

## **Implications of U.S. Supreme Court Decision on Application of Section 5 of the Voting Rights Act**

*By Kristen Olson*

The Supreme Court of the United States recently addressed the preclearance requirements of §§ 4 and 5 of the Voting Rights Act of 1965 (“Act”) in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. \_\_\_ (2009). Section 5 of the Act provides that all changes in election procedures must be approved by the U.S. Department of Justice prior to conducting elections to ensure the changes will not have the purpose or effect of denying the right to vote based on race or color. Section 4 of the Act provides that those states and political subdivisions that must submit a preclearance request to the U.S. Department of Justice under § 5 of the Act can choose to utilize the “bailout” process, which requires the filing of a federal lawsuit to authorize exemption from the preclearance submission requirements. Sections 4 and 5 of the Act specifically apply only in those states that have a history of discrimination in voting, including Texas.

Because Northwest Austin Municipal Utility District Number One (“District”) is a political subdivision located in Texas, it is required to file a federal preclearance request in accordance with § 5 of the Act before making any changes to its method of electing members to the District’s Board of Directors. Rather than file the preclearance request before making a change to its voting procedures, the District originally filed suit in the District Court for the District of Columbia (“D.C.”) under the bailout provisions of § 4 of the Act. The District’s bailout suit also claimed that if the District were not eligible for bailout under § 4 of the Act, the provisions requiring preclearance in § 5 were unconstitutional because there is no evidence the District ever discriminated against race or color in its voting practices. The District Court held that the bailout option did not apply to the District and that the preclearance requirements were not unconstitutional due to the continuing problem of racial discrimination in voting. The District appealed the decision to the Supreme Court of the United States (“Court”).

The Court decided the case on June 22, 2009, and limited its decision to address the issue of whether political subdivisions are eligible for bailout under § 4 of the Act. Although the Court did not make a decision as to whether the application of the preclearance requirements in § 5 of the Act to certain states and not others was unconstitutional, the Court’s opinion did express concern over the constitutionality of applying § 5 to only certain states. The Court explained that the voter discrimination data that Congress relied on in applying § 5 only to certain states is now more than 35 years old and that there have been significant accomplishments in voting equality since that time. Despite the Court’s reservations, the Court held that it intends to maintain judicial precedent by not making decisions on constitutional questions if there are other grounds to decide a case.

The Court reviewed the various amendments to the Act over the years to determine whether the bailout provisions apply to political subdivisions and determined that the 1982 amendments to the Act allow states, counties and all political subdivisions the opportunity to opt

out of the preclearance requirements by filing suit in D.C. District Court. The Court specifically noted that since 1982, only 17 jurisdictions out of the more than 12,000 political subdivisions subject to the Act have actually used the bail out provisions of the Act. The Court held that all political subdivisions are entitled to seek relief from the preclearance requirements by filing suit in federal court.

The practical implication of the Court's decision is that the preclearance requirements in § 5 of the Act continue to apply to political subdivisions in covered states, including Texas, but that political subdivisions can opt out of the preclearance requirements under the bailout provision in § 4 of the Act. To opt out of the preclearance requirements, a political subdivisions must file suit in D.C. District Court where a panel of three judges must hear and decide whether the political subdivision is exempt from the preclearance requirements. The political subdivision must prove that it has not discriminated in its voting practices within the previous ten years, has not been subject to a valid objection under § 5, has not been guilty for any other voting rights violations and must prove that it has engaged in constructive efforts to eliminate discrimination in voting. While the Court's decision does not change the requirement that political subdivisions must choose to file the preclearance request or opt out by filing suit in federal court, it is important to note the concerns the Court conveyed with regard to the application of the § 5 preclearance requirements to only certain states. This concern could signal a possible change in the Court's view of the application of the Act and could influence future decisions of the Court.

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