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April 18, 2006

Honorable Don Perata
Room 205, State Capitol

HELP AMERICA VOTE ACT OF 2002 (P.L. 107-252): VOTER REGISTRATION REQUIREMENTS- #0609610

Dear Senator Perata:

You have asked whether the Secretary of State has the authority under existing federal and state law to adopt regulations that would allow state and local elections officials to correct erroneous information regarding a driver's license or social security number contained in a voter affidavit of registration, or, if that information is not provided by the affiant, to add that information to the affidavit.

The Secretary of State, as the chief elections officer of the state, has the powers and duties specified in Section 12172.5 of the Government Code (Sec. 10, Elec. C.¹). Section 12172.5 of the Government Code, as set forth below, provides that the Secretary of State has all of the following powers and duties:

"12172.5. The Secretary of State is the chief elections officer of the state, and shall administer the provisions of the Elections Code. The Secretary of State shall see that elections are efficiently conducted and that state election laws are enforced. The Secretary of State may require elections officers to make reports concerning elections in their jurisdictions.

"If, at any time, the Secretary of State concludes that state election laws are not being enforced, the Secretary of State shall call the violation to the attention of the district attorney of the county or to the Attorney General. In these instances, the Secretary of State may assist the county elections officer in discharging his or her duties.

"In order to determine whether an elections law violation has occurred the Secretary of State may examine voted, unvoted, spoiled and canceled ballots, vote-

¹ All section references are to the Elections Code, unless otherwise designated.

counting computer programs, absent voter envelopes and applications, and supplies referred to in Section 15082 of the Elections Code. The Secretary of State may also examine any other records of elections officials as he or she finds necessary in making his or her determination, subject to the restrictions set forth in Section 6253.5.

“The Secretary of State may adopt regulations to assure the uniform application and administration of state election laws.” (Emphasis added.)

Thus, as can be seen, the Secretary of State has broad powers with respect to the conduct, administration, and enforcement of state election laws.

Pursuant to these provisions and the Help America Vote Act of 2002 (P.L. 107-252) (hereafter *HAVA*), discussed in more detail below, the Secretary of State entered into a Memorandum of Agreement (MOA) with the federal Department of Justice on November 2, 2005, and has adopted emergency regulations, to implement the requirements of *HAVA*. *HAVA* requires, among other things, that the state not accept or process an application for voter registration for an election for federal office, except as provided in *HAVA* and notwithstanding any other provision of law, unless the application includes either the applicant’s current and valid driver’s license number or the last four digits of the applicant’s social security number (Sec. 303(a)(5)(A), *HAVA*). If neither the driver’s license number nor social security number is provided, the regulations require that an elections official use Calvalidator² to determine if these numbers have been issued, and confirm them with the applicant prior to entering the numbers in the voter registration record (2 Cal. Code Regs. 20108.70). However, there is nothing in the regulations that permits an elections official to correct erroneous information contained in an applicant’s voter registration affidavit other than by Calvalidator, or to add information not provided.

Therefore, the issue for discussion is whether there is any provision of federal or state law that would prevent the Secretary of State from adopting regulations that would permit elections officials, with regard to these identifying numbers, to correct erroneous information in a voter registration affidavit, or to add information not previously provided by an applicant.

Federal Law

The Help America Vote Act (*HAVA*), enacted on October 9, 2002, among other things, requires each state, acting through the chief state elections official, to implement a computerized statewide voter registration list, to be administered at the state level, that contains the name and registration information of every legally registered voter in the state and assigns a unique identifier to each legally registered voter in the state (Sec. 303(a)(1)(A), *HAVA*). *HAVA* requires the state election system to maintain the accuracy of state voter registration records,

² Calvalidator is the Secretary of State’s computer application and system used to validate the California driver’s license or state identification number, or the last four digits of the social security number of new or existing registrants (2 Cal. Code Regs. 20108.1 (c)).

including a system of file maintenance and safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters (Sec. 303(a)(4), *HAVA*).

In this regard, *HAVA* directs that the appropriate state or local elections official shall perform the list maintenance with respect to the computerized statewide voter registration list, and that the appropriate state or local elections official shall provide adequate technological security measures to prevent unauthorized access to the computerized list (Sec. 303(a)(2) and (3), *HAVA*). Thus, *HAVA* gives the state the flexibility of having local elections officials update the list and implement security measures to prevent unauthorized access to the computerized statewide voter registration list.

HAVA also requires the chief state elections official to enter into agreements with the official responsible for the state's motor vehicle authority and the federal Commissioner of Social Security for the purpose of sharing information in databases (Sec. 303(a)(5)(B)(i) and (ii), *HAVA*).

Under *HAVA*, each application for voter registration must include the applicant's driver's license, or, if the applicant does not have a current and valid driver's license, the last four digits of the applicant's social security number (Sec. 303(a)(5)(i)). If an applicant has neither number, the state is required to "assign the applicant a number which will serve to identify the applicant for voter registration purposes" (Sec. 303(a)(5)(ii)). Although *HAVA* prohibits states from processing voter registration forms without any of these identifying numbers, the statute does not specify that the voter be the source of these numbers (Sec. 303(a)(5)(i)). The statute's language about the information required to process applications is in the passive voice and states only that the application must include this information (Sec. 303(a)(5)(i)).

Indeed, *HAVA* expressly gives states discretion in determining how to implement its identifying number and verification provisions. Specifically, the statute provides that each state "shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law" (Sec. 303(a)(5)(iii)), and Section 305 of *HAVA* requires that the specific choices on the methods of complying with the requirements of *HAVA* are to be left to the state. Thus, if an applicant provides sufficient information on the affidavit of registration to enable state or local elections officials to determine the applicant's driver's license or social security number and the officials in fact do determine that number, we conclude that nothing in *HAVA* precludes the state from including that voter on its rolls.

Moreover, as United States Senator Dodd, the chief Senate sponsor of *HAVA*, explained, the statute's drafters were careful to ensure flexibility so that states could maximize voters' access to registration:

"[N]othing in this section [303(a)(5)(A)] prohibits a State from accepting or processing an application with incomplete or inaccurate information. Section 303(a)(5)(A)(iii) specifically reserves to the States the determination as to whether the information supplied by the voter is sufficient to meet the disclosure requirements of this provision. So, for example, if a voter transposes his or her Social Security number, or provides less than a full driver's license number, the State

can nonetheless determine that such information is sufficient to meet the verification requirements, in accordance with State law....” (148 Cong. Rec. S10505 (daily ed. Oct. 16, 2002)).

Furthermore, HAVA leaves it to the discretion of each state to determine what to do if no match is found with the information that is available to the state from state and federal databases (Sec. 305, HAVA). As United States Senator Dodd has stated:

“[N]othing in this section prohibits a State from registering an applicant once the verification process takes place, notwithstanding the fact that the applicant provided inaccurate or incomplete information at the time of registration ... or that the matching process did not verify the information.” (148 Cong. Rec. S10505 (daily ed. Oct. 16, 2002)).

In this regard, there is no provision of HAVA that would prevent the state from verifying the voter registrant’s information from any other state governmental database. For example, in this context, in administering HAVA voter registration requirements, the states have been required to accept other forms of identification in order to verify a person’s identity (*ACLU of Minn. v. Kiffmeyer* (2004) U.S. Dist. LEXIS 22996 (D. Minn.)).

Therefore, in our view, there is no provision of federal law that would prevent the Secretary of State from adopting regulations that, pursuant to appropriate safeguards to protect the accuracy and integrity of voter registration data, would permit election officials, with regard to these identifying numbers, to correct erroneous information in a voter registration affidavit, or to add information not previously provided by an applicant.

State Law

Section 2150 was amended by Senate Bill No. 1016 (Ch. 726, Stats. 2005), effective January 1, 2006, to, among other things, incorporate language from Section 303(a)(5) of HAVA. The intent of this change was to comply with those provisions of HAVA that require states to give voter registrants the additional option of putting the last four digits of their Social Security number (SSN) on their voter registration form in lieu of another identifying number (Senate Com. on Elections, Reapportionment and Const. Amdts., Analysis of S.B. 1016 (2005-06 Reg. Sess.), as amended March 29, 2005).

Section 2150, prior to the 2005 amendments, had required that a voter registration affidavit contain the affiant’s California driver’s license number, California identification card number, or other identification number as specified by the Secretary of State. The final version of Section 2150, as adopted by the Senate and the Assembly, included the additional option of providing the last four digits of an affiant’s social security number, as well as the provision of Section 303(a)(5) of HAVA that requires a state, if an applicant for voter registration has not been issued a current and valid driver’s license or a social security number, to assign the applicant a number that will serve to identify the applicant for voter registration purposes (subpara. (C), para. (7), subd. (a), Sec. 2150). To the extent that the state has a computerized list in effect under subdivision (a) of Section 2150 and the list assigns unique identifying numbers to voter registrants, the number assigned for purposes of this latter requirement of HAVA becomes the unique

identifying number assigned to that voter registrant under the list (subpara. (C), para. (7), subd. (a), Sec. 2150).

Thus, it would appear from a comparison of the changes made to Section 2150 by Senate Bill No. 1016 and the provisions of Section 303(a)(5) of HAVA that the Legislature intended to incorporate the federal requirements into state law.

In this regard, in construing a statute, the California Supreme Court has stated that it is appropriate for a court to take judicial notice of the various versions of a bill and to rely on legislative committee reports and analyses in order to determine the Legislature's intent (see *Quintano v. Mercury Casualty Co.* (1995) 11 Cal. 4th 1049, 1062, fn. 5; *Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7). The June 28, 2005, version of S.B. 1016, which amended Section 2150, incorporated the identical language from Section 303(a)(5) of HAVA. That language was later amended to conform to California code style (for example, state code references to subdivisions and not to subsections; see S.B. 1016, as amended in Assembly August 15, 2005). The state was still obligated, however, to determine the specific methods of complying with the newly incorporated HAVA provisions since HAVA leaves to the discretion of the state the specific choices on the methods of complying with Section 303(a)(5) of HAVA (Sec. 305, HAVA).

If an affidavit of registration does not contain all of the information required, Section 2153 is applicable. Section 2153 provides as follows:

“2153. (a) Except as provided in Section 2154³, the affidavit of registration shall show all the facts required to be stated.

“(b) If the affidavit does not contain all of the information required, but the telephone number of the affiant is legible, the county elections official shall telephone the affiant and attempt to collect the missing information.

“(c) If the affidavit does not contain all of the information required, and the county elections official is not able to collect the missing information by telephone, but the mailing address of the affiant is legible, the county elections official shall inform the affiant of the reason for rejection and shall send to the affiant a new voter registration card.”

Thus, if an affidavit of registration does not contain all of the required information, the county elections official is required to make the attempt to collect the missing information from the affiant by either telephone or by mail, whichever is applicable. The issue raised here is whether Section 2153 should be construed to reflect the intent of the Legislature that no other means may be utilized to add to an affidavit information that the affiant failed to supply.

³ Section 2154 applies certain rebuttable presumptions when an affidavit of voter registration does not include the affiant's middle name or initial, party affiliation, state of birth, or date of the affiant's execution of the affidavit.

According to the doctrine of “*expressio unius est exclusio alterius*,” a statutory grant of power or expression of how such power is to be exercised implies that no other power passes and that no other mode of exercise is permitted (*Kaplan v. Superior Court* (1989) 216 Cal.App.3d 1354, 1359-1360; *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 196). Thus, it could be argued that because Section 2153 provides for the collection of missing information only by way of telephone or mail, state law precludes any other method available to an elections official, such as accessing a government database, to add information to an affidavit. However, this doctrine relating to statutory construction is a mere guide to resolve ambiguity, and is inapplicable when, for example, there is no manifest reason why persons or things other than those enumerated should not be included and thus exclusion would result in injustice, or operation of the rule would contradict a discernable and contrary legislative intent (*In re Christopher T.* (1998) 60 Cal.App.4th 1282, 1290-1291).

In addition, in construing statutory language a court must consider the language in the context of the entire statute and the statutory scheme of which it is a part. The various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole (*Dubois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388).

In our view, applying the above doctrine in interpreting Section 2153, with the result that information not placed in an affidavit of registration by the affiant may be supplied only in the limited circumstance identified by that section, would contradict the legislative intent underlying the constitutional and statutory provisions governing voter registration. Subdivision (d) of Section 2150 contemplates that any person, including a deputy registrar, may assist the affiant in completing the affidavit of registration and requires that person or the deputy registrar to also date and sign the affidavit of registration below the signature of the affiant.

More importantly, California law establishes the right to vote as a fundamental right (Secs. 2, 2.5, and 4, Art. II, Cal. Const.; Sec. 2052). In connection with that right, Section 2103 states the intent of the Legislature that each county, “in order to promote and encourage voter registrations,” shall establish a high number of registration places throughout the county “to the end that registration may be maintained at a high level,” and that “no limitation be imposed on the number of persons appointed to act as deputy registrars of voters” (subds. (a) and (f), Sec. 2103). Moreover, under that section, “[i]t is also the intent of the Legislature that non-English-speaking citizens, like all other citizens, should be encouraged to vote. Therefore, appropriate efforts should be made to minimize obstacles to registration by citizens who lack sufficient skill in English to register without assistance” (subd. (c), Sec. 2103).

While the promotion and encouragement of voter registrations is thus an explicit legislative purpose under Chapter 2 (commencing with Section 2100) of Division 2, that statutory scheme also recognizes the need to maintain the accuracy and integrity of voter registration data. In discussing a predecessor statute to Section 2150 — the statute that, as specified above, requires that an affidavit of voter registration contain specific information — the court in *Allyn v. Allison* (1973) 34 Cal.App.3d 448 stated that “the Legislature has the power to enact reasonable provisions for the purpose of requiring persons who are electors and who desire to vote to show that they have the necessary qualifications, Such provisions ... are only reasonable regulations

for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting” (at p. 451, quoting *Bergevin v. Curtz* (1899) 127 Cal. 86).

In this case, it is our opinion that construing Section 2153 to require that a telephone call to the affiant is the only available means of adding to an affidavit missing information regarding a driver’s license number, or other identifying number, or correcting that information, would frustrate the purpose of promoting voter registration without apparently furthering the purpose of “ascertaining who are qualified electors.” In accordance with the federal requirement, discussed above, that the chief state elections official enter into an agreement with the official responsible for the state’s motor vehicle authority and the federal Commissioner of Social Security for sharing information in databases (Sec. 303(a)(5)(B)(i) and (ii), HAVA), the Secretary of State has issued regulations requiring, as part of a voter registration verification process, that elections officials access those databases to ascertain the affiant’s driver’s license number or social security number, as applicable (see 2 Cal. Code Regs. 20108.65 and 20108.70). Construing Section 2153 to require the rejection of a voter registration affidavit on the basis that, for example, driver’s license number information that the Secretary of State has procured from the official database of the Department of Motor Vehicles has not also been supplied pursuant to a telephone call with the affiant may reasonably be deemed, in our view, to be inconsistent with the legislative intent governing the provisions discussed above.⁴

Therefore, in our view, there is no provision of state law that would prevent the Secretary of State from adopting regulations that, pursuant to appropriate safeguards to protect the accuracy and integrity of voter registration data, would permit elections officials, with regard to these identifying numbers, to correct erroneous information in an affiant’s voter registration affidavit, or to add information not previously provided by the affiant.

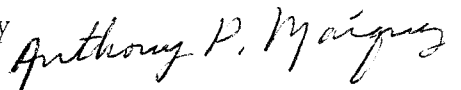
To summarize, it is our opinion that the Secretary of State has the authority under existing federal and state law to adopt regulations that, pursuant to appropriate safeguards to protect the accuracy and integrity of voter registration data, would allow state and local elections

⁴ The provisions of Section 2153 have not been altered or changed since 1975 (Ch. 704, Stats. 1975). These provisions require the county elections official to make the attempt to collect the missing information and were enacted when the technology, including Calvalidator (see 2 Cal. Code Regs. 20108.1(c)), was not available to the county elections official to correct erroneous or missing information contained in a voter affidavit of registration.

officials to correct erroneous information regarding a driver's license or social security number contained in a voter affidavit of registration, or, if that information is not provided by the affiant, to add that information to the affidavit.

Very truly yours,

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