IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN LAROQUE, ANTHONY CUOMO, JOHN NIX, KLAY NORTHRUP, LEE RAYNOR, and KINSTON CITIZENS FOR NON-PARTISAN VOTING,	)	
Plaintiffs,	)	Civil Action No. 1:10-0561 (JDB)
v.	)	
ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES,	)	
Defendant.	)	

ATTORNEY GENERAL'S REPLY
TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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The Defendant Attorney General of the United States ("Attorney General") respectfully submits his reply to the Plaintiffs' Opposition to the Attorney General's Motion to Dismiss.

I. INTRODUCTION

The Plaintiffs oppose the Attorney General's Motion to Dismiss for lack of standing with strong measures of derision, invective, and vilification. Harsh rhetoric alone, however, cannot change the basic facts of this case and the fatal limitations of the Plaintiffs' claims. Nor can it change the fact that, since the Voting Rights Act became law in 1965, there are no cases in which private plaintiffs alone have been permitted to challenge Section 5's constitutionality or the Attorney General's exercise of Section 5 discretion. Plaintiffs cite no such case because none exists. This case exemplifies why. The Plaintiffs cannot demonstrate they have Article III standing as they have not shown the requisite injury, causation, or redressability. The failure to show any one of these three elements is fatal. Nor can Plaintiffs cite a case establishing their prudential standing to bring claims that, in fact, belong to the City of Kinston and not to a select few of its citizens. Finally, the crux of Plaintiffs' case repeatedly attacks the Attorney General's exercise of discretion under Section 5 of the Voting Rights Act ("Section 5"), 42 U.S.C. § 1973c, and the allegedly unconstitutional results flowing from it. Plaintiffs' failure to distinguish the authority prohibiting review of the Attorney General's decision, however, is fatal and requires this Court to dismiss for lack of jurisdiction. Accordingly, the Attorney General's Motion to Dismiss should be granted.

II. ARGUMENT

A. Plaintiffs Cannot Establish Injury Sufficient for Article III Standing.

1. Plaintiffs as Potential Future Candidates Fail To Allege Sufficiently Concrete or Imminent Harm.

Plaintiffs argue that the mere intent to run for Kinston City Council in November 2011 establishes the concreteness and imminence of their alleged injuries as candidates. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss ("Opp'n") at 11-12 (Doc. No. 12, filed July 1, 2010). Yet the cases upon which they rely, including authority binding on this Court, establish beyond doubt that a declared intent to engage in future conduct – without more – fails to establish requisite injury in fact.

Each of the cases upon which the Plaintiffs rely establishes that, for an injury to be sufficiently concrete and imminent, plaintiffs must establish facts – including past acts or behavior – that contextualize the alleged harm and establish its palpability. For instance, in *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003), the court found sufficient injury where a former elephant handler sought to visit elephants whose mistreatment by the circus was the basis for his alleged injury. *Id.* at 333-36. The plaintiff established the concreteness of his claim with evidence of an extended history of past visits as the elephant's caretaker, and his "personal attachment" to them. *Id.* In contrast, the speculative allegation claimed here, Opp'n at 5, 10-12, is nothing more than a bare, inchoate intent to run for office 19 months in the future. Compl. ¶¶ 3-4.

Likewise, *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379 (4th Cir. 2001), illuminates "concreteness" and "imminence" principles, and demonstrates the failure of Plaintiffs' claim. There, an advocacy group – with an established history of public advocacy – challenged the constitutionality of a regulation that affected its future advocacy efforts and

subjected it to criminal prosecution. The court found standing based on several factors, including that 1) the group "concretely described" its plans to engage in the prohibited activity in multiple places, to buy radio advertisements, and to conduct other advertising activities across a broad geographic area; and 2) the group planned to "continue to spend money to communicate with the general public as it ha[d] in the past." *Id.* Like in *Ringling Brothers*, the plaintiff's manifold prior actions conferred concreteness to the future injury alleged.

Similarly in *ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177 (11th Cir. 2009), the court found standing where a father challenged the removal of a book from his son's school library. The father had previously seen the book, intended to borrow it, and read it with his son. The court found standing based on plaintiff's prior knowledge of and intentions for the book, the short six-week period until his intent could come to fruition, and his inability to check out the book because the school was closed. These factors supported the father's avowed intent to act after school resumed, and thus sufficed to establish imminence and concreteness. *See also Equal Access Educ. v. Merten*, 305 F. Supp.2d 585, 591-96 (E.D. Va. 2004) (finding standing where the plaintiff as an "illegal alien" was already part of an injured class, and his future intent to apply for admission at two Virginia post-secondary schools was bolstered by previous applications to other Virginia colleges, and a sufficient explanation as to why he had not yet applied – he missed two key deadlines).

Plaintiffs also cite *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), a voting case addressing claims that voters were prevented from effectively registering and voting in an election that was to be held on a specific date 14 months after the complaint was filed. The Plaintiffs' narrow focus on the mere timing of the future event is misplaced. First, as

the court recognized, the possibility of injury actually began when voters registered, an event closer in time to the complaint than the future election 14-months hence. *Id.* at 1163-64. More importantly, the court specifically stated that the "odds of an injury occurring . . . d[id] not depend on conjecture about how individuals will intentionally act in the future," but rather on the probability of an injury occurring in light of the number of possible victims and rate of harm (20,000 members with at least a one percent harm rate). *Id.* Based on the facts alleged, the court found that the probability of even one person being harmed was very high.

In short, Plaintiffs' authority demonstrates that to establish concreteness and imminence, more is required than the mere expression of an intent to act in the future. As noted, though – and in fatal contrast to the cases they cite – Plaintiffs here allege no concrete facts at all. If nothing more were required to establish actual injury, then the constitutional requirement of standing would have no meaning. More is required: a past or present act or other indicia demonstrating the likelihood that Plaintiffs will act commensurately in the future and suffer harm from that act. While Plaintiffs protest that it is too early in the political process to establish facts to lend concreteness to the harms alleged, that argument concedes that the Plaintiffs' alleged injuries are not in fact imminent.

2. Plaintiffs as Voters Fail To Allege Sufficiently Direct Harm To Establish Article III Standing.

Plaintiffs as voters allege that partisan elections impose "additional burdens and costs on candidates they support in running for, and being elected to, the relevant local offices[.]" Opp'n at 12. These hand-me-down harms, however, derive solely from hypothetical harm borne by the hypothetical candidates the Plaintiffs may support in the future. Such "derivative" harm alone

does not establish Article III standing. *See Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001) ("Several other Circuit Courts have also concluded that a voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate."); *Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000) (holding that voters suffer uncognizable derivative harm when they "remain fully able to advocate for [a] candidate and to cast their votes in his favor," even where the preferred candidate "has less chance of being elected" (citing *Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998))). Plaintiffs as voters can freely support any candidate of choice, including non-partisan candidates. Accordingly, as alleged, their harms are derivative and do not establish injury in fact.

Plaintiffs cite several cases to support their derivative injury argument. None are apt. *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988), *Erum v. Cayetano*, 881 F.2d 689, 690-91 (9th Cir. 1989), and *Duke v. Cleland*, 5 F.3d 1399, 1401 (11th Cir. 1993), for instance, are particularly unhelpful in that each involved situations where the alleged harm arose from ballot exclusion practices. Plaintiffs here, of course, make no claim that preferred candidates have been or will be stricken from the ballot.[1]

Plaintiffs reliance on *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999), is similarly misplaced. Opp'n at 13. There, the court found that registered voters had standing to challenge

[1] Plaintiffs also rely on *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006). In *Benkiser*, however, the plaintiff was a political party that had invested money and time in a particular candidate who was running for office such that the harm alleged was a "direct" and "economic" harm. *Id.* at 586. The political party also had associational standing on behalf of its candidate. *Id.* at 587-88. Like their reliance on the above cases, the Plaintiffs' reliance on *Benkiser* is misplaced.

pejorative ballot labels attached to their preferred candidates' names. *Id.* at 1123. The court noted that a voter has standing to challenge a "state law regulating elections when that law . . . dilute[s] the effect of his vote if his chosen candidate [is] not [depicted] fairly." *Id.* The unfair distortion of the political process of an actual pejorative ballot label in *Moore* is a far cry from the amorphous injuries derived by Plaintiffs here. *Cf. Becker v. FEC*, 230 F.3d at 390 (describing the finding in *Gottlieb* as denying standing where a voter's preferred candidate has been treated unfairly and the voter experiences only derivative harm).

Plaintiffs cite *Duke* to argue that a partisan system violates freedom of association. Opp'n at 13. *Duke*, however, is inapposite. In *Duke*, voters alleged their party's exclusion of an unsavory candidate from their party's ballot denied them, as party members, association rights. 5 F.3d at 1403. Here, however, a partisan election denies Plaintiffs nothing. They may choose to associate politically or not with whomever they please, within or without a political party.

Plaintiffs fail to distinguish *Gottlieb*, *Becker*, and *McConnell*, three cases decisively unfavorable to their standing claims. Plaintiffs argue that the *Gottlieb* court denied plaintiff's standing because it was based on a series of hypothetical occurrences. That is of course true, but it is equally true the harms alleged here are as hypothetical as those found wanting in *Gottlieb*. How and to what degree Plaintiffs' votes for their preferred candidates will operate in the future, which candidates will in fact run and what parties, platforms, or policies they will advance – indeed, whether Plaintiffs will in fact vote at all – are hypothetical questions for which, based on this record, there are conjectural answers only.[2] The *Gottlieb* court not only focused on the

[2] Plaintiffs contend that the Attorney General's asserted use of *Gottlieb* would create a rule "that allegations of past or future injury to candidates are *inherently* speculative," and claims

conjecture, but also on the fact that the harm alleged was derivative and did "not impede the voters from supporting the candidate of their choice." *Gottlieb,* 143 F.3d at 622; *see also id.* ("The cases recognizing a link between harm to candidates and a derivative harm to voters also require that the voters have themselves suffered a concrete and personalized injury. Such injury arises when the candidate is prevented from appearing on a ballot altogether . . . .").

Moreover, while Plaintiffs concede that *Becker* is on point, they dismiss it first as dicta, then as simply wrong. Opp'n at 14 n.1. It is not dicta; the *Becker* court properly and necessarily addressed each argument seeking to establish plaintiffs' standing and the court's own jurisdiction. Yet, even assuming that *Becker*'s holding is dicta, its reasoning is compelling, adheres to *Gottlieb*'s analysis of derivative harm, *see* 230 F.3d at 390, and has been relied upon by several courts for the very principles at issue here, *see, e.g.*, *Berg v. Obama*, 586 F.3d 234, 239-40 (3rd Cir. 2009); *Crist v. Comm'n on Presidential Debates*, 262 F.3d at 195; *Hollander v. McCain*, 566 F. Supp.2d 63, 68-70 (D.N.H. 2008). *Becker* is persuasive authority directly on point.

Plaintiffs contend *Becker* was "wrong" because the court characterized the interest there as one in casting a ballot and not the interest in the plaintiffs' preferred candidate's victory. Opp'n at 14 n.1. They are incorrect. The *Becker* court specifically noted the plaintiffs' alleged harm (like that alleged here) was that "their preferred candidate now has less chance of being elected." 230 F.3d at 390. Plaintiffs' mischaracterization of *Becker*'s holding cannot spare them

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the Attorney General's reading is an erroneously overbroad interpretation." This "erroneously overbroad" interpretation of *Gottlieb*, however is created out of whole cloth by Plaintiffs. The Attorney General asserts only the unremarkable position that allegations of future injuries to candidates resulting in amorphous and derivative harms to voters are speculative as to injuries alleged by voters. Such derivative voter harms do not establish injury in fact as to the voters.

the brunt of its force or that of other cases in harmony with it. S*ee, e.g.*, *Berg*, 586 F.3d at 240; *see also McCain*, 566 F. Supp.2d at 68-69 ("[V]oters have no standing to complain about the participation of an ineligible candidate in an election even if it results in the siphoning of votes away from an eligible candidate they prefer," because "competitive standing" only applies to candidates and political parties and has "never been extended to *voters* challenging the eligibility of a particular candidate" (citing *Gottlieb*, 143 F.3d at 622)).

Next, Plaintiffs scramble to escape the grip of *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. FEC*, 130 S. Ct. 876 (2010). They argue that the injury there was an "unequal ability to participate in the election process based on their economic status," and that the Court's later discussion of "competitive injury" showed that such injuries could not be "categorically noncognizable." Opp'n at 15. They are incorrect. While *McConnell* did recognize that the alleged injury was based on the voters' "unequal ability to participate in the election process based on their economic status," it also characterized the injury as a denial of the "right to an equally meaningful vote . . . ." 540 U.S. at 226. Thus, the voters in *McConnell*, like the Plaintiffs here, sought standing based on harm to a candidate that resulted in a solely derivative "competitive injury" to the voters. Accordingly, the Court found no standing.[3]

Plaintiffs as voters have claimed only a derivative harm. They, like all Kinston voters, may support any candidate or cause fully. Accordingly, they do not have constitutional standing.

[3] The Plaintiffs contend that *McConnell*'s later discussion on "competitive injury" shows that it can *sometimes* be cognizable. Opp'n at 15. This argument is irrelevant. The Attorney General does not assert that "competitive injury" can *never* be cognizable; rather, case law demonstrates that such injuries are not cognizable when, like here, the harm alleged is solely a derivative harm suffered by a candidate's supporters. Also, the language relied upon by Plaintiffs does not shed any light, because that portion of the opinion addresses harms claimed by candidates and not derivative harms claimed by candidates' supporters – the voters. *Id.* at 227.

3. Plaintiffs Fail To Allege Sufficient Harm as Referendum Proponents To Establish Article III Standing.

Plaintiffs claim their alleged harms as referendum proponents suffice to establish Article III standing. They contend that cases concerning legislative standing "bind" this Court to hold that voters who supported a nullified voter referendum have constitutional standing. Opp'n at 17. They are incorrect for several reasons.

First, *Coleman v. Miller*, 307 U.S. 433 (1939), and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), upon which Plaintiffs primarily rely, address the singular issue of nullification of a legislator's vote. Those cases, which found standing, are not in any way concerned with, nor do they speak to, alleged nullification of a citizen's votes.

Second, the Supreme Court and the D.C. Circuit have made clear that *Coleman*'s holding was narrow, and that *Kennedy* retains little if any vitality in light of the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997). In *Raines*, the Supreme Court stated:

> It is obvious, then, that our holding in *Coleman* stands (*at most*, see n.8, *infra*) for the proposition that legislators *whose votes would have been sufficient to defeat (or enact) a specific legislative Act* have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

Id. at 822-23 (emphasis added). Thus, not only are *Coleman* and *Kennedy* specifically confined to legislator votes, standing depends entirely on whether the allegedly nullified votes would have sufficed to defeat or enact the legislation. In other words, the plaintiffs' votes must be decisive to confer standing. Thus, to the extent that the legislator nullification cases are remotely applicable to referendum nullification cases, Plaintiffs here have not alleged that their individual votes

sufficed to ensure passage of the referendum at issue. This of course should end the matter.[4]

Yet, Plaintiffs ask this Court to simultaneously ignore *Raines* and find that a citizen referendum is analogous to legislative action, based on Y*niguez v. Arizona*, 939 F.2d 727, 731-33 (9th Cir. 1991), *rev'd on other grounds by Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Opp'n at 18-19. Plaintiffs decline to note, however, that *Yniguez* relied on *Coleman* for its holding, and was decided before *Raines*'s dramatic curtailment of *Coleman*'s scope.

Plaintiffs nonetheless urge this Court to follow *Kennedy,* despite its doubtful relevance, and despite the Supreme Court's "grave doubts" as to whether referendum proponents can ever qualify as "Article-III-qualified defenders of the measures they advocated." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997). They argue that the Supreme Court's concerns in *Arizonans for Official English* were based merely on a lack of state authorization for the initiative sponsors to bring suit, as opposed to *Kennedy*, where standing existed for legislative vote nullification regardless of statutory authorization. Opp'n at 19-20. The Plaintiffs grasp at straws. First, it bears repeating that *Kennedy* – to the extent it even survives – does not control here. Second, the Supreme Court's admonition in *Arizonans for Official English* that referendum supporters are not likely ever to have Article III standing was not based on the plaintiffs' lack of state authority to bring the suit. Lack of authority was mentioned only to distinguish a case cited

[4] The Plaintiffs nonetheless cite *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), to argue that *Kennedy* survived *Raines*. This argument misleads. *Chenoweth*, in fact, casts grave doubt on *Kennedy*. *Id.* at 116-17; s*ee also Campbell v. Clinton*, 203 F.3d 19, 24 n.6 (D.C. Cir. 2000) ("*Chenoweth* did not hold . . . that *Kennedy* . . . survived *Raines* . . . . We only suggested tentatively that *Kennedy* may remain good law . . . as a peculiar application of the narrow rule announced in *Coleman*. Indeed, Judge Tatel understandably read our opinion to essentially overrule[] the theory of legislative standing recognized in *Kennedy*." (quotation marks and citations omitted)).

by plaintiffs there. The Supreme Court's overall concern for referendum proponent standing was not dependent of the state authority issue. 520 U.S. at 65.

Finally, contrary to Plaintiffs' assertion that *Nolles v. State Comm. for the Reorganization of Sch. Dists.* focused only on whether ballot referendum proponents had been denied "legally operative" effect of their referendum, the court there also focused on the generalized and non-particularized nature of the harm alleged. *See* 524 F.3d 892, 899-900 (8th Cir. 2008). As in *Nolles*, Plaintiffs here, as initiative proponents, are "attempting to bring a generalized grievance shared in common by all the voters" in Kinston who voted for the referendum. *Id.* They "have not asserted a personalized injury," and thus lack standing. *Id.*

4. Plaintiffs' Generalized Harms Are Too Vague and Impersonal To Establish Article III Standing.

Plaintiffs point to several passages in their Complaint to show they have standing to bring their unequal treatment claim. These passages, however, clearly demonstrate a failure to allege that white voters have been discriminated against or that Plaintiffs have personally been treated unequally. Opp'n at 21-22. Plaintiffs' allegations, even when viewed in the light most favorable to them, merely assert harm to the Plaintiffs "and every citizen's interest in proper application of the Constitution and laws, and seek[s] relief that no more directly and tangibly benefits [them] than it does the public at large." *Lance v. Coffman*, 549 U.S. 437, 439 (2007). None of the allegations suggest that white voters are treated unequally or are harmed at all, let alone harmed *personally. See United States v. Hays*, 515 U.S. 737, 743-44 (1995).

First, contrary to Plaintiffs' implied assertion, it does not follow that because Section 5 prevents diminishment of minority effectiveness, it necessarily causes diminishment of majority

effectiveness. There are countless situations where Section 5 could operate to bar harm to minority voters while not harming majority voters. For example, a polling place moved from the center of a black community that is accessible by public transportation to another location farther away and inaccessible to those without cars may cause retrogression to affected black citizens but not affect white citizens in any way whatsoever. Newton's Third Law of Motion does not apply to Section 5; in other words, the prevention of harm to minority voters does not necessarily create an equal but opposite harm to white voters, as this case makes clear. Indeed, Plaintiffs allege that black and white voters supported the Kinston referendum equally and thus bear Section 5's alleged burdens equally. Compl. ¶¶ 2, 15, 23.

Plaintiffs' reliance on *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993) is misplaced. Opp'n at 22. There, the Court focused not on whether the injury was *personal*, but rather whether the plaintiffs had to show an inability to obtain a benefit when minority business owners were given preferential treatment. 508 U.S. at 658, 666. The Court found standing because "[t]he 'injury in fact' in an equal protection case of *this variety* is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* at 666 (emphasis added). Plaintiffs there alleged a harm that was particular to them since they belonged to an identifiable group separate and apart from the general population, unlike here, where the Plaintiffs have alleged a harm that equally applies to all residents of covered jurisdictions. Additionally, the mandatory set aside necessarily resulted in majority contractors' lost chances to bid on some contracts altogether, creating a barrier. Section 5, on the other hand does not necessarily create such a "win-lose" situation.

Besides failing to allege unequal treatment of voters by race in general, Plaintiffs'

Complaint also fails to explain how these Plaintiffs have *personally* been subjected to racial classification or unequal treatment. Plaintiffs attempt to distinguish *Hays* by noting that the *Hays* plaintiffs did not reside in the challenged district while the Plaintiffs here are Kinston voters. Opp'n at 23. Plaintiffs miss the point. Although they live in Kinston, they are not *personally* affected because the administration of Section 5 has not treated them personally unequally. Similarly, the *Hays* plaintiffs were not *personally* harmed because they did not experience the alleged unequal treatment. 515 U.S. at 743-44 (finding injury resulting from governmental action, even if racially discriminatory, "accords a basis for standing only to those persons who are *personally* denied equal treatment by the challenged discriminatory conduct"). Plaintiffs allege that a majority of black voters supported the referendum, Complaint ¶¶ 2-3, 5, 7-8, 15, and therefore, it follows that a majority of black voters suffered precisely the same harm as white voters who supported the referendum. As such, Plaintiffs concede they have suffered no harm from a racial classification. Indeed, they have not alleged unequal treatment in any way, let alone a personal way, and thus have not established standing for their unequal treatment claim.

B. Plaintiffs Fail To Show Sufficient Causation To Establish Standing.

Plaintiffs mischaracterize the Attorney General's position on causation. They assert that the Attorney General's theory is "that a plaintiff lacks standing to challenge an injury directly caused by federal action simply because an independent third party could have eliminated that injury after the fact[.]" Opp'n at 24-25, 27. The Attorney General's actual position, however, is that there is no causation when a *regulated* independent third party not before the court is the *object of government action*, and where injury to others is contingent upon or the result of that third party's *unfettered* past and possible future choices.

The Supreme Court in *Lujan v. Defenders of Wildlife* explained why causation is so much more difficult to establish in those circumstances:

> In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.

504 U.S. 555, 560 (1992). Therefore, "Art. III [] requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

Plaintiffs present several cases and hypothetical situations designed to oppose a position the Attorney General has never taken. Having built the straw man, the Plaintiffs knock him down. And while the Plaintiffs labor to undermine a nonexistent issue in this case, they do nothing to explain why the logic and import of *Lujan* is not fully applicable here.[5] Plaintiffs fail to address the unpredictable "unfettered choices" of the *regulated* third party not before the court who is the specific object of the government regulations.

Additionally, Plaintiffs' proposition ignores completely the uniqueness of Section 5's statutory scheme. Under Section 5, the *regulated* jurisdiction has many "unfettered choices," including the choice of submitting to the Attorney General or this Court in the first instance, and the innumerable choices of how to meet the burden of showing that voting changes are not

[5] Although it is unnecessary to distinguish these cases cited by Plaintiffs, since they were cited to oppose a position the Attorney General has not taken, it should be noted that none of the four cases cited by the Plaintiffs discuss the issue of "unfettered choices" made by regulated third parties not before the court.

discriminatory. Those choices include how to present such a submission, what evidence to gather, and how much time and energy to put into such a submission, in addition to the option to ask the Attorney General to reconsider denials of preclearance at any time, *see* 28 C.F.R. § 51.45, and the option to file a declaratory judgment action in this Court, seeking judicial preclearance *de novo*, after an objection, *see* 42 U.S.C. § 1973c(a).

Here, Kinston had and still has choices that break any causal chain of injury. Kinston chose to submit the voting change to the Attorney General rather than this Court. Kinston chose what evidence to present to the Attorney General. Kinston chose to not pursue reconsideration of the Attorney General's objection. Kinston chose to not seek this Court's *de novo* review after the objection. Importantly, Kinston may, at any time now or in the future ask the Attorney General to reconsider or ask this Court to engage in *de novo* review. These still on-going choices showcase the unpredictability of linking causation directly to Section 5 or the Attorney General.

Plaintiffs' assertion that it would be futile for Kinston to submit the voting change to this Court, Opp'n at 27, oddly fails to note that Section 5 permits *de novo* review in this Court of voting changes to which the Attorney General has objected. This Court has in the past granted preclearance to changes which had been previously objected to by the Attorney General.[6] Proceedings in this Court are emphatically not futile.[7]

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[6] *See, e.g.*, *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995).

[7] Plaintiffs also fail to refute that Kinston may at any time ask the Attorney General to reconsider his determination. The Attorney General has withdrawn objections based on just such reconsideration requests on a number of occasions. A decision to withdraw an objection has been based on, among other things, new or additional evidence presented by the jurisdiction. *See* 28 C.F.R. §§ 51.45 & 51.48. Clearly this avenue is not futile.

Finally, Plaintiffs incorrectly apply *McConnell* to the facts here. Kinston's partisan system, rather than limiting Plaintiffs' choices, instead provides them multiple choices, including their preferred choice of political non-affiliation. This *personal* choice fits squarely within *McConnell*'s framework.[8] 540 U.S. at 228. The Plaintiffs' framing of *Shays v. FEC*, 414 F.3d 76, 88-90, 92-94 (D.C. Cir. 2005) to undercut the Attorney General's valid application of *McConnell* is not persuasive. This situation is not one where Plaintiffs' alternative choice is prohibited by law as in *Shays*, or where Plaintiffs' choices have been limited; indeed, Plaintiffs may opt to engage in either unaffiliated politics or partisan politics, both legal and constitutional alternatives. Plaintiffs assert a "competitive injury" because they prefer one valid election scheme over another. Such preference to avoid this "competitive injury" breaks the causation chain. Plaintiffs have thus failed to establish necessary causation.

C. Plaintiffs Fail To Show Sufficient Redressability To Establish Standing.

Plaintiffs contend the relief they seek—the invalidation of Section 5 on its face and as applied to the nonpartisan election system—will redress their alleged injury and that this requested relief will irrefutably satisfy the redressability element under Article III by allowing the implementation of a nonpartisan election system. In support, Plaintiffs cite North Carolina statutes regarding initiative petitions for charter amendments, N.C. Gen. Stat. § 160A-104, and municipal officers [duties] to carry out plan[s], N.C. Gen. Stat. § 160A-108, and speculate that without the constraints of Section 5, the Kinston City Council would necessarily implement the

[8] The Plaintiffs' analogy comparing the Attorney General's argument regarding Plaintiffs' personal choice for nonpartisan elections to endorsing separate but equal schools warrants no discussion other than to say it is preposterous. In *Brown*, the system itself was unconstitutional. There is no argument here that partisan elections are inherently unconstitutional.

nonpartisan election system.

Although Plaintiffs state that North Carolina state law "unambiguously" would require the implementation of nonpartisan elections in Kinston if Section 5 were invalidated, they offer no precedent with respect to any North Carolina statute, rule, or North Carolina Attorney General opinion, nor any other case or statute nationwide that contemplates, subsequent to the striking down of Section 5, the status or validity of any voting changes that were previously enacted but subsequently objected to under Section 5 – a wholly unique and novel legal issue. It is a situation that has understandably never occurred in North Carolina or anywhere else in the United States. A local ordinance was passed and essentially struck down by the Attorney General's objection. How or if this ordinance would then be resurrected and implemented, even if Section 5 were struck down, is in considerable question. The Attorney General asserts that there is no way to determine from this record what election system would be employed in the absence of Section 5, how long it would exist – especially given Kinston's apparent acceptance of the Attorney General's determination that Kinston failed to prove the proposed change is non-discriminatory – and how Plaintiffs and other voters and candidates would act within this system or any future alternative systems.

Plaintiffs' reliance on *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988), for their claim that Kinston would provide redress in a non-Section 5 environment by automatically implementing nonpartisan elections is misplaced. Opp'n at 30. In *Riley*, the Court was not discussing state enforcement of a statute that was in question, let alone a statute that had previously been struck down under Section 5. 487 U.S. at 795. There is simply no way to predict on this record what the Kinston City Council would do with a voting change found to

violate Section 5, if Section 5 were subsequently struck down. Plaintiffs cannot show redressability.

D. Plaintiffs Fail To Rebut the Attorney General's Prudential Standing Argument.

Even if Plaintiffs could show the injury, causation, and redressability necessary to establish Article III standing, this Court should dismiss their claims because the prudential standing doctrine bars them from asserting a third party's rights. Plaintiffs cite no authority casting doubt on the general rule against invoking third-party standing or suggesting that any of the doctrine's narrow exceptions apply.

The prudential standing doctrine requires that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The doctrine "'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,' and it assures the court that the issues before it will be concrete and sharply presented." *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (citation and footnote omitted).

Here, Kinston, and not the Plaintiffs, has the right to challenge Section 5 because Kinston is subject to Section 5's statutory requirements. *See* 42 U.S.C. § 1973c. Kinston, not the Plaintiffs, is required to preclear proposed voting changes with the Attorney General or this Court. *Id.* Kinston, not the Plaintiffs, is entitled to seek to "overturn" the Attorney General's decision not to preclear its proposed electoral change. *See* 28 C.F.R. § 51.45(a). And thus it is Kinston, and not the Plaintiffs, who has suffered any purported harm. Indeed, Plaintiffs cite no case where private plaintiffs alone have ever brought a stand-alone challenge to Section 5. They

cannot. The only such case of which the Attorney General is aware was dismissed by this Court for lack of standing. *Giles v. Ashcroft*, 193 F. Supp. 2d 258 (D.D.C. 2002). Every other challenge to Section 5 has been brought by a jurisdiction covered by Section 5. *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Nw. Austin Mun. Utility Dist. No. One v. Mukasey*, 573 F. Supp.2d 221 (D.D.C. 2008) (three-judge court), *rev'd and remanded on other grounds*, 129 S. Ct. 2504 (2009).

Kinston declined to challenge the Attorney General's objection to its proposed electoral change. It could have sought administrative reconsideration of that objection, *see* 28 C.F.R. § 51.45(a), or a *de novo* review in this Court, *see* 42 U.S.C. § 1973c(a). It voted to not pursue either course. Thus, Kinston's interest in not challenging the Attorney General's objection is directly opposed to Plaintiffs' interest in mounting that challenge. Plaintiffs may not invoke the standing rights of a third party where their interests conflict with those of the third party. *See Clifton Terrace Assoc., Ltd. v. United Techs. Corp.*, 929 F.2d 714, 721 (D.C. Cir. 1991).

Plaintiffs cite federalism and separation of powers cases to obviate the authority establishing their lack of prudential standing. Yet none of those cases undermines the general rule against asserting third-party rights. In *New York v. United States*, 505 U.S. 144 (1992), New York successfully challenged the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LRWPA"). LRWPA imposed sanctions on states that failed to dispose of radioactive waste within a certain time frame. *Id.* at 152-54. New York faced those sanctions and subsequently filed its constitutional suit. *Id.* at 154.

New York does not discuss prudential standing. New York, facing harsh sanctions

imposed by LRWPA, clearly had standing to challenge it. Plaintiffs' observation that the balance between the United States and the several states seeks to protect the rights of individuals is beside the point. The narrow issue here is whether Plaintiffs, isolated from the statutory requirements of Section 5, may invoke the jurisdictional rights of a covered jurisdiction to challenge Section 5's constitutionality. *New York* is silent on that issue.[9]

Plaintiffs cite *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), for the proposition that private citizens have standing to constitutionally challenge federal statutes that exceed Congress's powers. However, neither *Morrison* nor *Lopez* has any bearing on Plaintiffs' standing here. In *Morrison*, a young woman sued two men who sexually assaulted her under the civil liability provision of the Violence Against Women Act ("VAWA"). *Morrison*, 529 U.S. at 604. The men argued that VAWA's civil liability statute was unconstitutional. *Id.* However, defendants' standing rights were never in question because of their status as *defendants*. Their constitutional challenge was a defense to liability where jurisdiction had already been properly invoked, not an affirmative attack on the statute as plaintiffs.

Lopez is similar. Congress enacted the Gun-Free School Zones Act of 1990 which criminalized possession of firearms near a school zone. *Lopez*, 514 U.S. at 551. Lopez was convicted under the statute but overturned his conviction by successfully arguing the statute was unconstitutional. *Id.* at 551-52. Lopez was among the intended targets of the statute and his

[9] Plaintiffs claim *New York* stands for the proposition that a targeted jurisdiction may not bar review of a statute by consenting to its impact. That argument is factually inapposite here. "Consent" in New York constituted the support of various state officials for the initial, congressional passage of LRWPA. *Id.* at 180-81. "Consent" of that sort is present nowhere in the instant case.

standing to challenge the statute's constitutionality was never questioned.

Neither *Morrison* nor *Lopez* addresses prudential standing. Indeed, neither case involves third parties. Unlike Section 5, the statutes in *Morrison* and *Lopez* affect individuals, rather than governments. Naturally, individuals facing prosecution under specific statutes may challenge their constitutionality. Here, conversely, Section 5 targets state and local jurisdictions, not individuals. Thus, Plaintiffs are forced to invoke the standing rights of the jurisdiction affected by Section 5. If *Morrison* and *Lopez* have any relevance to the issue of standing –and neither opinion mentions it – it is only the uncontested principle that private citizens sued personally under a federal statute may challenge the constitutionality of that statute as a defense to prosecution.

Plaintiffs also attempt to analogize their standing rights to the rights of parties in a set of separation of powers cases. As a preliminary matter, this analogy sheds little light on the prudential standing question in this case. The cited cases deal with the allocation of power between the legislative and executive branches. The allocation of powers between two coordinate branches of government presents unique issues – balance of power, a branch's independent ability to increase its own power, and institutional roles, *see generally Morrison v. Olson*, 487 U.S. 654, 693-96 (1988) – not present here.

Additionally, the cases cited fail to support the Plaintiffs' jurisdictional rights and their argument that they are not barred from bringing suit by Kinston's decision not to pursue review of the Attorney General's objection. Plaintiffs here are far more distant from the effects of Section 5 than the plaintiffs in those cases cited. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, No. 08-861, Slip. Op. at 5-6 (U.S. June 28, 2010) (plaintiff received a critical

report and formal investigation from the Public Company Accounting Oversight Board); *Morrison v. Olson*, 487 U.S. at 668 (plaintiffs received subpoenas from a grand jury convened by the Independent Counsel). In both cases, the plaintiffs were able to challenge the authority of the government bodies that directly injured them. Here, Kinston, not Plaintiffs, has been primarily touched by Section 5.

Contrary to the Plaintiffs' claims, the Attorney General's prudential standing arguments have no "evil" consequences and merely reflect the fact that courts are mindful of their jurisdiction to decide constitutional cases of great national significance. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) ("The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake."). The collusion Plaintiffs envision between the federal and state governments to defeat citizen-initiated referenda is speculation not grounded in fact. Ultimately, Kinston residents may use their political power to change the composition of a City Council with which they disagree. However, it is the city of Kinston that is subject to Section 5's requirements and it is the city of Kinston that may challenge Section 5's constitutionality. Because Plaintiffs present no exception to the general rule against asserting a third-party's standing rights, their constitutional challenge should be dismissed.

As none of the individual Plaintiffs have standing, either constitutional or prudential, the Association, Kinston Citizens for Non-Partisan Voting does not have standing. *See GrassRoots Recycling Network, Inc. v. EPA*, 429 F.3d 1109, 1111 (D.C. Cir. 2005)

E. The Plaintiffs Complaint Targets the Result of the Attorney General's Decision under Section 5.

Despite binding Supreme Court authority to the contrary, Plaintiffs argue they can challenge as unconstitutional the Attorney General's denial of preclearance to the voting change submitted by the City of Kinston. Plaintiffs misapprehend Section 5's structure and, most importantly, Supreme Court authority interpreting that structure.

First, while conceding "the text of Section 5 does not create a statutory cause of action for private individuals to seek review of the Attorney General's statutory decisions applying the Section 5 preclearance standard," the Plaintiffs posit that Section 5 nonetheless does "not purport to confer blanket immunity" on the Attorney General from an "implied cause of action … that private individuals possess to seek redress from the unconstitutional enforcement of federal law by federal officials." Opp'n at 37. In fact, within the confines of this case and the Plaintiffs' Complaint, that is precisely what Section 5 confers, what Congress intended, and what the courts have resoundingly found.

It is important to understand the essence of the Plaintiffs' claims. They base their action upon the perceived harm flowing from the Attorney General's objection to the voting change submitted by Kinston. Specifically, as alleged, the asserted harms are linked to and flow from the Attorney General's decision not to preclear the voting change submitted by Kinston. The Plaintiffs claim their "efforts, as well as the benefits they would have derived from nonpartisan elections as voters and candidates, have been completely nullified *because the Attorney General denied preclearance under Section 5*." Compl. ¶ 1 (emphasis added). They reason that "[b]ut for Section 5's presumptive invalidation of the change to nonpartisan elections and *the Attorney General's refusal to eliminate that barrier by preclearing the change*, Kinston would now have such nonpartisan elections." Compl. ¶ 27 (emphasis added). Accordingly, they seek a

declaration that the Attorney General's "specific *refusal to permit Kinston's change* to nonpartisan elections" is unconstitutional, Compl. at 12 (emphasis added).

The Plaintiffs' claims, therefore, arise from the Attorney General's "refusal" to preclear the voting change they support. This Court has no jurisdiction to hear those claims. Congress foreclosed all judicial review of the Attorney General's exercise of Section 5 discretion, *Morris v. Gressette*, 432 U.S. 491, 501-07 & n.24 (1977), including any alleged unconstitutional effects flowing from his exercise of discretion, *County Council of Sumter County v. United States*, 555 F. Supp. 694, 706-07 (D.D.C. 1983).

The Plaintiffs' attempts to evade *Morris* and its progeny are unavailing. While they apparently concede that *Morris* precludes a challenge to the Attorney General's *granting* of preclearance, they inexplicably do not concede its application to the *denial* of preclearance. In so doing, they misread *Morris* and the compelling authority it generated. *See Morris*, 432 U.S. 491, 501-07 & n.24 ("Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act" under Section 5).

Moreover, and significantly, they virtually ignore *County Council of Sumter County*, a case in many respects uncannily similar to this one. The facts bear brief repetition. Plaintiffs sought a declaratory judgment in this Court seeking judicial preclearance of a voting change that, as here, was occasioned by a voter referendum. As here, the Attorney General had previously objected to that voting change (which proposed to change the county's method of electing members to the county council from single-member districts to at-large voting). As here, plaintiffs alleged, among other things, that the Attorney General's prior objection to the change to at-large elections "impaired their constitutional right to vote and the similar right of all other

citizens who voted in the 1978 referendum for the at-large system, and effectively denied their rights to vote" under their preferred election system. *Id.* at 706.

This Court, however, declined to address "whether the Attorney General's refusal to preclear violated rights asserted by plaintiffs." *Id.* at 706-07. Thus, this Court has made clear that plaintiffs – including covered jurisdictions and others with standing – do not state a cause of action by seeking to challenge "the effect on them of [the Attorney General's] refusal to grant Section 5 preclearance." *Id.* at 706-07 (citation omitted).

Plaintiffs with requisite standing may seek to challenge Congressional acts. However, when as here, a plaintiff challenges the Attorney General's discretionary review under Section 5 – and specifically and repeatedly decries the alleged unconstitutional results flowing from it – this Court is not empowered to hear that claim. The very essence of the Plaintiffs' case is their oft-repeated incantation that the Attorney General's exercise of Section 5 discretion resulted in constitutional violations.[10] Thus, even if Plaintiffs have standing, their Complaint seeks redress for the effects flowing from the Attorney General's exercise of Section 5 discretion. As such, Plaintiffs' Complaint should be dismissed.

III. CONCLUSION

For the reasons stated in the Memorandum Supporting the Motion to Dismiss and those stated above, the United States respectfully requests that this Court dismiss Plaintiffs' complaint with prejudice for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

[10] And while the Plaintiffs also allege that Section 5 is not appropriate legislation, that bare recitation is essentially unsupported. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," however, do not suffice to state a cause of action, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
District of Columbia

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/ Richard Dellheim
T. CHRISTIAN HERREN, JR.
RICHARD DELLHEIM (lead counsel)
ERNEST A. MCFARLAND
JARED M. SLADE
JUSTIN WEINSTEIN-TULL
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(ph) 202-305-1734 / (fax) 202-307-3961

Attorneys for Defendant
Attorney General Eric H. Holder, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, I served a true and correct copy of the foregoing via the Court's ECF system, to the following counsel of record:

Michael A. Carvin
D.C. Bar No. 366784
Noel J. Francisco
D.C. Bar No. 464752
Hashim M. Mooppan
D.C. Bar No. 981758
David J. Strandness
D.C. Bar No. 987194
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

Michael E. Rosman
D.C. Bar No. 454002
Michelle A. Scott
D.C. Bar No. 489097
Center for Individual Rights
1233 20th Street, N.W., Suite 300
Washington, D.C. 20036

/s/ Richard Dellheim
RICHARD DELLHEIM
Attorney, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(ph) 202-305-1734 / (fax) 202-307-3961