

2016 New York State Undue Hardship Waiver Request

1. State Name: **New York**

2. Chief State Election Official (CSEO):

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Signature (digital signature accepted):

Aug 22, 2016
Date:

3. Preferred State Election Contact:

First Name: **Robert**

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4. Acknowledgement of *UOCAVA* voters' right to vote

New York recognizes that the purpose of 42 USC 1973ff-1(a) (8) (A) is to allow absent uniformed services voters and overseas voters sufficient time to vote in an election for Federal office.

Type initials: **R.B.**

Date: **08/22/2016**

5. Type of hardship claimed (check one):

- (g)(2)(B)(i) Undue hardship due to a late primary.
- (g)(2)(B)(ii) Undue hardship due to a legal challenge
- (g)(2)(B)(iii) Undue hardship caused by a State constitutional prohibition.

6. Please indicate the location in package that identifies your plan to resolve the problem:

Appendix A

7. Please indicate the location in the package that contains the section in the comprehensive plan identifying the State's explanation for the necessity of the waiver request.

Appendix B

8. On what date(s) will the State require ballots to be available and sent?

On or before September 24, 2016 (Federal Ballot Containing Offices of United States President and United States Senator)

October 8, 2016 – October 15, 2016 (The ballot for Member of Congress only for the 3rd Congressional District will, if the primary election produces a clear winner, be transmitted on before October 8, 2016. If the result is close, the latest date of transmittal will be October 15, 2016.)

9. Please indicate the location in the package that contains the section in the comprehensive plan identifying how the State plans to provide sufficient time for UOCAVA voters, who have timely submitted an absentee ballot request, to receive, mark, and return their ballots in time to have those ballots counted.

Appendix C

10. If included, indicate the location in the package that contains the section in the comprehensive plan identifying how the State plans to resolve the underlying issue prior to the next election for Federal office, including steps already taken, to be taken, timelines, and supporting documentation.

N/A

11. If requesting a (g)(2)(B)(i) and/or (g)(2)(B)(iii) waiver, explain why there has not been a resolution of this issue(s) between enactment of the MOVE Act and the date of this waiver request.

N/A

Appendix A: Comprehensive Plan Summary

As a result of a federal court order, a Republican Primary for the 3rd Congressional District will be held on October 6th, 2016. As the 45 day transmission deadline for the November 8, 2016 General Election is September 24, 2016, there is no way to transmit General Election Ballots containing the 3rd Congressional District contest by the federal statutorily required deadline. As such, New York is prepared to transmit to UOCAVA voters in the 3rd Congressional District ballots containing all other federal contests by the September 24th deadline. A separate ballot, solely containing the 3rd Congressional District contest, will be sent subsequent to the statutory deadline, hence the need for this waiver application.

To ensure New York provides its UOCAVA voters in the 3rd Congressional District affected by this situation with the ability to participate fully in the electoral franchise, the State Board of Elections has already begun and will continue to work closely with the three counties affected – Nassau, Queens and Suffolk. Our efforts will focus on voting materials being made available as quickly as possible, communicating with the voters in order to explain the situation in a clear and concise manner, and ensuring that uniform processes are in place to ensure a minimum of 45 days for the roundtrip of balloting materials to and from affected voters.

Understanding the Universe of Voters Affected

There are presently 1,012 UOCAVA voters eligible to vote in the 3rd Congressional District contest at the November 8, 2016 General Election. Of these voters, 663 (66%) have requested their balloting materials by email/online and the remaining 349 (34%) have requested to receive them by postal mail. In addition, 221 (63%) of those voters requesting to receive their balloting materials by postal mail also provided an email address on their absentee application. The table below summarizes the UOCAVA voters impacted.

| | Mail | | | Email | | | Total UOCAVA |
|----------------|---------------------|---------------------|-----------------|---------------------|---------------------|-----------------|--------------|
| | Military (Domestic) | Military (Overseas) | Special Federal | Military (Domestic) | Military (Overseas) | Special Federal | |
| Nassau | 16 | 2 | 144 | 29 | 1 | 350 | 542 |
| Queens | 14 | 0 | 89 | 9 | 0 | 128 | 240 |
| Suffolk | 30 | 1 | 53 | 30 | 0 | 116 | 230 |
| <i>Totals</i> | 60 | 3 | 286 | 68 | 1 | 594 | 1,012 |

The table below also shows which military voters have provided an Army Post Office (APO) or Fleet Post Office (FPO) address.

| | Mail | | Email | | Total APO/FPO |
|----------------|----------|----------|----------|----------|---------------|
| | APO | FPO | APO | FPO | |
| Nassau | 0 | 2 | 4 | 1 | 7 |
| Queens | 2 | 0 | 1 | 1 | 4 |
| Suffolk | 2 | 2 | 4 | 2 | 10 |
| <i>Totals</i> | 4 | 4 | 9 | 4 | 21 |

Making Balloting Materials Available Quickly

The General Election ballot for the 3rd Congressional District contest cannot be transmitted to UOCAVA voters until the results of the Republican Primary to be held on October 6th are certified. In the event that it can be determined after the close of polls on October 6th, that there is an unambiguous winner¹ of the Primary Election, each county board of elections will issue a provisional certification of the results by October 7th, which would allow the State Board to certify the General Election ballot that same day, and allow for the transmittal of ballots on October 8th (31 days before the General Election). The normal canvassing, auditing and final certification processes will still be undertaken ensuring every eligible vote is duly canvassed and included in the final tallies.

Under normal circumstances, the post-primary certification process is completed within 15 days of the election. If an unambiguous victor cannot be determined based on Election Day returns, the affected boards will implement an expedited schedule utilizing the necessary staff resources to complete post-election tasks not later than 7 days after the election. All of the boards affirmatively indicate they are capable of completing their work in this timeframe. This includes the canvass of all absentee, special and affidavit ballots (Election Law § 9-209); recanvass of all voting machines (Election Law § 9-200); and the post-election audit of randomly selected voting machines (Election Law § 9-211). The normal notification sent by county boards to the affected candidates and party chairs will reflect this expedited schedule, along with additional information on the logistical and staffing changes being implemented to ensure that the affected parties have enough notice to plan to fully participate in the aforementioned tasks.

Each county board will be able to certify its portion of the results of the Primary Election to the State Board by October 13th. The State Board will certify the General Election ballot for the 3rd Congressional District to the counties on or before October 14th. It is then anticipated that counties will transmit the 3rd Congressional District General Election ballot to affected UOCAVA voters not later than October 15th (24 days before the General Election). In order to accomplish rapid transmittal upon certification, the State Board is also requesting that each County Board prepare a set of UOCAVA Congressional ballots to account for both possible outcomes of the October 6th Primary Election prior to such election, and have a sufficient number of printed ballots of each set on hand to transmit to UOCAVA voters who have requested their balloting materials by postal mail.

To best serve those voters who have requested to receive their voting materials online, the State will work with the County Boards to facilitate the steps necessary to identify the eligible UOCAVA voters in the 3rd Congressional District, coordinate and configure the local voter registration systems with the State's voter list and its SecureBallot online ballot delivery portal. Upon completion of each county's preparation of their voting materials, those materials would be uploaded to the SecureBallot portal which would then trigger the notification process to voters as to the availability of their ballot.

¹ A winner is unambiguous when the margin of victory is greater than the total number of outstanding absentee and affidavit ballots such that the uncanvassed ballots cannot change the winner of the election. New York has certified elections on this basis many times in the past. Based on preliminary results, the state board sent a letter advising of the unofficial results of the March 31, 2009 special election in the 20th Congressional District. Similar letters have been sent with regard to various state legislative contests as well. In the last federal primary held in the 3rd Congressional District, 5.5% of votes cast were by some form of absentee or affidavit ballot. Based on current applications, it is estimated at least 9,900 non-UOCAVA absentee ballots will be issued for the October 6, 2016 primary.

With regard to those UOCAVA voters who have requested to receive their voting materials by postal mail, each affected County Board will use an expedited service (commercial delivery providers that will best expedite the transmission process for their domestic UOCAVA voters and especially those overseas) in order to avoid unnecessary delays in the delivery of the 3rd Congressional District paper ballots to the relevant voters. In addition, each County Board will provide to these voters a postage-paid return envelope allowing them to utilize expedited mail service for the return of their voted ballot to further mitigate the shortened timeframe.

Communication with Voters

Affected UOCAVA voters may not be aware of the unique proceedings upon which this waiver is predicated. In addition, there exists the potential for voter confusion due to the proximity of the State Primary Election (for which ballots to military voters have already been transmitted), the court-ordered Primary Election (for which ballots to 246 of the total 1,012 UOCAVA voters in the district will be transmitted on Monday, August 22nd) and the General Election (for which Federal contest ballots are to be transmitted no later than September 24th and State and Local contest ballots are to be transmitted not later than October 7th). Therefore, it is imperative that County Boards take every reasonable opportunity to communicate with their UOCAVA voters affected by this situation in order to minimize such potential confusion.

Each county board follow the following communication plan and timeline:

- After approval of a waiver, and as soon as practicable, each county board will transmit to their affected UOCAVA voters a communication providing a clear and concise summary of the court-ordered primary and how it will impact the number and timing of ballots they will receive. It will also provide clear information as to the various deadlines for return of each ballot to be received. This communication will be sent in the manner of transmission stated on each voter's application. For those voters who have requested to receive their voting materials by postal mail, but who have also provided an email address, this communication will also be sent via email. For those voters with a postal mail preference for whom an email address is unavailable, additional language will be included in their communication encouraging them to consider providing their respective county board with a revised Federal Post Card Application (FPCA) for the purposes of establishing an email address of record and potentially changing their transmission preference to "Email/Online" to allow for the expeditious delivery of all future voting materials.
- The ballot for the 3rd Congressional District will not be available to UOCAVA voters by the September 24th transmission deadline for the General Election. However, each board will transmit the ballot with the Presidential and United State Senate contests by that deadline. In addition, as required by Election Law §§ 10-108 [1] [c] and 11-216 [3] [b]), each board will also transmit a Federal Write-In Absentee Ballot (FWAB) to each UOCAVA voter in the 3rd Congressional District. A communication will be included with these voting materials explaining to each voter that a General Election ballot for the 3rd Congressional District will not be transmitted until after the results of the October 6th Primary Election are known. It will inform them of their ability to utilize the FWAB for the purpose of casting their vote for this specific contest in advance of them receiving their official ballot, along with information on how to find information on the results of the October 6th Primary Election at the State Board's web site to make them aware of the certified candidates for the 3rd Congressional District in the General Election. For those voters who have still not provided an email address, additional language will again be included encouraging them to submit that information to their county board in the form of a new FPCA.

- For those voters who have requested their voting materials be transmitted by postal mail, their separate 3rd Congressional District ballot will be sent by an expedited mail service. Boards will be directed to utilize commercial providers that will most suitably expedite the transmission process for their domestic voters and especially those overseas. As mentioned previously, each county board will also provide for a return envelope allowing these voters to utilize the same expedited mail service to return their voted ballots. Clear instructions as to the use of expedited mail service for returning a ballot will be included with the transmitted materials.
- All communications to voters will include a point of contact at their respective county board for assistance with any question or part of the process.
- The State Board of Elections will provide sample language to all boards to use for each communication to ensure that similar language is being used for all affected voters.

Appendix B: Undue Hardship Necessitating Waiver Request

New York's federal primary election was held on June 28, 2016.[1] Owing to impossibility created by a legal challenge related to ballot access, a Republican primary in the 3rd Congressional District between Phillip Pidot and Jack Martins was not held on that day.

Phillip Pidot and Jack Martins both filed designating petitions seeking the Republican nomination for the office of Member of United States House of Representatives from the 3rd Congressional District of New York. Philip Pidot's Republican designating petition was ruled invalid by the New York State Board of Elections.

Mr. Pidot brought a proceeding to validate his designating petition in Nassau County Supreme Court which was dismissed by Judge Thomas Adams on procedural grounds on May 11, 2016. A subsequent motion of vacatur was denied on June 7, 2016 (*Pidot et al v Macedo et al*, No 3448/2016 [Sup. Ct. Nassau County, June 7, 2016]). Mr. Pidot appealed the dismissal of his proceeding to validate his designating petition to the New York State Appellate Division, Second Department. The Second Department heard the matter on June 17, 2016 and rendered a decision the same day reversing the trial court dismissal and remanded the matter for a "determination of the petition on the merits forthwith". *Pidot v. Madeco*, No 2016-05794, 2016 WL 3355183 [2nd Dept 2016].

Upon remittitur, the matter came before Judge Arthur Diamond. After hearing the merits, Judge Diamond ruled on June 23, 2016 that Mr. Pidot had 1,261 valid signatures on his Republican designating petition, more than the 1,250 required by law. However, on June 24, 2016, four days before the scheduled primary, Judge Diamond ruled it was impossible to place Mr. Pidot's name on the primary ballot, and he did not order a new or different primary election date. Accordingly, no Republican primary was held on June 28, 2016 for the 3rd Congressional District.

On June 27, 2016, Mr. Pidot commenced a proceeding in the United States District Court for New York, Eastern District, seeking an order granting a new primary election based on alleged violations of the Equal Protection Clause and the First Amendment (*Pidot v New York State Board of Elections*, 2:16-cv-03527 [EDNY]). On July 5, 2016 Mr. Pidot voluntarily discontinued this action. On July 7, 2016, Mr. Pidot took an appeal of Judge Diamond's June 24, 2016 Order insofar as it did not order him on the ballot or provide a new primary election. The Appellate Division scheduled oral argument on the appeal for July 19, 2016 and issued an order on July 21st, upholding the trial court decision and declining to order a new primary election.

A proceeding in the United States District Court for the Northern District of New York seeking similar relief was filed on July 13, 2016. Among other things, Pidot sought in that action a primary date to be ordered compliant with the MOVE Act or alternatively to require the State Board of Elections to seek a hardship exemption pursuant to 52 USC § 20302 (g)(2)(B)(ii) with reasonable accommodations for the mailing and counting of overseas and military ballots.

On August 17, 2016, the court ordered a Republican Party Primary to be held for New York's 3rd Congressional District "with a ballot that names both Jack Martins and Philip Pidot as candidates on October 6, 2016". The Court further ordered that the State Board of Elections "shall seek a 'hardship exemption' pursuant to 52 USC 20302 (g) (2) (B) (ii) from UOCAVA's 45 day requirement with regard to the November 2016 general election."

[1] Order of Judge Gary Sharpe, Northern District of New York (*United States of America v. State of New York et al*, Case 1:10-cv-01214 Document 88, dated October 29, 2015).

The Court's order renders compliance with the 45 day pre-election requirement for transmittal of UOCAVA ballots for the general election impossible. Accordingly, this hardship waiver application is being respectfully submitted.

Appendix C: Providing sufficient time for UOCAVA voters

The date of the Republican Primary for the 3rd Congressional District is set by federal court order for October 6th, 2016. The transmission date of the separate 3rd Congressional District General Election ballot to the 1,012 affected UOCAVA voters is expected to be at least 24 days before the election. New York State Election Law already allows for 13 days after the General Election for a timely sent UOCAVA ballot to be received by a board of elections (Election Law § 10-114 [1] and § 11-212) Therefore, the receipt deadline for this separate ballot will be extended an additional 8 days, so that any such ballot timely postmarked and returned by a UOCAVA voter and received by a board of elections not later than November 29, 2016 will be canvassed. The August 17, 2016 court order commanded the State Board to apply for a hardship exemption, and on that authority the board is making this application. The board will, however, ask the court to affirmatively ratify this receipt extension upon approval of the plan.