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LEGAL UPDATE

From: Ron Labasky, Esquire

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As everyone is no doubt aware, there has been a lot of rapid-fire action between the Department of State and the United States Department of Justice. Several matters have been filed, in addition to the correspondence that has gone back and forth. With respect to those matters, here is where we currently stand:

United States of America v. State of Florida, et al.

U.S. District Court – Northern District of Florida.

This case was filed by the Attorney General of the United States pursuant to Section 8 of the NVRA. The assertion is that the State of Florida is conducting a systematic program to remove names of ineligible voters from the official list of eligible voters within 90-days of an election for federal office. The Complaint states that Section 8 of the NVRA specifically prohibits removal programs during the 90-day period before a federal election, with limited exceptions. The gist of the Complaint is basically that the State has implemented a list-maintenance program. The Complaint asserts that the State developed this program, along with the Department of Highway Safety and Motor Vehicles, and presented a list of voters to the

Supervisors of Elections in a fashion that indicates that this was list-maintenance. The framework of the program was a webinar presented in April 2012 and the May 2012 presentation, entitled “List Maintenance Categories and Procedures” by the Division of Elections to the FSASE, which dealt with the “Non-U.S. Citizens Project.” The Complaint asserts that the list that was prepared and distributed was based upon outdated and inaccurate data, resulting in properly registered voters in Florida being erroneously identified, and thereby being intentionally deprived of their rights to vote. The Complaint asserts that this is a program with the purpose of systematically removing names from the official list of eligible voters which violates Section 8 of the NVRA, and that the Court should enter an injunction directing Defendant Department of State to cease the systematic verification of voters and any issuance of directives to the Supervisors of Elections to systematically investigate, verify, and possibly remove eligible voters from the voter rolls within 90-days of the August 14, 2012 primary election and the November 2012 general election.

This case has been assigned to the United States District Court in Tallahassee, with the case tentatively assigned to Charles Stampelos, who is the United States Magistrate for the Northern District. Based upon that, this case should receive a quick preliminary hearing and I would expect that it will move fairly rapidly thereafter.

Florida Dept. of State v. United States Dept. of Homeland Security, et al.

United States District Court – District of Columbia

This case was filed by the Department of State against the United States Department of Homeland Security, and other entities, seeking a Declaratory Judgment and Injunctive Relief based upon several different claims or causes of action. The Complaint recites the various and lengthy communications and interactions between the Department of State and Homeland

Security concerning access by the Department of State to the Department of Homeland Security's Systematic Alien Verification of Entitlements Program System of Records (SAVE). The Department of State asserts that the SAVE program was created for the use of state and federal governments to access information concerning immigration status of individuals in the United States, including voter registration. The Department lays out the numerous contacts between the Department of State and Homeland Security concerning the Department's desire to use the SAVE program to systematically review its voter registration rolls and to also check the status of individuals who are newly registering to vote.

The Complaint asserts that the lengthy delay in accessing this is inappropriate and that Homeland Security should provide access based upon the provisions of law allowing state governments to use the SAVE program. Based upon those assertions, the state requests the District Court to declare that the purposes that the Department desires to use the SAVE program to be legally appropriate and to order Homeland Security to provide the state with access to the SAVE program for the purposes of voter registration and verification.

This case has been assigned to Judge John Bates and no further actions have been taken in the case to date.

Correspondence

There was correspondence between the Department of State ("DOS") and the U.S. Department of Justice concerning the State's non-citizen voter list and the Department of Justice's position that the program should cease and the State of Florida's response to that concerning that the program was legal, requesting the Department of Justice to respond to several questions concerning the SAVE program, and questioning the lack of DOS's access to that program.

The Department of Justice responded to the State's letter on June 11, 2012, again reciting its assertion that the Department of State's program violates Section 8 of the NVRA and that it should cease. This, of course, led to the filing of the lawsuit previously described. The letter also states that the SAVE program has certain limitations on those things that it can confirm, dealing with documentation of U.S. citizens born abroad or who are naturalized. The letter states that the SAVE program can only verify individuals if there are unique identifiers available with respect to those individuals, such as Alien Registration numbers or certificate numbers found on immigration related documents. Without those unique identifiers, the program is limited and cannot be used for verification purposes, particularly based upon names or dates of birth alone. Homeland Security apparently requires the submission of immigration related documents, if needed, to complete the verification process under SAVE. Since DOS does not collect any of the immigration related numeric identifiers or documentation, the SAVE program has not been made available. The Department of Justice indicates that it understands that the SAVE program has been used successfully by a number of Florida agencies that need to verify immigration status as they are able to comply with the SAVE requirements. It would appear that the resolution of these issues will take place in the District Court in Washington. I would anticipate that case will move much slower than the case filed in Tallahassee.