IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN LAROQUE 2312 Hodges Road Kinston, N.C. 28504, ANTHONY CUOMO 802 Westminster Lane Kinston, N.C. 28501, JOHN NIX 3003 Hillman Road Kinston, N.C. 28504, KLAY NORTHRUP 3016 Johnson Street Kinston, N.C. 28504, LEE RAYNOR 710 Rountree Kinston, N.C. 28501, and KINSTON CITIZENS FOR NON-PARTISAN VOTING 2312 Hodges Road Kinston, N.C. 28504, Plaintiffs, v. ERIC H. HOLDER, JR. ATTORNEY GENERAL OF THE UNITED STATES U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001, Defendant.	Civ. No.: **APPLICATION FOR** **THREE-JUDGE COURT**

Plaintiffs, in their contemporaneously filed complaint, seek declaratory and injunctive relief challenging the constitutionality of Section 5 of the Voting Rights Act of 1965, as amended in 2006 (hereinafter "Section 5"). Complaint ¶¶ 1-7, 11-37. Pursuant to 28 U.S.C. §§ 291(b), 2284 and 42 U.S.C. § 1973c(a), as well as this Court's Local Rule 9.1, Plaintiffs hereby apply for a three-judge court to adjudicate this action. In support of this application, Plaintiffs respectfully submit the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

1. Plaintiffs are voters, prospective candidates, and proponents of citizen referenda in the city of Kinston, North Carolina. Complaint ¶¶ 1-7. In 2006, Congress renewed Section 5, thereby requiring that Kinston, as well as other previously covered jurisdictions, continue to obtain preclearance before making any changes in voting practices or procedures. *Id.* ¶¶ 11-12, 21-23. In 2008, Plaintiffs successfully sponsored and voted for a referendum that would have amended the Kinston city charter to change from partisan to nonpartisan local elections, but the Attorney General subsequently denied Section 5 preclearance. *Id.* ¶¶ 2-8, 14-19. Consequently, Plaintiffs' efforts in support of the referendum, as well as the benefits they would have derived from nonpartisan elections as candidates and voters in such elections, have been completely nullified due to Section 5's preclearance requirement. *Id.* ¶¶ 2-7, 27-31. In this action, Plaintiffs seek redress for that injury, alleging that Congress' decision in 2006 to subject Kinston to coverage under Section 5 was unconstitutional. *Id.* ¶¶ 32-37.

2. Plaintiffs' action challenging the constitutionality of Kinston's coverage under

Section 5 must, pursuant to Section 5 itself, be heard by a three-judge court. In prior cases raising such constitutional challenges to Section 5, it has been undisputed that a three-judge court was properly convened and a direct appeal to the Supreme Court was properly taken. *See, e.g.*, *Nw. Austin Municipal Utility Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2510-11 (2009); *City of Rome v. United States*, 446 U.S. 156, 159, 162 (1980). As the Supreme Court squarely held in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1968), "Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges." *Id.* at 563. Specifically, Congress expressly provided that "[a]ny action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C. § 1973c(a). And in *Allen*, the Supreme Court ruled that Section 5's three-judge-court provision is not narrowly limited to the declaratory judgment action for preclearance explicitly created "under" Section 5, but extends more generally to actions presenting "disputes involving the coverage of § 5," including suits by private citizens or the Attorney General. *See* 393 U.S. at 561-63. The Court's reasoning was as follows:

> In drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge. The clash between federal and state power and the potential disruption to state government are apparent. *There is no less a clash and potential for disruption when the disagreement concerns whether a state enactment is subject to § 5*.

Id. at 562 (emphases added); *see also NAACP v. New York*, 413 U.S. 345, 354-55 (1973) (observing that the three-judge-court and direct-appeal provisions in the Voting Rights Act

reflect "Congress' concern about hastening the resolution of suits involving voting rights").

Plaintiffs' constitutional challenge to coverage under Section 5 presents the precise federalism issues that were central to the *Allen* Court's interpretation of Section 5's three-judge-court provision. In fact, Plaintiffs' contention that the federal government lacks the authority to preclude Kinston from switching to nonpartisan elections vividly illustrates the correctness of the *Allen* Court's conclusion that "[t]he clash between federal and state power and the potential disruption to state government" "is no less … when the disagreement concerns whether a state enactment is subject to § 5." 393 U.S. at 562. Indeed, unlike the state-law-specific disputes that are involved in Section 5 preclearance actions or in *Allen*-authorized private actions, this action raises the fundamental question whether *any* state law in *any* jurisdiction is properly covered under Section 5. Thus, it would have been absurd for Congress to require three-judge-court adjudication with mandatory Supreme Court appellate review for mere applications of Section 5, while leaving the single most important question concerning Section 5—its constitutional validity—in the hands of a single district judge with appeal to a court of appeals followed only by discretionary Supreme Court certiorari review.

3. In an abundance of caution, Plaintiffs alternatively request that this Court voluntarily convene as a three-judge court. It is well established that, in *any* case where it would serve "the public interest," this Court may voluntarily convene as a three-judge court with a circuit judge designated to sit on the panel pursuant to 28 U.S.C. § 291(b), in precisely the same manner as if a three-judge court were required to be convened under Section 5 and pursuant to the procedures set forth in 28 U.S.C. 2284(a). *See, e.g.*,

Cavanagh v. Brock, 577 F. Supp. 176, 180 n.3 (D.N.C. 1983) (three-judge court) (citing cases); *accord* 17A Wright et al., *Federal Practice & Procedure* § 4234, 189 n.2 (3d ed. 2007). And it undoubtedly serves "the public interest" to utilize this procedure if there is any doubt as to whether a three-judge court is statutorily required, *see, e.g.*, *Cavanagh*, 577 F. Supp. at 180 n.3, in order to obviate the risk that the judgment of "a single judge" will subsequently be held void because it "erroneously invaded the province of a three-judge court," *see Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715-16 (1962); *see also Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 100 & n.19 (1974).

CONCLUSION

For the foregoing reasons, Plaintiffs request that this action be adjudicated by a three-judge court.

April 7, 2010

Respectfully submitted,

/s/ Michael A. Carvin

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