IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, Attorney General of the United States, et al.,	)	
Defendants.	)	

DEFENDANT-INTERVENORS TEXAS STATE CONFERENCE OF NAACP BRANCHES, AUSTIN BRANCH OF THE NAACP, RODNEY LOUIS, NICOLE LOUIS, WINTHROP GRAHAM, YVONNE GRAHAM, WENDY RICHARDSON, JAMAL RICHARDSON, MARISA RICHARDSON, LISA DIAZ, DAVID DIAZ AND GABRIEL DIAZ, PEOPLE FOR THE AMERICAN WAY, TRAVIS COUNTY, NATHANIEL LESANE, JOVITA CASAREZ, ANGIE GARCIA, AND OFELIA ZAPATA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The bailout provision of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 ("VRA" or "Act"), provides a workable mechanism by which certain covered jurisdictions may terminate their obligations under the Section 5 preclearance provision. Although Congress expanded the scope of bailout-eligible jurisdictions during the 1982 renewal, the statute's structure, text and legislative history make clear that political subunits such as the District that do not register voters have never been eligible to seek bailout. The case law and Attorney General's regulations also underscore this point. Despite the text, and the weight of the interpretive evidence standing against the District, it now urges a construction of the bailout eligibility provisions contrary to the legislative choice of Congress.

Anticipating that its bailout argument will fail, the District asks this Court to declare that Section 5 is an unconstitutional exercise of Congressional authority. In so doing, the District is not faithful to its "as-applied" First Amended Complaint, but launches a facial attack on Section 5 that ignores an unequivocal line of Supreme Court decisions that foreclose such a claim.

Further, the District's efforts to minimize the weight of the evidence amassed by Congress during the reauthorization are to no avail. As Representative F. James Sensenbrenner, then-chairperson of the House Judiciary Committee, stated: the 2006 reauthorization of Section 5 and the other temporary provisions of the Voting Rights Act was "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 ½ years" of his congressional tenure. 152 Cong. Rec. H5143. The record before Congress leaves no doubt that Section 5 is responsive to, and designed to deter, unconstitutional conduct. This Court should not set aside the Congressional decision to renew Section 5 as valid enforcement legislation under the Reconstruction Amendments, properly applied to the District and the other covered jurisdictions.

I. THE DISTRICT'S BAILOUT CLAIM FAILS

The District is not entitled to summary judgment on the bailout claim, for two reasons. *First* and foremost, the District is not eligible to petition for bailout under the statute. The statute's text and structure, its judicial construction in *City of Rome v. United States*, 446 U.S. 156, 168 (1980), and the legislative history, consistent with the Attorney General's interpretation of the Act, all make clear that political subunits such as the District that do not conduct voter registration are ineligible to seek bailout. As the 1982 Senate Judiciary Committee Report explained, other than States, bailout is limited "only to counties and parishes except in those rare instances in which registration is not conducted under the supervision of a county or parish." S. Rep. No. 97-417, at 69 (1982). And because the statute's bailout eligibility provision is clear (and constitutional, *see* Part II) the District's reliance on the canon of constitutional avoidance is meritless. *Second*, even if the District were eligible to seek bailout, it has failed to show that it satisfies the statute's bailout criteria.

A. Because The District Is Not A "Political Subdivision" For Purposes Of The Statute's Bailout Provision, The District Is Ineligible To Petition For Bailout

1. Under The Statutory Text and Structure, The District Is Not A "Political Subdivision" For Purposes Of The Bailout Provision

The Act sets forth the coverage formula for Section 5 preclearance obligations in Section 4(b). *See* 42 U.S.C. § 1973(b). Section 4(a) sets forth the bailout rules. *Id.* § 1973b(a). It is undisputed that under the bailout provisions in Section 4(a), only States or "political subdivisions" are eligible to petition for bailout. *See* 42 U.S.C. § 1973b(a); *see* D-I Mem. 21; Pl. Mem. 11-12. The District is not eligible to petition for bailout because it is not a State and, contrary to its assertions, *see* Pl. Mem. 12-23, the District is not a "political subdivision."

Section 14(c)(2) of the Act provides that "[t]he term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of

a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973*l*(c)(2). When a term is defined in the text of the statute, any contrary definition in the dictionary or under state law is irrelevant. *See, e.g., Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993). Because the District indisputably does not satisfy the Section 14(c)(2) definition of "political subdivision," *see* SMF ¶¶ 1575-1577, its citations to the dictionary and Texas state law, Pl. Mem. 13-14, are inapposite. The Court need not look any further than the definition of "political subdivision" in Section 14(c)(2) to end the inquiry necessary to resolve the bailout claim. *See City of Rome*, 446 U.S. at 168.

The definition of "political subdivision" for bailout purposes is confirmed by statutory context. *See generally McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). Section 4(a), unlike any other provision of the VRA, explicitly and repeatedly distinguishes between "political subdivision[s]" and the "governmental units within [the subdivision's] territory." *See* 42 U.S.C. § 1973b(a)(1)(D), (F), (a)(3), (a)(5). If "political subdivision" simply meant any political subunit, as the District claims, the vast majority of "political subdivision[s]" would not have *any* governmental units within their territory, and certain bailout requirements in Section 4(a) would be nonsensical. *See, e.g.*, 42 U.S.C. § 1973b(a)(1)(F) (listing positive steps that must be satisfied by the "state or political subdivision and *all governmental units within* its territory") (emphasis added).[1]

The District's interpretation of Section 4(a) is further undermined by the fact that the District would require the Court to ascribe different meanings to the term "political subdivision" within the same sentence. Section 4(a) limits bailout to three potential entities: (i) any State that

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[1] The legislative history confirms that the term "all governmental units" as used in § 4(a) "refers to all jurisdictions within a State or political subdivision." S. Rep. No. 97-417, at 71 (1982).

has been covered under Section 4(b) or (ii) any *political subdivision* of such State that has not been separately covered under Section 4(b), or (iii) any *political subdivision* that has been separately covered under Section 4(b). *See* 42 U.S.C. § 1973b(a)(1). It is undisputed that the Section 14(c)(2) definition applies to the term "political subdivision" in delineating the third category of government entities that are eligible to initiate bailout, because only "political subdivisions" that meet Section 14(c)(2)'s definition can be covered separately under Section 4(b). *See* Pl. Mem. 15. The District's interpretation of the statute requires defining "political subdivision" in the second above category to mean any political subunit, thus giving a different meaning to the same term in the *same sentence*. Lacking any affirmative evidence to support it, that interpretation must be rejected. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994).

2. The Supreme Court Foreclosed Any Alternative Interpretation Of The Statute In *City Of Rome v. United States*

The District maintains that "[t]he Supreme Court has determined that political subunits in covered states are 'political subdivisions' under § 4(a) even when they do not meet the definition in § 14(c)(2)." Pl. Mem. 14 (capitalization omitted). The Supreme Court has made no such determination, and, in *City of Rome v. United States*, 446 U.S. 156 (1980) the Court squarely rejected the position the District urges here.

In 1979, the City of Rome, Georgia—a political subunit of the State of Georgia—filed an action in this Court seeking to bail out from coverage under the Act. This Court, and on appeal the Supreme Court, rejected the argument that the City could seek bailout independently of the State of Georgia. Instead, because the City was not a "political subdivision" under the Act, the City had to rely on a larger entity in order to petition for exemption from coverage. *See City of Rome v. United States*, 472 F. Supp. 221, 229-332 (D.D.C. 1979) (three-judge court), *aff'd*, 446

U.S. 156 (1980). The Supreme Court stated that "under the express statutory language, the city is not a 'political subdivision' for purposes of § 4(a) 'bailout.'" 446 U.S. at 168.

The District's misinterpretation of Section 4(a) and *City of Rome* is based on a misreading of two cases that predate *Rome*: *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978) and *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978). *See* Pl. Mem. 14-20. These cases do not "even discuss the bailout process," *Rome*, 446 U.S. at 168, and they do not support the District's claim that the Section 14(c)(2) definition of "political subdivision" is inapplicable to Section 4(a). As discussed below, any doubt on this point is resolved by *Rome*, in which the Court unequivocally rejected Plaintiff's interpretation of *Sheffield* (and by necessary extension rejected Plaintiff's interpretation of *Dougherty County*).

In *Sheffield,* the Court held that the City of Sheffield, Alabama was subject to Section 5's preclearance requirements. In reaching this conclusion, the Court considered factors including the importance of giving Section 5 "the broadest possible scope" to fulfill the VRA's remedial objectives, 435 U.S. at 122-123 (citation and quotation marks omitted), the statutory structure, the legislative history, and the Attorney General's interpretation of the statute, *see id.* at 126-135. Based on this analysis, the Court held that Section 5 "applies territorially and includes political units like Sheffield whether or not they conduct voter registration." *Id.* at 130. Specifically, the Court interpreted the word "State" in Section 5 to "include[] all state actors within it." *Id.* at 129 n.17. The Court further noted that a similar analysis would likely apply to the term "political subdivision" in Section 5. *See id.* at 129.

The *Sheffield* Court's conclusion that Section 5 "applies territorially" was based in part on the Court's view that Congress intended the substantive obligations of Section 5 to have the same scope as the substantive obligations of Section 4(a) regarding the suspension of literacy

tests in covered jurisdictions. *See* 435 U.S. at 126-128. As the District recognizes, in *Sheffield*, the Court explained "'§4(a) imposes a duty on *every entity* in the covered jurisdictions having power over the electoral process, *whether or not the entity registers voters*.'" Pl. Mem. 15 (quoting *Sheffield*, 435 U.S. at 120) (emphasis in Pl. Mem.). The District reads this statement from *Sheffield* as establishing that Section 14(c)(2) does not define "political subdivision" as "the term is used ... in § 4(a)." *Id.* However, the District's claim that *Sheffield* defines the term "political subdivision" in Section 4(a) as coextensive with those political entities covered by Section 4(a)'s coverage scope is belied by *Sheffield* itself. As the Court explained:

> [Section] 4(a) imposes a duty on every entity in the covered jurisdictions having power over the electoral process, whether or not the entity registers voters. That § 4(a) has this geographic reach is clear both from the fact that a 'test or device' may be employed by any official with control over any aspect of an election and from § 4(a)'s provision that its suspension [of literacy tests and similar devices] operates "*in* any [designated] State ... or *in* any [designated] political subdivision."

435 U.S. at 120 (quoting § 4(a)) (alterations to statute and emphases in *Sheffield*). As the majority noted, even Justice Stevens' dissent did not "dispute that § 4(a)'s duties apply to all political units within designated jurisdictions." *Id.* at 125 n.13; *see also id.* at 144 n.6 (Stevens, J., dissenting). The City of Sheffield was covered by Section 4(a) not because it *was* a "political subdivision," but because it was *in* a covered jurisdiction. *Sheffield*, thus does *not* stand for the proposition that political subunits constitute "political subdivisions" under Section 4(a) regardless of whether they satisfy Section 14(c)(2)'s definition of the term. *Accord Coalition to Preserve Houston v. Interim Bd. of Trs. of the Westheimer Ind. School Dist.*, 494 F. Supp. 738, 740 n.1 (S.D. Tex. 1980) ("[S]chool districts in Texas are covered by § 5 of the Act, not because school districts come within the definition of 'political subdivision' ... but for the reason that Texas school districts are political units within a designated state.") (citing *Sheffield*).

Dougherty County is also inapposite to resolving the question of whether Section 14(c)(2)'s definition of "political subdivision" applies to Section 4(a). As in *Sheffield*, at issue in *Dougherty County* was whether a political subunit in a covered State was subject to Section 5's preclearance regime, and nothing more. *See* 439 U.S. at 44 ("[The County Board of Education's] contention [that it is not subject to Section 5] is squarely foreclosed by our decision last Term in [*Sheffield*]. There, ... we held that once a State has been designated for coverage, § 14(c)(2)'s definition of political subdivision has no 'operative significance in determining the reach of § 5.'" (quoting *Sheffield*, 435 U.S. at 126)).

Once the District's misinterpretation of *Sheffield* and *Dougherty County* is corrected, the District is left to rely on two quotations taken out of context from footnotes in *Sheffield*. The District cites the following statements from *Sheffield*: "Congress' exclusive objective in § 14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under § 4(b)," 435 U.S. at 130 n.18, and "the only limitation § 14(c)(2) imposes on the Act pertains to the areas that may be designated for coverage," *id.* at 129 n.16; *see* Pl. Mem. 15, 18. The District reads these statements to mean that the Section 14(c)(2) definition of "political subdivision" does not apply to Section 4(a). Pl. Mem. 15, 18. The District's interpretation of *Sheffield* is unavailing—because it misreads *Sheffield* itself and is squarely foreclosed by the Supreme Court's later interpretation in *City of Rome*.

The District misconstrues *Sheffield* by failing to acknowledge that when *Sheffield* was decided, the only entities eligible to petition for bailout were a "'State with respect to which the determinations have been made under the third sentence of subsection (b) of this section'" or a "'*political subdivision with respect to which such determinations have been made as a separate unit.*'" *Rome*, 446 U.S. at 167 (quoting pre-1982 version of § 4(a)) (emphasis added). At that

time, the "'determinations' in each instance" were "the Attorney General's decision whether the jurisdiction falls within the coverage formula of § 4(b)." *Id.* (quoting pre-1982 version of § 4(a)). Thus, the *Sheffield* Court's statements that the Section 14(c)(2) definition of "political subdivision" applied to Section 4(b) also necessarily meant that the same Section 14(c)(2) definition applied to Section 4(a). When *Sheffield* was decided, political subunits of counties or parishes that did not conduct registration were not even eligible to have had the Section 4(b) "determinations ... made [to them] as a separate unit," and therefore could not have possibly constituted "political subdivisions" under Section 4(a).[2]

In any event, *City of Rome*, 446 U.S. 156, definitively rejected the interpretation of *Sheffield* offered here by the District. This Court need not parse the language of *Sheffield* (or *Dougherty County*, which, as noted above, simply applied *Sheffield*) to determine whose reading of those opinions is more persuasive, because in *Rome* the Supreme Court considered and resolved that question. In *Rome*, the city argued that, under *Sheffield*, it was entitled to initiate a bailout action. The Supreme Court disagreed, explaining that the City had misinterpreted *Sheffield.* The *Rome* Court determined that *Sheffield* is irrelevant to the proper construction of

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[2] The District also fails to acknowledge that the statements in *Sheffield* concerning the application of Section 14(c)(2)'s definition of "political subdivision" to Section 4(b) were made in the context of addressing the limited question of whether Section 14(c)(2) applies to Section 5, and a fair reading of the entire opinion undermines the District's contention that these isolated statements were intended to resolve the applicability of Section 14(c)(2) to provisions of the VRA that were not before the Court. "[I]t [is] generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code," *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), and the District's reliance on isolated statements taken out of context from *Sheffield* is unpersuasive on its own terms, *see, e.g.*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457 (1988); *Vachon v. New Hampshire*, 414 U.S. 478, 484-485 (1974) (Rehnquist, J., dissenting) (noting that "those reading and relying upon our opinions would be ill-advised to seize one phrase out of context").

Section 4(a)'s bailout provision and that Section 14(c)(2)'s definition of "political subdivision" applies generally to the provisions of the VRA:

> [*Sheffield*] did not even discuss the bailout process. In *Sheffield*, the Court held that when the Attorney General determines that a State falls within the coverage formula of § 4(b), any political unit of the State must preclear new voting procedures under § 5 regardless of whether the unit registers voters and therefore would otherwise come within the Act as a "political subdivision." [n5: Section 14(c)(2) of the Act, as set forth in 42 U.S.C. § 1973 *l*(c)(2), provides: "The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."] In so holding, the Court necessarily determined that the scope of §§ 4(a) and 5 is "geographic" or "territorial," 435 U.S. at 120, 126 ... and thus that, when an entire State is covered, it is irrelevant whether political units of it might otherwise come under § 5 as "political subdivisions." 435 U.S., at 126-129[.]
>
> *Sheffield*, then, did not hold that cities such as Rome are "political subdivisions" under §§ 4 and 5.

Rome, 446 U.S. at 168. *City of Rome* thus forecloses the District's contention that *Sheffield* (or *Dougherty County*) establishes the District's eligibility to bail out.

The District's effort to evade *City of Rome* is unpersuasive. The District points out, correctly, that at the time *Rome* was decided, the only political subdivisions eligible to bail out under Section 4(a) were those independently covered under Section 4(b). Pl. Mem. 17. Thus, the *Rome* Court could have limited its decision to holding that the city was a "political subdivision" that could not bail out because it had not been independently covered under Section 4(b). But, as the quoted passage makes clear, that is not what the *Rome* Court did. Instead, the Court conclusively rejected the construction of "political subdivision" in Section 4(a) that the District advances here.

Moreover, contrary to the District's contention, *see* Pl. Mem. 17, the Fifth Circuit's decision in *United States v. Uvalde Consolidated Independent School District*, 625 F.2d 547 (5th Cir. 1980) recognized that, under *Rome*, political subunits that do not conduct voter registration

do not constitute "political subdivisions" under Section 4(a). In *Uvalde*, the Fifth Circuit analyzed statutory purpose and legislative history to conclude that Section 14(c)(2)'s definition of "political subdivision" does not apply to Section 2 of the Act. *See id.* at 555-556. The Fifth Circuit's interpretation of "political subdivision" in Section 2 is correct in light of, among other things, the importance of interpreting the VRA "'in a manner that provides the broadest possible scope in combating racial discrimination." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 593 (9th Cir. 1997) (internal quotation marks omitted); *see id.* (embracing *Uvalde*'s construction of "political subdivision" under Section 2). However, the Fifth Circuit reached this conclusion concerning Section 2 only after recognizing that, in *Rome*, the Supreme Court had determined that political subunits did not constitute "political subdivisions" for purposes of Section 4(a). *See Uvalde*, 625 F.2d at 555 (analyzing *Rome, Sheffield*, and *Dougherty County* and explaining: "Here we must determine whether the term 'State or political subdivision' in section 2 is to be read, as it is in section 5, to include a school board (to which Sheffield and Dougherty County would lead us) *or whether it excludes such a governmental unit (to which Rome, interpreting section 4(a), leads*)." (emphasis added)).

Because it misinterprets *Sheffield*, *Dougherty County*, *Rome*, and *Uvalde*, the District mischaracterizes the judicial interpretations of Section 4(a) that Congress ratified when it amended that provision. In 1982, Congress modified Section 4(a) to permit "political subdivisions" that had not been independently covered to initiate bailout actions, but Congress did not in any way signal its intent to alter the definition of "political subdivision" in Section 4(a). As the District correctly points out, Congress is presumed to have acquiesced in the Supreme Court's prior construction of the term "political subdivision" in Section 4(a). *See* Pl. Mem. 18-20. The District fails to acknowledge, however, that by 1982 the Court had

definitively rejected the District's view that "political subunits in covered states are 'political subdivisions' under § 4(a) even when they do not meet the definition in § 14(c)(2)." *Id.* at 14. In other words, Congress had no need to "make any change affecting *Sheffield*'s and *Dougherty County*'s conclusions that the Section 14(c)(2) definition of 'political subdivision' does not 'impose any limitations on the reach of the [VRA] outside the designation process,' *Sheffield*, 435 U.S. at 129 n.16, and thus that 'political subdivision' as used in Section 4(a) must encompass any subunits of a state that would ordinarily be encompassed by the term," Pl. Mem. 18. The Court in *City of Rome* decided that *Sheffield* and, by necessary extension *Dougherty County*, do not stand for those propositions, and that *Sheffield* is irrelevant for purposes of construing the bailout provision. Rather, under *City of Rome*'s analysis, political subunits that do not conduct voter registration are not "political subdivisions" under Section 4(a).

3. The Legislative History Unambiguously Confirms That The District Does Not Fall Within The Scope Of Entities Eligible To Seek Bailout

Beyond the plain text, statutory structure, and the Supreme Court's definitive statement in *City of Rome*, the bailout provision's legislative history further confirms that Congress purposefully declined to extend the class of non-state jurisdictions eligible to initiate bailout actions beyond counties and entities that register voters where the county does not do so. *See, e.g.*, *McDaniel v. Sanchez*, 435 U.S. 130, 147 (1981) (examining legislative history in construing Section 5 of the VRA); *Sheffield*, 435 U.S. at 129-31 (same). The bailout provision has undergone a number of modifications since the Act's original passage in 1965. Most importantly, in 1982, Congress ratified *City of Rome*'s explanation that political subunits that do not conduct voter registration do not constitute "political subdivisions" under Section 4(a). At no point before or since has Congress indicated an intent to modify the bailout statute in a manner that conforms with the District's proposed interpretation.

a) Bailout Following The 1965 Enactment Of The VRA

In 1965, Congress created a link between Section 4(a)'s bailout provision and the coverage formula of Section 4(b): only those jurisdictions that had been independently designated for coverage could bail out. *See South Carolina v. Katzenbach*, 383 U.S. 301, 339-342, 353 (1966) (Appendix) (Sections 4 and 14(c)(2) of the Voting Rights Act of 1965). By definition, only those States or political subdivisions that satisfied the Section 14(c)(2) definition were eligible to bail out. *See* H.R. Rep. No. 89-439, at 14 (1965) ("This opportunity to obtain exemption is afforded only to those States or to those subdivisions as to which the formula has been determined to apply as a separate unit; subdivisions within a State which is covered by the formula are not afforded the opportunity for separate exemption."). At the time, the House Judiciary Committee reasoned that allowing each subdivision to seek bailout "would severely limit the effectiveness of the bill and would impose a continuation of the burdensome county-by-county litigation approach which has been shown to be inadequate." *Id.* at 13-16.

b) Bailout Following The 1970 Amendments

During the 1970 and 1975 reauthorization process, Congress did not make any changes regarding the type of jurisdictions eligible to seek bailout. In 1970, Congress extended the time, from five to ten years, during which eligible jurisdictions seeking to bail out had to demonstrate that they had not used a prohibited test or device for the purpose or with the effect of denying or abridging the right to vote on account of race or color. SMF ¶¶ 135-136; H.R. Rep. No. 94-196, at 12 (1975). In 1975, Congress determined that there was a need to "insure the applicability of Section 5 protections during the [1980s] reapportionment and redistricting" cycles, and again

extended the statutory time period from ten to seventeen years but did not modify the class of jurisdictions eligible to seek bailout. S. Rep. No. 94-295, at 17.[3]

c) Amendments to the Bailout Statute in 1982

In 1982, Congress amended the bailout provision to permit political subdivisions that had not been separately covered by Section 4(b) to initiate bailout suits. The legislative history of the 1982 Amendments described below unambiguously supports the understanding that only counties, parishes, or other entities that register voters may initiate bailout actions.

In broadening the scope of jurisdictions eligible to seek bailout, Congress abrogated that aspect of the Supreme Court's decision in *City of Rome* that any bailout action in a covered state must be filed by, and seek to exempt, the covered state in its entirety. *See Rome*, 446 U.S. at 167. Congress did *not*, however, change the definition or applicability of the term "political subdivision" in Section 4. The 1982 Amendments expanded the scope of bailout-eligible jurisdictions to permit counties or other entities that conduct voter registration (in counties that do not do so) to initiate bailout actions, regardless of whether they had been separately covered. The amendments do not permit smaller subunits, which could not have been separately designated for coverage, to bail out. *See* SMF ¶ 9.

Congress's intent on this point was clear. The Senate Judiciary Committee Report accompanying the 1982 Amendments explained that, for purposes of bailout, "[w]hen referring to a political subdivision this amendment refers only to counties and parishes except in those rare instances in which registration is not conducted under the supervision of a county or parish. In such instances, such as independent cities in Virginia, a jurisdiction other than a county or parish

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[3] In 1982, Congress reduced the statutory time period for which a jurisdiction would have to make a factual showing from seventeen back to ten years.

may file for bailout." S. Rep. No. 97-417, at 69.[4] Moreover, the Senate Report made clear that its amendments represented a "significant easing of the bailout provisions in current law" and noted that "[f]or the first time individual counties in a fully covered state will be permitted to file for bail-out even though other counties and the state government, itself, are not yet eligible to do so." *Id.* at 45.

The District's construction of the bailout statute directly contravenes Congress's intent in 1982. Congress reasoned that the limitation on which entities could initiate bailout is a "logistical one." If political subunits could bail out, the DOJ and private groups "would have to defend thousands of bailout suits." S. Rep. No. 97-417, at 69. The Report notes that "[f]ew questioned the reasonableness and fairness of this cutoff in the House." *Id.* at 57 n.192. These unambiguous statements from a legislative committee report provide authoritative evidence of Congress's intent.[5]

Congress's understanding of the statute was shared by William Bradford Reynolds, who at that time was Assistant Attorney General of the DOJ's Civil Rights Division. Reynolds observed that, under the amendments, "a bail out suit could be brought by an individual county in a fully covered state" and estimated that "[t]here are more than 800 such counties." SMF ¶¶ 135-136. Reynolds's interpretation of Congress's changes to the bailout statute is significant

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[4] To the degree that the District implies that the legislative histories from 1982, 1975, 1970, and 1965 are irrelevant merely because the bailout provision was reenacted in 2006, *see* Pl. Mem. 21, the District is plainly incorrect. *See, e.g.*, *City of Rome*, 446 U.S. at 168-169; *Conroy v. Aniskoff*, 507 U.S. 511, 516-517 (1993).

[5] *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.15 (2003) ("'In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those members of Congress involved in drafting and studying proposed legislation.'") (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984) (alterations and internal quotation marks omitted)).

in that it was not contested by any member of Congress and would inform the DOJ's long-standing regulations regarding the types of jurisdictions eligible to seek bailout (discussed in Part I(A)(4) *infra*). *See Sheffield*, 435 U.S. at 131 (noting, in interpreting Section 5 of the Voting Rights Act, that the "contemporaneous administrative construction of the Act is persuasive evidence of the original understanding, especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress").

Indeed, statements by members of Congress and witnesses during the 1982 renewal explain why Congress rejected further liberalization of the bailout statute in the manner that Plaintiff now proposes: Congress made the judgment that such an amendment would have significantly weakened the Section 5 preclearance provision and over-burdened those charged with defending bailout suits. *See, e.g.*, SMF ¶ 207 (statement in 1982 hearings of Senator Edward M. Kennedy) ("[I]f the bail-out is amended further, there is a serious danger that the extension of Section 5 will prove a hollow victory. A flimsy bail-out provision would become a seive [sic]. It would serve as a backdoor exit for many jurisdictions where the preclearance provision of Section 5 is still needed. It would be an indirect repeal of Section 5."); *id.* ¶ 214 (testimony of Drew S. Days III, former Assistant Attorney General of the Civil Rights Division) (observing that "there is a great danger in expanding the level of jurisdiction eligible to file suit. The sheer number of suits resulting and the drain on resources of the Justice Department and private intervenors would be enormous."); *id.* ¶ 209 (testimony emphasizing that the "new bail out provisions propose a substantial relaxation of the bail out provisions in the current law and would permit counties within a fully covered State to bail out independently of the State" and calling on the Senate to "reject attempts to weaken it further").

d) Bailout Statute Following The 2006 Renewal

More recently, in 2006, Congress was presented with evidence regarding the status of the Section 4(a) bailout provision but declined to make any further revisions. J. Gerald Hebert, a former senior official of the Voting Section of the Civil Rights Division of the DOJ, suggested that States might bail out more easily if "towns, cities and other local governmental units within a covered county [could] bailout independently."[6] In addition, John J. Park, Jr., Assistant Attorney General of Alabama, proposed that "with respect to bailout, the Congress should make certain that all covered entities, not just jurisdictions, be entitled to bail out."[7] Again, Congress declined to modify the statute in order to adopt the change that the District now seeks. Rather, Congress was persuaded by evidence in the record demonstrating the success and workability of the bailout statute.

Although a relatively small number of political subdivisions had sought bailout under the 1982 Amendments, there was no evidence presented to Congress indicating that this is the result of "unworkable" or "unachievable" standards. *See* June 19, 2006 Letter from County of Augusta, Virginia, to Senators Arlen Specter and Patrick J. Leahy, Declaration of Kristin M. Clarke in Supp. of Resp. to Pls.' Mot. for Summ. J. of Def.-Intervenors, Ex. 3, at 2 (noting that Section 4 provides a "workable mechanism for covered jurisdictions to terminate coverage"). Rather, the evidence made clear that every political subdivision that has applied for bailout since

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[6] *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 91 (2005) (*October 20, 2005 Hearing*).

[7] *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy, Perspectives, and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 15 (2006) (*June 21, 2006 Hearing*).

1982 has done so successfully.[8] Moreover, the evidence made clear that the Attorney General has defended these suits in a manner that does not seek to impose unreasonable barriers to jurisdictions that have made efforts to take the statutory prerequisites seriously. *May 9, 2006 Hearing*, at 176 (Shaw); June 23, 2006, Letter from City of Salem, Virginia to Senators Patrick Leahy and Arlen Specter, Clarke Decl., Ex. 2.

Finally, Theodore Shaw, Director-Counsel of the NAACP Legal Defense and Educational Fund, testified that "there are some administrative steps that the Justice Department might take to educate jurisdictions about [bailout] eligibility and requirements." *May 9, 2006 Hearing*, at 177. Shaw observed that the DOJ has, in stark contrast, invested tremendous resources to help inform jurisdictions about other provisions of the Act including the Section 5 preclearance provision and the Section 203 minority language requirements. *Id.* Shaw concluded that additional administrative efforts on the part of the Attorney General to educate

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[8] Theodore Shaw testified that "[unlike] the time period leading up to the 1982 reauthorization that resulted in liberalization of the bailout process, there is no evidence in the record that demonstrates that jurisdictions have encountered difficulty with the bailout process or that indicates that jurisdictions have tried, without success, to bail out from coverage under the Act." *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 10, 14 (2006) (*May 9, 2006 Hearing*). Likewise, Drew Days observed that "the bailout provisions—particularly if the Department makes increased efforts to share information about the process—will continue to provide an important incentive for covered jurisdictions to comply with Section 5 as intended in 1982." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 55 (2006) (*May 17, 2006 Hearing*). Professor Pamela Karlan testified that "it would be possible to amend section 4(a) to make it easier for jurisdictions to bail out. I have yet to see any convincing arguments as to why that should be done." *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 104 (2006). Karlan observed that some jurisdictions have not chosen to bail out because "they have not satisfied all the conditions ... and see no point in a futile effort to bail out," "jurisdictions appreciate ... the 'seal of approval' that preclearance accords," and "local jurisdictions are unaware of the bailout process." *Id.* at 93. Anita Earls, former Deputy Assistant Attorney General for DOJ's Civil Rights Division who oversaw the Voting Section, testified that "the bailout provisions already in place provide suitable means for the termination of Section 5 coverage." *Id.* at 42, 43.

bailout-eligible jurisdictions would likely result in "an increase in the number of jurisdictions that seek bailout over the course of the next 25 years as compliance improves." *Id.* However, these kinds of administrative efforts did not warrant legislative modification of the statute. That Congress chose not to further liberalize the bailout statute makes clear that Congress was persuaded by evidence of the workability and viability of the statute.

e) Bailout Is Achievable

The District seeks to avoid this overwhelming evidence of Congress's intent in 1982 by relying on more general legislative history from 2006, which does not discuss bailout eligibility at all, but which demonstrates that Congress believed that bailout was achievable for eligible jurisdictions. In the District's view, this history means that all subunits must be able to seek bailout, or bailout will be a Virginia-only remedy. Pl. Mem. 22-23 & n.5. Even assuming this general legislative history could trump the specific legislative history (not to mention the statutory text), which establishes the District's ineligibility to seek bailout, the District is plainly incorrect. The DOJ's interpretation of the statute, consistent with its plain text, judicial construction and history, as not permitting subunits that do not conduct voter registration to initiate bailout actions does not render bailout a Virginia-only remedy.

As the District notes, fourteen political subdivisions in the Commonwealth of Virginia (Essex, Botetourt, Salem, Augusta, Frederick, Greene, Pulaski, Roanoke, Rockingham, Shenandoah, and Warren Counties and the Cities of Fairfax, Winchester, and Harrisonburg) have bailed out from Section 5 coverage since the 1982 renewal.[9] The District argues that the fact that

[9] The cities of Fairfax, Harrisonburg and Winchester, Virginia were eligible to bail out independent of their respective counties because they satisfy the statute's and Guidelines' definition of a "political subdivision" in that these are jurisdictions "where registration for voting is not conducted under the supervision of a county or parish." *See* 28 C.F.R. § 51.2. Each of these three jurisdictions "conducts [its own] registration for voting." *Id.*; *see also* 42 U.S.C.

only Virginia jurisdictions have bailed out "illustrates the practical impossibility of bailing out for the majority of covered counties." Pl. Mem. 23 n.5. The District's argument is unavailing. In 1982, Congress made note of the exceptional efforts of Virginia officials in helping to bring about compliance with the mandate of Section 5, which means it is unsurprising that many of the Commonwealth's political subdivisions have successfully bailed out. Indeed, the 1982 Senate Report notes that "[w]here state attorneys general have been active in advising and educating local officials about their obligations, e.g., Virginia, there has been much less non-compliance with the law than in other covered states." S. Rep. 97-417, at 57.

Moreover, the District's contention that bailout is only possible in Virginia because many of the state's counties have "independent cities" that conduct their own voter registration and have a uniquely small number of subunits, *see* Pl. Mem. 23 n.5, ignores the fact that several of the Virginia counties that have successfully bailed out since the 1982 renewal are structured very similarly to many counties throughout the United States. Specifically, several of these counties have no "independent cities" and have numerous political subunits lying within their territory. Indeed, the bailouts of Shenandoah, Warren, Greene, and Pulaski Counties involved political subdivisions with no independent cities. *See October 25, 2005 Hearing Vol. 2*, at 2769-2777, 2789-2800, 2653-2659, 2693-2703. These political subdivisions had to demonstrate compliance among their respective political subunits in order to satisfy their burden under the statute. 42 U.S.C. § 1973b(a). Gerald Hebert, who served as counsel to Virginia jurisdictions that bailed out, testified that this process was "workable and practical." *October 20, 2005 Hearing Vol. 1*, at 163. Indeed, Shenandoah County, which successfully bailed out in October 1999, is a political

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§ 1973*l*(c)(2). In Virginia, some cities are considered "independent" of the counties that surround them, and counties have no governmental authority within such cities' boundaries.

subdivision with a total of nine political subunits lying within its territory. *See Shenandoah County v. Reno*, No. 1:99-cv-00992-PLF (D.D.C. Oct. 15, 1999), Clarke Decl., Ex. 1. Notwithstanding the state's exceptional size, data provided by the Texas Secretary of State's Office indicates that Texas has a total of 254 counties and an average of fourteen political subunits governed by elected bodies lying within each county. Clarke Decl., Ex. 4. Although some counties, such as Travis County, are large, many of the state's counties are comparable in size to counties that have successfully bailed out in Virginia. That some political subdivisions may seek to bail out under more fact-intensive circumstances than others hardly suggests that bailout is "practically impossible" to achieve. Indeed, the best evidence of the statute's achievable standard lies in the fact that every political subdivision that has applied for bailout has successfully done so under the liberalized eligibility standards adopted in 1982.

4. The Attorney General's Interpretation Confirms That The Statutory Definition Of "Political Subdivision" Applies To The Bailout Provision

The DOJ's interpretation of the statute is in accord with the statute's text, binding precedent interpreting the statute, and the legislative history. The Justice Department relies, in part, on its Guidelines, as reflected in the Code of Federal Regulations, to handle all bailout requests. *See* 28 C.F.R. § 51 *et. seq.* (2007). These Guidelines, which were revised in 1985 to reflect the 1982 amendments, critically distinguish between "political subdivisions," defined in Section 51.2, and "political subunits," defined in Section 51.6. Under the Guidelines, a "political subdivision" is "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 28 C.F.R. § 51.2. Meanwhile, they also state that "[a]ll *political subunits within a covered jurisdiction* (e.g. counties, cities, school districts) are subject to the requirement of section 5." *Id.* § 51.6 (emphasis added). Thus, not only do the

Guidelines contemplate a distinction between political subdivisions and political subunits, but they also note that political subunits are specifically housed *within* other covered jurisdictions. This agency construction is yet further support for Defendants' position. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.") (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984)); *see also Lopez v. Monterey County*, 525 U.S. 266, 281 (1999) (noting deference owed Attorney General's interpretation of Section 5 of the VRA in light of his "'central role ... in formulating and implementing' that section" (quoting *Dougherty County*, 439 U.S. at 39) (alteration in *Lopez*)).[10]

Moreover, Congress was aware of the DOJ Guidelines during the most recent renewal yet did not override or otherwise express disagreement with the prevailing interpretation of the agency charged with defending the interests of the United States in bailout suits. Indeed, these Guidelines were submitted into the record by Representative Steve Chabot, Chairman of the House Subcommittee on the Constitution. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1688-1698 (2005). Under these circumstances, Congress is presumed to

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[10] The District cites *Miller v. Johnson*, 515 U.S. 900, 923 (1995), for the proposition that the Attorney General's interpretation of the VRA should not receive deference if his interpretation raises grave constitutional questions. *See* Pl. Mem. at 11-12. However, as discussed in the text, the canon only applies at most in case of actual ambiguity. And even were there ambiguity, the avoidance canon would not be relevant here because as explained in Part II, the Attorney General's interpretation of the statute does not raise any grave constitutional questions. *Accord Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (granting deference to an agency construction and refusing to avoid the constitutional issue presented since it was not "grave").

have acquiesced in the Attorney General's interpretation of the statute. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

5. The Canon Of Constitutional Avoidance Is Inapplicable Here

The District seeks refuge in the canon of constitutional avoidance. *See* Pl. Mem. 24-28; *see also id.* at 11-12. For two reasons, however, the canon of constitutional avoidance does not apply here. First, that canon is irrelevant unless the statute is genuinely susceptible to two different constructions. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 385 (2005); *Schor*, 478 U.S. at 841 (reversing the lower court's decision, noting that the court had erred in applying the avoidance canon since "examination of the [statute] and its legislative history and purpose reveals that Congress plainly intended" the result avoided). As explained above, it is clear that the Section 14(c)(2) definition of "political subdivision" applies to Section 4(a), which means that the canon is inapplicable here. Second, in any event, there are no grave constitutional questions implicated by applying the § 14(c)(2) definition of political subdivision" to Section 4(a)'s bailout provision. *See* Part II, *infra*.

B. Even If The District Were Eligible To Apply For Bailout Independently Of Travis County, It Would Not Be Entitled To Bailout Because It Fails To Satisfy The Required Statutory Criteria

Even if the District were eligible to seek bailout, the record is clear that the District has not met its burden to satisfy the statutory criteria for bailout specified by 42 U.S.C. § 1973b(a). *See* Mem. in Supp. of Mot. for Summ. J. of Diaz Def.-Intervenors , Dkt. No. 101, at 26-30.

The VRA's bailout provision provides that "[a] declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action," the applying entity has met the criteria specified at 42 U.S.C. § 1973b(a). Congress has indicated that "it is important that a jurisdiction seeking bailout be required to present compelling evidence that it has earned the right to remove itself from Section 5 coverage," and thus, the

District, if deemed eligible to seek bailout, now bears "the burden of proof as to each element of the bailout criteria." S. Rep. No. 97-417, at 56 (1982). "This burden must be met by objective evidence and cannot be satisfied on the basis of assertions and conclusory declarations." *Id.; see also Gaston County v. United States*, 288 F. Supp. 678, 688 n.20 (D.D.C. 1968) (three-judge court) ("The placing of the burden in a § 4(a) Voting Rights Act case could not be more emphatic—it lies squarely on the certified subdivision."). Thus, were the District deemed eligible to bail out, it would now have the burden to show that there is no genuine issue of fact as to whether it has satisfied the statutory criteria for bailout to obtain a declaratory judgment from this Court. The District has not met this burden, in at least two respects.

First, it has not shown that over the previous ten years that it "has engaged in [any] ... constructive efforts, such as expanded opportunity for ... the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process." 42 U.S.C. § 1973b(a)(1)(F). The District's General Counsel (1986 through 2002) stated she was unaware of any affirmative efforts to encourage African-American or Hispanic residents of the District to run for Board office. SMF ¶ 1569.[11] Indeed, former MUD Board

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[11] Moreover, the District's opening memorandum also mischaracterizes some of the efforts it has made to increase general voter participation. For example, in 2004 and as part of the District's decision to enter into an election agreement with Travis County, the District moved its polling place out of Mr. and Mrs. Stueber's private home and into the local Elementary School. Pl. Mem. 9. The decision to move the polling places was not, however, made purely out of a desire to increase voter convenience; the District had substantial financial incentives to enter into the agreement. *See* Qualtrough Dep. 59:6-9.

Additionally, the District's opening brief also mischaracterizes the difficulties it has faced in making efforts to increase voter participation. By use of the passive voice, the District's brief leaves a misimpression about the District's difficulties in 2002 in finally moving polling places from a resident's home to a public location were somehow associated with Section 5 or the federal government. The District states that it "sought approval to hold [its] elections at one of the builder's model homes" and that "this request was denied," Pl. Mem. 6, and that when it then sought to hold elections in the Canyon Creek Elementary School after the school opened in the

President Donald Zimmerman testified that he would "absolutely not" make any special efforts to recruit African Americans or Latinos to serve as election clerks. *See id.* ¶ 1570.

Second, the District failed to publicize this action seeking bailout "in the media serving such State or political subdivision and in appropriate United States post offices." 42 U.S.C. § 1973b(a)(4). Other than placing an action item on its May 23, 2006 regular meeting agenda pursuant to the Texas Open Meetings Act "regarding continued enforcement of Section 5," the District made no effort to inform its residents that it had decided to seek bailout from Section 5 or that it had filed this case. The District failed to publish any notice in a local newspaper or newsletter, write to its voters or even post a notice on the residential subdivision's bulletin board informing the public that it had decided to file a bailout action. The District's sole public notice concerning this action was a meeting agenda that said nothing about seeking bailout. *See* June 15, 2007 Wolfson Decl., Ex. 6; Zimmerman Dep. 88:25-91:178. Nor is there any record evidence whatsoever that the District posted any notice of this action in any United States post office.[12]

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neighborhood, "this request was also denied." *Id.* Yet the District fails to clarify that it was *local officials* who denied the request (the developer and the school, respectively)—not the federal government pursuant to Section 5. Collins Dep. 33:2-11; 144:6-19.

[12] Plaintiff also mischaracterizes, as merely a "philosophical" difference, the deep concern expressed by the District's minority voters who have intervened in this case. However, although they never received the required notice by the District of its plan to file this case, after learning about the case, minority voters of the District attended a District Board meeting to voice their opposition, intervened in this litigation and presented testimony. When the District recently attempted to adopt a change to numbered place elections, a system notorious in Texas for increasing the effect of minority vote dilution, minority voters once again attended the District Board meeting to voice their concern and opposition. *See, e.g.*, J.G. Diaz Dep. Tr. 14:23-15:9; Richardson Dep. 11:2-12:4, 25:14-29:14. Individual Intervenors have also described their painful experiences with racial discrimination in the District, and one intervenor has discussed the ways in which that discrimination has affected his participation in the political process. Mr. Winthrop Graham, an African-American resident of the District, has been subject to repeated police harassment because of his race, and has found the prejudice of his neighbors so severe that