IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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