Opting Out of Preclearance

by Alan J. Bojorquez &
Cristina R. Blanton
Bojorquez Law Firm, PLLC
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Recently, the United States Supreme Court upheld the authority of an Austin-area Municipal Utility District (MUD) to opt-out of the Preclearance requirements under the Voting Rights Act of 1964. Below is a summary of the opinion, which was issued June 22, 2009.

Issue: Whether the appellant (Northwest Austin Municipal Utility District Number One "District") was eligible to "bailout" from the preclearance requirement of Section 5 of the Voting Rights Act, and whether Congress provided sufficient justification of current voting discrimination when in 2006 it extended the requirement for another twenty-five years.[1]

***Holding*:** The Act allows all political subdivisions to seek bailout from the preclearance requirements. The court further recognized that the Voting Rights Act currently raises serious constitutional concerns and the preclearance requirement represents an intrusion into areas of state and local responsibility that is otherwise unfamiliar to the federal system.

***Procedures & Requirements*:** The Court provided in its holding that a political subdivision seeking a bailout from the preclearance requirements of Section 5, must seek a declaratory judgment from a three-judge District Court in Washington, D.C.[2] In the declaratory judgment action, the subdivision must show that during the previous ten (10) years:

- No test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color;
- No final judgment of any court of the United States has determined that denials or abridgments to the right to vote on account of race or color have occurred anywhere in the territory of the covered jurisdiction;
- No Federal examiners or observers have been assigned to the covered jurisdiction;
- The covered jurisdiction has fully complied with Section 5; and
- The U.S. Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under Section 5.[3]

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[1] *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. __, (2009).

[2] The Court points out that since 1982, only 17 jurisdictions, out of more than 12,000, have successfully bailed out of the Act. Furthermore, Justice Thomas, in his concurring and dissenting opinion, states that even if a political subdivision provides and meets the objective criteria required for a bailout, the bailout request may still be denied because the political subdivision, in the subjective view of the United States District Court of Columbia, failed to engage in sufficiently "constructive efforts" to expand voting opportunities. *Id.* (Thomas, J., concurring in part, dissenting in part).

[3] 42 U.S.C. §1973 (a)(1)(A)-(E).

In addition, evidence of the following must also presented by a political subdivision seeking a bailout:

- The political subdivision must have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;
- The political subdivision must have been engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under the Act; and
- The political subdivision has engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.[4]

The U.S. Attorney General may consent to entry of judgment in favor of bailout if the evidence warrants it, though other interested parties are also provided the opportunity to intervene in the declaratory judgment action.[5]

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[4] *Id.* at §1973 (a)(1)(F)(i)-(iii).
[5] *Id.* at §1973b(a)(9).