

## Purging Noncitizen Voter Registrations

*United States v. Florida*

*(Robert L. Hinkle, N.D. Fla. 4:12-cv-285)*

The U.S. Court of Appeals for the Eleventh Circuit determined that a systematic purge of noncitizens' voter registrations violated the National Voter Registration Act. During the 2012 election cycle, the Justice Department brought a federal action against Florida in the Northern District of Florida claiming that Florida was violating the Act. Fifteen days later, the district court ruled against preliminary injunctive relief, because Florida had ceased the purge that prompted the suit. In addition, the district judge ruled that the ninety-day proscription against systematic purges did not apply to noncitizens. In another case, a judge in the Southern District came to the same conclusion. Florida resumed its purge upon access to more reliable citizenship data from the Department of Homeland Security. In 2014, the court of appeals held a systematic purge even of noncitizens illegal shortly before an election, when there is little time to correct errors.

*Subject:* Nullifying registrations. *Topics:* Citizenship; registration challenges; National Voter Registration Act; intervention; recusal; case assignment.

The Justice Department brought a civil action in the Northern District of Florida against the State of Florida on June 12, 2012, charging the state with violating the National Voter Registration Act by undertaking a systematic purge of its voter registrations within ninety days of a federal election, Florida's August 14 primary election.<sup>1</sup> The suit followed Florida's refusal to comply with a May 31 letter request by the department that Florida halt the purge.<sup>2</sup> Three days after it filed its complaint, the department moved for a temporary restraining order.<sup>3</sup> The court originally assigned the case to Judge William Stafford, but he recused himself, so the court reassigned the case to Judge Robert L. Hinkle.<sup>4</sup>

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1. Complaint, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 12, 2012), D.E. 2; *United States v. Florida*, 870 F. Supp. 2d 1346, 1347, 1349 (N.D. Fla. 2012); see 52 U.S.C. § 20507(c)(2)(A); see also Robbie Brown, *Florida's Approach to Purging Voter Rolls of Noncitizens Prompts Federal Lawsuit*, N.Y. Times, June 13, 2012, at A17; Marc Caputo, *Move to Purge Rolls Started with a Chat*, Miami Herald, June 13, 2012, at 1A.

2. See Lizette Alvarez, *Florida Defends Search for Ineligible Voters*, N.Y. Times, June 7, 2012, at A17; Lizette Alvarez, *Search for Illegal Voters May Violate Federal Safeguards, U.S. Tells Florida*, N.Y. Times, June 2, 2012, at A13; Marc Caputo, *Florida Ordered to Halt Purge of Voters*, Miami Herald, June 2, 2012, at 1A; Marc Caputo & Steve Bousquet, *Scott: Feds Are Breaking Law on Voter Purge*, Miami Herald, June 7, 2012, at 6B.

3. Temporary-Restraining-Order Motion, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 15, 2012), D.E. 7; *United States v. Florida*, 870 F. Supp. 2d at 1347.

4. Recusal Order, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 13, 2012), D.E. 6; Docket Sheet, *id.* (June 12, 2012).

Tim Reagan interviewed Judge Hinkle for this report by telephone on October 10, 2012.

On May 10, the *Miami Herald* reported that a study found nearly 2,700 noncitizens in Florida who were registered to vote.<sup>5</sup> The method of identifying noncitizens included matching voter registrations to driver-license data, but driver-license data are not always updated to show naturalization.<sup>6</sup>

On June 8, two voters and Mi Familia Vota Education Fund filed a federal complaint in the Middle District of Florida claiming that the registration purge violated the Voting Rights Act because it had not received preclearance pursuant to section 5 of the Voting Rights Act.<sup>7</sup>

On June 11, Florida filed a civil action in the U.S. District Court for the District of Columbia against the department of homeland security, seeking a court order that the Department provide Florida with citizenship records.<sup>8</sup>

On June 19, two voters and five organizations filed a civil action in the Southern District of Florida alleging that not only was the purge improperly close to an election but it violated both the Voting Rights Act and the National Voter Registration Act as discriminatory against Black and Hispanic voters.<sup>9</sup>

In the Justice Department's case, Judge Hinkle set a telephone conference for the afternoon of June 18.<sup>10</sup> After the conference,<sup>11</sup> Judge Hinkle ordered argument on the temporary-restraining-order motion for the morning of June 27.<sup>12</sup>

On June 20, four voters moved to intervene in defense of the purge.<sup>13</sup> Neither party opposed the motion; Judge Hinkle allowed the voters to partic-

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5. Marc Caputo & Steve Bousquet, *State Finds Nearly 2,700 Noncitizens on Voting Rolls*, *Miami Herald*, May 10, 2012, at 1A.

6. *United States v. Florida*, 870 F. Supp. 2d at 1347–48; see Amy Sherman, *Democrats Rip Effort to Purge Voter Rolls*, *Miami Herald*, May 30, 2012, at 1A.

7. Complaint, *Mi Familia Vota Educ. Fund v. Detzner*, No. 8:12-cv-1294 (M.D. Fla. June 8, 2012), D.E. 1; *Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326, 1329 (M.D. Fla. 2012); see 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); Amended Complaint, *Mi Familia Vota Educ. Fund*, No. 8:12-cv-1294 (M.D. Fla. July 27, 2012), D.E. 20; see also Robbie Brown, *Florida Halts Its Search for Violations of Voter Law*, *N.Y. Times*, June 9, 2012, at A13; Brown, *supra* note 1; Marc Caputo, *ACLU Sues Florida Over Purge of Noncitizen Voters*, *Miami Herald*, June 9, 2012, at 1B.

“Five Florida counties—Hillsborough, Monroe, Collier, Hendry, and Hardee—are covered jurisdictions under Section 5 of the Voting Rights Act.” *Mi Familia Vota Educ. Fund*, 891 F. Supp. 2d at 1331.

8. Complaint, *Fla. Dep’t of State v. U.S. Dep’t of Homeland Sec.*, No. 1:12-cv-960 (D.D.C. June 11, 2012), D.E. 1; see Brown, *supra* note 1; Marc Caputo, *Florida, Feds in Brawl Over Purge*, *Miami Herald*, June 12, 2012, at 1A.

9. Complaint, *Arcia v. Detzner*, No. 1:12-cv-22282 (S.D. Fla. June 19, 2012), D.E. 1; *Arcia v. Detzner*, 908 F. Supp. 2d 1276, 1277–78 (S.D. Fla. 2012); see Amended Complaint, *Arcia*, No. 1:12-cv-22282 (S.D. Fla. Sept. 12, 2012), D.E. 57.

10. Order, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 18, 2012), D.E. 8.

11. Minutes, *id.* (June 18, 2012), D.E. 17.

12. Order, *id.* (June 18, 2012), D.E. 13.

13. Intervention Motion, *id.* (June 20, 2012), D.E. 18.

ipate in oral argument during time yielded by Florida.<sup>14</sup> On June 26, Judicial Watch and True the Vote also moved to intervene in defense of Florida.<sup>15</sup> On November 6, Judge Hinkle denied the intervention motions because the would-be intervenors' interests related to the litigation were the same as all registered voters and therefore adequately represented by the state defendants.<sup>16</sup>

At the June 27 hearing,<sup>17</sup> Judge Hinkle denied the Justice Department immediate relief on a finding that Florida had abandoned the purge.<sup>18</sup> He issued a written opinion on the following day.<sup>19</sup> So that the parties had a prompt outcome, including allowance for a prompt appeal, Judge Hinkle often ruled from the bench with written orders to follow.<sup>20</sup>

The federal government agreed to provide Florida with access to federal citizenship records,<sup>21</sup> so Florida dismissed its action in the District of Columbia on August 31, 2012.<sup>22</sup> Using federal citizenship information, Florida resumed its noncitizen voter-registration purge on September 26, identifying 198 potentially ineligible voters, of which thirty-six may have voted illegally.<sup>23</sup>

On October 4, 2012, Judge William J. Zloch determined in the Southern District action, as Judge Hinkle did in the Northern District,<sup>24</sup> that the nine-

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14. Order, *id.* (June 21, 2012), D.E. 22; Order, *id.* (Nov. 6, 2012), D.E. 49 [hereinafter Nov. 6, 2012, *United States v. Florida* Order].

15. Intervention Motion, *id.* (June 26, 2012), D.E. 28.

16. Nov. 6, 2012, *United States v. Florida* Order.

17. Minutes, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 27, 2012), D.E. 35.

18. *United States v. Florida*, 870 F. Supp. 2d 1346, 1347, 1350–51 (N.D. Fla. 2012); Transcript at 54–66, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 27, 2012, filed June 27, 2012), D.E. 33 [hereinafter *United States v. Florida* Transcript]; see Lizette Alvarez, *Judge Sides with Florida on Purging Voter Rolls*, N.Y. Times, June 28, 2012, at A14; Steve Bousquet, *Judge Halts Federal Attempt to Block Purge*, Miami Herald, June 28, 2012, at 1A; see also *Arcia v. Florida Sec'y of State*, 772 F.3d 1335, 1339 (11th Cir. 2014). *But see Arcia*, 772 F.3d at 1339 (“Records indicate, however, that suspected non-citizens continued to be removed from the voter rolls during May and June, which was less than 90 days before the Florida primary election.”).

19. *United States v. Florida*, 870 F. Supp. 2d 1346 (also ruling that the ninety-day proscription on registration purges did not apply to purges of noncitizens).

20. Interview with Hon. Robert L. Hinkle, Oct. 10, 2012.

21. See *United States v. Florida* Transcript, *supra* note 18, at 14–28 (discussion of the Department of Homeland Security's citizenship data at the Northern District of Florida hearing); see also Steve Bousquet, *A GOP Win in Voter-List Fight*, Miami Herald, July 15, 2012, at 1B.

22. Voluntary Dismissal, *Fla. Dep't of State v. U.S. Dep't of Homeland Sec.*, No. 1:12-cv-960 (D.D.C. Aug. 31, 2012), D.E. 12.

23. *Arcia*, 772 F.3d at 1339–40; see Marc Caputo, Patricia Mazzi & Anna Edgerton, *Voter Purge Begins Anew*, Miami Herald, Sept. 27, 2012, at 1A.

In 2014, the *Miami Herald* reported that because of changes to the federal database that would not be complete until 2015, Florida would suspend the 2014 effort to purge noncitizens from voter registrations. Steve Bousquet & Amy Sherman, *Fla. Postpones Voter Purge of Noncitizens*, Miami Herald, Mar. 28, 2014, at 1A.

24. *United States v. Florida*, 870 F. Supp. 2d at 1348–50; see Patricia Mazzei, *Timing at*

ty-day proscription on registration purges did not apply to purges of noncitizens.<sup>25</sup> At the plaintiffs' request, and after a hearing, Judge Zloch entered a final judgment on October 29 in favor of the secretary of state from which the plaintiffs could appeal.<sup>26</sup>

The parties stipulated dismissal of the action before Judge Hinkle on January 10, 2013.<sup>27</sup>

On September 17, 2012, a three-judge district court denied Florida's motion to dismiss the *Mia Familia Vota* section 5 action.<sup>28</sup> On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance.<sup>29</sup> The three-judge court therefore dismissed the action before it on July 24.<sup>30</sup>

On April 1, 2014, a divided panel of the court of appeals reversed Judge Zloch's ruling, concluding "that Florida's program was an attempt to systematically remove names from the voter rolls in violation of the 90 Day Provision."<sup>31</sup>

First, the purpose of Secretary Detzner's program was clearly to remove the names of "ineligible voters" from the Florida voter rolls. . . .

Second, . . . Secretary Detzner's program was a "systematic" program under any meaning of the word. . . .

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. . . At most times during the election cycle, the benefits of systematic programs outweigh the costs because eligible voters who are incorrectly removed have

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*Center of Voter-Purge Lawsuit*, Miami Herald, Oct. 2, 2012, at 3B.

25. Opinion, *Arcia v. Detzner*, No. 1:12-cv-22282 (S.D. Fla. Oct. 4, 2012), D.E. 111; *Arcia v. Detzner*, 908 F. Supp. 2d 1276, 1279 (S.D. Fla. 2012), *rev'd*, 772 F.3d 1335; see Patricia Mazzei, *Judge Rules Voter Purge Can Proceed*, Miami Herald, Oct. 5, 2012, at 1B.

An appeal of the October 4 ruling was dismissed voluntarily. Order, *Arcia v. Detzner*, No. 12-15220 (11th Cir. Dec. 3, 2012).

26. *Arcia*, 908 F. Supp. 2d 1276, *rev'd*, 772 F.3d 1335; see Notice of Appeal, *Arcia*, No. 1:12-cv-22282 (S.D. Fla. Nov. 1, 2012), D.E. 126; Transcript at 3–4, *id.* (Oct. 22, 2012, filed Oct. 29, 2012), D.E. 123.

27. Stipulation, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. Jan. 10, 2013), D.E. 54.

28. *Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326 (M.D. Fla. 2012) (opinion by Circuit Judge Charles R. Wilson and District Judges James D. Whittemore and James S. Moody).

29. *Shelby County v. Holder*, 570 U.S. 529 (2013); see Robert Barnes, *Court Blocks Key Part of Voting Rights Act*, Wash. Post, June 26, 2013, at A1; Steve Bousquet, *Court Deals Voting Rights Act a Blow*, Miami Herald, June 26, 2013, at 1A; Adam Liptak, *Justices Void Oversight of States, Issue at Heart of Voting Rights Act*, N.Y. Times, June 26, 2013, at A1.

30. Order, *Mi Familia Vota Educ. Fund v. Detzner*, No. 8:12-cv-1294 (M.D. Fla. July 24, 2013), D.E. 60.

31. *Arcia*, 772 F.3d at 1339 (opinion by Circuit Judge Beverly B. Martin, joined by Circuit Judge Adalberto Jordan), *superseding* 746 F.3d 1273, 1276 (11th Cir. 2014) (withdrawing a concurring opinion by Judge Jordan); see *id.* at 1348–49 (dissenting opinion by Sixth Circuit Judge Richard Suhrheinrich, sitting by designation, for the reasons set out by Judges Zloch and Hinkle); see also Steve Bousquet, *Appeals Court: Voter Purge Violated Federal Law*, Miami Herald, Apr. 2, 2014, at 1A.

enough time to rectify any errors. In the final days before an election, however, the calculus changes. Eligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote.

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In closing, we emphasize that our interpretation of the 90 Day Provision does not in any way handcuff a state from using its resources to ensure that non-citizens are not listed in the voter rolls. The 90 Day Provision by its terms only applies to programs which "systematically" remove the names of ineligible voters. As a result, the 90 Day Provision would not bar a state from investigating potential non-citizens and removing them on the basis of individualized information, even within the 90-day window.<sup>32</sup>

Judge Zloch reluctantly followed the appellate mandate and ruled in favor of the plaintiffs.<sup>33</sup>

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32. *Arcia*, 772 F.3d at 1344, 1356, 1348.

33. Opinion, *Arcia v. Detzner*, No. 1:12-cv-22282 (S.D. Fla. Feb. 12, 2015), D.E. 149; *id.* at 3 ("In the meantime, non-citizens, who were never eligible to vote in the first instance, will remain on the voting rolls within 90 days of a Federal election, and there is nothing practical the State of Florida can do about it.").