MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF HAWAII REGARDING COMPLIANCE WITH THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT FOR THE NOVEMBER 2, 2010 FEDERAL GENERAL ELECTION

A. Introduction

This agreement is entered into between the United States of America, through the U.S. Department of Justice ("United States" or "the Department"), and the State of Hawaii and Scott Nago, in his official capacity of Chief Election Officer of the State of Hawaii (collectively the "State"), through the Office of the Attorney General of the State of Hawaii, in order to secure the voting rights of absent uniformed services and overseas voters protected by the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. §§ 1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) ("MOVE Act"). UOCAVA provides that absent uniformed services voters and overseas voters ("UOCAVA voters") shall be permitted "to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 42 U.S.C. § 1973ff-1.

This matter arises out of UOCAVA's requirement, pursuant to amendments by the MOVE Act, that states transmit to their UOCAVA voters validly requested absentee ballots at least 45 days before an election for Federal office, 42 U.S.C. § 1973ff-1(a)(8), absent the granting of a waiver pursuant to 42 U.S.C. § 1973ff-1(g)). Hawaii's primary election is on September 18, 2010, which is exactly 45 days prior to the November 2, 2010 federal general election. In light of this, the State on March 25, 2010, requested from the Presidential designee for UOCAVA, the Secretary of Defense, a hardship exemption from the "45 day advance" transmission requirement of UOCAVA, pursuant to 42 U.S.C. § 1973ff-1(g). In its waiver request, Hawaii proposed mailing out its absentee ballots 35 days in advance of the November

2010 election, to accommodate State law requirements concerning, among other things, certification of the results of the primary election. On August 27, 2010, the Secretary of Defense found that Hawaii's primary date caused the State undue hardship, but denied Hawaii's waiver application due to the inadequacy of its comprehensive plan to transmit UOCAVA ballots in time to be received, marked and returned in time to be counted for the November 2, 2010 federal general election.

The United States and the State, through their respective counsel, have conferred and agree that this matter should be resolved without the burden and expense of litigation. The parties share the goal of ensuring that Hawaii's UOCAVA voters will have sufficient opportunity to receive absentee ballots they have requested and submit marked absentee ballots in time to be counted for the November 2, 2010 Federal general election. As consideration for this Agreement, the United States has agreed to forgo litigation, subject to compliance with the terms of this Agreement. The parties negotiated in good faith and hereby enter into this Agreement as an appropriate resolution of the UOCAVA claims alleged by the United States.

B. Recitals.

The United States and the State stipulate and agree that:

1. The United States District Court for the District of Hawaii has jurisdiction to enforce provisions of the UOCAVA, 42 U.S.C. §§ 1973ff to 1973ff-7, and the Federal Court would have jurisdiction over an action brought by the United States to enforce the terms of this Agreement pursuant to 42 U.S.C. § 1973ff-4 and 28 U.S.C. § 1345.

2. The United States Attorney General is authorized to enforce the provisions of UOCAVA, 42 U.S.C. § 1973ff-4.

3. The State of Hawaii is responsible for complying with UOCAVA, and ensuring

that validly-requested absentee ballots are sent to UOCAVA voters in accordance with its terms. 42 U.S.C. § 1973ff-1.

4. Scott T. Nago is the Chief Election Officer for the State of Hawaii. The State's Chief Election Officer has general supervisory authority over all elections in the State and is responsible for assuring that elections in the State are conducted in accordance with the law. Haw. Rev. Stat. §§ 11-2, 11-155, 11-156.

5. Section 102(a)(8) of UOCAVA requires that states transmit validly requested ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election, unless a hardship exemption (waiver) is obtained pursuant to Section 102(g) of UOCAVA. 42 U.S.C. § 1973ff-1(a)(8).

6. States can be exempted from the requirement to transmit ballots 45 days in advance of a Federal election if they apply for, and are granted, a hardship waiver from the Presidential Designee for UOCAVA, the Secretary of Defense. 42 U.S.C. § 1973ff-1(g). Pursuant to Section 102(g)(2)(B)(i) of UOCAVA, the State applied for a hardship waiver on grounds that Hawaii's September 18, 2010 primary election prevented the State from complying with Section 102(a)(8)(A). 42 U.S.C. § 1973ff-1(a)(8)(A). On August 27, 2010, pursuant to its statutory authority, the Department of Defense denied the State's request for a hardship waiver.

7. On September 18, 2010, the State will conduct a Federal primary election in which voters will select candidates for the Federal general election on November 2, 2010. The date of the September 18, 2010 primary election is exactly 45 days prior to the November 2, 2010 general election for Federal office.

8. Election officials of the State have received timely requests for absentee ballots for the November 2, 2010 Federal general election from approximately 208 voters who are entitled to vote pursuant to the provisions of UOCAVA.

9. The State has asserted it will be unable to send absentee ballots to UOCAVA voters until on or about September 28, 2010, and thus will transmit ballots no earlier than 35 days in advance of the deadline for their return for the November 2, 2010 Federal general election.

10. Under Hawaii law, absentee ballots received after the polls close on election day are not counted. Haw. Rev. Stat. § 15-9.

11. The United States contends that the failure by Hawaii either to obtain a hardship waiver or to transmit absentee ballots to UOCAVA voters by the 45th day before the November 2, 2010 Federal general election constitutes a violation of Section 102(a)(8)(A) of UOCAVA. Hawaii contends that since the Secretary applied an incorrect standard in determining whether to grant Hawaii a waiver, and that he erred in failing to grant Hawaii a waiver, Hawaii is not in violation of UOCAVA. The United States contends that absent corrective action, the admitted inability of election officials in Hawaii to transmit absentee ballots to UOCAVA voters 45 days in advance of the November 2, 2010 Federal general election threatens to deprive United States citizens protected under UOCAVA of a sufficient opportunity to vote in that election. Hawaii contends that the current time voters will have to transmit absentee ballots provides sufficient opportunity for those voters to vote in that election.

12. The parties recognize that on May 20, 2010, in order to facilitate compliance with UOCAVA's requirement to transmit absentee ballots to UOCAVA voters 45 days

in advance of an election for Federal office, the Hawaii Governor signed into law Act 126, which takes effect on January 1, 2011 and which, among other things, moves Hawaii's primary date to the second Saturday in August in every even-numbered year. The parties anticipate that this law will enable Hawaii, without a waiver, to meet the requirements of Section 102(a)(8)(A) of UOCAVA in future general elections for Federal office beginning in 2012.

13. The Department and the State have been engaged in extensive discussions since the August 27, 2010 denial by the Secretary of Defense of the State's waiver request, in an attempt to reach agreement on actions to be taken by the State to ensure that United States citizens protected under UOCAVA have a sufficient opportunity to receive, mark and return their absentee ballots in time to be counted for the November 2, 2010 Federal general election. To ensure that Hawaii's UOCAVA voters will have sufficient opportunity to receive absentee ballots they have requested and submit marked absentee ballots in time to be counted for the November 2, 2010 Federal general election, the parties have agreed on a series of actions to be taken by the State, specifically including the provision, at the State's expense, of express delivery and return of absentee ballots for UOCAVA voters, to protect the voting rights of UOCAVA voters. The parties believe that, in the instant circumstances, the State's agreement to provide express delivery and return service for absentee ballots and to take other actions set forth below will decrease substantially the overall transit time required for the delivery, marking and return of absentee ballots of UOCAVA voters in time for those ballots to be counted for the November 2, 2010 Federal general election.

14. It is the intent of the State and the United States that the State immediately undertake and complete the actions set forth in this Agreement.

C. Terms of Agreement.

Now, therefore, for full and adequate consideration given and received, the United States and the State agree that:

1. The State shall transmit ballots for the November 2, 2010 Federal general election either electronically or by mail, according to the voter's choice, to all of the State's UOCAVA voters who have validly requested such ballots, no later than September 24, 2010, except if an election contest or contests make it impractical for the State to do so as described in Paragraph C.2 below. With regard to all UOCAVA voters who have requested transmission by mail, the State shall provide for transmittal and return of such ballots as set forth in Paragraphs 3 and 4 below.

2. If an election contest or contests occurs such that the State believes it is impractical to send out a ballot to any UOCAVA voters affected by the pending election contest(s) by September 24, 2010, the State will immediately confer on this with the Department. If the parties agree that it is impractical to send out a ballot to any UOCAVA voters because of a pending election contest or contests, the State shall proceed as follows: a) the State shall immediately attempt to contact by, in the following order, electronic mail, facsimile or telephone, each UOCAVA voter whose electronic or mail ballot transmission is affected by the pending election contest(s) to advise each such voter: i) that transmission of his or her ballot has been delayed due to the election contest(s); ii) of the option to receive his or her ballot by electronic mail if the voter has not already chosen such option; and iii) that his or her ballot will be transmitted immediately upon the resolution of the election contest(s), which

is anticipated to be no more than 4 days; b) the State shall transmit, by electronic mail or by express mail as set forth immediately below, dependent upon the individual UOCAVA voter's choice, each such delayed UOCAVA ballot to each UOCAVA voter affected by the election contest(s), immediately upon the resolution of each election contest(s) by the Hawaii court. In addition to the above, where a particular election contest does not involve any Federal office, but only State office(s), the UOCAVA voter whose absentee ballot transmission is delayed by such contest should also be advised by the State of the candidates for Federal office for the November 2, 2010 Federal general election and of his or her ability to utilize the Federal Write-in Absentee Ballot (FWAB), with instruction on how to access the FWAB, to vote for Federal office candidates prior to receipt of his or her absentee ballot from the State. Where the State contact with such voter is by electronic mail, the State shall attach a FWAB and a list of the candidates for Federal office to the electronic mail in the form of an electronic file.

If the parties are unable to resolve any dispute regarding an election contest, the parties agree that the dispute may be resolved by the United States District Court for the District of Hawaii following the bringing of an action to enforce this Agreement and/or UOCAVA by the United States.

3. The State shall at its expense provide for express mail service for transmittal of blank ballots and return of completed ballots for military voters and overseas voters with Diplomatic Post Office ("DPO") addresses, through the use of the Express Mail Service of the United States Postal Service ("USPS").

4. The State shall at its expense provide for express delivery service for transmittal of blank ballots and return of completed ballots for all other UOCAVA voters,

utilizing FedEx express delivery service. The State may also include International Reply coupons to certain voters, to offer an alternative means of return of the completed ballots.

5. The State shall provide that each ballot sent by express mail or express delivery service to UOCAVA voters be accompanied by a pre-addressed express mail or express delivery form and appropriate envelope for a voter to utilize to return the ballot to appropriate Hawaii State or local election officials, as well as a set of instructions developed by the State explaining how to return the ballot by express mail or express delivery, or electronically, as set forth below. The parties acknowledge that the Department of Defense has established new procedures under UOCAVA for collecting marked absentee ballots of absent overseas uniformed services voters for the November 2, 2010 Federal general election and for delivering such marked absentee ballots to the appropriate election officials. 42 U.S.C. § 1973ff-2A. The instructions accompanying all ballots should advise such absent overseas uniformed services voters of their option to utilize the Department of Defense ballot collection and return service or the pre-addressed express mail or express delivery form provided with the ballot to return their ballots to Hawaii election officials.

6. With regard to the State's UOCAVA voters who have validly requested transmittal of absentee ballots, by mail or electronically, for the November 2, 2010 Federal general election, the State agrees to take the following actions to attempt to ensure that such UOCAVA voters receive their ballots and are periodically kept aware of their options under Hawaii Administrative Rule § 3-174-19, to request, receive and return, by facsimile or electronic mail, a replacement absentee ballot for

the November 2, 2010 Federal general election where they have not received such ballot within 5 days of the federal general election: a) Beginning on October 18, 2010, 15 days before the November 2, 2010 federal general election, the State shall attempt to contact by, in the following order, electronic mail, facsimile or telephone, each UOCAVA voter who has validly requested electronic or mail ballot transmission, and whose marked ballot has not yet been returned by the voter and received by Hawaii election officials, to inquire of the voter whether the voter has yet received, by mail or electronically, as applicable, his or her blank absentee ballot; b) Where the State determines by such contact that a UOCAVA voter has not yet received his or her blank absentee ballot, the State shall advise such voter: i) of his or her option under Hawaii Administrative Rule § 3-174-19, to request, receive and return, by facsimile or electronic mail, a replacement absentee ballot for the November 2, 2010 Federal general election where they have not received such ballot within 5 days of the federal general election; and ii) how to request and return a replacement absentee ballot under such circumstances. Such contact of UOCAVA voters as outlined in this paragraph shall be repeated by the State on October 23, 2010, 10 days before the November 2, 2010 federal general election, and on October 28, 2010, 5 days before the election; and c) Where such contact of a UOCAVA voter pursuant to this paragraph 5 days before the election indicates that the voter still has not received his or her absentee ballot from the State as requested, the State shall advise each such voter of his or her immediate option to request a replacement absentee ballot by electronic mail or by facsimile and to return such ballot by the same means and how to request and return such ballot. The parties acknowledge that electronic or facsimile return of a replacement absentee ballot may involve a voter

being required to waive certain privacy rights with regard to his or her vote.

7. By close of business on Wednesday, September 22, 2010, the State shall complete its attempt to contact its UOCAVA voters eligible to participate in the State's November 2, 2010 Federal general election, by, in the following order, electronic mail, facsimile or phone,to advise such UOCAVA voters of the terms of this Agreement and, specifically, of: 1) the State's plan for express mail or express delivery service for UOCAVA voters as set forth in this Agreement; 2) the option to receive a ballot by electronic mail if the voter has not already requested such option; and 3) the ability of UOCAVA voters who have not received their absentee ballot 5 days before the November 2, 2010 Federal general election to request, receive and return a replacement ballot by facsimile or electronic mail.

8. The State shall also take additional steps to afford UOCAVA voters eligible to participate in the State's November 2, 2010 general election for Federal office a reasonable opportunity to learn of this Agreement by issuing a press statement for release within two business days of execution of this Agreement, posted on the State's election information website, and distributed to the Federal Voting Assistance Program; International Herald Tribune (http://www.iht.com); USA Today International (http://www.usatoday.com); Military Times Media Group (cvinch@militarytimes.com); Overseas Vote Foundation (http://www.overseasvotefoundation.org/intro/); Stars and Stripes (www.estripes.com), and any other appropriate newspaper or news media in the State. The news release shall, at a minimum: (1) summarize this Agreement; (2) provide appropriate contact information at the State of

Hawaii Office of Elections; and (3) identify the contests for Federal office that will be on the ballot on November 2, 2010;

9. The State shall provide a report to the United States no later than September 21, 2010, on the progress of the implementation of this Agreement, including the final plans for express delivery of ballots, copies of instructions to accompany such ballots, the status of the State's efforts to contact UOCAVA voters concerning this Agreement and their ballot transmittal options, and the status of certification and preparation of the ballots for transmittal to UOCAVA voters. The State shall advise the Department within 24 hours by electronic mail to Risa Berkower at risa.berkower@usdoj.gov as well as by attempted telephone contact to Risa Berkower at 202-305-0150, of any occurrence which may give rise to noncompliance with any term of this Agreement;

10. The State shall provide a report to the United States no later than September 26, 2010, concerning the transmittal of UOCAVA absentee ballots by the counties. The report shall: (a) certify whether absentee ballots were transmitted by September 24, 2010 to all qualified UOCAVA voters who had validly requested such ballots, and if not, the particulars; and (b) indicate, by county, the number of requests received and the number of UOCAVA absentee ballots transmitted, and the method of transmittal thereof. Where there has been an election contest which has delayed the transmission of UOCAVA ballots as set forth above, the State shall provide the above information to the United States as to such ballot transmission within one (1) business day of resolution of each such contest;

11. The State shall provide a supplemental report to the United States by October 6, 2010, concerning the transmittal of UOCAVA absentee ballots, by county, to voters whose requests for an absentee ballot were received subsequent to September 24, 2010, but not less than thirty days (30) before the election. The report shall indicate, by county, the number of requests received and the number of UOCAVA absentee ballots transmitted, and the method of transmittal thereof, on each day between September 24, 2010 and the 30th day before the election; and

12. The State shall provide a report to the United States no later than December 17, 2010, concerning the number of UOCAVA absentee ballots, by county, received and counted for the November 2, 2010 general election for Federal office. The report will set forth the following information, by county, and categorized by the following voter groups: absent uniformed services voters with APO and FPO addresses; uniformed services voters within the United States; and overseas civilian voters:

a. The number of absentee ballots from UOCAVA voters received and counted before the close of the polls on November 2, 2010;

b. The number of absentee ballots from UOCAVA voters received after the close of the polls on November 2, 2010; and

c. To the extent that the State has the information, the number of absentee ballots from UOCAVA voters that were not counted in the general election for Federal office and the reason those ballots were rejected.

D. Term.

The State's obligations under this Agreement shall commence immediately and shall expire in their entirety on December 31, 2010.

E. Enforcement.

The terms of this Agreement are intended to resolve the alleged violation of Section 102(a)(8) of UOCAVA arising from the denial of the State's waiver application on August 27, 2010. Where the State materially fails in any manner to comply with the terms of this Agreement, this Agreement is enforceable immediately in United States District Court for the District of Hawaii as set forth above, and pursuant to law, and additionally in such event, the United States also may take any other actions required to enforce Section 102(a)(8) of UOCAVA in the United States District Court, including seeking appropriate relief as a substitute for or in addition to the actions which are the subject of this Agreement. Nothing in this Agreement precludes the United States from taking appropriate enforcement action against the State for any other violations of UOCAVA that are not the subject of this Agreement.

F. Non-Admission of Fault, Liability, or Violation of UOCAVA

The State has entered into this Agreement in order to avoid litigation and in order to help facilitate voting by UOCAVA-covered voters. The State does not admit any fault, liability, or violation of UOCAVA, and were there UOCAVA litigation the State would assert, *inter alia*, that the Secretary applied an incorrect legal standard in denying Hawaii a waiver, and that the Secretary had an obligation to issue Hawaii a waiver pursuant to 42 U.S.C. §§ 1973ff-1(g), which provides that the Secretary "shall approve a waiver" under certain conditions, which Hawaii believes were met.

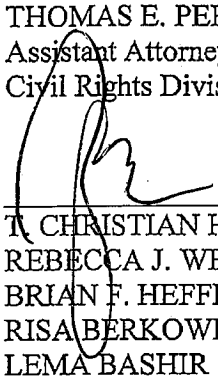
G. General.

This Agreement is binding on the parties and their successors in office. The parties agree to the admissibility of this Agreement in any subsequent proceeding for its enforcement, or other action filed to enforce Section 102(a)(8) of UOCAVA.

The undersigned enter into this Agreement this 16TH day of September, 2010:

FOR THE UNITED STATES:

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division



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The undersigned enter into this Agreement this 16th day of September, 2010:

FOR THE STATE OF HAWAII:

SCOTT T. NAGO
Chief Election Officer
State of Hawaii

APPROVED AS TO FORM AND SUBSTANCE:

MARK J. BENNETT
Attorney General
State of Hawaii