

LAW OFFICE OF
KUEHNE DAVIS LAW

BENEDICT P. KUEHNE* +#
MICHAEL T. DAVIS*
JOHAN DOS SANTOS
SUSAN DMITROVSKY (Retired)
*Board Certified Appellate Practice
+Board Certified Criminal Trials
#Board Certified Criminal Appeals

PROFESSIONAL ASSOCIATION
MIAMI TOWER, SUITE 3105
100 S.E. 2ND Street
MIAMI, FLORIDA 33131-2154
Tel: 305-789-5989
Fax: 305-789-5987
ben.kuehne@kuehnelaw.com
mdavis@kuehnelaw.com
johand@kuehnelaw.com
susand@kuehnelaw.com

BROWARD COUNTY OFFICE

1926 Harrison Street
Hollywood, FL 33020

REPLY TO: Miami

September 16, 2024

VIA FEDERAL EXPRESS AND EMAIL

Kristen Clarke, Assistant Attorney General
U.S. Department of Justice, Civil Rights Division
950 Pennsylvania Avenue NW
Washington, DC 20530-0001
kristen.clarke@usdoj.gov

Re: Request to Address Florida's Destruction of Essential
Election Records

Dear Ms. Clarke:

We are writing to address a recurring and vital issue related to the integrity of the 2024 presidential election. Through our work in protecting voting rights, we have learned that the digital ballot images that are automatically created by the official voting machines used to tabulate all votes have been and are currently being immediately deleted in many states throughout the country, including here in Florida.

Ballot images are essential to maintaining the integrity of the upcoming presidential elections because ballot images document each individual ballot as cast by each voter, thereby verifying the accuracy of election counts while preserving the anonymity of every voter. The official tabulated votes are actually counted from the images, not from the paper ballots. Their destruction not only undermines transparency and public trust in the electoral process, but also represents a clear violation of federal law. As you know, under 52 U.S.C. § 20701, election officials have a duty to preserve all election records. That federal statute requires that all election records be saved for 22 months following a federal election.

On May 25, 2021, we wrote to Pamela S. Karlan, at that time Deputy Assistant Attorney General, Civil Rights Division, to alert her to this situation. On July 28, 2021, the Department of Justice issued an opinion as part of its Guidance Directive entitled “Federal Law Constraints on Post-Election Audits,” stating, in part, “*The materials covered by Section 201 extend beyond ‘papers’ to include other ‘records.’ Jurisdictions must therefore also retain and preserve records created in digital or electronic form.*” Link to Directive: <https://www.justice.gov/opa/press-release/file/1417796/d1>

Unfortunately, many jurisdictions are not aware of or have chosen to purposely ignore the DOJ’s July 28, 2021 directive. Approximately half of Florida’s counties are preserving ballot images. However, the remaining counties—including the 8 largest counties in the state (encompassing the largest minority populations)—are destroying the anonymous ballot images during the tabulation process.

We have brought litigation on behalf of the Florida Democratic Party, state legislators, and a bi-partisan group of voters against Florida election officials for their failure to protect critical election materials, including ballot images. However, some courts have ruled that 52 U.S.C. § 20701 does not provide a private right of action and therefore it is the responsibility of the U.S. Department of Justice to enforce that federal statute.

For that reason, we strongly encourage the Department of Justice to issue a second directive clarifying that election “records created in digital or electronic form” specifically include the “ballot images” automatically created by a digital scanner to count votes. The voting and tabulation process leads inescapably to this interpretation. The voting system detects and counts the votes from the ballot image, not from the paper ballots. As anonymous paper ballots are fed through digital scanners, the scanners automatically create a digital image of each ballot that is stored as an electronic file. The electronic file is used for the tabulation and counting process. It is impossible to use digital voting equipment used in Florida and throughout the country without creating ballot images. Their destruction eliminates the most accurate and easily accessible proof of how voters voted.

Ballot images are part of the chain of custody of every vote. They are a vital audit record and would be essential records for the Department of Justice or Congress to have in the event of an

investigation of any federal election. Whether ballot images are released to the public, are only available to election officials, or are only available to the Department of Justice or to a court (a determination that can be reached at a later date), it is imperative that these critical election records be preserved.

In addition, we request that the Department of Justice investigate the destruction of ballot images by Florida election officials and nationwide. As mentioned, this is a very important issue with national implications. Only a handful of states are currently preserving ballot images. In most states, election officials allow ballot images to be destroyed.

The use of ballot images provides an accurate means to inspect close or controversial election results in a short period of time. (Maryland has done this for several years *before* certifying the results.) Ballot images are also critical when paper ballots are lost or destroyed during recounts (as has happened on a number of occasions in Florida and elsewhere), since they provide a readily verifiable backup to the paper ballots themselves. Not only is preserving ballot images vitally important to bolster public confidence in elections, allowing their destruction is clearly in violation of 52 U.S.C. § 20701.

We ask that you act swiftly with an updated Guidance directing all election jurisdictions with digital voting systems to save ballot images in the November election and beyond. Considering possible controversies that may arise regarding election results, the preservation of ballot images could make the difference in being able to resolve election disputes readily and peacefully.

Thank you for your continuing attention to this issue and for your vigilance in pursuing compliance with federal election laws throughout the country.

Sincerely,

Chris Sautter
Attorney at Law
202.285.7560
sauttercom@aol.com

Joseph Geller
Attorney at Law
305.409.4431
Joseph.Geller@gmlaw.com

Benedict P. Kuehne
Kuehne Davis Law, P.A.
305.789.5989
ben.kuehne@kuehnelaw.com

cc:

Merrick Garland
United States Attorney General
U.S. Department of Justice
c/o Tamar Hagler
Voting Section
Civil Rights Division
4CON – Room 8.1136
950 Pennsylvania Avenue,
NW Washington, DC 20530
tamar.hagler@usdoj.gov