

# THE DEMISE OF THE VOTING RIGHTS ACT?: A PREVIEW OF *NORTHWEST AUSTIN MUNICIPAL DISTRICT NUMBER ONE v. HOLDER*

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## I. INTRODUCTION

The landscape in American voting has changed dramatically in the years since the Civil Rights Movement of the 1960s, culminating in the election of the nation's first African-American President last year. Despite these advances, the Voting Rights Act of 1965 ("VRA") and its subsequent reauthorizations and amendments impose strict requirements on how elections may be carried out in parts of the country with a history of racial discrimination in voting.<sup>1</sup> In particular, Section 5 of the VRA prohibits jurisdictions covered by the Act from making *any* changes in their election laws without approval from the Justice Department or the United States District Court for the District of Columbia.<sup>2</sup> A change can be pre-cleared only if one of these entities determines that it "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."<sup>3</sup> Simultaneously, in order to address the potential problems of overinclusiveness that could result from Section 5's coverage, Section 4(a) of the VRA allows the covered jurisdictions to bail-out from these requirements if they meet certain conditions.<sup>4</sup>

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1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C.A. §§ 1971, 1973 to 1973bb-1 (West 2003 & Supp. 2007)).

2. *See generally* 42 U.S.C. § 1973c (outlining the procedure for changes in the election process in covered jurisdictions).

3. *Id.*

4. *See* 42 U.S.C. § 1973b(a) (allowing jurisdictions to earn exemption from coverage by satisfying a three-judge panel of the United States District Court for the District of Columbia that, in the previous ten years, they have not used a test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color").

Congress has reauthorized and amended the VRA several times following its original enactment in 1965—most recently in 2006, when it was extended for another twenty-five years.<sup>5</sup> A mere eight days after its 2006 renewal, however, Sections 4(a) and 5 were challenged by the Petitioner, Northwest Austin Municipal Utility District Number One (“the District”).<sup>6</sup> On May 30, 2008, a three-judge panel of the United States District Court for the District of Columbia rejected both the Petitioner’s request to bail-out from Section 5 coverage and its challenge to the constitutionality of Sections 4(a) and 5.<sup>7</sup>

## II. FACTS

The District is a local government entity created in the late-1980s to facilitate the development of a residential subdivision.<sup>8</sup> It is wholly within the boundaries of both Travis County and the City of Austin,<sup>9</sup> but is not subject to the control of either.<sup>10</sup> The District, however, has contracted with Travis County to administer its elections.<sup>11</sup> After the 2006 reauthorization of the VRA continued election coverage over the District, the District filed suit arguing both that it had a statutory right to bail-out from Section 5 coverage and, alternatively, that Section 5 is an unconstitutional exercise of congressional power.<sup>12</sup> This second, broader challenge is based on the District’s assertion that when Congress extended Section 5’s coverage provisions in 2006, it lacked sufficient evidence of racial discrimination to justify the continued voting restrictions in jurisdictions where it *had* been a problem but may no longer be one.<sup>13</sup>

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5. 42 U.S.C.A. §§ 1971, 1973 to 1973bb-1.

6. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (Northwest Austin)*, 573 F. Supp. 2d 221 (D.D.C. 2008), *argued sub nom.* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322 (U.S., Apr. 19, 2009), 2009 WL 1146055 (the case’s name was changed due to Attorney General Holder replacing Attorney General Mukasey as U.S. Attorney General).

7. *Id.* at 223–24.

8. *Id.* at 229–30.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*; Brief for Appellee Travis County at 6, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322 (U.S., Mar. 18, 2009), 2009 WL 740766.

13. *Northwest Austin*, 573 F. Supp. 2d at 223.

### III. LEGAL BACKGROUND

Congress originally provided in Section 4(b) that the requirements of Sections 4(a) and 5 would apply to any state or political subdivision that both: (1) according to the Attorney-General, maintained a test or device [for voting registration] on November 1, 1964; and (2) according to the Director of the Census, had registration or turnout rates below 50% of the voting age population on November 1, 1964.<sup>14</sup> Originally, Section 4(b) did not cover the State of Texas.<sup>15</sup> The 1975 amendments to the VRA, however, expanded the definition of “test or device” to include jurisdictions that provided voting materials only in English and where more than 5% of voting-age citizens belonged to a single language minority.<sup>16</sup> Consequently, the statute covered Texas.<sup>17</sup>

The District’s challenge is not the first challenge to the VRA. Shortly after it was originally passed, South Carolina—which the VRA provisions covered in its entirety—challenged the constitutionality of the preclearance requirement.<sup>18</sup> The United States Supreme Court rejected South Carolina’s arguments, holding that Congress had properly exercised its enforcement powers under the Fifteenth Amendment because Congress may use “any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”<sup>19</sup>

Congress subsequently reauthorized Sections 4 and 5 several times over the past few decades.<sup>20</sup> Each subsequent reauthorization has likewise been challenged; each time unsuccessfully.<sup>21</sup> *Northwest Austin Municipal Utility District Number One v. Holder* represents the

14. 1965 Act § 4(b), 79 Stat. at 438 (codified as amended at 42 U.S.C. § 1973b(b)).

15. *See generally id.* (limiting the geographic jurisdiction of the Voting Rights Act).

16. *See* 42 U.S.C. § 1973(b)(f)(3) (expanding the Voting Rights Act’s reach to jurisdictions that only provided voting materials in English and that had significant numbers of non-English-speaking citizens).

17. *See* 42 U.S.C. §§ 1973–1973d, 1973k (expanding coverage to incorporate jurisdictions including Texas).

18. *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

19. *Id.* at 324, 327.

20. *See* *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (Northwest Austin)*, 573 F. Supp. 2d 221, 226–27 (D.D.C. 2008) (discussing the reauthorizations of the Voting Rights Act).

21. *See* Brief for the Federal Appellee at 15, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322 (U.S., Mar. 18, 2009), 2009 WL 819480 (“Beginning in *South Carolina [v. Katzenbach]*, this Court has upheld the constitutionality of the VRA on four separate occasions.”).

latest challenge to Congress's enforcement of the VRA under its Reconstruction Amendments powers.

#### IV. HOLDING

The district court rejected the District's claims on two grounds. First, the court held that the District was ineligible to seek a declaratory judgment exempting it from Section 5 because it did not qualify as a "political subdivision" as defined in the VRA.<sup>22</sup> Second, the court, applying the rational basis standard set forth in *South Carolina v. Katzenbach*<sup>23</sup>—that government action need only represent a reasonable means of pursuing a legitimate governmental interest—found that Congress's decision to extend Section 5 for an additional twenty-five years was rational. Section 5 was therefore held to be constitutional, given the extensive legislative record documenting continued racial discrimination in covered districts.<sup>24</sup> The district court also concluded in the alternative that, even if the extension of Section 5 was controlled by the stricter standard laid down in *City of Boerne v. Flores*<sup>25</sup>—that the government must show that the remedial legislation is sufficiently connected to remedying a constitutional violation—Section 5 passed muster. Section 5's tailored and remedial scheme meant that the extension qualified as a "congruent and proportional" response to the continued problem of racial discrimination in voting in the covered districts.<sup>26</sup>

#### V. ANALYSIS

##### A. *Is the Municipality Eligible for Bail-out As a "Political Subdivision"?*

The District argues that it satisfies the requirements for bail-out under the plain meaning of Section 4(a), which states that "any political subdivision of" any covered State may seek a bail-out

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22. *Northwest Austin*, 573 F. Supp. 2d at 223.

23. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (holding that the Voting Rights Act was a valid exercise of Congress's power under the enforcement clause of the Fifteenth Amendment).

24. *Northwest Austin*, 573 F. Supp. 2d at 223–24.

25. *See City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (holding that the Religious Freedom and Restoration Act was not a congruent and proportional response to the protection of substantive rights).

26. *Northwest Austin*, 573 F. Supp. 2d at 223–24.

declaration.<sup>27</sup> Because the District is considered a political subdivision under Texas law, it should likewise qualify as a political subdivision under the VRA.<sup>28</sup> Given that the Court should “give the words of a statute their ‘ordinary, contemporary, common meaning,’ absent an indication Congress intended them to bear some different import[.]”<sup>29</sup> and that Congress has expressed no contrary meaning, the District contends that it should be covered by the bail-out procedure.<sup>30</sup> The Federal Government, however, argues that the District is seeking an expansion of the bail-out provision “that the statutory text will not bear” and that the district court was correct in rejecting the District’s interpretation of the statute.<sup>31</sup>

Originally, only two categories of jurisdictions were eligible to seek bail-out under Section 4(a): (1) designated States and (2) “political subdivision[s]” separately designated for coverage even if the state was not.<sup>32</sup> The District acknowledges that, under these original bail-out criteria, it does not qualify for bail-out.<sup>33</sup> But the District contends that the 1982 Amendments to the VRA govern the current situation because Congress added a third type of jurisdiction eligible for bail-out: “any political subdivision of [a covered] State . . . though such determinations were not made with respect to such subdivisions as a separate unit.”<sup>34</sup> The Federal Government responds that the District cannot rely on this provision, as it was designed only to apply to subdivisions defined in Section 14(c)(2).<sup>35</sup> As the District does not conduct voter registration itself, the district court found, and the Federal Government urges the Court to affirm, that the District cannot fall into this third category.<sup>36</sup>

Finally, the practical effect of interpreting the statute against the District makes it effectively impossible for it ever to secure bail-out:

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27. *Id.* at 230; 42 U.S.C. § 1973b(a)(1).

28. *See* TEX. CONST. art. XVI, §§ 59(a), (b) (holding that the District would qualify as a “political subdivision”).

29. *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

30. Brief for the Appellant at 17, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322 (U.S., Feb. 19, 2009), 2009 WL 453246.

31. Brief for the Federal Appellee, *supra* note 21, at 7.

32. VRA § 4(a), 79 Stat. 438 (codified at 42 U.S.C. § 1973(b)(a)(1) (Supp. I 1965)).

33. Brief for Petitioner at 21, *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, No. 08-322 (U.S., Dec. 9, 2008), 2008 WL 5195625.

34. VRA § 2(b)(2), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1)).

35. VRA § 14(c)(2) defines “political subdivision” as “any county or parish” that “conducts registration for voting” when the county does not (codified at 42 U.S.C. § 1973(c)(2)).

36. Brief for Federal Appellee, *supra* note 21, at 10.

“In most covered States, including Texas, restricting [bail-out] to the county level makes the bailout procedure practically unworkable. For example, the territory of Travis County, in which the district is located, includes at least 107 geographically smaller government units.”<sup>37</sup>

*B. What Standard of Review Should Apply If the District Is Eligible to Bail-Out?*

The issue that will have more far-reaching implications is whether Section 5’s restrictions pass constitutional muster under Congress’s power to enforce the Reconstruction Amendments.<sup>38</sup> The Supreme Court has articulated two distinct standards for evaluating the constitutionality of laws enforcing the Reconstruction Amendments depending on which amendment is implicated: (1) a “congruence and proportionality” test for legislation enacted pursuant to the Fourteenth Amendment; and (2) a less demanding rational basis test for effectuating the prohibition of racial discrimination in voting under the Fifteenth Amendment.<sup>39</sup> The first issue, then, is what standard the VRA should be judged under: the rational basis standard, as set forth in *South Carolina v. Katzenbach*, or the congruence and proportionality test, as laid out in *City of Boerne v. Flores*.

The District contends that the “original emergency [that prompted the restrictions] has now passed,”<sup>40</sup> and that it can demonstrate a continued history of respect for voting rights and therefore present a compelling case that the burdens imposed upon it should be removed.<sup>41</sup> The District argues that the Court’s 1997 decision in *City of Boerne*, which held that Congress’s remedial powers under the Reconstruction Amendments must pass a congruence and proportionality test, makes its challenge ripe for success.<sup>42</sup>

Moreover, the District questions Congress’s reliance on decades-old data in renewing Section 5 in 2006 in order to show the reauthorization did not represent a congruent and proportional

37. Appellant’s Brief, *supra* note 30, at 24.

38. U.S. CONST. amend. XIV; *id.* amend. XV.

39. *See* *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (Northwest Austin)*, 573 F. Supp. 2d 221, 235–36 (D.D.C. 2008) (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997) & *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966)) (discussing Congress’s ability to enforce the Reconstruction Amendments).

40. Appellant’s Brief, *supra* note 30, at 2.

41. *Id.*

42. *Id.* at 32–33.

exercise of Congress’s enforcement powers under the Reconstruction Amendments.<sup>43</sup> The District argues that “[a] workable [bail-out] process is the only possible way of removing compliant jurisdictions from § 5’s overbroad coverage.”<sup>44</sup> It must be questioned whether Section 5 is a valid exercise of the enforcement power, given that “[i]f bailout is indeed unavailable to jurisdictions like the [D]istrict, it is of no practical use for correcting Congress’s reliance on obsolete data and restraining § 5’s reach.”<sup>45</sup>

Moreover, the District argues that:

[p]rophylactic legislation enacted to enforce the substantive guarantees of the Reconstruction Amendments must be clearly related to remedying violations of those guarantees. And the more a prophylactic measure intrudes on the scope of other constitutional provisions and principles, the more critical it is that the measure fit as closely as possible to a valid remedial objective.<sup>46</sup>

This lack of congruence and proportionality, given the absence of discrimination in Travis County over the past decade, is favorable to the District. It can point to the fact that the conditions that justified Section 5 in 1965 are not the same as those in 2006, so Congress’s actions do not meet the *City of Boerne* standard. Section 5 coverage cannot be justified as being a congruent and proportional response to discrimination where such discrimination does not exist. Furthermore, the original enactment of Section 5 was initially “confined to those regions of the country where voting discrimination had been most flagrant,”<sup>47</sup> but the District’s electoral landscape in 2006 was very different from the original conditions that prompted the VRA, thus giving weight to the argument that continued coverage is excessive.<sup>48</sup> The District elaborates on the now antiquated nature of the continued preclearance requirements: “Section 5 today imposes a scarlet letter on residents of covered jurisdictions based on acts of their grandparents or—given our mobile society—other people’s grandparents.”<sup>49</sup> Furthermore, the District asserts that § 5 “cannot be

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43. *Id.* at 23.

44. *Id.*

45. *Id.* at 60.

46. *Id.* at 30.

47. *City of Boerne v. Flores*, 521 U.S. 507, 532–33 (1997).

48. Appellant’s Brief, *supra* note 30, at 57.

49. *Id.* at 58.

justified simply on a record of discrimination in general. Instead, there must be a showing . . . of a systematic pattern of covered jurisdictions recently engaging in concerted efforts to game the system to the disadvantage of minorities by acting preemptively to impose new barriers to voting.”<sup>50</sup>

*Northwest Austin Municipal Utility District Number One v. Holder* also raises federalism concerns. Section 5 goes beyond addressing discrimination and preempts *all* changes to voting procedures in covered jurisdictions, risking the balance of state and federal power, and representing “the most severe intrusion on state sovereignty in federal law.”<sup>51</sup> Put simply, when Congress extended the VRA in 2006, did it have sufficient evidence of racial discrimination in voting to justify its intrusion upon state sovereignty? For Congress to justify such an intrusion, there must be “a clear demonstration that it remains a needed and justifiable emergency remedy, separate and distinct from the general justification for the VRA’s core substantive provisions.”<sup>52</sup>

The Federal Government rebuts the District’s argument simply by stating that even if Section 5 is judged under the congruent and proportional standard set forth in *City of Boerne*—and not the more deferential rational basis test—it still fails: “Even when applying the congruence-and-proportionality standard, the Court has never invalidated a statute securing rights that the Court’s decisions recognize as entitled to heightened protection.”<sup>53</sup> Protection of the rights of racial minorities to vote is at the very top of this heightened protection. While the Court is traditionally deferential to Congressional findings, it will be interesting to see just how deferential the Roberts Court will be to findings that do not directly implicate the District in racial discrimination in voting.

## VI. ARGUMENTS AND DISPOSITION

Ultimately, there remains a possibility that the Supreme Court will reach an anti-climatic decision and not even address the bigger

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50. *Id.* at 40.

51. *Id.* at 42.

52. *Id.*

53. Brief for the Federal Appellee, *supra* note 21, at 25 (citing Nevada Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003)) (recognizing that the Court has upheld the family leave provisions of the Family and Medical Leave Act of 1993 under the congruence-and-proportionality standard).



question concerning the constitutionality of Section 5. If the Court accepts the first part of the District’s claim—that it is a “political subdivision” that is eligible to bail-out—then the constitutional question may become moot as the case would be resolved by permitting the District to bail-out.

*A. Strengths and Weaknesses of the District’s Case*

“In upholding the original § 5 as a provision with a five-year lifespan, *South Carolina v. Katzenbach* characterized it as a response to an acute emergency.”<sup>54</sup> Consequently, the District argues that “Congress cannot indefinitely continue exercising extraordinary powers in response to an emergency with no showing the emergency persists.”<sup>55</sup> This consideration is likely to carry considerable weight if the Respondents cannot convince the Court that the evidence of continued racial discrimination in voting is compelling enough that only Section 5’s broad approach will suffice. The considerable weakness in the District’s case, however, is that considerable Congressional findings were presented when the VRA was reauthorized in 2006 (discussed below).

*B. Strengths and Weaknesses of the Respondents’ Case*

Congress is afforded a great deal of latitude when enforcing the Fourteenth and Fifteenth Amendments: “This Court . . . has repeatedly reaffirmed that Congress is ‘entitled to much deference’ in ‘determin[ing] whether and what legislation is needed to secure the guarantees’ of the Reconstruction Amendments.”<sup>56</sup> As such, the Respondents appear to be in a strong position to ask the Court to defer to Congress in this area, especially given that “deference to Congress is highest when it enforces the core protections of the Reconstruction Amendments.”<sup>57</sup> Congress has repeatedly attempted to remedy racial discrimination in voting; the fact that it did so as recently as 2006 weighs in favor of Respondents’ argument that there remains a continued need for federal preclearance requirements. Moreover, given that racial discrimination in voting has been reduced considerably since the passage of the VRA, the Court might be

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54. Appellant’s Brief, *supra* note 30, at 61.

55. *Id.* at 61–62.

56. Brief for Federal Appellee, *supra* note 21, at 18 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

57. *Id.* at 19.

inclined to see the VRA as a powerful force that does more good than it does harm, and should therefore be left in place.

At the same time, the Court's congruence and proportionality test in *City of Boerne v. Flores* leaves the Respondents open to attack on grounds that there no longer remains a continuing need for Section 5 in light of the progress made in eliminating racial discrimination in voting. If the Court sees the case as primarily being under the Fifteenth Amendment (as the district court did), then it should be relatively easy for the Respondents to satisfy the lower standard of the "any rational means" test. Alternatively, if the Court is more inclined to see it as a Fourteenth Amendment case, the Respondents will face a more difficult task in showing that the VRA is congruent and proportional in light of the lack of evidence of racial discrimination in elections in the District.

Finally, Travis County claims that the District experiences only "trivial" burdens from Section 5's coverage, pointing to the fact that in the two decades of the District's existence it has only conducted one contested election.<sup>58</sup> Given the limited experience of the District in conducting elections, the District could be found to be "institutionally inexperienced with the benefits that [Section] 5 coverage brings."<sup>59</sup> Establishing that Section 5 actually imposes a burden on the District could therefore weaken the District's argument. It will likely have to satisfy the Court that, in contrast to Travis County's assertion, there is a practical reason to extend the bail-out option to it if the Court decides that Section 5 is not an unconstitutional use of Congress's remedial powers under the Reconstruction Amendments.

Unlike the District, Travis County asserts that "racial discrimination in voting is not a thing of bygone days and generations[.]"<sup>60</sup> which receives support from the Congressional findings for the 2006 reauthorization.<sup>61</sup> This may not be a guaranteed victory for the Respondents, however, given that no discrimination was found in the District itself. Although Travis County mentions the continued prevalence of racial discrimination, it does not provide any evidence of racial discrimination in voting occurring either within the District or Travis County. Instead, Respondent Travis County relies on

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58. Brief for Appellee Travis County, *supra* note 12, at 8.

59. *Id.*

60. *Id.* at 9.

61. See Brief for Federal Appellee, *supra* note 21, at 41 (discussing Congressional findings in reauthorizing the Voting Rights Act).

simplistic generalizations, such as: “There remain solid reasons to keep . . . [Section] 5 on the statute books.”<sup>62</sup> The Court is likely to demand more in the way of firm evidence than these generalizations, especially if it employs the congruence and proportionality test.

## VII. CONCLUSION

Given the relatively new composition of the Roberts Court, the decision in *Northwest Austin Municipal Utility District Number One v. Holder* is eagerly awaited, not just by those who oppose Section 5’s continued application but also by those who believe Section 5 is essential to the continued protection of minorities. This case will also serve as an indicator of how the Court will treat future Congressional legislation under the Reconstruction Amendments, and how far the Court will allow federal intrusion in state affairs.

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62. Brief for Appellee Travis County, *supra* note 12, at 17.