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Bailout of Jurisdictions from Section 5 of the Voting Rights Act

I. What is the bailout procedure?

Section 5 of the Voting Rights Act requires that certain states and their political subdivisions submit any change in a voting practice to the U.S. Department of Justice or a three-judge federal district court in the District of Columbia before that new voting practice can be used or enforced. This process is called “preclearance.” Section 5 of the Voting Rights Act covers all of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, and parts of California, Florida, Michigan, New Hampshire, New York City, North Carolina, and South Dakota.

Bailout is a procedure by which a state or political subdivision seeks to end its coverage under Section 5 of the Voting Rights Act. If a state or political subdivision under the Voting Rights Act succeeds in bailing out, it is no longer covered by section 5 of the Act and has the power to employ *test or devices* in determining a person’s eligibility to vote in any Federal, State, or local election.

A “political subdivision” is a county or parish that conducts voter registration activities. Voting Rights Act, Section 14(c)(3). In practice, “county” has been deemed to include “independent city” in Virginia, since they are the functional equivalent of counties and they carry out voter registration. Thus, other cities and school boards and other sub-county entities must rely on the bailout of the state or county in which they are located, just as they become covered when the county or state containing them is covered.

The term “test or device” means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by voucher or registered voters or members of any class.

“Test or device” can also mean any practice by which a state or political subdivision provides any registration or voting information relating to the electoral process only in English, where the Director of Census determines that more than 5% of the citizens of voting age residing in that state or political subdivision are members of a single language minority.

A state or political subdivision seeking to bailout must file lawsuit for a declaratory judgment in the U.S. District Court for the District of Columbia. The lawsuit is heard and determined by a court of three judges and any appeal goes to the U.S. Supreme Court. In a bailout suit, the state or political subdivision is the Plaintiff and the U.S. Attorney General is the Defendant.

II. What does a state or political subdivision have to prove in order to bailout from the provisions of the Voting Rights Act?

In a bailout lawsuit, the state or political subdivision wanting to bailout has the burden of proof. Consequently, the state or political subdivision must prove that preclearance of its proposed voting changes under section 5 is no longer necessary to ensure that voting rights are protected from unlawful discrimination within its jurisdiction. Specifically, the state or political subdivision must show that, during the ten years preceding the filing of the bailout suit and while the suit is pending, the following is true:

1. It has not used a test or device that has a discriminatory purpose or effect as a precondition to registering or voting. Since state laws are effective in localities, a state law containing a test or device would count as a use by the state or political subdivision.

2. No state or federal court has issued a final judgment against the state or political subdivision for voting discrimination.

3. The jurisdiction has submitted all voting changes for preclearance before it implements them.

4. The Attorney General has not issued an objection to a proposed voting change, and no declaratory judgment under section 5 has been denied by the U.S. District Court for the District of Columbia. The Attorney General will not raise as a defense in a bailout suit any objection which was based on an erroneous interpretation of the law nor an administrative objection where the locality sought and obtained a declaratory judgment.

5. The Justice Department has not assigned Federal examiners to the jurisdiction to carry out voter registration or otherwise protect voting rights.

The five points listed above are relatively easy to prove or disprove. In addition, in order to bailout a state or political subdivision must also meet three other standards which are more flexible.

First, it must show that it has not engaged in other discriminatory practices prohibited by the law, unless it can be shown that such practices were promptly corrected and were not repeated.

Second, the state or political subdivision must show that it has taken constructive steps to increase minority access to the political process. For example, such steps would removing barriers to registration and voting, eliminating intimidation and harassment of minority voters, increasing registration opportunities for minorities, removing voting

practices that inhibit or dilute access to the political process, and appointing minorities to key positions in the electoral process.

Finally, the state or political subdivision must show that there has been an increase in minority political participation. This would include evidence of increased voting and registration rates for minorities over time and evidence of a decrease in disparities in registration and voting rates between minorities and non minorities. No particular level of minority participation is required under the Act, but evidence of increased registration and voting rates may be necessary to show improvement in minority political participation.

III. What evidence can citizen groups use to stop a bailout procedure?

Although the U.S. Attorney General is the defendant in a bailout suit, community groups or minority citizens in the affected state or political subdivision have a right to participate at any stage of the bailout proceeding. In particular, they can show why the state or political subdivision should or should not bail out. To help ensure that citizens are aware that a state or political subdivision is seeking to bail out, the law requires that the state or political subdivision publicize its intent to seek a bailout and any proposed bailout settlement in the local media and in appropriate United States post offices.

Citizens or community groups who may want to intervene in a bailout proceeding can provide the Attorney General with useful information to determine whether a state or political subdivision should be permitted to bail out. For example, they may know of voting changes that were not submitted for preclearance, voting practices that are used which limit minority access to the political process, or any other information which is critical in determining whether a jurisdiction can bail out.

Citizen groups may also be allowed to intervene as parties to oppose bailout. They will have to have their own attorney to do this. A delay in moving to intervene in the suit may be fatal to the group's objection.

Even if state or political subdivision succeeds in bailing out, the court retains jurisdiction over the jurisdiction for 10 years after the bailout. If voting rights violations occur within that 10 year period, the Attorney General or any aggrieved citizen can petition the court to place the state or political subdivision under Section 5 of the Voting Rights Act again.