IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, ET AL., *Plaintiffs,* v. GREG ABBOTT, ET AL., *Defendants.*	Civil Action No. SA-11-360

PLAINTIFFS' JOINT REPLY TO TEXAS' AND THE UNITED STATES' OPPOSITION TO PLAINTIFFS' REQUEST FOR RELIEF UNDER SECTION 3(C) OF THE VOTING RIGHTS ACT

Acceptance of the arguments of Texas and the United States would render the bail-in relief Congress made available under Section 3(c) of the Voting Rights Act a superfluous, toothless element of statutory authority. The plain result of accepting those arguments would be that Section 3(c) relief would be unavailable *any time* a state had purposely discriminated against voters on the basis of race—as long as the state rushed to fix *some* of its racially-directed actions before the appeals process completed. Invidious racial discrimination is not just a phrase thrown about in technical legal briefing; it is among the most heinous acts a state government can perform. Section 3(c), which now is the only way to judicially redress what Texas purposely did in 2011, and has done again and again in the past decades, is crafted specifically and by its own terms to give courts the authority to look back to the beginning, and not simply the ending, of a case and impose an

equitable remedy proportionate to the original violation in relevant context. There can be no better example of when it makes sense to apply the bail-in statutory relief than in this case.

Aiming to insulate Texas from a preclearance requirement in the upcoming redistricting cycle, Texas and the United States urge this Court to disregard its prior rulings and relevant evidence, and instead apply rigid, narrow standards that are incompatible with traditional principles of equity enforcing civil rights statutes. The reason for this strategy is plain: to shift the Court's focus away from where it should and must be under Section 3(c). The history of this litigation, coupled with Texas's persistent, systematic attacks on minority voting rights, demonstrate the necessity for something more than the piecemeal litigation, prolonged for an entire decade, which Texas and the United State would force on minority voters seeking to preserve their fundamental right to vote guaranteed by federal law and the Constitution. Neither Texas nor the United States identifies any statute or precedent that forbids the Court from taking into account all of the relevant evidence before it to exercise its statutorily-granted discretionary authority and award Plaintiffs much-needed bail-in relief afforded under Section 3(c). This Court should decline Texas's invitation to turn a blind eye to the relevant law and facts, thereby abandoning Texas's minority voters to spend yet another decade fighting for the fundamental rights that this Court now has the opportunity to protect.

I. Because the decision to afford equitable relief is within a district court's discretion in light of the specific legal and factual circumstances before it, the Fifth Circuit's decision to deny bail-in relief in *Veasey* cannot be "controlling" on this Court

Texas and the United States argue that the Fifth Circuit's invalidation of Section 3(c) relief in *Veasey v. Abbott,* 888 F.3d 792 (5th Cir. 2018), dictates the same result here. Specifically, the United States argues that because the Fifth Circuit held that the enactment of a remedial voter ID statute removed the "'equitable basis for subjecting Texas to ongoing federal election scrutiny

under Section 3(c),'" U.S. Br. at 3 (quoting *Veasey,* 888 F.2d at 804), this Court is precluded from awarding bail-in based on the constitutional violations identified in the 2011 plans. In urging that *Veasey* dictates the denial of equitable relief, Texas and the United States ask this Court to ignore the fact-bound nature of equitable relief and to treat as irrelevant the significant factual and procedural distinctions between *Veasey* and this case.

Veasey itself says otherwise. It acknowledged that "[t]he remedy for violations of voting rights is governed by traditional equitable standards." 888 F.3d at 800. These "traditional equitable standards" dictate that "'the nature of the violation determines the scope of the remedy,'" *Veasey,* 888 F.3d at 800 (quoting *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971)), and necessarily require flexibility, rather than rigidity in application. *See Morrow v. Crisler,* 479 F.2d 960, 963 (5th Cir. 1973). Indeed, "'[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.'" *Id.* (quoting *Swann,* 402 U.S. at 15). As always in equity, crafting a remedy "to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *United States v. Paradise,* 480 U.S. 149, 184 (1987). When exercising its equitable jurisdiction, '[a] district Court has 'not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*" *Id.* at 183 (quoting *Louisiana v. United States,* 380 U.S. 145, 154 (1965)) (emphases added).

These are long-settled equitable standards, and the claim that this Court is somehow "controll[ed]" by *Veasey*'s ruling that the district court's Section 3(c) order "far exceed[ed] the scope of the actual violations found by the court," 888 F.3d 801, is legally baseless. When the question here is whether equitable relief is appropriate, the *Veasey* ruling cannot possibly be

controlling, as this is a completely separate case with distinct factual and procedural circumstances, involving challenges to a completely different type of statute that resulted in numerous distinct findings of unconstitutionality. The Fifth Circuit rested its holding in *Veasey* that Section 3(c) relief in *Veasey* did not meet "the necessities of the particular case," *Morrow,* 479 F.2d at 963, on a detailed appraisal of the specific violations identified, the procedures employed, and the adequacy of the remedy invalidated by the court below *in that particular case*. *Id.* at 799-804. The Fifth Circuit's decision was necessarily tailored to the specific findings below. *Id.* at 800 (noting that "[r]elief must be tailored . . . in order to appropriately reconcile constitutional requirements and legislative goals"). Far from barring Section 3(c) relief in this case, this principle from *Veasey requires* this Court to conduct its own appraisal and order such equitable relief as is necessary to address the widespread, systematic racial discrimination identified in the 2011 plans and to "bar like discrimination in the future." *Paradise,* 480 U.S. at 183. And while this Court's analysis may certainly be guided by the factors and types of findings that underpinned the Fifth Circuit's conclusion in *Veasey*, the *outcome* of the bail-in analysis there cannot be binding here. Texas and the United States' assertion to the contrary asks this Court to impose rigidity where the long-standing principles of equity demand flexibility. *Morrow,* 479 F.2d at 963.

Even the most cursory reading of *Veasey* reveals that it is not, as Texas and the United States would have it, on all-fours with this case. Start with the question of the passage of purportedly remedial legislation. The procedure that led to implementation of the statutory remedy in *Veasey* bears faint resemblance to the process that resulted in enactment of the 2013 State House and Congressional plans. The interim remedy imposed by the district court in *Veasey* that served as the basis for the remedial voter ID statute, SB 5, came *after a full adjudication on the merits*, and the need for such interim relief was affirmed and ordered by the Fifth Circuit. *Veasey v. Abbott,* 830

F.3d 216, 272 (5th Cir. 2016). In contrast to the situation here, the order for interim relief was *not* based on findings of intentional discrimination. The Fifth Circuit had previously concluded that the district court erred in its intentional discrimination analysis.[1] Rather, the district court's remedy in *Veasey* was based on the affirmed Section 2 effects claims. *Id.* Finally, the interim remedy was "agreed to by all parties," *Veasey,* 888 F.3d at 796, and was "designed to cure *all the flaws cited in evidence* when the case was first tried." *Id.* at 795. (emphasis added).

These facts and sequence of events stand in sharp juxtaposition to those which resulted in implementation of this Court's 2012 interim maps. Those interim maps had to be put in place due to Texas's failure to obtain timely preclearance for its 2011 plans and only came after a preliminary determination of the merits of Plaintiffs' statutory and constitutional claims. *See* Opinion and Order Regarding Plan H309, ECF No. 690, at 12 (emphasizing "the preliminary and temporary nature of the interim plan"); Opinion and Order Regarding Plan C235, ECF No. 691, at 1 (noting that the interim map was "a result of preliminary determinations regarding the merits of the § 2 and constitutional claims presented"). Because this Court was, by the Supreme Court's own instruction, precluded from ruling on the Section 5 claims, the Court could not possibly cure "all the flaws cited in evidence," *Veasey,* 888 F.3d at 795, which was central to the Fifth Circuit's ruling in that case. Instead, as instructed by the Supreme Court in *Perry v. Perez,* 565 U.S. 388 (2012), this Court gave deference to the challenged, legislatively-enacted plan, and made changes only where the Section 2 and constitutional claims had "a likelihood of success on the merits," and

[1] Although the Fifth Circuit reversed and remanded the *Veasey* district court's finding of intentional discrimination for further proceedings consistent with its opinion, the Fifth Circuit did note that there was evidence that could support a conclusion that Texas had acted in a racially discriminatory fashion. *Veasey v. Abbott,* 830 F.3d 216, 235-36 (5th Cir. 2016). That evidence, and the Fifth Circuit's acknowledgement of its significance, is also evidence that this Court may properly consider in deciding whether Texas' recent history of discrimination warrants bail-in.

where the Section 5 claims were "not insubstantial." *Id.* at 393-95. These constraints were not present in *Veasey,* yet this Court based its remedial maps in part on preliminary findings of discriminatory purpose, in addition to claims under the VRA. *See* ECF No. 690 at 5, 6, 10; ECF No. 691 at 38-39. Although some parties portray the 2012/2013 Congressional plan as a compromise map, it was implemented over the objection of most of the plaintiff groups, and even those who agreed to its use conceded that it did not resolve all of their claims. *See* ECF No. 691 at 28 & n. 62-65. Finally, unlike the state-enacted version of the remedial voter ID statute which the Fifth Circuit held mirrored the Court's interim plan and lacked a proven constitutional defect, the court-ordered House plan was altered by the legislature in such a way that it violated Plaintiffs' constitutional rights anew, with the racial gerrymandering of HD 90. *Abbott v. Perez,* 138 S. Ct. 2306, 2335 (2018). Despite Texas and the United States' contentions to the contrary, this procedural history is vastly different from that of *Veasey*, where "the state [] acted promptly following th[e] court's mandate" to implement a remedial statute that "constituted an effective remedy for the only deficiencies testified to . . ." and "essentially mirror[ed] an agreed interim order for the same purpose . . . ." 888 F.3d at 804.

The most important distinction to note is that the key issue before the Fifth Circuit in *Veasey* was *not* the issue of bail-in, but rather whether the District Court erred in its wholesale invalidation of SB 5 (the enacted remedial action) in light of the fact that "Plaintiffs never actually challenged SB 5 in pleadings or evidence during the remedial phase" and "no evidence was offered to show that the agreed interim remedy," which served as the model for SB 5, "was insufficient." 888 F.3d 802. The court spent nearly its entire opinion addressing the errors of law that led the district court to enjoin the otherwise-unchallenged remedial statute, noting at the outset that "where an injunction is 'grounded in erroneous legal principles,' injunctive relief is not warranted . . . ." *Id.*

at 798. The *Veasey* court held that both the injunction of SB 5 and the order for a hearing on Section 3(c) relief were based on the district court's erroneous legal analysis that SB 5 was "fatally infected" by the invidious intent of the original law, SB 14. *Id.* at 801.

In sharp contrast, Plaintiffs here do not ask this Court to invalidate wholesale the 2013 plans which the Supreme Court held largely remedied the constitutional violations identified in the 2011 plans. Nor do Plaintiffs request that bail-in be imposed based on a theory of imputed intent that the Supreme Court found unsupported by the record. *Abbott v. Perez,* 138 S.Ct. at 2328. Plaintiffs here request that bail-in be imposed according to the plain text of Section 3(c) – based on the violations of the Fourteenth Amendment found as to the 2011 plans, which prompted the changes now in place under the 2013 plans, and which constitute yet another occurrence of what has become a predictable and unbroken decennial pattern of illegal abuse and manipulation of the redistricting process in Texas. *Veasey* may stand for the proposition that a court may not, without a showing of "some constitutional or statutory infirmity," 888 F.3d at 801, displace a legislative remedy designed to "eliminate the discriminatory effects of the past," but that principle has no bearing on the relief sought here. Indeed, nothing in the Fifth Circuit's opinion precludes this Court from exercising its discretion to "bar like discrimination in the future," as equitable principles and Section 3(c) of the Voting Rights Act explicitly allow. *Paradise,* 480 U.S. at 183.

II. This Court has already rejected Defendants' arguments as to ripeness, mootness, and subject matter jurisdiction, and should continue to do so

Perplexingly, despite the fact that this Court has issued hundreds of pages of findings of fact, conclusions of law, and opinions to the contrary, Defendants spend a significant portion of their brief insisting that Plaintiffs are not entitled to Section 3(c) relief based on the 2011 plans "because they cannot establish a constitutional violation." Defs.' Resp. Br. at 4. Defendants cite three separate but equally unavailing justifications to support this contention.

First, Defendants assert that "because the plans were never precleared, they never became effective, and the plaintiffs' claims against them never became ripe" *Id.* Defendants cite *Branch v. Smith,* 538 U.S. 254 (2003), and *Connor v. Waller,* 421 U.S. 656 (1975), in support of their argument that this Court was not permitted to reach the merits of the constitutional claims at issue because without being precleared, the plans were never effective as law. Defs.' Resp. Br. at 5. Of course, the rulings in those cases came during a time – unlike now – when Section 5 was still operative. The Supreme Court in 2012 acknowledged this Court had to make some preliminary rulings on all the statutory and constitutional claims in order to have redistricting plans in place for the 2012 elections. *Perry v. Perez,* 565 U.S. at 394. Defendants' reliance on this body of law is misplaced given the unusual timing and shifting legal landscape that surrounded the injunction imposed by the 2012 interim plans and the later repeal and replacement of the 2011 plans.

Second, Defendants argue that Plaintiffs cannot establish a constitutional violation because their claims against the 2011 plans became "moot as soon as the Legislature repealed the 2011 plans in 2013." Defs.' Resp. Br. at 4. But Defendants fail to address the fact that this Court has heard and rejected many of these very same mootness arguments on multiple occasions. *See* Order, ECF No. 886 at 11-15, ECF No. 1390 at 2-6. Specifically, this Court has already corrected the Defendants erroneous conflation of the standard for Article III standing with the standards for mootness as laid out by the Supreme Court, noting that "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness," and that "'[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct.'" ECF No. 886 at 12 (quoting *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953). Further, this Court has already squarely distinguished *Davis v. Abbott,* 781 F.3d 207 (5th Cir. 2015), on which Defendants continue to rely, *see* ECF No.

1390 at 3-6. Defendants' only new argument as to mootness – that the Supreme Court's intervening decision in *Abbot v. Perez* "refutes any argument that claims against the 2011 plans remained live because certain districts were incorporated in the Legislature's 2013 redistricting plans," Defs.' Resp. Br. at 6 – is no more persuasive in light of the Court's previous analysis. This Court's determination that the claims against the 2011 plans were not moot did not rest solely on the possibility that the harms identified in those plans persisted in the 2013 plans. In fact, this Court specifically noted that "even if the Court ultimately declines to award injunctive relief, it may find that declaratory relief and equitable relief under § 3(c) are appropriate," ECF No. 886 at 14, (citing *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 307 (2012) ("A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever' to the prevailing party")); *see also* Statement of Interest of the United States, ECF No. 827 at 9 (noting, following the repeal of the 2011 plans, that "[t]his case is not moot because the availability of the Section 3(c) remedy allows this Court to grant relief to the Plaintiffs if they prevail on their claims"). The Court has already rejected Defendants' mootness arguments as unavailing, and Defendants have failed to present a compelling argument for this Court to reconsider that determination.

Finally, and most perplexingly, Defendants assert that this Court may not impose Section 3(c) relief on the state of Texas "because the 2011 plans were never implemented, they never affected the plaintiffs[,] and therefore could not have deprived them of their constitutional rights." Defs.' Resp. Br. at 4. Defendants note that "[t]he 'right' to seek bail-in does not materialize until the litigation concludes and a plaintiff prevails on the merits of a constitutional claim that satisfies Article III's case-or-controversy requirement." *Id.* at 8. This argument lends no support to Defendants' position that bail-in is unwarranted in this circumstance because this Court has found that Plaintiffs had Article III standing to pursue their claims against the 2011 plans and indeed

awarded them injunctive relief in 2012, because they would be harmed by the 2011 plans. Defendants' argument that "plaintiffs are not 'aggrieved' by the 2011 plans because the plans never applied to the plaintiffs," taken to its logical conclusion, borders on the frivolous.[2] Plaintiffs who succeed in obtaining a preliminary injunction preventing an intentionally discriminatory practice from ever being implemented or enforced during the pendency of litigation cannot then logically be precluded from proving a constitutional injury on the merits simply because they did not wait to endure the discriminatory effects before seeking equitable relief. Significantly, Defendants altogether fail to mention that this Court has *already* held that the aggrieved Plaintiffs' have prevailed on the merits of their constitutional claims against the 2011 plans. ECF No. 1365; ECF No. 1390. That adjudication on the merits was complete in April of 2017, and this Court's decision still remains in effect.[3] Regardless of how vehemently Defendants insist that it cannot do so, this Court has already issued findings that Defendants engaged in intentional racial discrimination in contravention of the Fourteenth Amendment. And despite Defendants' insistence that these findings cannot support an injunction or other equitable relief, the injunction prohibiting the implementation and enforcement of the 2011 plans remains in place to this day. *See* ECF 886

[2] It is worth noting that the United States has also argued that this position is untenable. *See* Statement of Interest of the United States, ECF No. 827 at 9 (noting that "Texas's argument that the plaintiff who initiated the litigation must still be 'aggrieved' by the practice that initially prompted the lawsuit . . . is inconsistent with the language of Section 3(c)").

[3] Despite Texas' invitations to do so, the Supreme Court declined to rule that this Court's holding that the 2011 plans were infected with intentional discrimination was moot. *See Abbott v. Perez,* 138 S. Ct. at 2318 n.8 ("express[ing] no view on the correctness of this holding"). And even if those findings were moot, the preliminary findings of Fourteenth Amendment violations in the orders implementing the 2012 interim plans, along with the extensive evidence of Texas' recent patterns of intentional discrimination, are sufficient to order bail-in under Section 3(c). *See* Statement of Interest of the United States, ECF No. 827 at 7 (noting that "the evidence presented to this Court – as well as the substance of the decision in *Texas v. United States* and other instances of discrimination in voting in Texas – demonstrates that such constitutional violations" to support bail-in had occurred in Texas).

at 18 (noting that the 2011 plans remain enjoined "unless and until the court lifts the injunction"). This Court is thus appropriately poised to award Plaintiffs the requested relief under Section 3(c).

Bail-in is purposely designed to allow a court to reach back to the *beginning* of a case to evaluate the scope of a remedy for invidious racial discrimination. The core argument being made against awarding such relief here runs directly counter to this basic statutory design. But just because, in the Supreme Court's view, the state belatedly and reluctantly remedied its original sin of purposeful racial discrimination, it hardly follows under Section 3(c) that the original violation is wiped from history's pages. Acceptance of the counter-argument, that the slate may be wiped clean by a later, somewhat-mitigating enactments, would open the door to the effective elimination of the last remaining preclearance bulwark found in the Voting Rights Act. This case, and the inch-by-inch way redistricting litigation would have to proceed in Texas in the future if Section 3(c) is turned into what amounts to a dead letter, offers the best possible example of why the arguments of Texas and the United States should be firmly rejected.

III. Texas and the United States' insistence that bail-in is inappropriate in this circumstance rests upon an untenable interpretation of Section 3(c) as well as a revisionist approach to Texas's redistricting history

In their briefs, Defendants and the United States attempt to restrict this Court's review by propounding an exceedingly narrow set of findings that may open the door to Section 3(c) relief, as well as an equally narrow set of circumstances in which bail-in is permissible, neither of which comport with the plain text of the statute or the "demonstrated ingenuity of state and local governments in hobbling minority voting power. . . ." *Johnson v. De Grandy,* 512 U.S. 997, 1018 (1994). Despite repeated citation to *Shelby County v. Holder,* 570 U.S. at 554, which noted that "history did not end in 1965" and invalidated the Section 4 coverage formula for its reliance on "40-year-old facts having no logical relation to the present day," both Texas and the United States

urge this Court to limit its consideration to only those specific constitutional violations that serve to demonstrate the "'systematic resistance to the fifteenth Amendment' . . . necessary to support the original preclearance regime." Defs.' Resp. Br. at 19; *see also* U.S. Br. at 10 (alleging that "intentional discrimination . . . is the only category of constitutional violation that can justify the equitable remedy of preclearance"), *but see* Statement of Interest of the United States, ECF No. 827 at 4 ("Imposing a preclearance requirement for all voting changes is warranted when there is a demonstrated history of intentional discrimination and *the potential for backsliding through creative changes in voting procedures"*) (emphasis added). But Section 3(c) is not a substitute for Section 4's now-invalidated coverage formula, which underpinned the Section 5 preclearance regime. Section 3(c) is not confined to the original history giving rise to the Voting Rights Act. Were that the case, it would be superfluous. Instead, it is an alternative remedial path to preclearance that is not based on any formula at all, but is instead based on the Court's evaluation of the specific matter before it and considerations of the jurisdiction's *recent* past.

Additionally, both parties criticize Plaintiffs for asserting that it is within this Court's discretion to consider instances in which Texas violated the Fourteenth Amendment by crafting a racial gerrymander or by subverting the one-person, one-vote principle. *See* Defs.' Resp. Br. at 13-15, U.S. Br. at 9-10. However, the plain text of Section 3(c) does not confine the Court to consider only findings of intentional racial discrimination. Rather, it mandates that a court "find[] that violations of the *fourteenth and fifteenth amendment* justifying equitable relief have occurred within the territory. . . ." 52 U.S.C. § 10302(c) (emphasis added). The United States suggests that equitable relief ordered to remedy one-person, one-vote and racial gerrymandering claims does not "redress the 'condition alleged to offend the Constitution' at which Section 3(c) is aimed," U.S. Br. at 10, but this line of argument ignores the manner in which jurisdictions often use these

unconstitutional tactics in tandem to diminish minority participation and influence. *See, e.g.* ECF No. 1365 at 69-71 (noting that strategies of racial gerrymandering and the intentional underpopulation of certain districts were employed in concert to intentionally dilute the voting strength of minorities in Tarrant County).[4]

Texas and the United States further criticize Plaintiffs for both failing to identify more findings of intentional discrimination and citing to objections lodged under Section 5 highlighting discriminatory purpose. *See* Defs.' Resp. Br. at 20, 21-22; U.S. Br. at 9, *but see* Statement of Interest of the United States, ECF No. 827 at 18-19 (detailing Section 5 objections on the basis of discriminatory purpose to support their claim for Section 3(c) relief). However, Texas and the United States fail to acknowledge that there are not additional findings of intentional discrimination in more cases precisely *because* Texas had been subject to a preclearance requirement since 1975, *see Briscoe v. Bell,* 432 U.S. 404 (1977), and the Section 5 objections lodged for findings of discriminatory purpose served for nearly forty years to prevent many (but not all) intentionally discriminatory voting practices from going into effect in the first place. Under Section 5's retrogression standard, the attorney general could interpose an objection and the D.C. Circuit Court could deny preclearance where the legislature was unable to demonstrate that its plan lacked a discriminatory purpose. *See Texas v. United States,* 887 F. Supp. 2d 133, 151-52 (D.D.C. 2012). While this standard is less stringent than is required for a plaintiff to affirmatively prove

[4] That these claims were not appropriate subjects of review under the Section 5 preclearance standard, as emphasized by both parties, *see* Defs.' Resp. Br. at 15, U.S. Br. at 10 n.3, has no bearing on whether they are appropriately considered in determining whether a jurisdiction should be subjected to preclearance in the first place. Indeed, one of the principal characteristics used to identify flagrant discrimination and thereby subject jurisdictions to Section 5 preclearance when the coverage formula was enacted – low minority voter registration rates – was not in and of itself actionable in a preclearance proceeding; rather, it served as evidence that a jurisdiction required closer scrutiny in the form of federal oversight. *See Shelby County,* 570 U.S. at 546.

intentional discrimination, the legislature's inability to justify its own plans is nonetheless probative when considering whether to bring a previously covered jurisdiction back into the ambit of federal oversight. Despite the protestations of Texas and the United States, this Court may appropriately consider—and indeed should consider—the Section 5 objections plaintiffs highlight in their 2013 Joint Advisory to this Court, ECF No. 788 at 22-25, and in their opening brief, at 20, as they illuminate not only the pervasiveness of the pattern of state-sponsored discrimination, but also the effectiveness of preclearance as a prophylactic remedy for that demonstrated tendency to discriminate.

Strikingly, Texas claims that the plain-text requirements of Section 3(c) "are necessary but not sufficient to justify preclearance." Defs.' Resp. Br. at 3. Rather, Texas asserts that "[a] preclearance regime is constitutionally tolerable only when a State shows, through the sort of 'pervasive, flagrant, widespread, and rampant discrimination that faced Congress in 1965,' that is so determined to deny its citizens' voting rights that not even a federal injunction will stop it." *Id.* at 25 (quoting *Shelby County,* 570 U.S. at 554). Texas therefore mistakenly concludes that—even if each instance of unconstitutional conduct that Plaintiffs have cited is properly before this Court—bail-in relief cannot be justified because litigation remains an available avenue of relief and because Texas has demonstrated that it will comply with legally binding court orders. But this is an argument against Section 3(c)'s existence, not against its application.

Despite Defendants' contention that "[t]he history of this litigation provides the best evidence that preclearance is neither necessary nor justified" due to Texas's pseudo-voluntary implementation of the 2013 "remedial" plans, the fact of the matter is that regardless of ultimate outcome, the adjudication of this case to finality has taken nearly a full decade. That piecemeal litigation remains *available* does not mean that such litigation is an effective substitute for Section

3(c) in protecting the rights of minority voters in Texas. Further, the test for granting Section 3(c) relief cannot possibly rest on a jurisdiction's willingness to overtly defy a court order eventually issued, especially in light of the fact that "[s]ince the adoption of the Voting Rights Act, [some] jurisdictions have substantially moved from direct, overt impediments to the right to vote to more sophisticated devices that dilute minority voting strength." *De Grandy,* 512 U.S. at 1018; *see also NC NAACP v. McCrory,* 831 F.3d 204, 221 (4th Cir. 2016) (noting that, in assessing whether a jurisdiction has engaged in intentional racial discrimination, a "holistic approach is particularly important, for '[d]iscrimination today is more subtle than the visible methods used in 1965'") (quoting H.R. Rep. No. 109-478 at 6 (2006)).

IV. Conclusion

The Court should reject the rigid standards proposed by Defendants, which are incompatible with the realities of modern-day vote dilution and discrimination in redistricting and would effectively read Section 3(c) out of existence. Instead, the Court should provide assurance to the minority voters of Texas and a warning to the Texas State Government that the federal judiciary will protect Texas citizens' most fundamental rights in the upcoming redistricting cycle at the front-end, not the back-end, of the decade. The intentional discrimination the Court identified with respect to the 2011 plans, as well as Texas's long, not to mention, *fresh* history of intentional racial discrimination in the voting context, more than justify the imposition of bail-in on the State of Texas, and nothing precludes this Court from exercising its equitable discretion accordingly. For the reasons stated herein, as well as in their opening brief, Joint Plaintiffs respectfully request that this Court order the imposition of Section 3(c) preclearance for all statewide redistricting plans passed by the Texas Legislature for a period of no less than five years.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2019, I filed a copy of the foregoing for service on counsel of record in this proceeding through the Court's CM/ECF system.

/s/ Allison J. Riggs
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