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The Voting Rights Act “Formula” Is Under Review

Executive Summary

Today the U.S. Supreme Court heard oral arguments in *Shelby County v. Holder*, and considered whether a provision of the Voting Rights Act of 1965 (the “VRA”), which requires certain jurisdictions to obtain prior approval for changes in election laws, is unconstitutional. Most observers expect the Supreme Court to invalidate the provision in June. Such a decision would likely force Congress to revisit the issue in greater detail before any state or local jurisdictions can be required to seek prior approval of their election laws.

Background on the Preclearance Requirement

Section 5 of the VRA (commonly referred to as the “Preclearance Requirement”) requires certain jurisdictions to obtain prior approval from the U.S. Department of Justice or the court in Washington, D.C. before enforcing any changes in election laws.

The VRA contains a formula for determining which jurisdictions are subject to the Preclearance Requirement. Under the current formula, all or portions of 16 states are subject to the Preclearance Requirement: Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia.

Each year, the U.S. Department of Justice reviews 15,000 to 24,000 election law changes from covered jurisdictions—and historically has objected to approximately 1% of the proposed changes that, if enforced, might adversely affect the voting rights of racial or language minorities. Although nearly all covered jurisdictions’ changes in election laws eventually receive preclearance, covered jurisdictions consistently complain that the Preclearance Requirement is costly and burdensome and, in some cases, that the preclearance process has been politicized.

In 2009, Chief Justice Roberts raised serious questions as to the constitutionality of the Preclearance Requirement during oral arguments, and all nine justices expressed doubts as to the constitutionality of the Preclearance Requirement in a written opinion—and since that time, observers have expected the Supreme Court to entertain a constitutional challenge to the Preclearance Requirement.

Legal Issues in *Shelby County v. Holder*

In *Shelby County v. Holder*, a county in Alabama sued to invalidate the formula that determines which jurisdictions are subject to the Preclearance Requirement. The trial court upheld the formula, and the court of appeals affirmed that decision. The Supreme Court then granted *certiorari* to review the case and, after the parties submitted legal briefs, held oral argument this morning.

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The attorneys challenging the Preclearance Requirement formula are arguing that, under prior case law, the VRA must be “congruent and proportional” to a particular harm. Shelby County is arguing that, because Congress failed to identify a particular harm (such as *actual* discrimination against voters) when reauthorizing the VRA in 2006, the formula for applying the Preclearance Requirement against state and local jurisdictions is not congruent or proportional to a particular harm and is, therefore, unconstitutional. The attorneys challenging the Preclearance Requirement formula also argue strongly that civil rights problems have changed significantly since the VRA was originally passed in 1965, and that the Preclearance Requirement is no longer necessary.

The attorneys defending the Preclearance Requirement argue, in turn, that Congress made the necessary findings when reauthorizing the VRA in 2006 and, further, that the Preclearance Requirement is a central component of a very successful program to eliminate voting rights discrimination in the United States.

Oral Arguments

Questioning at today’s oral argument largely confirmed prior expectations. The Court directed probing questions to attorneys on both sides—but a majority of the Justices seemed to reserve their most difficult questions for the attorneys defending the Preclearance Requirement formula. Chief Justice Roberts at one point asked the government’s attorney whether Southerners “are more racist than citizens in the North.” The answer—no—was taken by the challengers as a concession that the Preclearance Requirement, which affects a disproportionate number of Southern states, is no longer necessary.

The more liberal Justices used a portion of their questions to explore a procedural question—essentially whether Shelby County can challenge the Preclearance Requirement formula at all—which conceivably could allow the Court to decide the case without invalidating any portion of the VRA. Although that line of questioning appeared to spark some interest in Justice Kennedy, a potential “swing” vote, most observers believed Justice Kennedy’s questions signaled general skepticism about the constitutionality of the Preclearance Requirement formula.

Expected Ruling

Most observers expect a ruling from the Supreme Court in June. Although questioning at oral arguments is a notoriously unreliable guide, most observers believe, based on today’s oral arguments and suggestions in prior decisions, that at least the five conservative justices on the Supreme Court will rule in favor of Shelby County and invalidate the formula underlying the Preclearance Requirement. Such a decision would not necessarily end the Preclearance Requirement permanently, but it would likely force Congress to review the issue in greater detail before “singling out” any particular state or group of states for heightened regulation.

Kory A. Langhofer

Associate

KLanghofer@BHFS.com

602.382.4078