IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, *Plaintiff,* v. UNITED STATES OF AMERICA; ERIC HOLDER in his official capacity as Attorney General of the United States, *Defendants*, and WENDY DAVIS, et al., *Defendant-Intervenors*,	CIVIL ACTION NO. 1:11-cv-1303 (RMC-TBG-BAH)

PLAINTIFF'S OPPOSITION TO DEFENDANT-INTERVENORS' MOTION FOR LEAVE TO FILE AMENDED ANSWER AND COUNTERCLAIM

The intervenors' motion and request for "bail-in" should be denied for four reasons. First, this lawsuit was initiated by the State of Texas, and section 3(c)'s "bail-in" remedy can apply only in a "proceeding instituted by the Attorney General or an aggrieved person." Second, the intervenors cannot bring a counterclaim under section 3(c) because that section provides only a remedy, not a claim, which may be considered only after the court awards equitable relief on a constitutional claim. Third, a bail-in remedy cannot be awarded without "find[ings]" that violations of the Fourteenth or

Fifteenth Amendment "have occurred." No findings of past constitutional violations have been made or can be made in this case, and in all events the vacated ruling of this Court cannot be relied upon. *See United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (when a district-court opinion is vacated, "its ruling and guidance" are "erased").

Finally, the Supreme Court's ruling in *Shelby County* requires the Court to dismiss this case immediately. The Supreme Court has held that the very existence of this preclearance proceeding violated the Constitution, and the State has moved to dismiss under Rule 41(a). Any further proceedings in this Court will aggravate the constitutional injuries that have already been imposed on the State of Texas. The intervenors' motion represents a last-ditch effort to impose additional litigation costs on Texas in a proceeding that the State should never have been subjected to in the first place.

I. SECTION 3(C) CANNOT APPLY IN THIS PRECLEARANCE LAWSUIT BECAUSE THIS IS NOT A PROCEEDING "INSTITUTED BY THE ATTORNEY GENERAL OR AN AGGRIEVED PERSON."

Section 3(c) does not apply because this lawsuit was not "instituted by the Attorney General or an aggrived person"; it was "instituted" by the State of Texas. *See Gollust v. Mendell*, 501 U.S. 115, 124 (1991) (explaining, in a securities case, that "the word 'institute' is commonly understood to mean 'inaugurate or commence; as to institute an action.'" (citing dictionaries)). The intervenors admit that this proceeding "was not 'initiated,' [sic] per se, by

the Attorney General or aggrieved individuals." *See* Intervenors' Mot. at 11. But the intervenors insist that section 3(c)'s "broad remedial purpose" demands a counter-textual interpretation of the statute because "Congress in 1965 would not have foreseen this particular situation arising." Intervenors' Mot. at 11.

The intervenors' argument rests on the proposition that statutes do not mean what they say. Federal civil rights statutes may receive a broad remedial interpretation only when the statutory terms are ambiguous; that is what separates a "broad remedial interpretation" from judicial legislation. *See, e.g.*, *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971). But the word "instituted" could not be more clear, and the intervenors do not contend that the statutory language is ambiguous. The plaintiffs are seeking not a "broad remedial construction," but a world in which words in statutes mean whatever litigants or judges want them to mean.

In all events, the intervenors are wrong to assert that section 3(c) should be construed as broadly as its language may bear. The Supreme Court has held that the very act of imposing a "preclearance" requirement on a State raises grave constitutional questions, and for that reason courts must narrowly construe statutes that authorize preclearance regimes. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009). The district-court opinion in *Jeffers v. Clinton*, 740 F. Supp. 585, 586 (1990), on which the plaintiffs rely, pre-dates *Northwest Austin*, and this Court cannot

follow a district-court opinion at the expense of a binding Supreme Court pronouncement. *See, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 J. Moore et al., Moore's Federal Practice § 134.02[1][d], at 134-26 (3d ed. 2011))). No one can seriously believe that the current Supreme Court, after invalidating section 4(b)'s coverage formula in *Shelby County*, would tolerate a "bail-in" order in a proceeding that was not "instituted by the Attorney General or an aggrieved person."

Finally, the intervenors are wrong to suggest that the text of section 3(c) reflects a lack of congressional imagination. *See* Intervenors' Mot. at 11 (urging the Court to rewrite the statutory text to fit this situation which "Congress in 1965 would not have foreseen"). Preclearance proceedings exist only for jurisdictions that are already subject to a preclearance requirement, so there will never be a need for a preclearance court to consider "bail-in." Jurisdictions no longer subject to preclearance remain subject to "bail-in" remedies in section 2 litigation, and most of the intervenors have already asked the District Court for the Western District of Texas to "bail-in" Texas on account of its 2011 redistricting maps.[1] That is the forum in which to

[1] *See, e.g.*, Joint Motion of the Texas State Conference of NAACP Branches, Juanita Wallace, Rev. Bill Lawson, Howard Jefferson, Congresspersons Eddie Bernice Johnson, Sheila Jackson-Lee, Alexander Green, LULAC, Eddie Rodriguez, et al., and Margarita Quesada, et al., for Leave to Amend Complaint, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex July 12, 2013), ECF No. 776; Plaintiff MALC's Motion for Leave to File Amended Complaint and

litigate the "bail-in" remedy, and there is no need (and no justification) for this Court to re-write the language of section 3(c) to give the intervenors an additional bite at the apple.

II. THE INTERVENORS' MOTION SHOULD BE DENIED BECAUSE SECTION 3(C)'S REMEDY MAY BE USED ONLY AFTER A COURT AWARDS RELIEF ON A CLAIM TO ENFORCE THE VOTING GUARANTEES OF THE FOURTEENTH OR FIFTEENTH AMENDMENT.

A. Section 3(c) Provides a Remedy, Not a Claim for Relief, So It Provides No Basis For An Independent Counterclaim.

Section 3(c)'s "bail-in" remedy may be considered only after a court finds intentional racial discrimination in violation of the "voting guarantees" of the Fourteenth or Fifteenth Amendment. Section 3(c) is a remedial provision, and "does not . . . provide a basis on which to state a cause of action." *Webber v. White*, 422 F. Supp. 416, 423 (N.D. Tex. 1976). The intervenors' motion to amend should be denied as futile because their counterclaim is not a claim at all.[2]

Memorandum of Law in Support, *Perry v. Perez*, No. 11-cv-360 (W.D. Tex. July 12, 2013), ECF No. 779; Texas Latino Redistricting Task Force Plaintiffs' Opposed Motion for Leave to Supplement Pleadings and Brief in Support, *Perry v. Perez*, No. 11-cv-360 (W.D. Tex. July 12, 2013), ECF No. 780.

[2] Even if the plaintiffs could characterize their request for "bail-in" as a "claim," it is far from clear that this Court's limited jurisdiction under section 5 even allows it to consider counterclaims. *See N.C. State Bd. of Elections v. United States*, 208 F.Supp.2d 14, 18-19 (D.D.C. 2002) (per curiam) (Tatel, Oberdorfer, & Kessler, JJ.) (explaining that the "limited inquiry" under section 5 "cannot properly extend to tangential issues—though important issues—which Congress felt could best be handled in local district courts" (citation omitted)).

B. Section 3(c)'s Bail-In Remedy May Be Ordered Only After A Court Has Awarded Relief in Response to a Finding of a Violation of the Fourteenth or Fifteenth Amendment.

Section 3(c) forbids a court to order bail-in as a stand-alone remedy. The statute provides that if the court finds a constitutional violation that justifies equitable relief, "the court, *in addition to such relief as it may grant*," may consider judicial preclearance. 42 U.S.C. § 1973a(c) (emphasis added). Before a court may consider bail-in under section 3(c), it must not only find a violation of the Fourteenth or Fifteenth Amendment, it must also determine that equitable relief is justified, and grant some form of relief (other than bail-in) on the prevailing party's constitutional claims. This Court has not awarded any relief in this case. The ruling denying preclearance was vacated by the Supreme Court, and this Court has not awarded (and no longer has the power to award) further relief now that section 4(b)'s coverage formula has been declared unconstitutional.

III. THE INTERVENORS' AMENDMENT WOULD BE FUTILE BECAUSE SECTION 3(C) "BAIL-IN" REMEDY REQUIRES JUDICIAL FINDINGS THAT "VIOLATIONS OF THE FOURTEENTH OR FIFTEENTH AMENDMENT" "HAVE OCCURRED."

Section 3(c)'s "bail-in" remedy requires judicial findings that "violations of the fourteenth or fifteenth amendment . . . have occurred." The intervenors cannot satisfy this requirement because the Supreme Court vacated the judgment and findings in this case. *See Texas v. United States*, __ S. Ct. __, 2013 WL 3213539 (U.S. June 27, 2013). When a judgment is

vacated, "its ruling and guidance" are "erased." *See United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013).

The intervenors cite no authority allowing an inferior court to resurrect its judgment and findings after vacatur by a superior court. Courts to address the question have found the answer almost too obvious for mention. *See, e.g., Tollett v. City of Kemah*, 285 F.3d 357, 366 (5th Cir. 2002) ("It goes without saying that, as a result of the revised sanctions [order] being vacated, the findings of fact and conclusions of law in the district court's post-remand orders . . . are vacated as well."); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1218 (11th Cir. 2009) ("Parts of decisions that are vacated and have not been reinstated 'have no legal effect whatever. They are void.' "). And this Court surely cannot impose new findings on remand after the Supreme Court has held that the very existence of this preclearance proceeding violates the Constitution. *See Shelby County v. Holder*, 133 S. Ct. 2612 (2013) Without non-vacated findings from this Court that the State has violated the Fourteenth or Fifteenth Amendments, the intervenors have no basis for seeking section 3(c) relief.

Even if the plaintiffs could rely on this Court's vacated opinion, there were no findings in that opinion that Texas had violated the Fourteenth or Fifteenth Amendment. Section 5 of the Voting Rights Act sweeps far beyond the requirements of the Fourteenth and Fifteenth Amendments, and a State does not violate the Constitution merely because a preclearance court finds

that the State failed to prove the absence of discriminatory purpose. Texas v. United States, 887 F. Supp.2d 133, 151-52 (D.D.C. 2012) (holding that Texas must prove the absence of discriminatory purpose), *vacated*, __ U.S. __, 2013 WL 3213539 (U.S. June 27, 2013).

Finally, it was impossible for this court to have found that "violations of the fourteenth or fifteenth amendment . . . *have occurred*" in deciding whether to preclear the 2011 maps. *See* 42 U.S.C. § 1973a(c) (emphasis added). The 2011 maps never took effect, and violations of the fourteenth or fifteenth amendment do not "occur" until a state actually "deprive[s]" or "den[ies]" a person of due process or equal protection, or "denie[s]" or "abridge[s]" a citizen's right to vote on account of race. *See* U.S. Const. amends. XIV, XV. The mere enactment of a law cannot result in a "violation" of the fourteenth or fifteenth amendments, and the 2011 maps were repealed before they could "deprive" or "deny" or "abridge[]" the rights of any person or citizen. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010) (contrasting the First Amendment, which is violated upon the enactment of a speech-restricting law, with the remaining provisions of the Bill of Rights, which are not violated until the executive acts). A preclearance court determines not whether violations of the fourteenth or fifteenth amendment *have occurred*, but whether violations *will occur* if a law is allowed to take effect.

IV. *SHELBY COUNTY* REQUIRES THE COURT TO DISMISS THIS CASE IMMEDIATELY.

The Supreme Court has held that the statute requiring Texas to seek preclearance for its 2011 maps violates the Constitution. *See Shelby County*, 133 S. Ct. at 2631. These proceedings have been constitutionally illegitimate from the outset, and the intervenors' efforts to prolong this case serve only to aggravate the constitutional injuries that have already been imposed on the State of Texas. The State has moved to dismiss this case under Rule 41(a), and it is entitled to immediate dismissal.

It is hard to imagine an act more disrespectful to the Supreme Court than what the intervenors are asking this Court to do. *Shelby County* held that these preclearance proceedings are *unconstitutional*, yet the plaintiffs want this Court to *continue* these unconstitutional proceedings and order a "bail-in" remedy in a case that the State never should have had to file in the first place. And this in the teeth of the State's motion to dismiss, which the intervenors would presumably have the Court deny even though there is no imaginable justification for a court to continue a preclearance proceeding that the State no longer wants to pursue. The State is entitled to prompt dismissal, and we respectfully ask the Court to dismiss and end this unconstitutional imposition as soon as possible.

CONCLUSION

The motion for leave to file an amended answer and counterclaim should be denied, and the case should be immediately dismissed.

Dated: July 26, 2013

Respectfully submitted.

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