection (a)(8)(A) provides a single, specific exception to its broadly applicable rule – the waiver provisions of Subsection (g) – that contains no language narrowing or contradicting an otherwise inclusive meaning for "an

election for Federal office." The structure of the interrelated but apparently conflicting provisions that Alabama cites (Ala. Br. 52-53) also stands in direct contrast to the interrelated provisions of 42 U.S.C. 1973ff-1(a)(7) and (f), which consistently provide a broad definition of "an election for Federal office" as including runoffs among all of the other federal election types listed in Subsection (a)(7). Accordingly, Alabama's citations and comparisons of unrelated provisions that are not disputed in this case are irrelevant.

2. Alabama's attempt to recast the phrase "an election for Federal office" as a kind of legislative throwaway is equally unavailing. In arguing that "for Federal office" simply connotes that UOCAVA applies to federal rather than state or local elections (Ala. Br. 55), Alabama states the obvious; the entirety of Section 1973ff-1 is aimed at only "general, special, primary, and runoff elections for *Federal* office." 42 U.S.C. 1973ff-1(a)(1) (emphasis added). The use of the phrase "Federal office" in the title of Subchapter I-G and many subsections of Section 1973ff-1, including Subsection (a)(8)(A), serves as a reminder that Congress did not intend Section 1973ff-1 to impose obligations on States for *state* elections.

E. If The Court Determines That Subsections (a)(8) And (a)(9) Are Collectively Ambiguous, Other Statutory Construction Tools Confirm That Congress Intended Subsection (a)(8)(A) To Encompass Runoffs

1. Legislative History Demonstrates Congress's Intent To Apply The 45-Day Deadline To All Federal Elections Absent A Waiver

This Court can turn to legislative history if it believes that the statutory language of UOCAVA is unclear about the inclusion of runoff elections in Subsection (a)(8)(A). See *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235, 106 S. Ct. 555, 557 (1985). This Court treats as most authoritative the portions of legislative history that reflect indicia of agreement between the House of Representatives and the Senate. See *Burns* v. *United States*, 887 F.2d 1541, 1548-1549 (11th Cir. 1989). The House Conference Report for the 2009 MOVE Act, which contains such indicia of agreement, states that Congress intended for States to "transmit a validly requested absentee ballot" to a UOCAVA voter "at least 45 days before an election for federal office unless * * * a hardship exemption is approved." H.R. Rep. No. 288, 111th Cong., 1st Sess. 744 (2009). There is no indication that Congress intended to exempt runoff elections from the 45-day rule apart from the hardship exemption.

The Court may also consider the legislative history of the MOVE Act that was incorporated and printed in the Congressional Record by unanimous bipartisan

consent as another weighty source. See 156 Cong. Rec. 9762-9770, 9766 (2010) (statement of Sen. Schumer) (reflecting unanimous consent to inclusion of history in the record). The legislative history of the MOVE Act is replete with hearing testimony and reports attesting that 45 days of advance ballot transmittal time is the minimum time normally necessary to get a ballot to and from service members. See 156 Cong. Rec. at 9764, 9766-9767. Indeed, Congress was clearly focused on solving the particular problem of servicemember disenfranchisement, and thus did not permit any exceptions to a 45-day advance ballot transmittal rule except those specifically outlined in the hardship waiver provision of Subsection (g). See 156 Cong. Rec. at 9767.

Neither the statutory language nor legislative history provides any reason to believe that runoff elections present fewer ballot delivery problems than the other federal election types Congress addressed in the MOVE Act. It thus would have been counterintuitive for Congress to have routinely permitted shorter deadlines, with fewer assurances of full election participation by UOCAVA voters, for runoff elections than for other elections. Congress instead legislated, based on the evidence before it in 2009, to meet the specific and pressing goal of enfranchising UOCAVA voters for all federal elections despite potential inconveniences to States.

Alabama nevertheless spends numerous pages arguing with Congress's choices and setting forth its own contrary public policy recommendations. Ala. Br. 58-64. It is apparent that Alabama simply disagrees with the law Congress enacted. Disregarding Congress' decision to protect UOCAVA voters who have no internet access, Alabama speculates about runoff election procedures that could be appropriate "[o]ne day" when UOCAVA voters "might even be able to cast ballots on line." Ala. Br. 46. Technological advancements would potentially impact all federal election types, however, and thus lend no support to Alabama's argument for flexibility in planning runoff elections compared to other federal elections. Alabama might well be right that advancements that ensure universal internet access for all UOCAVA voters could support an argument for legislative amendments by a future Congress. But it is making that argument to the wrong forum. Alabama can seek such change *from Congress*. In the meantime, this Court must interpret UOCAVA as currently written. *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 878 (2014).

Alabama's citation of recent, unexamined studies suffers from the same flaw. Alabama argues that Congress "should" be "expected to recognize" that delaying runoff elections to ensure enfranchising UOCAVA voters might affect turnout. Ala. Br. 59-60. In presenting the equivalent of a policy initiative,

Alabama ignores that this Court's role is to apply UOCAVA "as it is written -- even if it were to think some other approach might accord with good policy." *Sandifer*, 134 S. Ct. at 878 (quoting *Burrage* v. *United States*, 134 S. Ct. 881 (2014)). As the Supreme Court has stated, "[i]n the last analysis, these always-fascinating policy discussions are beside the point," because this Court must apply UOCAVA as Congress wrote it. *Burrage*, 134 S. Ct. at 892. Congress wrote Subsection (a)(8)(A) to apply to "an election for federal office," and a federal runoff election is such an election.

Even if Alabama is correct that Congress knew some States that hold federal runoff elections could face compliance challenges, Congress nevertheless chose to establish a uniform 45-day advance transmittal rule for UOCAVA ballots, require written runoff plans, and to ameliorate any hardships by providing a waiver process. Alabama's criticism that Congress "should have been clear" before requiring alteration of its runoff election procedures is misplaced; Congress was quite clear in enacting a 45-day advance ballot transmittal requirement, subject only to the Subsection (g) exemption. Congress also would have been clear in the legislative history if it in fact wanted to categorically exclude federal runoff

elections from the 45-day rule.[18] But nothing in the legislative history of the MOVE Act "points in a different direction than does the plain language of the statute." See *Andrus* v. *Glover Const. Co.*, 446 U.S. 608, 617-618 & n.18, 100 S. Ct. 1905, 1910-1911 (1980). The plain language interpretation of "an election for Federal office" in Subsection (a)(8)(A) to include primary runoff elections, and the absence of any exemption from Subsection (a)(8)(A)'s 45-day rule beyond the Subsection (g) waiver grant, therefore must prevail.

[18] Alabama's unresolved policy dilemmas arising from Congress's decision to protect UOCAVA voters in federal runoff elections do not suggest any improperly implied preemption or otherwise threaten federalism. See *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2261 (2013) ("The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under [the Elections Clause], which empowers Congress to "make or alter" state election regulations."; "When Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States.") (citation omitted). Alabama concedes, as it must, that the Supreme Court's recent decision in *Inter Tribal Council*, undercuts its argument that this Court should be reluctant to find that UOCAVA's requirements for runoff elections prevail over incompatible state procedures. Ala. Br. 64.

2. The Reasonable Interpretations Of Federal Agencies Are Consistent With A Plain Language Interpretation of Subsection (a)(8)(A)

This Court should also consider the interpretations of federal agencies with roles in implementing and enforcing UOCAVA to determine the meaning of Subsections (a)(8) and (a)(9). The district court's plain language interpretation of Section 1973ff-1(a)(8)(A) is consistent with the interpretation of both the federal agency principally charged with administering UOCAVA and the Attorney General, to whom Congress assigned a role in enforcing the statute. See 42 U.S.C. 1973ff-1(g)(2), 1973ff-4(a)-(b).

The Federal Voting Assistance Program (FVAP), a Department of Defense office, has been delegated the primary responsibility for administering UOCAVA. See 42 U.S.C. 1973ff-1(a) and (b).[19] FVAP's February 7, 2012, guidance to all Chief State Election Officials specifies that the requirement to transmit absentee ballots 45 days prior to "*any* election for Federal Office" includes runoff elections.

[19] The Secretary of Defense was designated the Presidential designee under UOCAVA by Executive Order 12,642, 53 Fed. Reg. 21,975 (June 8, 1988). The Secretary of Defense has delegated this authority to the Under Secretary of Defense For Personnel And Readiness through DoD Directive 1004.04. Pursuant to Enclosure 2 of that Directive, the Undersecretary of Defense for Personnel and Readiness shall "designate[] a civilian Director of the FVAP, who shall be responsible for all aspects of the FVAP and shall have the necessary authority to administer that responsibility."

Doc. 84-4, Ex. 38 (emphasis in original). The Attorney General's interpretation of Subsection (a)(8)(A) as encompassing runoff elections is amplified in this brief and has been advanced consistently in his UOCAVA litigation before this Court and elsewhere. This Court should give *Skidmore* deference to the consistent interpretations of the two agencies – the United States Department of Justice and FVAP – that Congress assigned statutory roles in enforcing and implementing UOCAVA. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944); *Pugliese*, 550 F.3d at 1304-1305 (giving substantial deference, under *Skidmore*, to HUD director's letter opining on the scope of a disputed statutory exemption and the United States' amicus curiae brief explaining HUD's interpretation); *Durr* v. *Shinseki*, 638 F.3d 1342, 1348-1350 (11th Cir. 2011) (crediting a federal agency's longstanding interpretation of a statute, expressed in its personnel handbook, to resolve a dispute over two intrinsically conflicting statutory provisions).

3. The Canon Of Statutory Construction Requiring Liberal Interpretation Of Statutes To Benefit Military Service Members Applies To Subsection (a)(8)(A)

Yet another reason to construe Subsection (a)(8)(A) in accordance with its plain language is that interpreting that provision to include runoff elections also effectuates the canon that statutes providing benefits to uniformed service

members are to be construed in their favor. See, *e.g.*, *Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1206 (2011); see also *King* v. *Saint Vincent's Hosp.*, 502 U.S. 215, 220-221 & n.9, 112 S. Ct. 570, 573-574 & n.9 (1991) (liberally construing a statute in favor of military service members to resolve a dispute over the time period during which statutory protections apply).

Although some UOCAVA voters are not military service members, this Court should apply this canon of statutory interpretation when interpreting Subsection (a)(8)(A) because a significant number of military service members are among the intended beneficiaries of the MOVE Act. See 156 Cong. Rec. at 9762, 9767-9768. Two of the UOCAVA provisions Alabama cites (Ala. Br. 52-53) single out overseas military service members for additional assistance in returning their marked UOCAVA ballots. See p. 40, *supra*. Indeed, there is ample evidence that Congress was especially concerned with amending UOCAVA to address the plight of military service members who risk their safety for this country but are prevented from casting ballots to elect its leaders. 156 Cong. Rec. at 9766 (citing testimony of Lieutenant Colonel Joseph DeCaro at Rules Committee May 2009); see also 155 Cong. Rec. 18,991-18,993 (2009) ("They can risk their lives for us, we can at least allow them to vote."). Interpreting Subsection (a)(8)(A) to include runoff elections thus would be consistent with Congress's "solicitude" towards

uniformed service members and Congress's indisputable goal of fully enfranchising them. See *Henderson*, 131 S. Ct. at 1205 (citation omitted).

II

IF THE COURT WERE TO HOLD THAT ONLY SUBSECTION (a)(9) APPLIES TO RUNOFF ELECTIONS, A REMAND IS REQUIRED TO DETERMINE IF ALABAMA HAS A WRITTEN PLAN AND, IF SO, WHETHER IT PROVIDES SUFFICIENT TIME TO VOTE

The prior section of this brief explains why Subsection (a)(8)(A) applies to runoff elections. The district court agreed and therefore made no findings regarding Alabama's independent compliance with Subsection (a)(9)'s requirement that States using runoffs have a written plan for transmitting ballots that would give UOCAVA voters "sufficient time to vote in the runoff election." If this Court were to hold that only Subsection (a)(9) applies to runoffs, the issue of whether Alabama has complied with Subsection (a)(9) must be addressed. Here, the district court erred in believing that the United States had not alleged a separate violation of Subsection (a)(9). It had. However, the record contains no evidence that Alabama has a written runoff plan for the 2016 federal election cycle, as required by Subsection (a)(9), let alone a plan that would meet a substantive "sufficient time" requirement under Subsection (a)(9). If this Court disagrees that Subsection

(a)(8)(A) applies to federal runoff elections, it therefore must remand the case for further proceedings on the United States' Subsection (a)(9) claim.

A. The United States Challenged Alabama's Subsection (a)(9) Compliance

The United States' Complaint clearly challenged Alabama's compliance with Subsection (a)(9) (Doc. 1, at 7, ¶ 35). The parties' briefs below incorporated discussion of that issue (Doc. 93, at 20-21), and Alabama concedes (Ala. Br. 39) that the United States' Complaint challenged alleged that its 2012 written "plan" was insufficient under Subsection (a)(9).

B. A Remand Is Required To Decide The United States' Subsection (a)(9) Claim

Alabama now argues that the United States' claim that Alabama violated Subsection (a)(9) is moot (Ala. Br. 39). Alabama argues that the February 2012 temporary emergency administrative rule the Secretary had in place when the United States filed suit was replaced by a so-called "new plan" that is in "place for this year." Ala. Br. 39 & n.11. But there is no evidence in the record that Alabama actually has a written plan in place, despite the district court's March 14, 2014, Amended Consent Order requiring it to "develop a 'written plan' pursuant to" Subsection (a)(9) "by no later than April 2, 2014." Doc. 127, at 8.

The only available evidence, which is neither in the record on appeal nor in the post-appeal trial court docket, reflects that Alabama has no written plan in place for the 2016 federal election cycle. See Doc. 127, at 2, 8, 10; Addendum A-4, 1. Although Alabama bears the heavy burden of demonstrating mootness, see *Dupree* v. *Palmer*, 284 F.3d 1234, 1237 (11th Cir. 2002), the State has not moved to supplement the record with whatever "new plan" it contends renders the Subsection (a)(9) claim moot.

For the convenience of the Court, the United States provides the so-called "new plan" in an Addendum attached to this brief. Addendum A-1-7. That plan is clearly no longer in effect, and thus cannot moot the United States' claim.[20] Despite its misleading silence on this point (Ala. Br. 39 n.11), Alabama's "new plan" was simply another temporary emergency administrative rule that tracked the

[20] In *Bankshot Billards, Inc.* v. *City of Ocala*, 634 F.3d 1340, 1352 (11th Cir. 2011), the City raised the issue of mootness for the first time on appeal. This Court remanded the case for the district court to determine whether the voluntary cessation exception to mootness applied, because there was no pertinent factual record before it on appeal. *Ibid.* Here, the Court may examine the single document that the United States has provided to determine that the "new plan" Alabama cites has expired, even if *Bankshot* requires a remand to determine the existence or non-existence of a current written plan. As is explained above, however, even if the district court were to determine that Alabama has another written plan, that fact still would not render the case moot if that written plan does not provide sufficient time to vote in runoff elections.

Consent Order's requirements only with respect to the federal primary runoff election held on July 15, 2014. See Addendum. That rule expired on July 30, 2014, by operation of State law. Ala. Code § 41-22-5(b). There is thus no evidence, in the record or elsewhere, demonstrating that Alabama has a written plan in place.

The United States' Subsection (a)(9) claim is not moot either (a) if Alabama has no written plan as required by Subsection (a)(9), or (b) if the State has a written plan that does not meet the substantive requirement of providing sufficient time for UOCAVA voters to vote in a federal runoff election. Declaratory and injunctive relief would be available to the United States in either situation, making its claim justiciable. See *Calderon* v. *Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066, 2067 (1996) (per curiam) (holding that mootness is triggered only when a court cannot grant "any effectual relief whatever" (quoting *Mills* v. *Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 133 (1895)); see also *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464, 127 S. Ct. 2652, 2663 (2007) (holding that case is

not moot when "there exists a reasonable expectation that the same controversy involving the same party will recur").[21]

C. Before This Court Can Consider The Existence Or Sufficiency Of Any Subsection (a)(9) Plan, The District Court Must Make Findings Of Fact

If Subsection (a)(8)(A)'s 45-day rule does not directly apply to runoff elections, then Subsection (a)(9) requires that Alabama have a written plan in place that meets the substantive standard of transmitting absentee primary runoff ballots in "sufficient time" to ensure that UOCAVA voters can receive and return them so that they count. In the United States' experience, it is unlikely that any State could demonstrate compliance with Subsection (a)(9) when the State's existing election laws and procedures provide far fewer than 45 days of ballot transit time.[22] That likelihood is diminished when, as here, State laws appear to authorize a process

[21] The United States' claim also is not moot because, as the Supreme Court held in *Davis* v. *Federal Election Commission*, 554 U.S. 724, 735, 128 S. Ct. 2759, 2769 (2008), a short election cycle presents events that are capable of repetition yet evading review. See also *Arcia* v. *Florida Sec'y of State*, 746 F.3d 1273, 1280-1281 (11th Cir. 2014) (holding that NVRA challenge was not mooted by the end of the 2012 elections given the three-month duration of the challenged activity).

[22] Even if this Court holds that the Subsection (a)(8)(A) 45-day advance ballot transmittal rule does not encompass runoff elections, Congress's determination that 45 days of ballot transit time is sufficient to ensure that UOCAVA voters are enfranchised still provides a benchmark for considering whether a written plan provides "sufficient time" to vote under Subsection (a)(9).

that could leave *at most* only 31 days of roundtrip ballot transit time, only 24 days of which are provided for UOCAVA voters to receive, vote, and postmark their ballots. See p. 13-14, *supra*.

When all of the steps of Alabama's election process are considered, Alabama's 42-day window between primary and primary runoff elections, along with the seven-day post-election ballot receipt deadline for UOCAVA voters, do not reflect the number of days Alabama actually provides for UOCAVA voters to vote in federal primary runoffs. Alabama's statutory scheme, and the very limited factual record regarding primary election certification and primary runoff ballot preparation procedures, suggests that fewer than 31 days of roundtrip ballot transit time remain, and thus fewer than 24 days for UOCAVA voters to receive, vote, and postmark their primary runoff election ballots. See pp. 13-14, *supra*. In addition, the record amply demonstrates a history of errors and glitches that have repeatedly resulted in UOCAVA violations even for Alabama's regularly scheduled federal elections, likely further reducing the available time for UOCAVA voters to vote. See, *e.g.*, Doc. 84-4, at 10 (describing an error caught at proofing, requiring reprinting of the ballots); Doc. 84-4, at 14 (reporting errors on printed ballots that had already been shipped, resulting in a three-day delay); Doc. 84-4, at 19 (reporting that county did not receive its paper ballots from vendor until

after the 45-day transmittal deadline for 2012 federal primary); Doc. 84-4, at 42 (attesting that electronic transmission system contained no ballot styles as of the ballot transmission deadline for the 2012 general election); Doc. 84-4, at 26 (describing a six-day delay in receiving printed ballots from the vendor); see also p. 15 & n.9, *supra*.

A remand is required to allow the parties to develop a record, and the district court to make findings, about whether Alabama currently has a written runoff election plan and whether any such plan provides sufficient time. Even if the Court were to reverse summary judgment on the United States' Subsection (a)(8)(A) claim and therefore vacate the Consent Order provisions setting Alabama's primary runoff elections 63 days after its federal primary election beginning with the 2016 federal election cycle, the Court should deny Alabama's request to vacate the entirety of the March 4, 2014, Consent Order (Ala. Br. 65). The Consent Order provisions requiring Alabama to create a written runoff plan pursuant to Subsection (a)(9) (Doc. 127, at 8) should remain in place because there is no evidence that Alabama has complied with that requirement despite the district court's direction to do so and the State's independent statutory obligations to do so.

CONCLUSION

For all of the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF OF APPELLEE UNITED STATES OF AMERICA:

(1) complies with Federal Rule of Appellate Procedure 32 (a)(7)(B) because it contains 11,959 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word, in 14-point Times New Roman font.

s/ Jodi B. Danis
JODI B. DANIS
Attorney

Dated: August 27, 2014

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2014, I electronically filed the foregoing BRIEF OF APPELLEE UNITED STATES OF AMERICA with the Clerk of the Court for the United States Court of Appeal for the Eleventh Circuit by using the appellate CM/ECF system and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid.

I also certify that all counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Jodi B. Danis
JODI B. DANIS
Attorney

ADDENDUM

APA-4
11/96

CERTIFICATION OF EMERGENCY RULES
FILED WITH LEGISLATIVE REFERENCE SERVICE
JERRY L. BASSETT, DIRECTOR

Pursuant to Code of Alabama 1975, §§41-22-5(b) and 41-22-6(c)(2)a. and b.

I certify that the attached emergency rule is a correct copy as promulgated and adopted on the 1st day of April, 2014.

AGENCY NAME: Secretary of State

RULE NO. AND TITLE: 820-2-9-.09-.10ER 2014 UOCAVA State Written Plan for Federal Primary Runoff Election

EFFECTIVE DATE OF RULE: April 1, 2014

EXPIRATION DATE (If less than 120 days): _____

NATURE OF EMERGENCY: These emergency rules are necessary to provide the 2014 state written plan for the potential Federal Republican primary runoff election for Alabama's 6th Congressional District.

STATUTORY AUTHORITY: 42 U.S.C. section 1973ff-1 (a)(9)(2009).

SUBJECT OF RULE TO BE ADOPTED ON PERMANENT BASIS ___ YES __X__ NO

NAME, ADDRESS, AND TELEPHONE NUMBER OF PERSON TO CONTACT FOR COPY OF RULE:

Jean Brown, Chief Legal Advisor
Office of the Secretary of State
State Capitol
Montgomery, AL 36104

REC'D & FILED
APR 01 2014
LEGISLATIVEREFSERVICE

Jim Bennett
Signature of officer authorized to promulgate and adopt rules and regulations or his or her deputy

FILING DATE
(For APA Use Only)

NEW

OFFICE OF THE SECRETARY OF STATE
ADMINISTRATIVE CODE

820-2-9-.09-.10ER 2014 UOCAVA State Written Plan for Federal Primary Runoff Election

Pursuant to 42 U.S.C. section 1973ff-1 (a)(9), these rules provide the state written plan for the potential Federal Republican primary runoff election for Alabama's 6th Congressional District, which is the only 2014 Federal election with the potential for a primary runoff election.

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

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

(2) The Secretary of State will transmit to 6th Congressional District Republican UOCAVA voters instant runoff ballots for the primary election. The instant runoff ballot will allow these voters to rank the candidates in order of preference. In the primary election, each validly cast vote will be counted for the first choice candidate. In the event of a primary runoff election, each validly cast vote will be counted for whichever of the runoff candidates is ranked higher on the ballot.

(b) In order to fully facilitate the conduct of any federal runoff election in compliance with UOCAVA

and other applicable election laws, for the 2014 Republican primary and(potential) primary runoff election for the 6th Congressional District only, the Secretary of State is expressly authorized in the Consent Order entered by the U.S. District Court for the Middle District of Alabama in *United States of America v State of Alabama et al.*, Case 2:12-cv-00179-MHT-WC and this written state plan to do the following:

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

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

(3) To prepare and approve the instant runoff ballots and to create a ballot record in *Power Profile*.

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

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

(6) To assume and exercise the duties of the county absentee election manager to receive UOCAVA absentee ballot applications directly from Republican UOCAVA voters residing in the 6th Congressional District and transmit both mailed and electronic ballots.

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

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

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

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

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

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

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

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

(14) To utilize a voting tabulation machine for counting the instant runoff ballots received from Republican UOCAVA voters residing in the 6^{th} Congressional District.

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

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

(17) To implement as necessary provisional balloting with regard to the instant runoff ballots as provided in *Code of Alabama*, § 17-10-2, to include (1) a determination of which instant runoff ballots shall be converted to provisional ballots, (2) a 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.

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

(c) 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.

(d) The Secretary of State will perform any and all other duties and functions as may be necessary to effectuate the UOCAVA voting in any runoff election in the 6th Congressional District Republican race and to effectuate the above-referenced Court Order.

(e) In the event a UOCAVA voter makes a valid and timely request for an absentee ballot to participate in the Democratic primary, and also makes a valid and timely request for an absentee ballot to participate in the Republican primary *runoff* (such cross-over voting being allowed by the rules of the Republican party), that voter shall be sent both ballots. The ballot to participate in the Democratic primary shall be sent by the county absentee election manager no later than 45 days before the primary election, and the ballot to participate in the Republican primary runoff shall be sent separately, at a later date, but no later than 45 days before the Republican primary runoff election. The ballots for the Republican primary runoff for state and county offices shall be sent by the county absentee election manager and the ballots for the Republican primary runoff for federal offices shall be sent by the Secretary of State.

(f) Pursuant to the above-referenced Court Order, the Secretary of State shall provide notice to UOCAVA voters residing in the 6th Congressional District as follows:

(1) Notify the Director of the Federal Voting Assistance Program (FVAP) of the United States Department of Defense of the entry of said Order, and request assistance in notifying impacted voters of the relief afforded in the Order. The Secretary of State will coordinate with the FVAP as necessary to facilitate such notice.

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

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

(3) For applicable UOCAVA voters residing in the 6th Congressional District who provide an email address, the Secretary will notify the voter of the relief afforded in the above-referenced order by email communication.

(4) The Secretary of State will provide a copy of the above-referenced Court Order to the Probate Judges, the Chair of the Republican Party State Executive Committee, Absentee Election Managers, the Boards of Registrars, and the Chair of the Republican Party County Executive Committee in each of the Alabama Counties that comprise the 6th Congressional District. Defendants shall also provide a copy of the Court's Order to the Chair of the Republican Party State Executive Committee.

Authors: Jean Brown; William Sutton.

Authority: Consent Order entered in *United States of America v. State of Alabama, et al.*, Case 2:12-cv-00179-MHT-WC; 42 U.S. C. section 1973ff-1- (a)(9).

History: **New Rule**. Effective Date: April 1, 2014.