

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

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

Case No. 1:12-cv-02230-SCJ

THE STATE OF GEORGIA; and)

BRIAN P. KEMP,)

SECRETARY OF STATE)

OF GEORGIA, in his official capacity,)

Defendants.)

_____)

UNITED STATES' RESPONSE
TO DEFENDANTS' AMENDED PROPOSED ORDER

Plaintiff United States of America (“United States”) submits the following Response to Defendants’ Amended Proposed Order. *See* Am. Proposed Order, May 30, 2013, ECF No. 35. For the reasons discussed herein, the State of Georgia and Brian P. Kemp, Georgia’s Secretary of State, in his official capacity, (“Defendants” or “the State”) have failed to present a proposal that would remedy the State’s violation of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (“UOCAVA”), 42 U.S.C. § 1973ff *et seq.*, as amended by the Military and Overseas Voter Empowerment Act (“MOVE Act”), Pub. L. No. 111-84, Subtitle H, §§ 575-89, 123 Stat. 2190, 2318-35 (2009), and this Court should order an

appropriate remedy that will govern all of Georgia's future Federal runoff elections, unless and until there is an enactment of changes to Georgia's election laws that ensures full compliance with UOCAVA's requirements.

I. ARGUMENT

While maintaining the current compressed runoff election schedule, Defendants propose extending the deadline for receipt of UOCAVA ballots in runoff elections until 45 days after a "transmittal date" designated by the Secretary of State. Am. Proposed Order 4-5, ECF No. 35. Further, although Georgia law requires UOCAVA ballots to be postmarked by Election Day and returned within three days after any Federal election, *see* Ga. Code Ann. § 21-2-386(a)(1)(G), Defendants' proposal does not require that ballots be voted by Election Day and would extend the ballot receipt deadline to at least 35 days after a Federal primary runoff election and 28 days after a Federal general runoff election, depending on the transmittal date, in an attempt to comply with UOCAVA and this Court's Order,¹ *see* Order, Apr. 30, 2013, ECF No. 33.

¹ With regard to the 2014 Federal elections, Defendants proffer that a July 15, 2014 primary election date would result in certification by July 22, 2014, seven days later, and a UOCAVA absentee ballot transmittal date (to county election officials, *not* to UOCAVA voters) of July 26, 2014, 11 days after the July 15, 2014 primary election date and 10 days before the primary runoff election date, if held, of August 5, 2014. Am. Proposed Order 3-4, ECF No. 35; *see* O.C.G.A. § 21-2-150. Under Defendants' proposal, UOCAVA voters would be permitted to vote and return their absentee ballots through September 9, 2014, 35 days after Election Day for the primary runoff election on August 5, 2014, Am. Proposed Order 6,

Defendants' proposed order recommends that a section of the Georgia Code be amended, as described above, in an attempt to comply with Section 102(a)(8) of UOCAVA and this Court's Order. Am. Proposed Order 7-8, ECF No. 35. However, no legislation concerning or responsive to this action was introduced during Georgia's 2013 legislative session. *See id.* at 4. Defendants offer no assurance to this Court that corrective legislative action is imminent or even likely to be adopted in time for the next regularly scheduled Federal elections in 2014.

As discussed below, Defendants' proposal would not remedy their inability under Georgia's current electoral system to transmit absentee ballots in future Federal runoff elections to qualified military and overseas voters who have requested them by the 45th day *before* such an election. *See* 42 U.S.C. § 1973ff-1(a)(8)(A). Thus, Defendants have failed to propose a remedy that would comply with UOCAVA's requirements. *See id.* Accordingly, Defendants' proposal should be rejected, and the Court should order an appropriate remedy that will govern all of Georgia's future Federal elections unless and until there is an enactment of changes to the State's election laws to ensure UOCAVA compliance. *See* Order, ECF No. 33.

ECF No. 35. Under the same procedure, UOCAVA voters would be permitted to vote and return their absentee ballots for the 2014 Federal general runoff election, if held, through December 30, 2014, 28 days after Election Day for the general runoff election on December 2, 2014. *Id.* at 5.

A. An Extension of the Ballot Receipt Deadline is an Insufficient Substitute for the 45-Day Absentee Ballot Transmittal Period Required Under UOCAVA.

Rather than propose changes that would remove the structural impediment to UOCAVA compliance in current Georgia law, *see* Order 30-31, ECF No. 33, Defendants' proposal would maintain the current election calendar – the root cause of noncompliance, Am. Proposed Order 4, ECF No. 35. Under this proposal, Georgia would transmit absentee ballots to UOCAVA voters far less than 45 days prior to the date on which Federal runoff elections would be held, while extending the ballot receipt deadline after the election by the number of days needed to provide a 45-day window.

As a means of temporary injunctive relief in this case, when immediate action was required due to Defendants' inability to transmit Federal primary runoff election ballots in accordance with UOCAVA, the United States requested and this Court ordered the extension of the ballot receipt deadline for the 2012 Federal primary runoff election along with other remedial measures. Mot. TRO Prelim. Inj., June 27, 2012, ECF No. 2. However, an extension of the ballot receipt deadline for a period of time after Election Day is not appropriate as a permanent substitute for the full pre-election 45-day period required under UOCAVA. *See* 42 U.S.C. § 1973ff-1(a)(8)(A); *see also* Order 30, ECF No. 33.

As this Court found, UOCAVA's mandate that each state shall "transmit a validly requested absentee ballot . . . not later than 45 days *before* the election[,]" Order 3, ECF No. 33 (emphasis added), applies equally to federal runoff elections. *Id.* at 12-18. Accordingly, Georgia must send UOCAVA voters their runoff ballots by the 45th day *before* the actual date of the election, not merely provide a 45-day window for UOCAVA ballots to be transmitted and voted, which in the State's proposal would extend long past Election Day.

Thus, adoption of the State's proposal would subvert the Court's summary judgment ruling. *See* Am. Proposed Order, ECF No. 35; *cf.* Order, ECF No. 33 (holding that UOCAVA's 45-day advance transmission requirement applies to runoff elections). Since Defendants' plan does not comply with UOCAVA's ballot transmission requirements for Federal runoff elections, it must be rejected.

B. Defendants' Proposal that UOCAVA Voters Vote After the Election Cuts Against Democratic Principles.

In addition to the fundamental failure to comply with UOCAVA's advance ballot transmission requirement, Defendants' proposed remedy is unreasonable because it cuts against bedrock democratic principles that votes should not be cast after Election Day and that voters should have equal access to information about the election. The proposed order would permit all UOCAVA voters to vote their

absentee ballots as many as 35 days after Election Day for Federal runoff elections.²

In our nation's elections, votes are to be cast by the close of polls on Election Day and before any votes are tallied and results publicized. Concluding the casting of all ballots before the release of any election results ensures a level playing field for all voters. That is, no class of voters in a jurisdiction should have access to information about how their own votes will impact cumulative vote tallies before casting their vote.³ Among the many problems a system such as Georgia proposes here, where vote totals would be known before voting ends, is that news reports of Election Day vote tallies could discourage UOCAVA voters from voting in runoff elections where a candidate received enough votes to appear to have won, (*i.e.*, on the basis of the Election Day vote margin). Indeed, such a

² Notably, although this Court's preliminary injunction and temporary restraining order extended the ballot receipt deadline for UOCAVA ballots after the 2012 Federal primary runoff election, it required that such ballots be voted, executed, and sent by voters by Election Day. *See* Mot. TRO Prelim. Inj. 25, ECF No. 2. This stands in contrast to Defendants' remedial proposal here, which would provide for voting after Election Day.

³ Buttressing the principle of equal access by all voters to election information, Congress has set a uniform date for Senate, House, and Presidential general elections, 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1, premised on Congress' constitutional authority to select the day Congressional representatives and Presidential electors are chosen. U.S. Const. art. I, § 4, cl. 1; art. II, § 1. Defendants' proposed remedy is unreasonable and inconsistent with the principle embodied in these federal statutes.

scenario likely would be a common occurrence, frustrating the goal of enfranchising military and overseas voters, the very purpose of UOCAVA. In stark contrast, a fully adequate remedy for the State's violation of UOCAVA's 45-day advance ballot transmittal requirement is available to the State, without presenting the problems that Defendants' proposal has, as discussed below.

C. Defendants' Proposal is Unreasonable as a Permanent Remedy Because the Proposed "Transmittal Date" is Unrelated to the Date on Which Absentee Ballots Will Be Transmitted to UOCAVA Voters.

As stated, Defendants' proposal to extend the ballot deadline and allow post-election voting is not an adequate or reasonable permanent remedy. Even assuming such a proposal were adequate and lawful, Defendants' proposal would be insufficient, because it offers no assurance that the proposed "transmittal date" is the date on which absentee ballots will be transmitted to UOCAVA voters. Instead, the "transmittal date" is merely "the date that the official absentee ballots will be delivered to the county election superintendents." Am. Proposed Order 5, ECF No. 35. Significantly, Defendants' May 30, 2013 Amended Proposed Order and related affidavits are devoid of any assurance that county officials will be required to transmit the absentee ballots to UOCAVA voters that same day.

Moreover, as each of Defendants' proposed dates on which ballots will be transmitted to county officials falls on a Saturday, such officials would need to be at work that day, ready to receive and transmit all UOCAVA ballots to voters

before the close of mail services that day, to allow for the ballots to be transmitted 45 days before Defendants’ proposed UOCAVA ballot receipt deadline. *See id.* at 2-5. However, neither Defendants’ Amended Proposed Order nor the supporting affidavits indicate that local election officials will be required to work on that day to ensure that absentee ballots are transmitted to UOCAVA voters on that day.⁴ If any ballots are not transmitted that Saturday, the remaining UOCAVA ballots would presumably be transmitted no earlier than Monday, two days later and only 43 days before Defendants’ proposed UOCAVA ballot receipt deadline.

Defendants’ proposal is inadequate because their proposed “transmittal date” does not ensure that the absentee ballots will actually be transmitted to UOCAVA voters by the 45th day before the election. Accordingly, Defendants’ proposal should be rejected.

⁴ The affidavits of Linda Ford, Director of the Elections Division of the Office of the Secretary of State of Georgia, and Michael Barnes, Director for Elections Systems at Kennesaw State University, address only the State’s ability to transmit ballots to county officials. Decl. of Linda Ford, May 29, 2013, ECF No. 35-1 (“I am familiar with the process by which all election ballots, including absentee ballots, are created or ‘built’ and then distributed to each *county*.”) (emphasis added); Decl. of Michael Barnes, May 29, 2013, ECF No. 35-2 (“In the case of both the 2010 Republican gubernatorial primary runoff and the 2012 Congressional primary runoffs . . . the official ballots were ready to transmit by the second Friday following the General Primary.”).

D. The Court Should Order An Appropriate Modification to the State's Election Calendar Which Will Govern Future Federal Runoff Elections in Georgia.

Defendants had an opportunity to propose a permanent remedy. To date, the State's General Assembly has failed to adopt legislation that would permit the State to fully comply with UOCAVA in Federal runoff elections.⁵ Defendants have provided no indication that the General Assembly would consider and enact, and the Governor would sign such legislation in time for the 2014 Federal elections. And for the reasons discussed above, Defendants' proposal for a remedial order of this Court fails to afford the structural changes needed to ensure the transmittal of ballots in future Federal runoff elections by the 45th day *before* Election Day, as the Court held is necessary to comply with UOCAVA.

Accordingly, the Court should now order an appropriate remedy. *See United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263, at *1 (N.D.N.Y. Jan. 27, 2012) (finding that the court must revise the State of New York's Federal primary

⁵ Georgia's General Assembly has not convened since this Court's summary judgment decision on April 30, 2013. However, the General Assembly did convene (in January 2013) and adjourn (in March 2013) since the Court's July 2012 preliminary injunction decision in this case. *See* Ga. General Assembly, <http://www.legis.ga.gov> (last visited June 19, 2013). To our understanding, the General Assembly is not scheduled to convene again until January 2014. Waiting until then would leave very little time to determine if the State was going to enact legislation that includes an appropriate remedy, and failing that, to return to this Court for a permanent remedy to address the state's 2014 Federal election schedule.

election date, because despite “[h]aving had ample opportunity to correct the problem, [the State] has failed to find the political will to do so”).

The United States respectfully submits that an order revising Georgia’s election calendar is a viable and appropriate remedy, unless and until there is a change to Georgia’s election laws that ensures full conformity with all UOCAVA requirements.⁶ *See* Order 30-31, ECF No. 33. The Court’s order should expand the current election calendar to provide the time necessary for transmission of ballots 45 days before Federal runoff elections. *See generally New York*, 2012 WL 254263, at *3. The United States’ proposal would maintain the State’s policy decision to hold Federal primary and general runoff elections in contests where a candidate fails to garner the majority of the vote, and hew as closely as possible to the current election calendar.

Working from the uniform Federal general election date established by federal law⁷ and Georgia’s currently scheduled Federal primary runoff date of

⁶ The Court held that the hardships Defendants may experience in amending the State’s election system “are substantially outweighed by the threatened injury to UOCAVA voters[.]” Order 27, ECF No. 33, and a permanent change to the State’s election system to bring it into compliance with all provisions of UOCAVA, 42 U.S.C. § 1973ff-1(a)(8)(A), “will not be adverse to the public interest[.]” Order 29, ECF No. 33.

⁷ *See* 3 U.S.C. § 1; *see also* O.C.G.A. §§ 21-2-2(15), 21-2-9(a).

August 5, 2014,⁸ *see* Am. Proposed Order 6, ECF No. 35, the Court should set the remaining Federal election dates so that the State will have sufficient time to transmit absentee ballots 45 days before the date of Federal runoff elections, *see* 42 U.S.C. § 1973ff-1(a)(8)(A).

The United States proposes that this Court order the election dates described below, based on Defendants' representations and assurances in their Amended Proposed Order and its accompanying affidavits that within 11 days they are able to both prepare absentee ballots for runoff elections and send them to county election officials. However, because Defendants have failed to state definitively that county election officials are actually able to transmit absentee ballots by the State's "transmittal date," Am. Proposed Order, ECF No. 35, the United States' proposal adds an additional week to Defendants' proposed 11-day timeframe to ensure the State's UOCAVA compliance.⁹

⁸ Defendants' proposed Federal primary runoff date is 13 weeks before the Federal general election.

⁹ As elections are held on Tuesdays, the 45-day UOCAVA deadline necessarily falls on a Saturday. Adding one week to Defendants' proposed 11-day, Saturday deadline on which Defendants submit that absentee ballots will be transmitted to county election officials, appears a reasonable amount of time for county election officials to prepare and transmit absentee ballots to UOCAVA voters.

Accordingly, the United States requests that this Court order that in regular Federal elections in 2014 and beyond, the State's election calendar be configured as follows:

1. The State's Federal primary election shall be held on the Tuesday nine weeks before the Federal primary runoff election, and 22 weeks before the Federal general election.
2. The State's Federal primary runoff election shall be held 13 weeks before the Federal general election.
3. As required by federal law, the State's Federal general election shall be held on the Tuesday following the first Monday in November. *See* 3 U.S.C. § 1; *see also* O.C.G.A. §§ 21-2-2(15), 21-2-9(a).
4. The State's Federal general runoff election shall be held on the Tuesday nine weeks after the Federal general election.

Consequently, in 2014, the State's Federal primary election would be held on Tuesday, June 3, 2014, nine weeks before Defendants' proposed Federal primary runoff election date of Tuesday, August 5, 2014, Am. Proposed Order 5, ECF No. 35. The Federal general election would be held 13 weeks later, on Tuesday, November 4, 2014,¹⁰ and if necessary, the Federal general runoff election would be held nine weeks thereafter, on Tuesday, January 6, 2015.¹¹ Additionally, the Court

¹⁰ *See* 3 U.S.C. § 1; *see also* O.C.G.A. §§ 21-2-2(15), 21-2-9(a).

¹¹ Should a general runoff election be necessary, the United States recognizes that this date falls between Federal and religious holidays, and that it would, in 2014 and beyond, delay the seating of Georgia's newly elected Federal legislators. *See* U.S. Const. amend. XX, § 1 (A new Congress begins at noon

should order that in the event of a special Federal election to fill a vacancy, the date of any special runoff election, if held, shall be nine weeks after the special election necessitating the runoff election.

Finally, the Court should order Defendants to submit to the Court, within 20 days of the Court's order, a proposed calendar for all statutory and administrative election-related deadlines based upon the election dates set by the Court. *Cf. New York*, 2012 WL 254263, at *3 (mandating the submission of a calendar of statutory and administrative election-related deadlines, and the subsequent adoption and promulgation thereof). Furthermore, for any Federal runoff election held through January 31, 2015, this Court should order Defendants to submit a report, in a format agreed to by the parties, to the United States within three days of the 45-day deadline detailing whether all UOCAVA ballots for the runoff election were transmitted by that deadline.

II. CONCLUSION

For the reasons set forth above, Defendants have failed to present a proposal that provides an adequate permanent remedy for the State's UOCAVA violations, and this Court should order an appropriate modification of Georgia's election

January 3 of each odd-numbered year following a general election). However, under the State's current election system, involving majority vote requirements for both Federal primary and general runoff elections, these dates are the earliest UOCAVA-compliant dates in the corresponding election calendars. *See* 42 U.S.C. § 1973ff-1(a)(8)(A).

calendar that will govern all of Georgia's future Federal runoff elections, unless and until there is an enactment of changes to Georgia's election laws that ensures full compliance with UOCAVA.

Respectfully submitted,

Date: June 19, 2013

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CERTIFICATE OF SERVICE

I hereby certify that the United States' Response to Defendants' Proposed Order was filed through the ECF system and therefore will be sent electronically to Defendants' counsel.

June 19, 2013

/s/ Janie Allison (Jaye) Sitton
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