No. 12-81

# In the Supreme Court of the United States

JOHN NIX, ET AL., PETITIONERS

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly dismissed this case as moot after the Attorney General withdrew the objection under Section 5 of the Voting Rights Act of 1965 (Section 5), 42 U.S.C. 1973c, that was the basis of petitioners' standing to challenge the constitutionality of Section 5.

2. Whether Congress acted within its authority to enforce the constitutional prohibition against discrimination in voting when it reauthorized Section 5 in 2006.

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## OPINIONS BELOW

The opinion of the court of appeals dismissing this case as moot (Pet. App. 1a-7a) is reported at 679 F.3d 905. The opinion of the district court (Pet. App. 8a-122a) is reported at 831 F. Supp. 2d 183. Previous opinions of the court of appeals (Pet. App. 123a-158a) and district court are reported at 650 F.3d 777 and 755 F. Supp. 2d 156, respectively.

## JURISDICTION

The judgment of the court of appeals was entered on May 18, 2012. The petition for a writ of certiorari was filed on July 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Congress enacted the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437, "to banish the

blight of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Section 5 of the VRA, which applies to the "areas where voting discrimination has been most flagrant," *id.* at 315, prohibits covered jurisdictions from adopting or implementing changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining either judicial preclearance from a three-judge district court in the District of Columbia, or administrative preclearance from the Attorney General, 42 U.S.C. 1973c(a). By its terms, Section 5 expires periodically unless reauthorized by Congress. Congress reauthorized Section 5 in 1970, 1975, and 1982, and this Court upheld the constitutionality of Section 5 after each of those reauthorizations. See *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *City of Rome* v. *United States*, 446 U.S. 156, 172-182 (1980); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999).

In 2006, Congress again reauthorized Section 5. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization), Pub. L. No. 109-246, § 2(b)(1)-(2), 120 Stat. 577. After holding extensive hearings to learn about ongoing voting discrimination in the country and whether there remained a need for Section 5 in covered jurisdictions in particular, Congress concluded: "The record compiled by Congress demonstrates that, without the continuation of the [VRA's] protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the

significant gains made by minorities in the last 40 years." § 2(b)(9), 120 Stat. 578.[1]

In addition to reauthorizing Section 5 for an additional 25 years, Congress also amended Section 5's substantive standard in two ways. The first amendment provides that an election change motivated by any racially discriminatory purpose may not be precleared regardless of whether the change is retrogressive. See 42 U.S.C. 1973c(a) and (c). That change supplanted this Court's statutory holding in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*), that changes motivated by discrimination, even though unconstitutional, were not a basis for denying preclearance if the intent was "discriminatory but nonretrogressive." *Id.* at 341. The second amendment provides that preclearance should be denied if an electoral change diminishes, on account of race, citizens' ability "to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). That change supplanted this Court's statutory holding in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), that a proposed redistricting plan was not retrogressive even though it reduced minority voters' ability to elect their candidates of choice because it created new districts in which minority voters could potentially influence the outcome of an election. *Id.* at 480-482.

2. Lenoir County, North Carolina, has been a covered jurisdiction subject to Section 5 since 1965. Pet. App. 452a; 30 Fed. Reg. 9897 (Aug. 7, 1965). The City of Kinston is a political subdivision of Lenoir County and is therefore also subject to Section 5. Pet. App. 2a, 18a-

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[1] For a more extensive discussion of the history of Section 5 and its reauthorization in 2006, see the United States' Brief in Opposition in *Shelby County* v. *Holder*, No. 12-96 (U.S.), filed the same day as this brief.

19a. In November 2008, Kinston voters adopted a referendum that, once implemented pursuant to state law, would change Kinston's municipal elections from partisan to nonpartisan (*i.e.*, candidates for municipal office would run without party affiliation and without competing in party primaries). *Id.* at 18a, 127a. Pursuant to Section 5, Kinston submitted the proposed voting change to the Attorney General for administrative preclearance. *Id.* at 19a, 453a.

In a letter dated August 17, 2009, the Attorney General interposed an objection to the proposed change because Kinston had failed to demonstrate that the change to nonpartisan elections would not have a retrogressive effect on the ability of black voters to elect their candidates of choice. Pet. App. 19a, 462a-466a. The objection letter explained that, although Kinston is a majority-black city by population, black voters had constituted a minority of the City's electorate in three of the last four elections and had "had limited success in electing candidates of choice during recent municipal elections" in Kinston. *Id.* at 463a. The success achieved resulted from black voters' cohesive support for minority candidates in the Democratic primaries, in which black voters were a larger share of the electorate, combined with the willingness of a small but consistent number of white Democratic voters to support the Democratic nominee in the general election, regardless of that candidate's race. *Id.* at 463a-464a. Because Kinston is a majority Democratic city, this resulted in the election of some candidates of choice of black voters. *Ibid.* Because of the high degree of racially polarized voting in Kinston, however, a majority of white Democrats supported white Republican candidates rather than black Democratic candidates in the general election. *Id.* at 464a-465a.

The limited amount of white crossover voting, which was necessary for black voters to elect their candidate of choice while they remained a minority of the electorate in the general election, was due largely to party loyalty and would be eviscerated by removing partisan identification on election ballots. *Ibid.* Thus, "while the motivating factor for this change may be partisan," the objection letter concluded, "the effect will be strictly racial." *Id.* at 465a.

3. a. In April 2010, petitioners filed this action challenging the constitutionality of Section 5, as reauthorized and amended in 2006.[2] Pet. App. 448a-460a. No covered jurisdiction (*e.g.*, Kinston, Lenoir County, or North Carolina) participated as a party in the litigation. *Id.* at 129a. In Count I of their complaint, petitioners asserted a facial constitutional challenge to Section 5, arguing that, in amending and reauthorizing Section 5 in 2006, Congress exceeded its authority under the Fourteenth and Fifteenth Amendments. See *id.* at 9a, 458a-459a. In Count II of their complaint, petitioners alleged that that the 2006 substantive amendments to Section 5 on their face violate the nondiscrimination guarantees of the Fifth, Fourteenth, and Fifteenth Amendments. See *id.* at 9a, 459a-460a.

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[2] The original plaintiffs in the case were (1) petitioner John Nix, a Kinston voter and prospective candidate for local office; (2) petitioner Anthony Cuomo, a Kinston voter and referendum supporter; (3) Stephen LaRoque, a former Kinston elected official who does not join the petition; (4) Klay Northrup, a Kinston voter who alleged that he intended to run for local office but ultimately opted not to and who does not join the petition; (5) Lee Raynor, who died during the pendency of the litigation; and (6) petitioner Kinston Citizens for Non-Partisan Voting, a private organization dedicated to eliminating partisan elections in Kinston.

On the Attorney General's motion, the district court dismissed petitioners' complaint on the ground that all of the plaintiffs lacked standing. The court determined that the individual plaintiffs had not alleged a cognizable injury and, in the alternative, that even if they had, their injuries were not redressable. Pet. App. 21a-22a, 132a-135a; *LaRoque* v. *Holder*, 755 F. Supp. 2d 156, 168-183 (D.D.C. 2010). The court also held that Kinston Citizens for Non-Partisan Voting (KCNV) lacked standing in its own right as a proponent of the referendum and lacked associational standing because none of its members had standing. *LaRoque*, 755 F. Supp. 2d at 169, 183.

b. The court of appeals reversed in part. Pet. App. 123a-158a. The court concluded that petitioner Nix had standing to challenge the constitutionality of Section 5 because he was a candidate for office intending to run unaffiliated in what would be a nonpartisan election in the absence of the Section 5 objection. *Id.* at 136a-152a. The court identified two injuries Nix allegedly suffered as a result of Section 5's preemption of the nonpartisan referendum: the partisan election system made access to the general-election ballot more costly and time-consuming, and the partisan system created a competitive disadvantage for unaffiliated candidates like Nix in the general election. *Id.* at 139a-143a. The court also held that Nix's alleged injuries were redressable in this action because a declaration that Section 5 is unconstitutional "would remove the federal barrier to the implementation of the nonpartisan referendum," *i.e.*, the Attorney General's objection. *Id.* at 147a-148a; see *id.* at 152a ("Because section 5 is preventing the Kinston city council from carrying out its state-law duty to implement the nonpartisan referendum, Nix has both standing and a cause of action to seek declaratory and injunc-

tive relief against the Attorney General—the Executive Branch official charged with enforcing section 5—on the grounds that the provision exceeds Congress's enumerated powers.").

c. On remand, the district court granted summary judgment to the Attorney General. Pet. App. 8a-118a. The court first noted that the bulk of petitioners' challenge to the 2006 reauthorization of Section 5 was foreclosed by the court's then-recent decision in *Shelby County* v. *Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), aff'd, 679 F.3d 848 (D.C. Cir. 2012), petition for cert. pending, No. 12-96 (filed July 20, 2012), which held that the reauthorization was a valid exercise of Congress's authority to enforce the Fourteenth and Fifteenth Amendments. Pet. App. 10a, 26a-27a. The court, however, understood petitioners to be arguing not only that the 2006 reauthorization of Section 5 was beyond Congress's enforcement authority, but also that the two substantive amendments enacted as part of the 2006 reauthorization, see p. 3, *supra*, were themselves beyond Congress's authority. See Pet. App. 26a-28a. With respect to that aspect of petitioners' claim, the court noted that the decision in *Shelby County*, as well as the decision of the three-judge court in *Northwest Austin Municipal Utility District Number One* v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008), rev'd on other grounds, 557 U.S. 193 (2009), had "implicitly" determined that the substantive amendments were "an integral part of" the 2006 reauthorization of Section 5, which "represented a congruent and proportional, or rational, response to the problem of discrimination in voting." Pet. App. 26a-27a. The court nevertheless opted not to "rely on its past implicit finding that" the 2006 substantive amendments were valid, instead considering anew "whether specific

evidence in the record before Congress justified the enactment" of those amendments. *Ibid.*

On the merits, the district court examined the legislative record before Congress in 2006 and concluded that Congress validly acted pursuant to its authority under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5, including the substantive amendments. Pet. App. 52a-96a. With respect to the amended purpose prong, the court noted that "Congress collected extensive evidence of purposefully discriminatory voting changes that could or clearly would go into effect in the absence of the amendment in subsection (c)." *Id.* at 61a. The court also acknowledged that Congress "heard testimony that leaving *Bossier II* intact would shift a great deal of voting rights litigation from Section 5 to Section 2, and that such a shift would be a practical disaster for minority voting rights." *Ibid.* Explaining that Section 5(c)'s prohibition of voting changes that are intentionally discriminatory forbids only conduct that constitutes an actual violation of the Constitution, the court found that Congress's enforcement powers were therefore at their broadest in adopting Section 5(c). *Id.* at 62a-63a. The court also upheld Section 5's burden-shifting mechanism, noting that this Court "has previously approved this burden-shifting procedure." *Id.* at 63a (citing *South Carolina*, 383 U.S. at 334-335).

The district court also addressed the amended retrogression prong as part of the court's analysis of the constitutionality of the 2006 reauthorization, noting that the 2006 record was "replete with evidence of intentionally discriminatory vote dilution, particularly in the districting context." Pet. App. 71a. The court also acknowledged that Congress heard consistent testimony that the *Ashcroft* standard "was impossibly challenging to

administer," *id.* at 75a, "might allow jurisdictions to substantially dilute minority voting strength under the guise of creating more influence districts," *id.* at 79a, and "too often subsumed the goals of minority voters in favor of the goals of individual legislators and their political parties," *id.* at 82a. Reiterating that the critical legal question was whether Sections 5(b) and 5(d) can "be understood as responsive to, or designed to prevent, unconstitutional behavior," *id.* at 88a (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1997)), the court concluded that the amendments are "precisely congruent to the problem" of "intentional vote dilution aimed at making minority votes less effective" and are a proportional response to that problem, *id.* at 91a-93a. The court also noted both that Sections 5(b) and (d) are temporally and geographically limited, and that they are relevant for only so long as racially polarized voting continues to persist in the covered jurisdictions. *Id.* at 93a-94a.[3]

4. While the decision was pending on appeal, events transpired that rendered the case moot. See Pet. App. 1a-7a.

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[3] In their petition for a writ of certiorari, petitioners do not argue that the 2006 substantive amendments themselves fall outside of Congress's enforcement powers. Instead, they argue, as explained below, that reauthorization of Section 5's preclearance regime and geographic coverage are beyond Congress's authority, and that the effect of the substantive amendments supports that general argument. See Pet. 16-27; see pp. 26-29, *infra*.

The district court also rejected petitioners' claim that the 2006 substantive amendments violate equal protection principles (Count II of their complaint). Pet. App. 96a-117a. Petitioners do not renew that claim in their petition for a writ of certiorari. Pet. 8 n.2.

a. On September 7, 2011 (while this case was pending in the district court), Lenoir County (in which Kinston is located) submitted a voting change to the Attorney General for administrative preclearance. See Pet. App. 467a. The proposed law would have changed the method of electing the County's school board members from partisan elections to nonpartisan elections. *Ibid.* The Attorney General determined that the County had not submitted sufficient data to permit a preclearance determination to be made and requested additional information pursuant to the regulations implementing Section 5. *Id.* at 468a. That information was submitted on December 12, 2011 (ten days before the district court's decision in this case), requiring the Attorney General to determine within 60 days, or by February 10, 2012, whether to preclear the change. *Ibid.*; see 28 C.F.R. 51.37(b)(3). The Attorney General notified Lenoir County on February 10, 2012, that he did not object to the change. Gov't C.A. Br. 14.

On January 30, 2012—11 days before a determination was due on the Lenoir County submission and 14 days before the government was due to file its brief as appellee in the court of appeals in this case—the Attorney General (acting through the Assistant Attorney General for the Civil Rights Division) notified Kinston that his review of the additional evidence submitted in connection with the proposed Lenoir County change had prompted him to reconsider his 2009 objection to Kinston's nonpartisan referendum. Pet. App. 467a-470a. The Attorney General explained that the newly presented evidence, which included evidence of voting behavior in the November 2011 election for the Kinston City Council, revealed that "there may 'have been a substantial change in operative fact' such that it is appropriate

to reconsider the August 17, 2009, objection concerning the City of Kinston." *Id.* at 468a (quoting 28 C.F.R. 51.46(a)). The Attorney General stated his intent to make a decision with respect to the reconsideration at the same time he made a determination on the Lenoir County Board of Education submission, *i.e.*, by February 10, 2012. *Id.* at 469a.

On February 10, 2012, the Attorney General notified the City of Kinston that he was withdrawing his 2009 objection to the nonpartisan referendum based on "a substantial change in operative fact[s]." Pet. App. 471a-475a. The Attorney General explained that the additional information submitted in late 2011 in connection with the Lenoir submission "indicate[d] a shift in the electoral pattern in Kinston elections" since the time of the 2009 Kinston objection. *Id.* at 473a. In particular, data from the 2010 Census indicated both "that the black share of the voting age population in Kinston has risen over the last decade from 58.8 to 65.0 percent" and that, "as of January 2012, the black share of registered voters in Kinston is now 65.4 percent." *Ibid.* The letter further explained that voter turnout data from the November 2011 municipal election showed that "black voters constituted a majority of the electorate" and "elected their candidates of choice to a majority of the seats on the Kinston City Council for the first time in modern times." *Ibid.* Based on the new data, the Attorney General concluded, "in light of the consistently high levels of black political cohesion in elections in the City of Kinston, the growing percentage of the voting-age population in Kinston that is black, and the demonstrated increase in the share of the actual electorate in Kinston that is black, that the black electorate is now large enough to successfully elect its preferred candidates in

either partisan or nonpartisan municipal elections in Kinston." *Id.* at 473a-474a. The Attorney General therefore concluded that "today, a change from" partisan to nonpartisan elections "in Kinston is not impermissibly retrogressive under Section 5." *Id.* at 474a. The Attorney General further noted that, although the reconsideration of the Kinston objection arose in the course of reviewing the Lenoir County change, his "analysis and determination regarding the Kinston voting change are based on the demographics of and electoral patterns in the City of Kinston in municipal (not county) elections." *Ibid.*

b. On February 10, 2012, the Attorney General informed the court of appeals that he had withdrawn the 2009 objection to Kinston's nonpartisan referendum, see Pet. App. 474a-475a, and on February 13, 2012, the Attorney General filed his brief as appellee, see *id.* at 3a. Before addressing the merits of petitioners' constitutional challenge, the Attorney General argued that the case was moot as a result of the withdrawal of the objection and urged the court to vacate the district court's order and dismiss the complaint. The following day (in response to the court of appeals' request that the parties submit motions "to govern future proceedings"), the Attorney General filed a motion to dismiss, reasserting his mootness arguments, and petitioners had the opportunity to respond to that motion. See *ibid.* (discussing supplemental briefing on mootness). The court of appeals canceled the previously scheduled oral argument and took the matter under advisement.

c. On May 18, 2012, the court of appeals issued a unanimous decision holding that the case is moot.[4] Pet. App. 1a-7a. Noting that "Article III limits our authority to actual ongoing controversies," the court concluded that the case had become moot because a decision on petitioners' constitutional challenge would "neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Id.* at 3a-4a (internal quotation marks and citations omitted). The court explained that the sole "injury on which [the court had] originally found standing—the extra burden a partisan system placed on Nix's chance to get elected—has effectively disappeared" as a result of the objection withdrawal. *Id.* at 4a. Kinston was free, the court explained, to implement the referendum and hold nonpartisan elections—enabling petitioner Nix to run in such elections as he had declared was his intent and desire. See *id.* at 450a (complaint alleging that petitioner Nix "has a direct interest in [running for Kinston City Council] on a ballot where he is unaffiliated with any party, against opponents similarly unaffiliated, and without the preliminary need to either run in a party primary or obtain sufficient signatures to obtain access to the ballot as a candidate").

The court of appeals rejected petitioners' three arguments against mootness. Pet. App. 4a-7a. First, the court rejected petitioners' argument that the withdrawal is without legal effect because the Attorney General lacks authority under Section 5 to reconsider or withdraw an objection. *Id.* at 4a-5a. The court noted that, although the statute is silent as to reconsiderations and

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[4] The same panel issued a divided decision in *Shelby County* on the same day. *Shelby County* v. *Holder*, 679 F.3d 848 (D.C. Cir. 2012), petition for cert. pending, No. 12-96 (filed July 20, 2012).

withdrawals, the four-decades-old regulations governing the Attorney General's implementation of Section 5—regulations this Court has stated should be accorded "substantial deference," *Lopez*, 525 U.S. at 281—expressly grant him that authority. Pet. App. 4a-5a (citing 28 C.F.R. 51.46).

Second, the court considered plaintiff LaRoque's assertion that, as a state legislator, he intended to propose two local bills governing Lenoir County that, if passed, would be subject to preclearance. Pet. App. 5a-6a. The court found that assertion to be insufficient to overcome its conclusion that the objection withdrawal had removed petitioner Nix's injury. *Ibid.* Noting that the prospect that such bills would be enacted was speculative at best, the court stated that it was also speculative that the changes (if enacted) would draw an objection from the Attorney General. *Ibid.* And the court concluded that petitioners had not offered any "evidence that * * * the failure to implement either change would cause them any cognizable injury." *Id.* at 6a.

Finally, the court rejected petitioners' argument that they had a continuing stake in the case because a declaration that Section 5 is unconstitutional would give petitioner Nix "a 'strong argument' that the North Carolina State Board of Elections should order a new election for the Kinston City Council." Pet. App. 6a. The court relied on a North Carolina state court decision providing that the Board of Elections has no authority to revoke a certificate of election once it has issued and officials have been sworn in. *Id.* at 7a (citing *In re Caldwell Cnty. Election Protests of Hutchings*, 600 S.E.2d 901, No. COA03-1177, 2004 WL 1610347, at *3 (N.C. Ct. App. July 20, 2004)).

The court summarized its holding: "Due to the Attorney General's withdrawal of his objection, nothing will hinder [petitioner] Nix from running in a nonpartisan election during the next cycle. Given this, and [petitioners'] inability to present us with any other cognizable injury caused by § 5, we hold that [petitioners] have 'obtained everything that they could recover from this lawsuit,' and that the case is thus moot." Pet. App. 7a (brackets and citation omitted).

**ARGUMENT**

Petitioners ask (Pet. 14-27) this Court to grant their petition for a writ of certiorari to consider the constitutionality of the 2006 reauthorization of Section 5 of the VRA, a question the court of appeals did not reach in this case because it correctly determined that this case is moot. Petitioners further ask (Pet. 28-36) the Court to summarily reverse the court of appeals' mootness holding (or grant plenary review if necessary, see Pet. 36). This Court should deny the petition for a writ of certiorari because the court of appeals correctly determined that petitioners' claims are moot, and that decision does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly concluded that the Attorney General met his burden of demonstrating that petitioners' claims are moot. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (*Laidlaw*). That holding does not warrant further review.

a. It is well settled that Article III of the Constitution limits federal courts to adjudicating "only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). It is equally well settled "that a justiciable case or controversy must re-

main 'extant at all stages of review, not merely at the time the complaint is filed.'" *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (per curiam) (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997)). Through every stage of federal litigation, therefore, "the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Ibid.* (internal quotation marks and citation omitted). When a party ceases to have a "personal stake in the outcome" of his suit, his claims become moot. *Lewis*, 494 U.S. at 478 (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983)).

In its first decision in this case, the court of appeals determined that petitioner Nix had standing to challenge the constitutionality of Section 5 in his capacity as a candidate for office because the Attorney General's Section 5 objection to Kinston's nonpartisan referendum injured Nix by making ballot access more costly and time-consuming and causing Nix a competitive disadvantage in the election. Pet. App. 136a-143a.[5] Those concrete and cognizable injuries would be redressed by a declaration that Section 5 is unconstitutional, the court held, because such a judgment would eliminate the 2009 objection, thereby "remov[ing] the federal barrier to the

[5] The district court found that Nix's injuries also formed the basis of petitioner KCNV's standing. Pet. App. 40a-41a. KCNV's claims therefore rise and fall with Nix's. The district court originally concluded that petitioner Cuomo has no standing to challenge the constitutionality of Section 5. *LaRoque* v. *Holder*, 755 F. Supp. 2d 156, 169-173 (D.D.C. 2010). Although petitioners list Cuomo as joining the petition for a writ of certiorari, see Pet. ii, they do not challenge the holding that he has no standing. The Attorney General therefore does not address petitioner Cuomo's claims.

implementation of the nonpartisan referendum." *Id.* at 147a-148a.

The court of appeals correctly held that petitioners' case is moot because the Attorney General's withdrawal of his 2009 objection removed the federal barrier to the implementation of the nonpartisan referendum. As a result of the withdrawal, "Kinston can implement the referendum and hold nonpartisan elections, and the injury on which [the court of appeals] originally found standing—the extra burden a partisan system placed on Nix's chance to get elected—has effectively disappeared." Pet. App. 4a.

Significantly, this is not a case in which the party challenging the constitutionality of Section 5 bases its standing on the alleged injury of having to submit voting changes for preclearance. None of the original or remaining plaintiffs in this case is a jurisdiction that is directly regulated under Section 5. Petitioners Nix and KCNV have standing only by virtue of the alleged injuries Nix suffered from having to run in a partisan election. Because those injuries have "disappeared," Pet. App. 4a, the case is moot. The fact that Nix was injured by a particular Section 5 objection does not suffice to give him a personal stake in continuing to challenge Section 5 now that his injuries as a result of that objection have been remedied. See *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 494 (2009). Even when parties "continue to dispute the lawfulness" of the conduct that gave rise to a lawsuit, the case is moot if "that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Alvarez* v. *Smith*, 130 S. Ct. 576, 580 (2009).

b. The court of appeals correctly rejected petitioners' argument (Pet. 34-36) that the withdrawal of the 2009

objection was without effect because Section 5 does not explicitly authorize the Attorney General to withdraw an objection once entered. As the court of appeals noted (Pet. App. 4a-5a), authority for the Attorney General's withdrawal "is to be found in regulations promulgated by the Justice Department over four decades ago"—regulations this Court has held are entitled to "substantial deference." *Ibid.* (citing 28 C.F.R. 51.46 and 36 Fed. Reg. 18,190 (Sept. 10, 1971)) (quoting *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 281 (1999)). Those regulations authorize the Attorney General to reconsider an objection when there "appears to have been a substantial change in operative fact or relevant law." 28 C.F.R. 51.46(a). Petitioners ignore the existence of that regulation, arguing instead (Pet. 34-35) that the action authorized by the regulation was "*ultra vires*" because it is not authorized in the text of Section 5 itself.

Nearly 40 years ago, this Court rejected a similar argument that other provisions in the regulations governing the Attorney General's Section 5 review of voting changes were invalid, explaining:

> It is true * * * that § 5 itself does not authorize the Attorney General to promulgate any regulations. But § 5 is also silent as to the procedures the Attorney General is to employ in deciding whether or not to object to state submissions, as to the standards governing the contents of those submissions, and as to the meaning of the 60-day time period in which the Attorney General is to object, if at all. Rather than reading the statute to grant him unfettered discretion as to procedures, standards, and administration in this sensitive area, the Attorney General has chosen instead to formulate and publish objective ground rules. If these regulations are reasonable

> and do not conflict with the Voting Rights Act itself, then 5 U.S.C. § 301, which gives to "[t]he head of an Executive department" the power to "prescribe regulations for the government of his department, . . . [and] the distribution and performance of its business . . . ," is surely ample legislative authority for the regulations.

*Georgia* v. *United States*, 411 U.S. 526, 536-537 (1973) (brackets and ellipses in original).

The regulation permitting the Attorney General to reconsider and withdraw an objection on his own initiative, 28 C.F.R. 51.46, is reasonable and consistent with Section 5. Indeed, the unanimous court of appeals panel could "imagine no[]" reason "why the Department [of Justice] should be unable to withdraw an objection." Pet. App. 5a. Without that authority, the Attorney General would be unable to correct errors in preclearance decisions or take account of changes in law or facts without asking the jurisdiction to resubmit the proposed change, even though requiring such a resubmission would serve no purpose.[6] This Court should decline petitioners' invitation to interpret Section 5 so as to maximize its burden on covered jurisdictions merely to keep alive a constitutional challenge to a statute that no longer injures petitioners in any concrete way.

Petitioners argue (Pet. 34-35) that this Court should draw a negative inference from Section 5's explicit grant of authority to the Attorney General to reexamine a prior "affirmative indication by the Attorney General that

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[6] The Department's records indicate over 160 instances in which the Department has withdrawn an objection under Section 5, some of which were on the Attorney General's own initiative, as in this case. See Reply in Supp. of the Att'y General's Mot. to Dismiss, Attach. at ¶¶ 10-11, *LaRoque* v. *Holder*, No. 11-5349 (D.C. Cir. Feb. 22, 2012).

no objection will be made" if he does so within the 60-day period for reviewing a change. See 42 U.S.C. 1973c(a). Petitioners' argument proves too much. The cited authority is one of only two procedural specifications governing administrative preclearance included in Section 5 (the other permits covered jurisdictions to seek expedited review). But as noted, neither this Court nor the Attorney General has taken the bare-bones nature of Section 5 as an indication either that the Attorney General may do only what is specifically mentioned in the statute or that he may do anything that is not specifically prohibited in the statute. The Attorney General long ago took the sensible course of promulgating procedures to govern administrative review and this Court has sanctioned that approach.

c. The court of appeals correctly rejected petitioners' argument (Pet. 32-33) that Nix's injury has not truly been remedied because he is unable to seek a new election from a North Carolina court but might be able to do so with a declaration from this Court that Section 5 is unconstitutional. Prior to the February 2012 withdrawal of the 2009 objection that formed the basis of his standing, Nix had never indicated that he would seek to redo the 2011 election if he prevailed in this action. After he ran and lost in the 2011 election, the district court (on its own initiative) requested supplemental briefing from the parties about whether Nix's election loss rendered the case moot. Both the Attorney General and Nix argued that the case was not moot at that point because Nix planned to run again in 2013 and the 2009 objection remained an obstacle to his running in a nonpartisan election. In his filing, Nix gave no indication that he would ask state officials to order the 2011 election redone if he prevailed on his constitutional claim. See No. 1:10-cv-

561, Docket entry No. 67, at 2-3 (D.D.C. Dec. 9, 2011). He argued instead that his "candidacy injuries evaded review" and were "capable of repetition[] because he ha[d] publicly expressed his intent to run in the 2013 election for Kinston City Council, * * * which once again will be a partisan election due to Section 5's suspension of the nonpartisan-elections referendum." *Ibid.* Nix suggested that he might seek a do-over of the 2011 election for the first time in response to the Attorney General's February 2012 motion to dismiss. Prior to that, he had only sought prospective relief—a declaration that Section 5 is unconstitutional and an injunction against its enforcement. See Pet. App. 460a.

The court of appeals found no clear indication in state law that, even if Nix sought to have the 2011 election redone, the North Carolina State Board of Elections would have the authority at this point to order a new election. Pet. App. 6a-7a. Given that uncertainty, the court held that "[t]he prospect of a new election in the event of § 5's invalidation is thus too speculative to give [petitioners] a continued stake in the litigation." *Id.* at 7a. Petitioners now seek to question (Pet. 33-34) the court of appeals' interpretation of state law, although they offer no example of the Board of Elections' ordering a new election in these or analogous circumstances. But petitioners understandably do not suggest that that state law question independently merits this Court's review in this case. In order to grant petitioners' request for a summary reversal on that basis, the Court would have to decide a question of state law that has never been fully briefed or argued. Such a course would be far afield from this Court's traditional exercise of its certiorari jurisdiction. In any case, given that the next regularly scheduled election is just over a year away, it is extreme-

ly unlikely that petitioners could obtain a favorable judgment from this Court in time to successfully request and obtain a new nonpartisan version of the 2011 election.

d. The court of appeals correctly rejected petitioners' argument (Pet. 31-32) that the case is not moot because the Attorney General might some day object to a hypothetical election change, thereby injuring petitioners in a new way. Petitioners assert that their claims can never be moot because there is an "essentially infinite number of potential voting changes that would benefit Nix's candidacy but be vulnerable to preclearance denial." Pet. 31. Such an assertion is inadequate to establish either an ongoing case or controversy or the requisite personal stake in the outcome of this case.

If petitioners were jurisdictions covered under Section 5, their standing to challenge Section 5's constitutionality would not depend on the existence or imminence of any particular objection. But petitioners are not covered jurisdictions. They are citizens who have been injured by a particular Section 5 objection that no longer exists. They do not now have—nor have they ever had—standing to seek a declaration of Section 5's invalidity absent a showing that Section 5 actually affects and injures them. Article III does not permit a citizen to "employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *United States* v. *Richardson*, 418 U.S. 166, 174 (1974) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J., concurring)). Because the cause of petitioners' injuries no longer exists, they no longer have a cognizable interest in the declaratory and injunctive relief they seek from the federal judiciary. Even if other entities (*i.e.*,

covered jurisdictions and particular citizens therein who can demonstrate injuries as a result of particular objections) could benefit from the relief petitioners seek, this Court has made it clear that "the Article III [mootness] question is not whether the requested relief would be nugatory as to the world at large, but whether [the plaintiff] has a stake in the relief." *Lewis*, 494 U.S. at 479. Because petitioners do not have a stake in the relief they seek absent the existence of an objection that injures them, the court of appeals correctly concluded that this case is moot.

Even if petitioners could resurrect a cognizable interest in the relief they seek by demonstrating a risk of future injury from Section 5, they have failed to do so. It is not enough for Article III purposes to hypothesize an infinite number of possible changes that might be enacted, might benefit petitioner Nix's candidacy for local office, and might draw an objection under Section 5. In the court of appeals, petitioners hypothesized two such changes that might be introduced by then-legislator and then-plaintiff Stephen LaRoque. Neither of those changes has come to pass and LaRoque is no longer a state legislator.[7] See Pet. App. 5a-6a. In their petition for a writ of certiorari, petitioners do not hypothesize different changes that might be enacted, might benefit Nix's candidacy, and might draw an objection. Nor do they hypothesize a different route (other than relying on now-citizen LaRoque) for any such potential changes to become law. In short, there is no cognizable likelihood that Section 5 will injure petitioners in the future in any

[7] On August 1, 2012, LaRoque resigned from the state legislature. See North Carolina General Assembly, *Representative Stephen A. LaRoque* (Sept. 24, 2012), http://www.ncleg.net/gascripts/members/viewMember.pl?sChamber=H&nUserID=622.

way. The court of appeals therefore correctly concluded that their case is moot.

e. The court of appeals correctly declined to accept petitioners' argument that, even if the injuries that formed the basis of their standing have been cured, their case is not moot because the voluntary-cessation exception to the mootness doctrine applies. That decision does not conflict with any decision of this Court or of any other court of appeals.

As petitioners correctly point out (see Pet. 28-29), "a defendant claiming that its voluntary [conduct] moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. Here, the allegedly wrongful conduct that caused petitioners' injuries was the Attorney General's 2009 objection to Kinston's nonpartisan-election referendum. As explained, that objection has been irrevocably withdrawn and the referendum precleared. See *Morris* v. *Gressette*, 432 U.S. 491, 504-505 (1977) (Attorney General's decision to preclear a change is not subject to judicial review). There is therefore no possibility, let alone a reasonable expectation, that the now-withdrawn objection could injure petitioners in the future. Petitioners overstate their case significantly in describing the relevant "allegedly wrongful behavior" as "Section 5's 2006 reauthorization and expansion." Pet. 31. In the absence of a particular application of Section 5 in a way that injures petitioners—or a reasonable (or at least foreseeable) possibility that Section 5 will again be applied to injure petitioners—Article III does not

permit petitioners to keep this litigation alive on the basis of a generalized grievance.[8]

Petitioners are incorrect, therefore, in asserting that the court of appeals improperly allocated the burdens in assessing whether the case is moot. The Attorney General bore the burden of demonstrating that Nix's objection to Kinston's nonpartisan-election referendum is no longer operative and cannot become operative again. The Attorney General met his burden. Although petitioners suggest (Pet. 29-30) that the court of appeals applied a different standard than that applied in the Se-

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[8] Petitioners suggest (Pet. 11-12) that the voluntary-cessation exception must apply here because the Attorney General's withdrawal of his 2009 objection was "a transparent pretext" for attempting to avoid the arguments petitioners raise. Petitioners made the same accusation in the court of appeals, see Pet. C.A. Resp. to Gov't Mot. to Dismiss 3-5, and the court correctly disregarded the accusation in finding the challenge moot. The accusation has no more merit in this Court. The evidence before the Attorney General in connection with his review of the Lenoir County voting change amply and independently supported his decision to withdraw his objection to Kinston's nonpartisan-election referendum. Although the timing of the withdrawal was close to the date oral argument had been scheduled in this case in the court of appeals, that timing was primarily dictated by the actions of Lenoir County officials. Those officials, on December 12, 2011, submitted to the Attorney General the information he needed to assess whether to preclear Lenoir County's election change. Section 5 requires that, if the Attorney General is to interpose an objection, he must do so within 60 days of receiving a complete submission. The deadline for interposing such an objection to the County's change was therefore February 10, 2012, which happened to be three days before the scheduled oral argument. Due to the sheer volume of submissions that must be reviewed by the Department of Justice under Section 5, however, the Attorney General usually takes all or nearly all of his allotted 60 days to determine whether to object unless the jurisdiction seeks expedited review—which Lenoir County did not seek in this case.

cond, Ninth, Eleventh, and Federal Circuits, that suggestion is without merit. In every case on which petitioners rely—as in this case—the relevant court of appeals has concluded that a defendant's voluntary action may moot a case only when it is clear that the defendant's allegedly wrongful behavior will not recur. See *Ahrens* v. *Bowen*, 852 F.2d 49, 53 (2d Cir. 1988); *Rosemere Neighborhood Ass'n* v. *EPA*, 581 F.3d 1169, 1173-1175 (9th Cir. 2009); *Ouachita Watch League* v. *Jacobs*, 463 F.3d 1163, 1175 (11th Cir. 2006); *Rothe Dev. Corp.* v. *Department of Def.*, 413 F.3d 1327, 1332-1333 (Fed. Cir. 2005). Petitioners cannot manufacture a circuit split by erroneously defining the scope and cause of their injuries more broadly than the courts adjudicating their case have.[9]

2. The main thrust of the petition for a writ of certiorari is that the Court should grant review in order to decide a question the court of appeals did not consider in this case—namely, whether Congress validly acted pursuant to its authority under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 in 2006. Because the court of appeals correctly (and unan-

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[9] The court of appeals' decision also does not conflict with this Court's decision in *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000). The Court held in that case that the plaintiffs' challenge to a Department of Transportation program benefitting minority-owned businesses was not moot based on the state defendant's attempt to obtain federal certification of the plaintiff business as eligible for the challenged benefit. *Id.* at 221-222. Because the federal government had not issued such a certification, the Court held that it was not clear that the plaintiff could not be harmed by the challenged conduct in the future. *Id.* at 222. That is not true in this case. The Attorney General has precleared the relevant voting change, thereby irrevocably removing any Section 5 obstacle to the outcome petitioners seek, *i.e.*, running for office in a nonpartisan election.

imously) held that this case is moot, there is no Article III jurisdiction to consider that merits question in this case. That is reason enough to deny review. At the very least, the Court would have to address the threshold question before it could consider the merits issue raised by petitioners, which is the same issue presented by the pending petition in *Shelby County* v. *Holder*, No. 12-96 (filed July 20, 2012). The need for that threshold inquiry here counsels strongly against granting review in this case.

Even aside from the threshold mootness obstacle to review here, review of the constitutionality of the 2006 reauthorization should be denied. For the reasons explained in the government's brief in opposition in *Shelby County*, this Court's review of the constitutionality of Section 5's reauthorization is unwarranted. Although the constitutionality of Section 5 is an important federal question, the court of appeals correctly resolved it in *Shelby County* by applying settled legal standards articulated by this Court.

Insofar as the Court may nonetheless be inclined to grant certiorari in *Shelby County* to consider the constitutionality of Section 5's reauthorization, petitioners here contend (Pet. 20-27) that the Court should grant certiorari in this case as well to enable consideration of certain arguments that were not presented to the court of appeals in the *Shelby County* case. In particular, petitioners argue, this Court can properly assess the validity of Section 5's reauthorization only if it is able to consider the effect on covered jurisdictions of the substantive amendments to Section 5 enacted in 2006. Petitioners observe (Pet. 13) that the panel majority in *Shelby County* declined to consider the implications of the 2006 substantive amendments because those arguments had

not been presented to the court. But the dissent in *Shelby County*, petitioner emphasizes (Pet. 12-13, 20-21, 22-24), viewed the 2006 substantive amendments as supporting the conclusion that Congress lacked power to reauthorize Section 5.

Contrary to petitioners' argument, there is no need to grant review in this case to consider arguments based on the 2006 substantive amendments when assessing the constitutionality of Section 5's reauthorization. Petitioner in *Shelby County*, while not raising those arguments in the court of appeals, now relies on those arguments in the petition for a writ of certiorari in that case. See Pet. at 18-19, *Shelby County* v. *Holder*, No. 12-96 (filed July 20, 2012). Because those arguments support a claim that petitioner in *Shelby County* has pressed from the outset of that case—that Congress acted beyond its constitutional authority when it reauthorized Section 5 in 2006—there is no apparent obstacle to this Court's consideration of those additional arguments in that case. See *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992).

Those arguments, in any event, lack merit. The district court in this case correctly concluded that the 2006 substantive amendments were fully within Congress's authority and thus fail to bolster petitioner's challenge to the validity of Section 5's reauthorization. Those substantive amendments responded to this Court's decisions in *Bossier II* and *Ashcroft*. In considering whether to reauthorize Section 5 in 2006, Congress determined that those decisions had departed from the preclearance standards long enforced by the Attorney General and the D.C. district court. See H.R. Rep. No. 478, 109th Cong., 2d Sess. 65 (2006). Congress also determined both that the longstanding interpretations of Sec-

tion 5 predating those decisions had been essential to the protection of minority voting rights and that a restoration of the previously applied standards was necessary in order to protect the progress minority voters had made since 1965. *Id.* at 65-72; 2006 Reauthorization § 2(b)(6), 120 Stat. 578; Pet. App. 52a-60a, 65a-83a. After engaging in an extensive review of the legislative record, the district court correctly concluded that the amendments were justified by current needs and are therefore a congruent and proportional means of enforcing the protections of the Fourteenth and Fifteenth Amendments. Pet. App. 52a-96a.

With respect to purpose prong, the amendment prohibiting preclearance of any intentionally discriminatory changes makes Section 5 hew even more closely to the constitutional prohibition it enforces. Under *Bossier II*, an unconstitutional discriminatory motive was not a basis to refuse to preclear an election change. Section 5 now stands as protection against that type of constitutional violation as well, a protection the district court correctly found to be a congruent and proportional means of enforcing constitutional guarantees. Pet. App. 62a-65a. The district court was similarly correct in upholding the validity of the amended retrogression prong, which clarifies that a change is not retrogressive if it does not diminish minority voters' ability to elect their candidate of choice. As the court explained, Congress amassed substantial evidence of intentional voting discrimination in covered jurisdictions, particularly with respect to redistricting plans. *Id.* at 65a-71a. Congress also "gathered extensive evidence that discriminatory and dilutive techniques remained a significant problem, and that the *Ashcroft* standard did not remedy—and could easily worsen—the problem," including by inject-

ing partisan considerations into the preclearance determination. *Id.* at 83a; see *id.* at 81a-82a. Concluding that the amendments to Section 5's retrogression standard are "necessary to avoid giving cover to intentional discrimination and to prevent an administrability nightmare that would itself harm covered jurisdictions," the district court held that the amendments "represent a congruent and proportional response to the problem of intentionally discriminatory dilutive techniques." *Id.* at 95a-96a. The district court's analysis was correct and does not warrant further review.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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