Litigation & Trial Practice ADVISORY

July 2, 2009

Summary of *Northwest Austin Municipal Utility District Number One v. Holder*

Overview

In its recent decision in *Northwest Austin Municipal Utility District Number One v. Holder*, the Supreme Court addressed questions about the constitutionality and appropriate application of Section 5 of the Voting Rights Act of 1965 ("Act"),¹ which requires certain jurisdictions covered by Section 5 of the Act to obtain federal preclearance before making any changes to their election procedures. In an 8-1 decision, the Court raised grave concerns about the constitutionality of Section 5 en route to concluding that many political subdivisions in jurisdictions covered by Section 5 are entitled to pursue the opportunity to bailout of federal oversight of electoral changes under that section. The decision's immediate impact will be to vastly increase the number of jurisdictions entitled to pursue bailout from the restrictions of Section 5.

Summary of the Case

The appellant, Northwest Austin Municipal Utility District Number One ("Northwest Austin" or "Appellant"), was a small utility district with an elected board. Because it is located in Texas, Northwest Austin was required by Section 5 of the Act to seek federal preclearance before changing any voting procedure, even though there was no evidence that Northwest Austin ever discriminated on the basis of race in prior elections. Northwest Austin filed suit seeking relief under the "bailout" provision in Section 4(a) of the Act, which allows a "political subdivision" to be released from the preclearance requirements if certain conditions are met. The district court, relying on existing precedent, ruled that Northwest Austin was ineligible to bailout of Section 5's coverage because it was not the type of "political subdivision" to which Section 4(a) applied. Northwest Austin argued in the alternative that, if Section 5 were interpreted to render it ineligible for bailout, Section 5 was unconstitutional. The district court rejected this claim as well. It concluded that bailout under §4(a) is available only to counties, parishes and subunits that register voters, not to an entity like the Northwest Austin utility district that does not register its own voters. The district court also concluded that a 2006 amendment extending Section 5 of the Act for 25 years was constitutional.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

¹ See generally 42 U.S.C. § 1973 et seq.

Summary of the Decision

Chief Justice Roberts delivered the 8-1 opinion of the Court, while Justice Thomas filed a separate opinion concurring in the judgment in part and dissenting in part. The Court noted that, despite the historic accomplishments of the Act, the preclearance requirement of Section 5 of the Act raises serious constitutional concerns in light of the fact that the preclearance requirement represents an intrusion into areas of state and local responsibility that is otherwise unfamiliar to the federal system. Because the Court normally will not decide a constitutional question if there is some other ground upon which to dispose of the case, however, the Court ruled in favor of Appellant on narrower grounds.

Specifically, the Court considered the proper interpretation of Section 4(a) of the Act, which allows a court to issue a declaratory judgment allowing a State or "political subdivision" to bailout of Section 5 preclearance requirements upon a showing that

- 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 abridgements
 of the right to vote on account of race or color have occurred anywhere in the territory of such
 state or political subdivision;
- no federal examiners have been assigned under the Act to such state or political subdivision;
- such state or political subdivision and all governmental units within its territory have complied with section 1973c of the Act, including compliance with the requirement that no change covered by section 1973c of the Act has been enforced without preclearance, and have repealed all changes covered by section 1973c of the Act to which the attorney general has successfully objected or as to which a court has denied a declaratory judgment;
- The attorney general has not interposed any objection and no declaratory judgment has been denied under section 1973c of the Act, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of the Act, and no such submissions or declaratory judgment actions are pending; and
- · such state or political subdivision and all governmental units within its territory
 - have eliminated voting procedures and methods of election that inhibit or dilute equal access to the electoral process;
 - have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under the Act; and
 - have 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.

Though the government pushed for a narrow interpretation of the term "political subdivision" as including only a county, a parish or another subdivision which conducts voter registration, the Court held that "political subdivision," as used in Section 4(a) of the Act, refers to "political subdivision" in the ordinary sense of the term, including political subsets of larger, covered political divisions. As such, the Court found in favor of the Appellant, holding that Northwest Austin was a political subdivision that was entitled to exercise the bailout provisions of the Act. The Court thus reversed and remanded.

Implications

While the Court did not go so far as to strike down Section 5 of the Act as unconstitutional, the Court did significantly increase the number of jurisdictions that are entitled to avail themselves of Section 4(a)'s bailout provisions. Specifically, smaller jurisdictions such as electrical and water districts within covered jurisdictions are now, for the first time, entitled to pursue Section 4(a)'s bailout provisions irrespective of whether a covered county or covered state as a whole chooses to pursue the bailout option.

Alston & Bird has expertise with the policies and procedures related to the preclearance requirements under Section 5 of the Act, as well as the Section 4(a) bailout provisions affected by this decision. If you have any questions or would like additional information, please contact your Alston & Bird attorney or Robert N. Driscoll. Robert is a partner in the firm's Litigation and Trial Practice Group in Washington, D.C. and was formerly the deputy assistant attorney general and chief of staff for the Civil Rights Division of the Department of Justice.

If you would like to receive future *Litigation and Trial Practice Advisories* electronically, please forward your contact information including e-mail address to *litigation.advisory@alston.com*. Be sure to put "subscribe" in the subject line.

If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

Peter M. Degnan pete.degnan@alston.com 404.881.7743

Robert N. Driscoll bob.driscoll@alston.com 202.756.3470

Darren L. McCarty darren.mccarty@alston.com 214.922.3414

Della Wager Wells della.wells@alston.com 404.881.7891

ATLANTA

One Atlantic Center 1201 West Peachtree Street Atlanta, GA 30309-3424 404.881.7000

CHARLOTTE

Bank of America Plaza Suite 4000 101 South Tryon Street Charlotte, NC 28280-4000 704.444.1000

DALLAS

Chase Tower Suite 3601 2200 Ross Avenue Dallas, TX 75201 214.922.3400

LOS ANGELES

333 South Hope Street 16th Floor Los Angeles, CA 90071-3004 213.576.1000

NEW YORK

90 Park Avenue New York, NY 10016-1387 212.210.9400

RESEARCH TRIANGLE

Suite 600 3201 Beechleaf Court Raleigh, NC 27604-1062 919.862.2200

SILICON VALLEY

Two Palo Alto Square Suite 400 3000 El Camino Real Palo Alto, CA 94306-2112 650.838.2000

VENTURA COUNTY

Suite 215 2801 Townsgate Road Westlake Village, CA 91361 805.497.9474

WASHINGTON, D.C.

The Atlantic Building 950 F Street, NW Washington, DC 20004-1404 202.756.3300

www.alston.com

© Alston & Bird LLP 2009