



May 17, 2012

Christopher Herren, Chief, Voting Section  
Civil Rights Division  
Room 7254 – NWB  
Department of Justice  
950 Pennsylvania Av., NW  
Washington, D.C. 20530

Dear Chief Herren:

We write to urge you to take immediate action to ensure that a large number of Florida voters are not improperly disenfranchised. The State of Florida recently implemented significant changes to its rules, policies and practices governing its voter registration list maintenance procedures. Because these new practices change the procedures governing qualifications and eligibility to vote, they are subject to the Voting Rights Act's Section 5 preclearance procedures. Therefore, the Department of Justice should require Florida to submit these procedures and practices for preclearance and ensure that continued use of these new procedures be enjoined in all of Florida's 67 counties until preclearance review is completed. We are particularly concerned about the impact of this election year's voter removal practice on eligible voters of color protected under the Voting Right Act, given Florida's documented history of erroneous, discriminatory purges in the past. Furthermore, we note the possible retrogressive impact on minority voters, particularly Latinos, as reportedly 58 percent of voters being challenged are Latino. *See Miami Herald, infra.* We are also concerned about compliance with Sections 203 and 4(e) of the Voting Rights Act with regard to language access.

According to news reports, the Florida Department of Elections ("DOE") is conducting "sweeps" of the voter rolls through new practices and methodologies using novel and questionable methods of matching voter rolls against lists maintained by the Florida Department of Highway Safety and Motor Vehicles and other state and federal databases in order to generate purge lists. Large numbers of U.S. citizens reportedly have been wrongly swept up in this purge.

We have attached a copy of new documents being used in this sweep: a form letter to voters and a "Voter Eligibility Form." According to the attached letter, currently being used by Collier County and reportedly by other counties, registered voters who have been put on a purge list by the Florida Division of Elections must bring original copies of documents establishing citizenship in person to the Election Supervisor's office, along with a completed "Voter Eligibility Form." The letter specifies in bold type: "**Failure to submit this form within thirty (30) days will result in the**

person to the Election Supervisor's office, along with a completed "Voter Eligibility Form." The letter specifies in bold type: **"Failure to submit this form within thirty (30) days will result in the removal of your name from the voter registration rolls and you will no longer be eligible to vote."**

News reports indicate that the number of voters targeted in this sweep could be as high as 180,000. The Division of Elections reportedly created the purge list by attempting to match the Florida voter rolls with information on U.S. citizenship purportedly in the Florida drivers' license database. The Miami Herald has also reported that the DOE is extending this effort to federal databases, requesting access to federal citizenship databases maintained by the Department of Homeland Security.<sup>1</sup>

As you know, the implementation of proposed voting changes in Florida are subject to the requirements of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c(a) ("Section 5"), which prohibits certain States and political subdivisions from implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect," unless the change has been precleared by the United States Department of Justice or the United States District Court for the District of Columbia.

Because five counties in Florida are covered by Section 5 (Collier, Hardee, Hendry, Hillsborough, and Monroe Counties), statewide voting changes in Florida are subject to Section 5's preclearance requirements. *See Lawyer v. Dep't of Justice*, 521 U.S. 567, 570 (1997) (Section 5 applies to statewide voting changes in Florida); *see also Lopez v. Monterey County*, 525 U.S. 266, 283-84 (1999) (statewide voting changes are subject to Section 5 review where a state is partially covered by Section 5).

The new list maintenance procedures that Florida is attempting to implement change the procedures and qualifications that govern the eligibility to vote, and therefore fall within the purview of Section 5. *See* 28 C.F.R. § 51.13(a) ("[a]ny change in qualifications or eligibility for voting"). *See also Riley v. Kennedy*, 553 U.S. 406, 412 (2008) (Section 5 requires "covered jurisdictions to obtain ... 'preclearance' ... before 'enact[ing] or seek[ing] to administer' any alteration of their practices or procedures affecting voting.") (quoting 42 U.S.C. § 1973c(a)); *Young v. Fordice*, 520 U.S. 273, 284 (1997) (preclearance is necessary for "[a]ny change affecting voting, even though it appears to be minor or indirect") (quoting 28 C.F.R. § 51.12). The Supreme Court has broadly defined "voting" for this purpose to "include all action necessary to make a vote effective in any election, including, but not limited to, registration, listing . . . . other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly." *Allen v. State Bd of Elections*, 393 U.S. 544, 565 (1969) (quoting § 14(c)(1) of the Voting Rights Act). Any change to a voting practice or procedure, even a seemingly minor one, is subject to this mandate.

The DOJ has made clear that changes to list maintenance procedures fall squarely within the purview of Section 5's review requirements, and Florida has a consistent history of submitting changes

<sup>1</sup> "Hispanics, HPAs more likely to face noncitizen voter purge than whites, GOP," Miami Herald (May 12, 2012), <http://www.miamiherald.com/2012/05/12/2796905/noncitizen-voter-hunt-targets.html>

1220 L Street, NW • Suite 850 • Washington, DC 20005 • 202.728.9557 • 202.728.9558 fax

[ap@advancementproject.org](mailto:ap@advancementproject.org) • [www.advancementproject.org](http://www.advancementproject.org)

LA Office: 1545 Wilshire Boulevard • Suite 800 • Los Angeles, CA 90017 • 213.989.1300 • 213.989.1309 fax

to its list maintenance procedures for preclearance review. Indeed the very list maintenance practices now altered by the DOE's new initiative (part of the Florida Election Reform Act of 2001), were themselves subject to pre-clearance review. Although no objection was interposed, in its letter pre-clearing the list maintenance procedures, the DOJ made clear that any changes to those practices would require a new review under Section 5.<sup>2</sup> Indeed, in its next legislative session, Florida again altered its list maintenance procedures and submitted those to the Department of Justice for pre-clearance.

The specific ways that the DOE has now altered its list maintenance practices by attempting to match its voter rolls against unrelated state and federal databases to create lists of "presumptively" ineligible voters are precisely the kinds of alterations that the DOJ indicated would subject those practices to preclearance review. In its letter pre-clearing Florida's list maintenance procedures contained in the Election Reform Act of 2001, the DOJ cleared the procedures with a caveat that preclearance was based on representations of how the state would undertake its purge practices, including:

- that there is no longer a presumption favoring the accuracy of any computer database and that the presumption now favors the voter; Jan. 29 letter at 3;
- that the appearance of a voter's name on the State's list of potentially ineligible voters does not, by itself, confirm that voter's ineligibility; Jan. 29 letter at 4; . . .
- that through implementation of Fla. Stat. 98.0977, the burden of proof is shifted from the voter to the supervisor of elections to establish ineligibility by the highest degree of proof consistent with the fact that the fundamental right to vote is at stake; Jan. 29 letter at 5; . . .

Significantly, the DOJ made clear: "Modification of the implementing procedures set forth in your Jan. 29 letter would likely constitute voting changes requiring preclearance under Section 5."<sup>3</sup>

The new procedures substantially alter each of the representations listed above. By blindly relying on state and federal databases to generate a list of presumptive ineligible voters, the new practice is "a presumption favoring the accuracy of any computer database" over the voter. By taking steps to immediately remove voters identified as non-citizens on motor vehicle lists without regard to the accuracy of those lists or the voters' current citizenship and eligibility status,<sup>4</sup> the practice violates the caveat that "the appearance of a voter's name on the state's list of potentially ineligible voters does not, by itself, confirm that voter's ineligibility," and by creating purge lists from external databases without regard to the voter's status and eligibility, and by requiring voters identified on these lists to take extra steps to prove their citizenship by providing citizenship documents to election officials in person,<sup>5</sup> the new practices place the burden of proof on the voter in contravention of the condition that the burden be on "the supervisor of elections to establish ineligibility by the highest degree of proof."

<sup>2</sup> See Letter from Joseph D. Rich, Chief, Voting Sec., to Robert A. Butterworth, Att'y Gen., State of Fla., 1-2 (March 28, 2002)

<sup>3</sup> Letter from Joseph D. Rich, Chief, Voting Sec., to Robert A. Butterworth, Att'y Gen., State of Fla., 1-2 (March 28, 2002)

<sup>4</sup> See NBC2 News Online, *supra*, "Florid election supervisors are working to remove 1,251 potential U.S. citizens from its databases... the Division of Election sdiscovered the names after Florida's Department of Highway Safety and Motor Vehicles idenfied non-citizens who obtained driver's licenses."

<sup>5</sup> See "Hispanics, NPA's more likely to face noncitizen voter purge than whites, GOP," *supra*.

1220 L Street, NW • Suite 850 • Washington, DC 20005 • 202.728.9557 • 202.728.9558 *fax*

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LA Office: 1545 Wilshire Boulevard • Suite 800 • Los Angeles, CA 90017 • 213.989.1300 • 213.989.1309 *fax*

For all these reasons, we believe that the DOJ should inform the State of Florida that it is required to submit the above-discussed changes to the Section 5 review process, and that the changes may not be implemented in any of the state's 67 counties during its review. We respectfully request that you inform us as soon as possible what action, if any, you intend to take to ensure compliance with Section 5 in this matter.

Thank you very much for your attention in this matter.

Sincerely,



Penda D. Hair, Co-Director  
 Edward A. Hailes, Jr., General Counsel and Managing Director  
 James Eichner, Managing Director of Programs  
 Katherine Culliton-Gonzalez, Senior Attorney and Director Voter Protection Project  
 Denise Lieberman, Senior Attorney

CC: The Honorable Rick Scott  
 Governor, The State of Florida  
 The Capitol, 400 S. Monroe Street  
 Tallahassee, FL 32399-0001

The Honorable Pam Bondi  
 Attorney General, The State of Florida  
 The Capitol PL-01  
 Tallahassee, FL 32399-1050

The Honorable Jeff Atwater  
 Chief Financial Officer  
 Florida Department of Financial Services  
 200 East Gaines Street  
 Tallahassee, FL 32399-0301

The Honorable Adam H. Putnam  
 Commissioner, Florida Department of Agriculture and Consumer Services  
 The Capitol  
 Tallahassee, FL 32399-0800

The Honorable Kurt S. Browning  
 Secretary of State, Florida Department of State  
 R. A. Gray Building, 500 South Bronough Street  
 Tallahassee, FL 32399-0250