IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE STATE OF NEW HAMPSHIRE, Plaintiff, v. ERIC H. HOLDER, JR. ATTORNEY GENERAL OF THE UNITED STATES, THOMAS E. PEREZ, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION Defendants And PETER HEILEMANN, Proposed Intervenor.	)	Civ. No.: 1:12-CV-01854 PROPOSED INTERVENOR'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Intervenor hereby moves to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). In this action, the state of New Hampshire, on behalf of itself and ten jurisdictions covered by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, seeks a declaratory judgment pursuant to Section 4 of the Act, 42 U.S.C. § 1973b, permitting the jurisdictions to bail out from coverage. Because Plaintiff admits on the face of the complaint that it does not satisfy the statutory criteria for a bailout, this court cannot grant such relief.

I. PLAINTIFF CANNOT MEET THE MANDATORY STATUTORY REQUIREMENTS UNDER SECTION 4.

A review of the statutory requirements under Section 4 and the face of the complaint reveal that Plaintiff is not legally entitled to a bailout. Among other things, in order to qualify for a bailout under Section 4, Plaintiff must demonstrate that during the last ten years all changes affecting voting have been reviewed and precleared by either the Department of Justice or this court under Section 5 prior to their implementation. 42 U.S.C. § 1973b(a)(1)(D). Section 1973b (a)(1) provides that a declaratory judgment permitting bailout "shall issue *only if such court determines* that during the ten years preceding the filing of the action, and during the pendency of such action" each of the criteria are met. (emphasis added). In this case, there is no question that New Hampshire and its covered jurisdictions are ineligible for a bailout due to their admitted failure to satisfy their preclearance obligations during the past ten years. Plaintiff admits it has implemented changes without submitting them for review; therefore it simply does not qualify to bail out. *See* Complaint par. 31. Since on the face of its complaint, Plaintiff fails to satisfy the statutory criteria, this court is without authority to issue a judgment permitting bailout.

Given the mandatory language of Section 1973b's bailout requirements, the statutory criteria cannot be waived by the parties or by the court. In recent litigation with Shelby County, both the district court and the D.C. Circuit found Shelby County ineligible for a bailout for their failure to submit *one* voting change. *See Shelby County v. Holder*, 67 F.3d 848, 857 (D.C. Cir. 2012) ("[u]nlike the utility district in Northwest Austin, Shelby County never sought bailout, and for good reason. Because the county had held . . . elections under a law for which it failed to seek preclearance and because the Attorney General had recently objected to annexations and a

redistricting plan proposed by a city within Shelby County, the County was clearly ineligible for bailout"); *Shelby County v. Holder*, 811 F. Supp. 2d 424, 446 n.6 (D.D.C. 2011) ("it is clear—based upon undisputed facts in the record" that Shelby County was not eligible for bailout because the Attorney General conceded that he interposed an objection to a change in 2008 and Shelby County conceded that it implemented changes without submitting them for preclearance). Much like Shelby County, the Plaintiff has conceded that it failed to satisfy preclearance obligations under section 5 and has implemented changes without preclearance within the past ten years. Thus, it is clearly ineligible for a bailout. *See Florida v. United States*, No. 11-cv-01428, Doc. No. 106 at 3 (D.D.C. June 5, 2012) (3-judge court) ("[T]he parties should bear in mind that the Court considers itself bound by . . . *Shelby County*. . ."). *See also* U.S. Attorney General Motion for Summary Judgment, *Texas v. Holder*, No. 12-cv-128, Doc. No. 350-1 at 12 (D.D.C. Oct. 22, 2012) ("[A] three-judge court convened under Section 5 to render a preclearance determination must follow relevant D.C. Circuit precedent, if any exists, as to the constitutional claims over which it exercises pendent jurisdiction.").

II. CONCLUSION

For the foregoing reasons, Proposed Intervenor respectfully requests this court dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted.

December 5, 2012

Respectfully submitted,

/s/ Michael E. Rosman
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