Oral Argument Scheduled for May 6, 2011

No. 10-5433

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN LAROQUE, ET AL.,

APPELLANTS,

V.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 10-561 (JDB))

BRIEF FOR INTERVENORS-APPELLEES

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STATEMENT OF JURISDICTION

Plaintiff-Appellants brought facial and as-applied challenges to the constitutionality of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. JA 153. The District Court granted the motions to dismiss of Defendant and Defendant-Intervenors on December 6, 2010. JA 152. Plaintiffs filed their notice of appeal on December 21, 2010. JA 206. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

In 2006, Congress reauthorized Section 5 of the Voting Rights Act, extending its applicability for another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §5, 120 Stat. 577. On August 17, 2009, the Attorney General of the United States, acting under his authority under Section 5 of the Voting Rights Act, objected to the implementation of a referendum passed in Kinston, North Carolina, that would create a non-partisan election system for city elections. JA 42-44. The City of Kinston subsequently voted not to seek preclearance in the D.C. District Court. JA 38. The issues under review are:

1. Whether Plaintiffs have established that they, as candidates, referendum supporters, or voters, have suffered injuries sufficient to support Article III standing.

2. Whether Plaintiffs' alleged injuries were fairly traceable to the challenged action and redressable by a favorable ruling; and
3. Whether Plaintiffs have a valid cause of action to bring this challenge to Section 5 of the Voting Rights Act.

STATEMENT OF PERTINENT AUTHORITIES

All applicable statutes and regulations are contained in the Brief for Appellants.

STATEMENT OF FACTS AND CASE

A. Section 5 of the Voting Rights Act

Congress, under its authority to enforce the 15th Amendment, enacted the Voting Rights Act of 1965 to "banish the blight of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). In order to deal with this "insidious and pervasive evil," *id.* at 309, Congress enacted Section 5 of the Act, which prohibited certain covered jurisdictions from making any changes to voting practices or procedures without first submitting those changes to the Attorney General or the United States District Court for the District of Columbia for preclearance. JA 154. Preclearance of the changes will only be granted if the covered jurisdictions can demonstrate that change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S. § 1973c(a). Section 5 was crafted to "shift the advantage of time

and inertia from the perpetrators of the evil to its victim" by placing the burden of proof on the covered jurisdiction. *Beer v. United States*, 425 U.S. 130, 140 (1976). If the covered jurisdiction goes first to the Attorney General and the Attorney General objects to a proposed voting change, the covered jurisdiction may ask the Attorney General to reconsider that determination, 28 C.F.R. § 51.45(a), or the jurisdiction may institute a *de novo* action in United States District Court for the District of Columbia seeking a declaration that the proposed change does not have a racially discriminatory purpose or retrogressive effect. 42 U.S. § 1973c(a).

Since its enactment, Section 5 of the Voting Rights Act has been repeatedly reauthorized and repeatedly held to be constitutional by reviewing courts. JA 155. In 2006, after months of hearings and compilation of an extensive legislative record documenting the continued prevalence of racially polarized voting and racial discrimination in elections, Congress decided to again renew the provisions of Section 5. Pub. L. No. 109-246, §5, 120 Stat. 577. The 2006 Amendments did not, as Plaintiffs suggested in their complaint, "significantly expand[] the substantive standards" of the law. JA 10. Rather, the 2006 Amendments simply clarified Congressional intent and amended its provisions in light of two recent Supreme Court decisions that altered and narrowed how Section 5 had been interpreted by the Justice Department since its original enactment in 1965. *Nw.*

Austin Mun. Utility Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 299 (D.D.C. 2008). Beyond that, the Reauthorization left the law "virtually unchanged." *Id.*

B. The Kinston Referendum

Kinston is a city in Lenoir County, North Carolina. Lenoir County is a covered jurisdiction subject to the provisions of Section 5 of the Voting Rights Act. JA 6-7. In November of 2008, voters in Kinston considered and passed a referendum that would have amended the city's charter to change local elections for mayor and city council from a partisan system to a nonpartisan system. JA 153. Under the partisan system, candidates had to either win a party primary or gather the requisite number of signatures to appear as an independent candidate on the ballot. *Id.* Kinston submitted the proposed change to the Attorney General for review under Section 5. The Attorney General objected to the change because it found that the city did not sustain its burden of proving that the proposed changes would not have a retrogressive effect on African Americans in Kinston. JA 42. First, the Attorney General noted that the city of Kinston is 62.6% African American. *Id.* The Attorney General noted the limited success that black voters had in recent municipal elections in electing candidates of choice, and recognized that what successes black voters did have came from a small number of crossover votes from white Democrats. JA 43. The Attorney General pointed out that a "majority of white Democrats support white Republicans over black Democrats in Kinston city

elections," but that the partisan nature of elections does result in "enough white cross-over to allow the black community to elect a candidate of choice." *Id.* Significantly, the Attorney General found that there was a high degree of racial polarization in city elections, and stated "[w]ithout party loyalty available to counter-balance the consistent trend of racial bloc voting, blacks will face greater difficulty winning general elections." *Id.* On November 16, 2009, the Kinston City Council voted not to seek judicial preclearance or administrative reconsideration of that objection. JA 38.

C. The District Court's Decision Below

On April 7, 2010, Plaintiffs filed a complaint alleging that Section 5 was facially unconstitutional because it exceeded Congress' enforcement authority under the 15th Amendment and that Section 5 was unconstitutional as applied by the Attorney General when he objected to the change proposed by the Kinston referendum. JA 3-15. The Defendant Attorney General and Defendant-Intervenors moved to dismiss the action for lack of standing and lack of a cause of action. JA 16-17, 58-59. The District Court below granted the Motions to Dismiss of the Defendants and the Defendant-Intervenors on December 16, 2010. JA 152.

In its Memorandum Opinion in support of the dismissal, issued on December 20, 2010, the District Court explained that Plaintiffs challenge to the constitutionality of Section 5 must be dismissed either for lack of standing or lack

of a valid cause of action. JA 171. On the standing issue, the District Court found that Plaintiffs did not establish the injury in fact required for Article III standing as proponents of the Kinston referendum. JA 172. The District Court further found that Plaintiffs' claim of candidate standing was flawed on several levels, JA 180, and that Plaintiffs claim of voter standing swept "too broadly." JA 193. The District Court found that Plaintiffs did meet the causation requirement for Article III standing, but did not meet the redressability requirement. JA 195. Because none of its members established standing in their own right, the District Court found no associational standing for Plaintiff Kinston Citizens for Non-Partisan Voting. JA 198.

Additionally, the District Court found that Plaintiffs' claims had to be dismissed because they constituted an impermissible challenge to the Attorney General's exercise of discretion under Section 5 and such claims are not judicially cognizable. JA 198. Plaintiffs, by necessity, premised their constitutional claims on the injuries that they allegedly suffered as a result of the Attorney General's refusal to preclear the Kinston referendum, but the court was without jurisdiction to consider individual injuries, and thus the constitutional claims, arising from the Attorney General's exercise of his discretion. JA 201-02. Accordingly, the District Court ordered the case dismissed for lack of a cause of action.

SUMMARY OF ARGUMENT

Plaintiffs' case suffers from two fatal flaws warranting dismissal: Plaintiffs lack standing to bring this challenge and there is no cause of action for these Plaintiffs to challenge the constitutionality of Section 5 of the Voting Rights Act. Plaintiffs sought to demonstrate standing through a number of avenues, but none of these approaches established the kind of particularized, imminent injury, capable of redress by a favorable decision, that is required by black-letter law. In finding that Plaintiffs' lacked the requisite standing, the District Court followed the example of the United States Supreme Court when it declared that its "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). Here, Plaintiffs asked the District Court to strike down one of the most important civil rights laws ever enacted by Congress. Surely if any situation called for an "especially rigorous" standing inquiry, this situation qualifies.

Moreover, Plaintiffs have tried to run circles around the fact that they are not the parties authorized to bring this claim. Plaintiffs initially brought a facial and as-applied challenge. Apparently now recognizing that well-established case law, *Morris v. Gressette*, 432 U.S. 491 (1977) and its progeny, precludes an as-applied challenge brought by private citizens, Plaintiffs, in argument on the motions,

seemed to abandon the as-applied challenge. JA 159-60. The reality is, though, that Plaintiffs are alleging injury (and thus standing) based on how the Act applies in this instance. If the Attorney General had not applied Section 5 to object to the Kinston non-partisan election referendum, the Plaintiffs clearly would have suffered none of the alleged injuries. Plaintiffs' attempt to characterize their challenge as a solely facial one is merely an attempt to avoid clear prohibition of exactly the kind of review they seek. The invalidation of Section 5 of the Voting Rights Act would be devastating to the ability of racial and language minority groups to participate meaningfully in the electoral process, and such a drastic result cannot be effectuated through the kind of gamesmanship demonstrated by Plaintiffs in this case. This challenge—a challenge to the constitutionality of Section 5—is a challenge that can be brought, but only by the proper party. These Plaintiffs are not the proper party.

ARGUMENT

I. STANDARD OF REVIEW

A dismissal under Rule 12(b)(6) for failure to state a claim is reviewed *de novo* and this Court applies the same principles that the District Court did. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1039-40. (D.C. Cir. 2003). When reviewing a motion to dismiss, the court accepts as true all factual allegations contained in the complaint and draws inferences in favor of the nonmoving party.

Ctr. For Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1556 (D.C. Cir. 2005). However, the court is not required to accept inferences unsupported by facts or legal conclusions that are framed as factual allegations. *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citation and quotation omitted). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable," however, to conclusions of law. *Id*. Here, even accepting all of Plaintiffs' allegations as true, the Complaint must be dismissed because Section 5 applies to governmental bodies and political subdivisions, not individuals. It is well established that the Act does not provide a private right of action in these circumstances.

II. PLAINTIFFS DO NOT HAVE STANDING BECAUSE THEY FAILED TO ESTABLISH INJURY IN FACT AS CANDIDATES, REFERENDUM PROPONENTS, OR VOTERS.

Although they attempted to do so through a variety of paths, Plaintiffs failed to establish particularized injury in fact sufficient to establish Article III standing. Article III standing requires an "injury that is (i) concrete, particularized, and

actual or imminent, (ii) fairly traceable to the challenged action, and (iii) redressable by a favorable ruling. *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). In its decision, the District Court correctly found that Plaintiffs had failed to allege a particularized injury sufficient to convey Article III standing as candidates, as referendum supporters, or as voters.

A. Plaintiffs Nix and Northrup Did Not Sufficiently Allege Injury in Fact as Potential Candidates and Thus Do Not Have Standing to Challenge the Constitutionality of Section 5

Plaintiffs Nix and Northrup failed to prove that they suffered an imminent, particularized injury to a judicially cognizable interest as a result of the existence of Section 5 of the Voting Rights Act. In their complaint, Plaintiffs alleged injuries that were too speculative to withstand the "especially" rigorous standing inquiry required when a court is asked to hold unconstitutional an act of Congress. *Raines v. Byrd*, 521 U.S. at 819-20. Moreover, these injuries stemmed from the candidates' personal choice of one means of ballot access over another—and self-inflicted injury does not satisfy an exacting standing inquiry. *McConnell v. FEC*, 540 U.S. 93 (2003).

The soundness of the District Court's judgment on the imminence issue has been proven by the turn of events in this case. The District Court rightfully found Plaintiffs' claim of candidate standing flawed because of the lack of imminence and the speculative nature of the alleged injuries. Alleged Article III injuries must

be imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The District Court was unconvinced that bare assertions in the complaint that Plaintiffs Nix and Northrup intended to run for Kinston City Council in November of 2011, unsupported by any details of preparations for such campaigning, satisfied the imminence requirement. JA 180. Imminence of harm is necessary so that the courts' resources are not wasted adjudicating cases in which parties lack a continuing interest. *Friends of Earth v. Laidlaw*, 528 U.S. 167, 191-92 (2000). Plaintiffs' brief illustrates precisely why the District Court was prudent in making the finding that it did. In a footnote, Plaintiffs reveal that one of the two candidates upon which Plaintiffs were pinning their claim of standing—Klay Northrup—has decided to end his candidacy due to "increased family and work obligations." Br. for App. 10 n. 1. Asserting an intention to run for office in the remote future is simply too vague to ensure that the court's time will not be wasted entertaining issues surrounding hypothetical happenings. Plaintiffs' proposed standard—"[s]o long as prospective first-time candidates allege in good faith," Br. for App. 32—is simply too speculative, too vague, untenable and would unduly burden the judiciary.

Plaintiffs dismiss the District Court's observation that there is no case in which "a court has ever found standing based on alleged injury to a prospective candidate who avows that he intends to run for political office at some point in the

future, but has never before held office, is not then the party nominee, and has not—at least at the time of the complaint—taken any preparations whatsoever in support of his candidacy" by claiming that this lack of precedent is adequately balanced by the fact that the District Court did not identify any case denying standing under those circumstances. JA 183; Br. for App. 33. The burden is on the Plaintiffs to demonstrate that they have standing, *Lujan*, 504 U.S. at 562, not on the court to disprove Plaintiffs' standing. Here, without sufficient allegations of imminent harm, the Plaintiffs have failed to carry that burden.

Furthermore, the District Court was correct in finding *McConnell* directly on point when assessing whether the injuries claimed by Plaintiffs were to "legally protected interest[s]," as required for Article III standing. *Lujan*, 504 U.S. at 561. In *McConnell*, the Supreme Court rejected the contention that plaintiffs were injured in competing in their race by having to choose between the advantages of the increased hard-money limits allowed by the Bipartisan Campaign Reform Act (BCRA) and their own personal desires to eschew such large contributions. 540 U.S. at 228. In perfect analogy, Plaintiff Nix's alleged injuries stem from his personal choice. Plaintiffs' attempt to distinguish *McConnell* as dealing with a benefit, rather than a burden, is inaccurate. Br. for App. 28. The identification of potential donors and the solicitation of large sums of money from them certainly require a burdensome outlay of time and resources before any potential benefits

can be realized. This is no different than the requirement of signature collection in Plaintiff Nix's case. Plaintiff Nix believes that being identified as a Republican will harm his chances of winning election, but he is choosing to avoid the path that would lead to independent ballot presence and alleged competitive advantage. *Id.* at 20.

Plaintiffs' argument that post-complaint evidence of imminence can correct failings in the complaint is unconvincing and a misleading characterization of legal precedent. The United States Supreme Court has clearly stated that standing is determined "when the complaint is filed." *Lujan*, 504 U.S. 571 n. 4. Plaintiffs mischaracterize the case cited by the District Court in support of this proposition—*National Law Party of U.S. v. FEC*, 111 F. Supp. 2d 33 (D.D.C. 2003). Br. for App. 36. In *National Law Party*, the court clearly states that "in 1998, at the time the complaint was filed, which is the point at which standing is determined, there was more than a speculative possibility that these injuries would recur." 111 F. Supp. 2d at 44-45. It is clear that a court must consider standing issues, including imminence, at the time the complaint is filed.

In their brief, Plaintiffs try to deflect from the legally-sound conclusion that they lack standing by raising irrelevant issues. Whether or not Plaintiff Nix would have standing to challenge North Carolina's ballot access requirements is not the issue in this case. The footnote from *Storer v. Brown*, 415 U.S. 724, 739 n. 9

(1974), relied upon by Plaintiffs, clearly indicates that the candidates in question have standing to challenge the signature requirements because the candidates' names would not appear on the ballot without meeting this requirement. Br. for. App. 19. Here, Plaintiff Nix has another easy route to getting his name on the ballot that does not require collecting any signatures. He may participate in the partisan primary. First, having a choice between what is unquestionably non-burdensome ballot access requirements for independent candidates, *Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding a more restrictive ballot access scheme than the one currently in place in North Carolina) or participation in a partisan primary does not create the kind of imposition that gave way to "ample standing" in the *Storer* footnote cited by Plaintiffs. Br. for App. 19. There, the specific candidates who had "ample standing" were members of a party, the Communist Party, which did not qualify for ballot recognition. Thus, those candidates had no choice but to run as independents. *Storer*, 415 U.S. at 728, 739 n. 9. Second, given Nix's *choice* between a partisan primary and a non-burdensome signature requirement, the facts as alleged here simply do not constitute an injury.

B. Plaintiffs Did Not Sufficiently Allege Injury in Fact as Proponents of the Non-partisan Election Referendum and Thus Do Not Have Standing to Challenge the Constitutionality of Section 5

Plaintiffs could not identify one valid federal circuit decision holding that a citizen supporter of a referendum has standing to sue if that citizen's support for

that referendum is somehow nullified. More significantly, Plaintiffs could not credibly counter recent Supreme Court observations that expressed doubt about whether standing could exist in such a circumstance. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997). The District Court correctly found that Plaintiffs did not have standing as proponents of the Kinston non-partisan election referendum. JA 179.

Plaintiffs incredibly assert that the 1974 holding in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), which relied upon a 1939 Supreme Court case, *Coleman v. Miller*, 307 U.S. 433 (1939), somehow trumps subsequent Supreme Court narrowing of the *Coleman* decision in *Raines v. Byrd*, 521 U.S. 811, 821-824 (1997). In its Memorandum Opinion, the District Court noted that even this Court has questioned the extent to which *Kennedy* survives *Raines*. *See* JA 175, *citing Chenoweth v. Clinton*, 181 F.3d 112, 116-17 (D.C. Cir. 1999). Plaintiffs disregard the distinction between the standing of citizens and the standing of legislators and completely dismiss the "grave doubts" expressed by the United States Supreme Court in *Arizonans*, 520 U.S. at 65, about whether proponents of an initiative have standing to sue where their efforts have been nullified. There, the Court noted the "quasi-legislative" interest that proponents would have in defending the law they supported, but stated that no law appoints proponents "as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives

made law of the State." *Id.* Furthermore, Plaintiffs dismiss as inapplicable other cases cited by the District Court where initiative proponents were found not to have standing because those cases did not address legislative standing precedent. Br. for App. 55 n. 4. Instead, Plaintiffs assert that *Kennedy*, decided nearly 25 years prior to *Arizonans* and which discusses the standing of legislators, not referendum proponents, should control. In short, referendum proponents do not have standing to challenge a federal statute that pre-empts their referendum from becoming law by virtue of the fact that they simply supported the referendum.

C. Plaintiffs Did Not Sufficiently Allege Injury In Fact as Voters and Thus Do Not Have Standing to Challenge the Constitutionality of Section 5

The injury that Plaintiffs allege that they suffered as voters in Kinston is so broad that it is, in essence, an injury suffered by every voter who lives in a Section 5 covered jurisdiction. This would amount to millions of voters in the sixteen states covered in whole or part by Section 5 of the Voting Rights Act having Article III standing sufficient to bring a facial challenge to the constitutionality of the Act. This theory of standing is impermissibly broad. This "'generalized grievance' shared in substantially equal measure by all or a large class of citizens" is precisely the kind of harm that the United States Supreme Court has said fails to establish Article III standing. *Warth v. Sedin*, 422 U.S. 490, 499 (1975) (internal citation omitted). Accordingly, the District Court rightfully found that Plaintiffs

failed to establish that the injuries they allegedly suffered as voters sufficiently conveyed upon them Article III standing. JA 193-94.

Cases in which courts find that a voter has suffered an Article III injury because of a harm to the voter's preferred candidate are ones in which the voter's preferred candidate has been either definitively or effectively excluded from the ballot or the voter's preferred candidate has, in some way, been pejoratively or harmfully presented to the voting public. *See Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998) (noting that a voter would have standing where the voter's preferred candidate is "prevented from appearing on a ballot altogether"); *Miller v. Moore*, 169 F.3d 1119,1123 (8th Cir. 1999) (finding voter standing where the preferred candidate is tagged with a pejorative ballot label); *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988) (finding voter standing where the preferred candidate is not "fairly presented to the voting public").

The partisan election scheme currently in place in Kinston provides two distinct and non-burdensome ways in which candidates can have their names placed on the ballot—thus, Plaintiffs cannot credibly allege that their preferred candidates are being unfairly excluded from the ballot. The idea that the label "Republican" is pejorative in nature is not convincing, and neither is the implication that having a partisan election somehow presents candidates unfairly to the voting public. Given all of this, the District Court was correct in recognizing

that the injury as voters that Plaintiffs espoused in their complaint was nothing more than a generalized, non-particularized harm insufficient to establish Article III standing.

III. PLAINTIFFS FAILED TO DEFINITIVELY MEET THE REDRESSABILITY REQUIREMENT FOR ARTICLE III STANDING

Plaintiffs failed to prove that were the court to facially invalidate Section 5, such a favorable ruling would "resurrect" the Kinston referendum and redress their alleged injuries. Therefore they have not met the burden required of them of proving redressability. JA 197. Section 5 of the Voting Rights Act was enacted to enforce the 14th and 15th Amendments. The United States Supreme Court has repeatedly upheld the constitutionality of the law. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Moterey Cnty.*, 525 U.S. 266 (1999). The idea that a state law that is barred from implementation as contrary to federal law would be instantly revived if the Supreme Court were to reverse its position on the constitutionality of the Voting Rights Act is far from clear and raises significant practical problems. For example, were the United States Supreme Court to decide to overturn its own precedent establishing that the liberty interests expressly contained and the privacy interests impliedly contained in the federal Constitution protects citizens from laws criminalizing sodomy,

Lawrence v. Texas, 539 U.S. 558 (2003), and early-term abortion, *Roe v. Wade*, 410 U.S. 113 (1973), it would be absurd to assume that every law that a state once had that criminalized abortion or sodomy would be instantly back in place. Certainly, such a ruling from the Court would free states to re-enact such laws, but there would be no precedent for enforcement of those laws absent re-enactment. Action taken by the Attorney General under Section 5 and repeatedly recognized as constitutional by the Supreme Court is not comparable to the line-item veto exercised by the President in *Clinton v. City of New York*, 524 U.S. 417 (1998), or the House of Representatives' veto of the Attorney General's suspension of a deportation in *INS v. Chadha*, 462 U.S. 919 (1983). These cases involved novel issues relating to separation of powers, not well-established federal law designed to effectuate the 14th and 15th Amendments. Thus, it highly questionable whether the Kinston referendum would be instantly revived if a court invalidated Section 5, and therefore Plaintiffs' have failed to establish redressability.

IV. PLAINTIFFS DO NOT HAVE A CAUSE OF ACTION TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 5

The District Court correctly held that Plaintiffs cannot challenge the constitutionality of Section 5 without seeking review of the Attorney General's exercise of discretion to deny preclearance. JA 200-201. First, the court below noted that Plaintiffs appeared to disavow their as-applied challenge to the act, despite numerous contradictory statements in their complaint. JA 160. During the

motions hearing, the Government emphasized that the language in Plaintiffs' complaint very clearly raised an as-applied challenge to Section 5, and that the complaint clearly indicated that the Attorney General's application of Section 5 caused harm to the Plaintiffs. JA133-134. Plaintiffs apparently recognized that an as-applied challenge to Section 5 was barred by *Morris* and its progeny, but they also recognized that without a disguised as-applied challenge, they would have no colorable claim to injury and thus establish standing. In its opinion, the District Court commented that "defendant's counsel aptly described plaintiffs' attempt to reformulate their challenges to Section 5, remarking that 'the target moves.'" JA 161. Thus, the District Court noted, this was a situation where Plaintiffs "necessarily premised their two broad constitutional challenges to Section 5 on the personal injuries that they allegedly suffered as a result of the Attorney General's refusal to preclear Kinston's proposed change to nonpartisan elections." JA 201. The court below clearly recognized that such constitutional claims, where the alleged injury arises from the Attorney General's application of Section 5, are precisely those kinds of claims that courts have refused to consider under the *Morris* line of cases.

As the District Court recognized, *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694 (D.D.C. 1983), is directly on point. JA 204. The court in that case recognized that the personal constitutional claims brought by two county

officials were essentially challenging the decision of the Attorney General to interpose an objection to an at-large election method, and that the court could not "sit in judgment here upon whether the Attorney General's refusal to preclear violated rights asserted by plaintiffs." 555 F. Supp. at 706.

Plaintiffs continue to mischaracterize the type and extent of review being precluded in this case. Plaintiffs rely on *Webster v. Doe*, 486 U.S. 592 (1988), and *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987), for the proposition that Congress is only able to immunize federal law from constitutional review through explicit court-stripping provisions. In *Webster*, the question was whether the law at issue—a statute that precluded review of the Central Intelligence Agency's employment termination decisions, 486 U.S. at 594—should be construed to "deny *any* judicial forum for a colorable constitutional claim." Id. at 603 (emphasis added). Likewise, in *Bartlett*, the court found problematic only instances where Congress might attempt to preclude "*altogether* judicial review of constitutional claims." 816 F.2d at 699 (emphasis added). These cases are clearly not representative of or comparable to the situation present here.

In contrast, Section 5 of the Voting Rights Act *does not* preclude judicial review or constitutional challenge. In fact, a facial challenge to the constitutionality of Section 5 is currently pending in the United States District Court for the District of Columbia: *Shelby Cnty. v. Holder*, No. 1:10-cv-00651

(D.D.C.). In that case, none of the defendants has denied that the jurisdiction, Shelby County, has a cause of action to bring that claim. Furthermore, the constitutionality of Section 5 has been directly challenged, and judicially reviewed, numerous times during its existence. *See South Carolina v. Katzenbach*; *Georgia v. United States*; *City of Rome v. United States*; *Lopez v. Monterey Cnty.*. In each instance, the reviewing court upheld the constitutionality of the Act. The statutory scheme in question clearly does not preclude judicial review. Rather, it limits such review to challenges brought by the proper party—the covered jurisdiction that is regulated by the law.[1]

The statutory structure of Section 5 of the Voting Rights Act does not preclude judicial review—it simply requires it to be brought by the proper party. The "traditional constitutional litigation," discussed in *Morris*, 432 U.S. at 507, and *City of Rome v. United States* (*Rome I),* 450 F. Supp. 378, 381 (D.D.C. 1978), available to private plaintiffs, was not, as indicated by Plaintiffs, for cases where

[1] Private citizens do have a right of action to seek injunctive relief against further enforcement of proposed changes in covered jurisdictions that have not been submitted for preclearance, pending the State's submission of the legislation pursuant to § 5. *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969). These Section 5 enforcement actions are not the same as declaratory judgment actions brought in the DC District Court under Section 5 by covered jurisdictions. Cases brought by covered jurisdictions in the DC District Court involve substantive questions relating to preclearance, *i.e.* whether the voting change is free of discriminatory purpose or retrogressive effect. Section 5 enforcement actions decide only the questions of whether the proposed change is a change within the meaning of Section 5 and whether it has been precleared. *Id.* at 555 n. 19.

Congress had exceeded its lawful authority. Br. for. App., 52. Such "traditional constitutional litigation" was available when the jurisdiction enacting a voting change had violated the personal, constitutional rights of such plaintiffs—that is, plaintiffs could bring a vote dilution case regarding the change under Section 2 and the 14th and 15th Amendments. Regardless, there can be, and indeed has been, judicial review of the constitutionality of Section 5 of the Voting Rights Act—such challenges simply must be brought by a jurisdiction that is regulated by the law.

In the end, Plaintiffs erroneously pin their hopes for success on a distinguishable Supreme Court case, *Clinton v. City of New York.* In *Clinton*:

(1) The taxpayer plaintiffs incurred an immediate and direct financial injury because of the President's exercise of the line-item veto, and their injury did not turn on the independent actions of third parties. 524 U.S. at 431. In this case, Plaintiffs injuries are vague, non-particularized, and most directly caused by the city of Kinston's decision not to seek preclearance in the D.C. District Court.

(2) Moreover, the Court in *Clinton* made clear that it was not convinced that line-item cancellations were even exercises of the President's discretionary, and thus unreviewable, spending authority. *Id.* at 443-444. In the present case, the statutory language of Section 5 and a wealth of case law indicate that the decision of the Attorney General to object to proposed changes can

be superseded only in a *de novo* action brought in the United States District Court for the District of Columbia and brought by the covered jurisdiction.

CONCLUSION

For all of the foregoing reasons, Intervenors-Appellees respectfully request that this Court affirm the judgment below.

This, the 7th day of March, 2011.

Respectfully submitted,

/s/ J. Gerald Hebert

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because it contains 6,070 words, as counted using the word-count function on Microsoft Word 2007 software.

This, the 7th day of March, 2011.

/s/ J. Gerald Hebert
J. Gerald Hebert
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CERTIFICATE OF SERVICE

I hereby certify that, on this, the 7th day of March, 2011, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/EMF system, and I also will file eight paper copies of the foregoing document, by first-class mail, within 2 business days of the electronic filing, with the clerk of this Court.

I further certify that, on this, the 7th day of March, I caused the foregoing document to be served by electronic mail upon the following counsel for Appellants and Appellees, at their designated electronic mail addresses:

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This, the 7th day of March.

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