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No. 10-5433

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

STEPHEN LAROQUE, ANTHONY CUOMO, JOHN NIX,
KLAY NORTHRUP, LEE RAYNOR, and KINSTON CITIZENS
FOR NON-PARTISAN VOTING,

Plaintiffs-Appellants

v.

ERIC H. HOLDER, JR., in his official capacity as
Attorney General of the United States, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE

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

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
JULIE A. FERNANDES
Deputy Assistant Attorneys General

DIANA K. FLYNN
LINDA F. THOME
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
P.O. Box 14403
Ben Franklin Station
Washington, D.C. 20044-4403
(202) 514-4706

**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

The Attorney General, as appellee, certifies that:

1. Parties

All parties, intervenors, and amici appearing before the district court are listed in the Brief for Appellants.

2. Rulings Under Review

Reference to the rulings at issue appear in the Brief for Appellants.

3. Related Cases

This case has not previously been before this court or any other court except the United States District Court for the District of Columbia. Two related cases are pending in the United States District Court for the District of Columbia: *Shelby County v. Holder*, No. 1:10-cv-00651-JDB; and *State of Georgia v. Holder*, 1:10-cv-01970.

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GLOSSARY

ASPCA – The American Society of the Prevention of Cruelty to Animals

FEC – Federal Election Commission

J.A. –Joint Appendix

KCNV – Kinston Citizens for Nonpartisan Voting

LULAC – League of United Latin American Citizens

MWAA – Metropolitan Washington Airports Authority

NAACP – National Association for the Advancement of Colored People

NRA – National Rifle Association

TVA – Tennessee Valley Authority

VRA – Voting Rights Act

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JURISDICTIONAL STATEMENT

This is an appeal from a final order dismissing plaintiffs-appellants' complaint for lack of jurisdiction. The district court lacked subject matter jurisdiction over plaintiffs' claims. The district court's order dismissing the case was entered December 16, 2010. J.A. 152. Plaintiffs-appellants timely filed their

notice of appeal December 21, 2010. J.A. 206. This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether plaintiffs have standing to assert their claim that Congress lacked the authority to enact the 2006 Reauthorization of Section 5 of the Voting Rights Act.

2. Whether plaintiffs' claim that the 2006 Amendments to Section 5 effect unconstitutional racial discrimination is properly before the court.

3. Whether plaintiffs stated a valid claim.

STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum to Appellants' Brief, except for the following, which are reproduced in the Addendum to this brief: 28 C.F.R. 51.45; N.C. Gen. Stat. 163-278.40A, 163-278.40B.

STATEMENT OF THE CASE

This is a facial challenge, brought by private plaintiffs, to the constitutionality of Section 5 of the Voting Rights Act, as amended and reauthorized in 2006. 42 U.S.C. 1973c; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of

2006, Pub. L. No. 109-246, §§ 4-5, 120 Stat. 580-581; 42 U.S.C. 1973c (2006 Reauthorization).

A. *Section 5 Of The Voting Rights Act*

In 1965, Congress enacted the Voting Rights Act “to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.” *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. The Act includes both temporary provisions, including Section 5, that are applicable only to certain covered jurisdictions,¹ and other provisions applicable to the nation as a whole. Congress reauthorized Section 5 in 1970 for five years, in 1975 for seven years, and in 1982 for 25 years.² The Supreme Court upheld the constitutionality of Section 5 after its enactment and after each of those reauthorizations. *South Carolina*, 383 U.S. at 323-335; *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).

¹ In enacting Section 5, Congress sought to cover those states and political subdivisions with the worst historical records of voting discrimination. *South Carolina*, 383 U.S. at 329-330; *United States v. Board of Comm’rs of Sheffield, Ala.*, 435 U.S. 110, 118 (1978).

² Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

The constitutionality of the 2006 reauthorization was upheld by a three-judge court in *Northwest Austin Municipal Utility District No. One v. Mukasey*, 573 F. Supp. 2d 221, 265-278 (D.D.C. 2008). The Supreme Court reversed the judgment, but resolved the case on statutory grounds, without reaching the constitutional question. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508, 2513 (2009). Two actions brought by covered jurisdictions subject to Section 5, and challenging the constitutionality of the 2006 Reauthorization, are pending in district court. *Shelby County v. Holder*, No. 1:10-cv-00651 (D.D.C.); *State of Georgia v. Holder*, 1:10-cv-01970 (D.D.C.).

Section 5 provides that “[w]hensoever” a covered jurisdiction “enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect” on the date of its initial coverage under Section 5, it must first obtain administrative preclearance from the Attorney General or judicial preclearance from a three-judge panel of the United States District Court for the District of Columbia. 42 U.S.C. 1973c(a). In either case, preclearance may be granted only if the jurisdiction demonstrates that the proposed change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a language minority group. *Ibid.* It has long been established that the “effect” prong of the preclearance standard precludes only changes that “would lead to a retrogression in

the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U.S. 130, 141 (1976).

When a jurisdiction chooses the administrative preclearance route, and the Attorney General interposes an objection to the change, the jurisdiction may request reconsideration of the objection at any time. 28 C.F.R. 51.45. The jurisdiction also may bring a declaratory judgment action in the District Court for the District of Columbia, after the Attorney General interposes an objection, seeking a *de novo* determination of whether the proposed change is discriminatory in effect or purpose. 42 U.S.C. 1973c; *City of Rome v. United States*, 450 F. Supp. 378, 381-382 & n.3 (D.D.C 1978) (*City of Rome I*), *aff’d*, 446 U.S. 156 (1980).

The Attorney General’s determination itself, however, is not judicially reviewable, either at the behest of private plaintiffs or of the submitting jurisdiction. *Morris v. Gressette*, 432 U.S. 491, 501-505 (1977) (no judicial review of Attorney General’s failure to object); *Harris v. Bell*, 562 F.2d 772, 773-774 (D.C. Cir. 1977) (no judicial review of Attorney General’s decision to withdraw objection); *City of Rome I*, 450 F. Supp. at 380-382 (no judicial review of Attorney General’s objection). Private plaintiffs who seek to challenge a voting change that has been precleared by the Attorney General may do so only in an action attacking the constitutionality of the proposed change itself, *Morris*, 432 U.S. at 503, or in an action under Section 2 of the VRA, *e.g.*, *Major v. Treen*, 574

F. Supp. 325, 327 & n.1 (E.D. La. 1983); see 42 U.S.C. 1973c(a). As with a declaratory judgment action brought by a jurisdiction, the issue to be adjudicated in such an action is not the merits of the Attorney General's exercise of his discretion, but the lawfulness of the underlying voting change. *Morris*, 432 U.S. at 506-507.

When Congress reauthorized Section 5 in 2006, it also amended the statute in two respects. Congress made these changes in response to the Supreme Court's decisions in *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003); and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier Parish II*), which Congress found to have "misconstrued Congress' original intent in enacting the Voting Rights Act of 1965," "narrowed the protections afforded by section 5," and "significantly weakened" the Act's effectiveness. 2006 Reauthorization, § 2(b)(6), 120 Stat. 578.

Ashcroft held that "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." 539 U.S. at 479. While the Court recognized that "the comparative ability of a minority group to elect a candidate of its choice" is an "important" factor in determining whether a plan is retrogressive, "it cannot be dispositive or exclusive."

Id. at 480. Thus, the Court held, a state may choose to create districts in which a minority group constitutes a sufficient majority that its ability to elect its candidates of choice is “virtually guarantee[d].” *Id.* at 480-481. Or the State may choose to create a larger number of districts in which minority voters have a substantial, but smaller representation, and thus will have only the possibility of electing the candidates of their choice, or perhaps only of influencing the outcome of the election, with or without a coalition with other groups. *Id.* at 481-482. “Section 5,” the Court held, “gives States the flexibility to choose one theory of effective representation over the other.” *Id.* at 482.

The House Report on the 2006 Reauthorization found that the Court’s decision in *Ashcroft* “turns Section 5 on its head” by directing courts to “defer to the political decisions of States rather than the genuine choice of minority voters regarding who is or is not their candidate of choice.” H.R. Rep. No. 478, 109th Cong., 2d Sess. 69 (2006) (2006 House Report). The Court’s “‘new’ analysis,” the House Report stated, “would allow the minority community’s own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give ‘influence’ to the minority community while removing that community’s ability to elect candidates. Permitting these trade-offs is inconsistent with the original and current purpose of Section 5.” 2006 House Report 69. The retrogression standard applied before the *Ashcroft* ruling, the Report explained,

was responsible for the electoral gains made by minority communities since enactment of the VRA, and the *Ashcroft* standard put those gains at risk. 2006 House Report 70.

Congress thus added subsection (b) to Section 5, clarifying that voters' ability to elect candidates of choice remains the central inquiry of the preclearance determination:

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

42 U.S.C. 1973c(b).

In *Bossier Parish II*, the Court held for the first time³ that, in the context of a claim of intentional vote dilution, the “purpose” prong of the preclearance standard is limited to voting changes with a retrogressive purpose. 528 U.S. at 328. “[N]o matter how unconstitutional it may be,” the Court later explained, “a plan that is not retrogressive should be precleared under § 5.” *Ashcroft*, 539 U.S. at 477 (quoting *Bossier Parish II*, 528 U.S. at 336) (emphasis in original).

³ See *Reno v. Bossier Parish School Board*, 520 U.S. 471, 486 (1997).

With regard to the Court's holding in *Bossier Parish II*, the House Report explained that "[t]hrough the 'purpose' requirement, Congress sought to prevent covered jurisdictions from enacting and enforcing voting changes made with a clear racial animus, regardless of the measurable impact of such discriminatory changes." 2006 House Report 66. Congress thus enacted Section 5(c), to make it clear that preclearance should be denied if the voting change had been motivated by *any* discriminatory purpose:

(c) The term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose.

42 U.S.C. 1973c(c).

B. Plaintiffs

Plaintiffs are proponents of a 2008 referendum that would have changed the method of electing the Mayor and City Council of the City of Kinston, North Carolina from partisan to nonpartisan elections. J.A. 4-5, 7. The individual plaintiffs are registered voters and residents of Kinston. J.A. 4-5. One of the plaintiffs, John Nix, also alleges that he is a candidate for the Kinston City Council in 2011, and that, while he is a registered Republican, he plans to run for office unaffiliated with any party. J.A. 4-5, 50.⁴ The organizational plaintiff, Kinston Citizens for Nonpartisan Voting (KCNV), consists of registered Kinston voters and

⁴ A second plaintiff who initially alleged his intention to run for office subsequently ended his candidacy. J.A. 5; Appellants' Br. 10 n.1.

prospective candidates who supported the referendum. J.A. 5-6. Plaintiffs are not subject to Section 5.

The City of Kinston, in Lenoir County, North Carolina, has been subject to Section 5 since 1965, when Lenoir County was designated for coverage. 30 Fed. Reg. 9897 (Aug. 7, 1965). After the nonpartisan referendum was adopted by the City's voters, Kinston submitted the proposed change to the Attorney General for Section 5 review. J.A. 7-8, 42. On August 17, 2009, the Attorney General interposed an objection to the proposed change on the ground that its effect would be to reduce the ability of black voters to elect the candidates of their choice. J.A. 42-44. The objection letter explained that black voters, who generally constituted a minority of the City's electorate, had "had limited success in electing candidates of choice during recent municipal elections" in Kinston, and that "[t]he success that they have achieved has resulted from cohesive support for candidates during the Democratic primary (where black voters represent a larger percentage of the electorate), combined with crossover voting by whites in the general election." J.A. 43. Thus, "while the motivating factor for this change may be partisan," the objection letter concluded, "the effect will be strictly racial." J.A. 43. The City of Kinston did not exercise its right either to seek reconsideration of the Attorney General's objection or to seek a *de novo* declaratory judgment that the proposed

change did not have a discriminatory effect. J.A. 38. Neither the City nor Lenoir County is a party to this action.

C. Proceedings Below

1. Plaintiffs' Claims

Plaintiffs filed this action on April 7, 2010. J.A. 1, 3-15. They make two distinct claims: (1) that Congress lacked the authority to enact the 2006 Reauthorization of Section 5 (J.A. 12-13); and (2) that Section 5, as amended in 2006, violates the nondiscrimination requirements of the Fifth, Fourteenth, and Fifteenth Amendments (J.A. 13-14). Plaintiffs' complaint includes allegations challenging Section 5 as applied, both generally and to Kinston's proposed change to nonpartisan elections. See, *e.g.*, J.A. 6-7 (¶ 20), 8-9 (¶¶ 25-26), 12 (¶ 30), 13-14 (¶ 36); see also J.A. 14 (Request for Relief). At oral argument on the motion to dismiss, however, plaintiffs made it clear that they assert only a facial challenge to the constitutionality of Section 5, disavowing any intention to challenge Section 5 as applied or litigate the merits of the Attorney General's objection to the proposed voting change in Kinston. J.A. 129 (“[W]e are bringing a facial challenge to the statute, we are not challenging the Attorney General's objection.”); J.A. 148 (plaintiffs are “willing to be held” to their statement that they “are bringing a facial and only a facial challenge”). Indeed, plaintiffs asserted not only that their claims stemmed solely from Congress's reauthorization of Section 5, but that they “would

be bringing the same exact claim if Kinston had never sought preclearance in the first place.” J.A. 107; see also J.A. 159-161; Appellants’ Br. 9 (plaintiffs “are not alleging that the Attorney General *misapplied* the *statutory* preclearance standard to Kinston’s referendum or that Section 5’s *application* to that referendum is in any way *uniquely* unconstitutional”).

2. *The District Court’s Decision*

The Attorney General and the defendant-intervenors⁵ moved to dismiss plaintiffs’ complaint for lack of subject matter jurisdiction and failure to state a claim. J.A. 16-19, 58-61. The district court granted the motions to dismiss. J.A. 152.

a. *Standing*

The district court ruled, first, that plaintiffs lack standing to challenge the constitutionality of Section 5. J.A. 171-198. To establish standing, the court explained, “a plaintiff must allege (1) an ‘injury in fact,’ defined as ‘an invasion of a legally protected interest which is (a) concrete and particularized,’ and (b) ‘actual and imminent, not conjectural or hypothetical’; (2) ‘a causal connection between the injury and the conduct complained of’; and (3) a likelihood ‘that the injury will

⁵ The district court permitted six African-American residents of Kinston and the North Carolina State Conference of Branches of the NAACP to intervene as defendants under Federal Rule of Civil Procedure 24(b)(1). J.A.159 n.3; see J.A. 58-61.

be redressed by a favorable decision.” J.A. 171-172 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). The court concluded that plaintiffs lacked standing either as referendum supporters, as candidates, or as voters, because they failed to establish one or more of these factors. J.A. 172.

Beginning with plaintiffs’ standing as supporters of the referendum that would have required Kinston to adopt nonpartisan voting procedures, the court acknowledged that legislators sometimes have standing to challenge actions that nullify their votes. J.A. 173-176. But the court declined to extend this principle to citizen supporters of a referendum such as the plaintiffs in this case. J.A. 176-179 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Nolles v. State Comm. for the Reorg. of Sch. Dists.*, 524 F.3d 892, 898 (8th Cir.), cert. denied, 129 S. Ct. 418 (2008); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 318 (6th Cir. 2005)). Both *Nolles* and *Providence Baptist Church*, the district court explained, had declined to accord standing to initiative supporters. J.A. 178-179; and in *Arizonans*, the Supreme Court had expressed “grave doubts” that the supporters of the initiative at issue there had Article III standing “based on their ‘quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored.’” J.A. 177 (quoting 520 U.S. at 65-66).

The district court next concluded that plaintiffs lacked standing to challenge Section 5 in their capacity as candidates. J.A. 179-191. The court found it doubtful that the candidate-plaintiffs, Nix and Northrup, had established the requisite injury to support standing for two reasons: because their candidacies were too speculative (J.A. 180-183); and because they had not sufficiently alleged harm to legally protected interests (J.A. 183-191). In their complaint, the court stated, these plaintiffs alleged only that they intended to run for the Kinston City Council in November 2011, but did not allege that they had taken any actions in preparation for their campaigns. J.A. 180. The court acknowledged that Nix and Northrup later submitted affidavits specifying actions they had taken that documented their intent to run for office. J.A. 181. But the court declined to consider those affidavits because it concluded that plaintiffs' standing depends upon the facts in existence at the time of the complaint, and all of the specific actions taken by plaintiffs had occurred after the complaint was filed. J.A. 181-182 (citing *Lujan*, 504 U.S. 571 n.4; *Natural Law Party of U.S. v. FEC*, 111 F. Supp. 2d 33, 40 (D.D.C. 2000)). The court recognized that, in some instances, "threatened future harms to prospective candidates can be sufficiently imminent to confer standing under Article III." J.A. 182. But it expressed "serious concerns" whether standing could be premised upon a complaint in which "a prospective candidate * * * avows that he intends to run for political office at some point in the

future, but has never before held office, is not then a party nominee, and has not – at least at the time of the complaint – taken any preparations whatsoever in support of his candidacy.” J.A. 183.

The court also expressed doubt that Nix and Northrup had “alleged invasions of ‘legally protected interest[s],’ as required to establish a constitutional injury in fact.” J.A. 183 (citing *Lujan*, 504 U.S. at 561). These plaintiffs had alleged that the continuation of Kinston’s partisan election system injured them directly, because the system’s ballot access restrictions imposed burdens on them as candidates; and indirectly, by conferring a competitive advantage on opponents who would be affiliated with a party. J.A. 183-184.

The court acknowledged that candidate-plaintiffs may establish injury “under a theory of ‘competitor standing’ in circumstances ‘where a defendant’s actions benefitted a plaintiff’s competitors, and thereby caused the plaintiff’s subsequent disadvantage.’” J.A. 184 (quoting *Fulani v. Brady*, 935 F.2d 1324, 1328 (D.C. Cir. 1991), cert. denied, 502 U.S. 1048 (1992)). But “to establish standing based on such a competitive injury,” the court concluded, plaintiffs were required to demonstrate that the benefit allegedly provided to their competitors was “assertedly illegal.” J.A. 186 (quoting *Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998)). Plaintiffs here, however, had not alleged that Kinston’s partisan election system was illegal; moreover, such an allegation was likely precluded by

the Supreme Court's decision upholding a similar system in *Jenness v. Fortson*, 403 U.S. 431, 440-441 (1971). J.A. 186-187. "Thus," the court concluded, "while it is possible – albeit entirely speculative – that Nix and Northrup's chances for election will be less than those of their partisan opponents if plaintiffs choose to run as unaffiliated candidates, this 'injury' is insufficient to establish competitor standing, absent an allegation that the government has somehow bestowed an 'assertedly illegal benefit' on plaintiff's opponents." J.A. 187.

As to plaintiffs contention that they were harmed by the ballot access requirements of Kinston's partisan election system, the court recognized that candidates "have a legally protected interest in being free from allegedly unlawful ballot access restrictions that deprive them of the opportunity to run for office or to appear on the ballot." J.A. 188. But, the court explained, plaintiffs had not alleged that Kinston's ballot access requirements were illegal. J.A. 190. Thus, the court expressed "serious doubts as to whether plaintiffs have established the invasion of any interest that is 'legally protected' – a prerequisite for an Article III injury in fact." J.A. 190.

The court next concluded that the plaintiffs failed to allege sufficient injury as voters to establish standing. J.A. 191-194. Their claim that Kinston's partisan electoral system burdened their right to political association, the court held, was presumably shared by all voters in jurisdictions with partisan election systems, and

thus the kind of “widely shared grievance[]” that was not sufficiently personal to constitute injury in fact. J.A. 193. In any event, the court stated, plaintiffs had not demonstrated that their right to associate politically had been impaired, since they were free to vote for either a partisan or a nonpartisan candidate. J.A. 193-194. The court also rejected plaintiffs’ claim that they would “‘suffer derivatively’ from the harms inflicted on their preferred candidates.” J.A. 194. Even assuming that Nix and Northrup were harmed by the partisan election system, the court explained, plaintiffs had not “established any correlative injury” as voters because they were not impeded from voting for “the candidate of their choice.” J.A. 194 (quoting *Gottlieb*, 143 F.3d at 622; citing *Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000), cert. denied, 532 U.S. 1007 (2001)).

Finally, the court concluded that plaintiffs could not establish that any injury they might suffer would be redressed by a favorable decision. J.A. 196-197. The nonpartisan election system adopted by referendum had been nullified by the Attorney General’s objection, the court stated. J.A. 196. Particularly since plaintiffs declined to challenge the objection itself, the court held, that system would not be automatically resurrected by a ruling that Section 5 is facially unconstitutional. J.A. 196-197. The referendum would thus have to be re-passed

by Kinston's voters. J.A. 197. And such an eventuality, the court concluded, was too speculative to establish redressability. J.A. 197.⁶

The court also ruled that the organizational plaintiff, Kinston Citizens for Non-Partisan Voting (KCNV), lacked standing. J.A. 197-198. The organization would have standing, the court explained, only if its members would have standing in their own right. J.A. 197 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000)). The members of the KCN, like the individual plaintiffs, lacked standing; therefore the organization lacked standing. J.A. 198.

b. Cause Of Action

Even if plaintiffs had standing, the district court concluded, their complaint should be dismissed because they failed to state a viable cause of action. J.A. 198-205.

It is well established, the district court explained, that Section 5 provides neither covered jurisdictions nor individual plaintiffs a cause of action to challenge the Attorney General's decision to object, or not to object, to a proposed voting change. J.A. 198 (citing *Morris*, 432 U.S. at 507 n.24; *Briscoe v. Bell*, 432 U.S. 404, 412 (1977); *Harris v. Bell*, 562 F.2d 772, 774 (D.C. Cir. 1977); *Reaves v.*

⁶ The court rejected the defendants' argument that plaintiffs had failed to establish causation. J.A. 194-196.

United States Dep't of Justice, 355 F. Supp. 2d 510, 514 (D.D.C. 2005); *County Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 706 (D.D.C. 1983); *City of Rome I*, 450 F. Supp. at 381-382). Thus, the court could not adjudicate any challenge to the Attorney General's objection in this case, even if it was couched as a facial challenge to the statute. J.A. 200.

Plaintiffs' claims, the court noted, were "premised" on the injuries they alleged they had suffered as a result of the Attorney General's objection. J.A. 201-202. Plaintiffs alleged that the objection had (1) burdened their rights of political association; (2) infringed their rights under state law "to participate in the electoral, political, and law-making process through citizen-referenda"; and (3) denied them "equal, race-neutral treatment." J.A. 201 (quoting J.A. 11-12). These claims, the court concluded, arose from the Attorney General's objection, and were "precisely the types of claims that courts have refused to entertain under *Morris* and its progeny." J.A. 202. In *City of Rome I*, the court explained, the three-judge court had dismissed claims brought by the City and private plaintiffs alleging that the Attorney General had applied Section 5 in an unconstitutional manner. J.A. 202 (citing 450 F. Supp. at 380). The court noted that it did not matter that plaintiffs in *City of Rome I* claimed that the Attorney General's objection violated the Constitution, rather than a statute. J.A. 203 (citing 450 F. Supp. at 383 n.3). And while *City of Rome I* had explained that plaintiffs there could bring a *de novo*

action seeking judicial preclearance of the proposed voting changes, the district court here noted that such an action is available only to covered jurisdictions. J.A. 203 & n.9. In a subsequent decision, the district court noted, the three-judge court had addressed both the City's and the private plaintiffs' claims, but it had "entertained the private plaintiffs' constitutional challenges to Section 5, under a theory of 'pendent jurisdiction.'" J.A. 204 (quoting *City of Rome v. United States*, 472 F. Supp. 221, 236 (D.D.C. 1979) (*City of Rome II*), aff'd, 446 U.S. 156 (1980)).

In *Sumter County*, the district court explained, private plaintiffs sought to bring a constitutional challenge to the Attorney General's refusal to preclear an election system for which the plaintiffs had voted. J.A. 204-205 (citing 555 F. Supp. at 706). The *Sumter County* court dismissed those claims, however, because they were, "in essence, seeking to 'challeng[e] the failure of the Attorney General to preclear the at-large method of election for Sumter County.'" J.A. 205 (quoting 555 F. Supp. at 706).

The district court concluded that, because plaintiffs in this case similarly sought to challenge the Attorney General's objection, it could not adjudicate their claims. J.A. 204-205.

SUMMARY OF ARGUMENT

The district court's order dismissing plaintiffs' complaint should be affirmed. Plaintiffs lack standing to bring this action and they have failed to state a viable claim for relief.

Plaintiffs lack standing, as candidates, as voters, or as referendum supporters, to assert their claim that Congress lacked the authority to enact the 2006 Reauthorization of Section 5. All of plaintiffs' alleged injuries stem from the application of Section 5 to Kinston's proposed change from partisan to nonpartisan voting that had been adopted by referendum. The City of Kinston submitted the change to the Attorney General for administrative preclearance. The Attorney General interposed an objection. And the City elected not to request reconsideration of the objection or to seek judicial preclearance. As a result, Kinston will continue to conduct elections on a partisan basis.

Plaintiffs do not allege that Kinston's partisan election system is unlawful. Rather, plaintiff Nix alleges that he will be burdened, as a candidate, because he will be required either to win a party primary or to obtain the requisite number of signatures to get on the ballot, because he will be forced to respond to a broader range of competitive tactics and issues, and because his electoral chances will be adversely affected. Plaintiffs also allege that they are injured as voters because the partisan election system places burdens and costs on the candidates they support.

And they allege that they are harmed as referendum supporters because their efforts in support of the referendum have been nullified. All of the plaintiffs allege that they have been harmed because Kinston's partisan election system requires them to choose to associate or not to associate with a political party.

None of these alleged harms satisfy the constitutional minimum requirement that plaintiffs have suffered or will suffer "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations & internal quotation marks omitted).

Nix's alleged harms are highly abstract, contingent, and speculative. First, his bare allegation that he intends to run for office is too speculative to support standing. And the district court properly declined to consider the allegations in his affidavit, which was submitted in support of plaintiffs' motion for summary judgment, after briefing on the motion to dismiss was complete, and which recounted alleged actions he had taken after the complaint was filed. Second, the injuries he alleges that the partisan election system will impose on his candidacy are not sufficiently concrete and particularized to constitute injury in fact. It is purely speculative that Nix's candidacy will be disadvantaged by the partisan election system; it is also possible that he will be benefited by that system.

The alleged harm to plaintiffs as voters is simply derivative of their support for Nix and other nonpartisan candidates. Because there is no allegation that those candidates will be deprived of access to the ballot, plaintiffs lack standing to assert this claim. Nor do plaintiffs have standing as supporters of the referendum. Their alleged injury is not sufficiently concrete and particularized to establish injury in fact.

Further, none of plaintiffs' alleged injuries are "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. First, any burdens allegedly imposed on Nix or other candidates who *choose* to run as nonpartisan candidates result from their own choices. Second, the perpetuation of Kinston's partisan election system resulted from a series of events, including the City's decision to acquiesce in the Attorney General's objection. It thus results from "the independent action of [a] third party not before the court." *Ibid.*

Finally, prudential standing rules also bar this claim. Plaintiffs seek to assert the legal rights of third parties not before the court – the City of Kinston and all the other jurisdictions that, unlike these plaintiffs, are subject to Section 5. In addition, plaintiffs seek to assert a generalized grievance they share with all voters in Kinston who prefer nonpartisan elections.

Plaintiffs' claim that the 2006 Amendments to Section 5 effect unconstitutional racial discrimination is not properly before the court. First, plaintiffs lack standing to challenge the constitutionality of the Amendments because they have failed to allege facts demonstrating that either of the amendments affected the Kinston objection in any way. It is apparent that the new Section 5(c) could have had no effect on the Kinston objection. Section 5(c) states that preclearance should be denied when a voting change was motivated by "any discriminatory purpose." But the Kinston objection was not based on discriminatory purpose, but rather on discriminatory effect. Nor have plaintiffs alleged facts indicating how the addition of Section 5(b), clarifying the retrogression standard in the context of redistricting, affected the objection.

Second, plaintiffs cannot establish that the 2006 Amendments are facially unconstitutional. Because plaintiffs have limited their claim to a facial challenge, they cannot rely upon allegations about how the Attorney General has applied Section 5 in the past or predictions about how he will apply it in the future. Rather, they must base their claim on the language of the Amendments themselves. Neither Amendment, on its face, requires or permits unconstitutionally race-based action by the Attorney General or by covered jurisdictions. And it would be improper for a court to presume that the Attorney General will apply the Amendments in an unconstitutional manner. Adjudication of this claim thus must

await a case in which a proper plaintiff challenges their application. Plaintiffs' disavowal of an as-applied challenge precludes such a cause of action here.

Plaintiffs failed to state a valid claim that Congress lacked the authority to enact the 2006 Reauthorization of Section 5. There is no cause of action for judicial review of the Attorney General's decision to object or not to object to a voting change. Covered jurisdictions may file a declaratory judgment action to obtain a *de novo* judicial determination whether the change should be precleared. Private plaintiffs have no remedy under Section 5. If they are dissatisfied with the Attorney General's resolution of a submission, they must file a separate action, which is limited to challenging the lawfulness of the underlying voting change. Here, plaintiffs' claim stems from the perpetuation of Kinston's partisan election system, which resulted from the Attorney General's objection. They have no valid cause of action to bring such an action against the Attorney General.

ARGUMENT

I

PLAINTIFFS LACK STANDING TO CLAIM THAT THE 2006 EXTENSION OF SECTION 5 EXCEEDED CONGRESS'S AUTHORITY

To establish standing, as an "irreducible constitutional minimum," a plaintiff must establish three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or

imminent, not conjectural or hypothetical.” *Ibid.* (citations & internal quotation marks omitted). “Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.’” *Ibid.* (citation omitted). “Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Ibid.* (citation omitted). The Supreme Court has repeatedly cautioned that standing requirements must be especially strictly construed when a plaintiff raises a constitutional challenge to an Act of Congress, out of “[p]roper regard for the complex nature of our constitutional structure.” *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982).

The “threshold question” in determining standing is “whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant,” that is, “whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (citation omitted). The requisite “personal stake” exists “only when the plaintiff himself has suffered ‘some threatened or actual injury resulting from the putatively illegal action.’” *Id.* at 499 (citation omitted). Where standing

depends upon allegations of future harm, the “threatened injury must be ‘certainly impending’ to constitute injury in fact.” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)). And “when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” *Lujan*, 504 U.S. at 562.

In addition to the constitutional requirements, courts have established prudential rules limiting standing. First, “when the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” *Warth*, 422 U.S. at 499. In addition, “even when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, * * * 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*, 422 U.S. at 499. This rule allows courts to avoid adjudicating rights “which those not before the Court may not wish to assert.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 n.7 (2001) (citation omitted). This prudential limitation on standing “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.” *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)) (citation omitted).

Plaintiffs bear the burden of establishing the Court’s jurisdiction, *Spencer v. Kemna*, 523 U.S. 1, 10-11 (1998), and they are required to demonstrate standing for each specific claim that they seek to raise, *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). The Court must accept as true the complaint’s material allegations. *Scandinavian Satellite Sys., AS v. Prime TV Ltd.*, 291 F.3d 839, 844 (D.C. Cir. 2002). Because subject-matter jurisdiction focuses on the Court’s power to hear the claim, however, the Court must scrutinize those allegations closely. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003). And a court need not accept as true insufficiently supported legal conclusions set forth in a complaint. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ibid.*

This Court’s review of the dismissal of a complaint for lack of jurisdiction is *de novo*. *National Wrestling Coaches Ass’n v. Department of Educ.*, 366 F.3d 930, 937 (D.C. Cir. 2004).

A. *John Nix Lacks Standing As A Candidate*

In their opening brief, plaintiffs place greatest reliance on the standing of John Nix. The complaint alleges that Nix “intends to run for election to the

Kinston City Council in November 2011,” and that “[h]e has a direct interest in doing so 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.” J.A. 5. Nix lacks standing as a candidate to challenge Congress’s authority to enact the 2006 Reauthorization because his allegations do not satisfy the injury in fact or causation elements of Article III standing. In addition, prudential standing limits preclude Nix’s claim because it is based upon the legal interests of a third party – the City of Kinston.

1. The Highly Abstract, Contingent, And Speculative Injury Asserted By Nix Is Not Sufficient To Confer Article III Standing

According to the complaint, Nix’s injuries (indeed, all of the plaintiffs’ injuries) arise from “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.” J.A. 11. Nix does not allege that Kinston’s partisan election system is unlawful, only that it is not the system he prefers and that it is disadvantageous to his chances as a candidate. He alleges that the perpetuation of Kinston’s partisan election system will increase his costs as a candidate by requiring him either to obtain 40% of the vote in a primary election or to obtain signatures from at least 4% of registered voters, in order to have his name placed on the ballot. J.A. 11. He alleges that the partisan election system “forces [him] to

anticipate and respond to a broader range of competitive tactics and issues than otherwise would be necessary * * * [and] substantially harms [his] chances for election by, among other things, making party affiliation a factor in voter's [sic] choices." J.A. 11. And he alleges that the partisan election system "forces [him] to associate with a political party or disassociate from all of them, thus burdening [his] freedom of political association." J.A. 11.⁷ These alleged harms are not sufficient to establish injury in fact.

a. Nix's allegations of harm are not sufficiently "concrete and particularized" to constitute injury in fact. *Lujan*, 504 U.S. at 560. Nix asserts only the sorts of "conjectural or hypothetical" injuries that the Supreme Court has found insufficient to confer standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted). Nix's claim of injury to his

⁷ In his affidavit, Nix elaborates on these allegations by adding that he will lack the party resources available to the partisan candidates, that those candidates "will have little incentive to engage the issues or debate with" him, and that he will have to "overcome the preference of many voters to simply vote a party-line ticket." J.A. 52-53. The district court properly declined to consider that affidavit. "It is black-letter law" (cf. Appellants' Br. 15, 19-20) that "standing is assessed as of the time a suit commences." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009). *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), on which plaintiffs rely to support considering the affidavit, does not contradict that basic principle. That case did not involve a plaintiff's effort to establish standing by pointing to post-complaint facts suggesting injury (the issue here). Instead, it involved an effort to perfect diversity jurisdiction by dismissing a nondiverse plaintiff. That and other cases involving post-complaint changes to the parties (*e.g.*, *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996)), say nothing about the matter at hand.

prospective candidacy fails in two respects. First, the bare allegation of an intent to become a candidate is highly speculative and conjectural. Maintaining a candidacy for public office is not like going to the circus to see the elephants. Cf. Appellants' Br. 29-31 (discussing *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003)). To maintain a candidacy requires compliance with significant reporting requirements, see *e.g.*, N.C. Gen. Stat. 163-278.40A, 163-278.40B, as well as the practical necessity of fundraising and campaigning. Because a great deal of effort is required to transform an intention into a candidacy (unlike buying a ticket to the circus), a bare allegation of intent cannot raise Nix's injury above the speculative and conjectural to the concrete and imminent level.

As noted, see n.7, *supra*, the district court properly declined to rely on the affidavits plaintiff submitted on this point, as they were filed after the close of briefing on the motion to dismiss and involved post complaint conduct. But if it were appropriate to consider post-complaint affidavits on the question of standing, that would only undermine Nix's claim here. As plaintiffs' brief points out, Plaintiff Northrup also alleged in the complaint that he intended to run for city council in 2011; that he in the end decided not to maintain his candidacy (Appellants' Br. 10 n.1) highlights the speculative and conclusory nature of Nix's bare allegation of candidacy.

Second, even assuming that Nix’s allegation of future candidacy could be taken as being sufficiently concrete and imminent, the injuries that he alleges he will face as a candidate are themselves speculative and contingent. Nix notes that, under the current system, he can get on the general election ballot only by obtaining 40% of the vote in a party primary or by obtaining signatures from 4% of registered voters, while under the nonpartisan system he could go directly to the general election ballot without obtaining those signatures. J.A. 11. But whether this is in fact a burden – or instead a benefit – to Nix is contingent on a number of facts that it is impossible to know in advance. The nonpartisan system may provide Nix easier *access* to the general election ballot (assuming that Nix, who states that he is a registered Republican (J.A. 5), cannot win the Republican primary). But it may impede his ultimate electoral *success* by ensuring that he will face a larger number of competitors in the general election than he would in a partisan system.⁸ Similarly, Nix asserts that the partisan system requires him “to

⁸ Nix asserts (J.A. 52) that Democrats have an electoral advantage over Republicans in Kinston under a partisan system. To be sure, the Attorney General determined that white Kinston voters in partisan elections will sometimes vote for Democrats who are the candidates of choice of black voters, but that they often would not do so in nonpartisan elections. J.A. 43. But that says nothing about the chances of any *particular* Republican candidate in any particular election. That will obviously depend on factors specific to the candidate, his or her opponents, the issues salient to the electorate at the time of the election, and mobilization and turnout. Those contingencies make it too speculative to claim that Nix, simply by being a Republican, suffers harm from the current electoral system.

anticipate and respond to a broader range of competitive tactics and issues than would otherwise be necessary.” J.A. 11. But there is no reason to conclude that the current partisan system, which practically limits the number of candidates, will force Nix to face a broader range of tactics and issues than the nonpartisan system incorporated in the referendum, a system that would invite a far broader array of candidates to participate. To determine that Kinston’s current partisan election system ultimately disadvantages Nix thus requires pure speculation regarding “contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted).⁹

Under well established legal principles, it is clear that Kinston’s partisan election system – the proximate cause of these alleged injuries – is not unlawful. See *Jenness v. Fortson*, 403 U.S. 431, 433-442 (1971) (upholding a Georgia requirement that independent candidates file nominating petitions signed by a number not less than 5% of eligible voters); *American Party of Texas v. White*, 415 U.S. 767 (1974) (upholding ballot access requirements for minor parties); cf. *Williams v. Rhodes*, 393 U.S. 23, 25-26, 31, 34 (1968) (striking down election

⁹ There is no basis for Nix’s allegation that his freedom of association is burdened because he has to either “associate with a political party or disassociate from all of them.” J.A. 11. Under Kinston’s current partisan election system, Nix is free to run as a partisan or a nonpartisan candidate and to associate with a political party or not. Indeed, if anything, his associational choices would be further restricted under the nonpartisan system that he favors, and that would force him – and all of his opponents – to run only as nonpartisan candidates.

system that made it “virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties,” and that made “no provision for ballot position for independent candidate.”)

This is significant because, as the Court explained in *McConnell v. FEC*, 540 U.S. 93, 227 (2003), overruled on other grounds, *Citizens United v. FEC*, 130 S. Ct. 876 (2010), “a plaintiff’s alleged injury must be an invasion of a concrete and particularized legally protected interest.” *McConnell* held that candidates lacked standing to allege that statutory limits on campaign contributions denied them “an equal ability to participate in the election process based on their economic status.” *Id.* at 227, 229. While acknowledging that “standing in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal,” the Court nonetheless explained that “it often turns on the nature and source of the claim asserted.” *Ibid.* (quoting *Warth*, 422 U.S. at 500). Noting that it had “never recognized a legal right comparable to the broad and diffuse injury asserted by the” plaintiffs, the Court observed that “[n]one of these plaintiffs claims a denial of equal access to the ballot or the right to vote. Instead, the plaintiffs allege a curtailment of the scope of their participation in the electoral process.” The Court further explained that “that “[p]olitical free trade does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.”” *Ibid.* (citation & internal quotation marks omitted).

“This claim of injury,” the Court concluded, “is, therefore, not to a legally cognizable right.” *Ibid.* Nix’s asserted injuries are similarly too “broad and diffuse” to constitute injury in fact.

b. To be clear, Nix’s lack of standing does not stem simply from his failure to identify any legal right to the nonpartisan election system. The lack of standing rests, crucially, on the highly contingent and speculative nature of the injury he asserts that the current electoral system causes him. It is therefore of no moment that a plaintiff need not identify the violation of a legal right to have standing. Cf. Appellants’ Br. 22-26. Whether or not it amounts to a violation of a legal right, the cases of the Supreme Court and this Court make clear that an injury sufficient for standing must be immediate, concrete, and particularized. See generally *Lujan*, 504 U.S. at 560; *Lyons*, 461 U.S. at 102.

The cases cited by appellants underscore this very point. See Appellants’ Br. 22-26. In *Clinton v. New York*, 524 U.S. 417 (1998), the Court held that the City of New York, health care providers, and an agricultural cooperative had standing to challenge the constitutionality of the Line Item Veto Act. Each of the plaintiffs would have received a specific economic benefit but for President Clinton’s line item veto of the legislation providing the benefits. *Id.* at 428-436. The veto directly deprived the City alone of a waiver of liability for millions of dollars in Medicaid funds it otherwise might have had to repay to the federal

treasury. *Id.* at 426. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (MWAA), the Court held that individuals who lived under the flight path for National Airport and an organization whose purpose was to advocate limitations on activity at the Airport had standing to bring an action to challenge a master plan adopted by MWAA. 501 U.S. at 261-262, 264-265. The existence of injury in fact was not at issue; plaintiffs had alleged that the master plan would result in “increased air traffic at National and a consequent increase in accident risks, noise, and pollution.” *Id.* at 264. In *Parker v. District of Columbia*, 478 F.3d 370, 375-378 (D.C. Cir. 2007), *aff’d*, *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court held that an individual plaintiff who had been denied a permit to own a handgun had standing to allege that the District of Columbia’s handgun ban violated the Second Amendment. Being personally denied a permit to own a handgun necessarily is a direct and concrete injury. And in *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822-824 (D.C. Cir. 1993) (*NRA*), this Court held that a defendant in a civil enforcement action initiated by the FEC had standing to challenge the constitutionality of the composition of the FEC. The Court explained that the “case [did] not raise” the first standing requirement, “because civil sanctions are injuries in fact.” *Id.* at 824.

In *Clinton*, *MWAA*, *Parker*, and *NRA*, the parties raising constitutional claims faced clear, direct, and concrete harm: the loss of a waiver of monetary liability or tax relief; increased aircraft noise over their houses; the denial of a gun permit; the threat of civil sanctions. Here, by contrast, Nix’s claim of injury is highly abstract and hypothetical, and it depends on a number of unknown and unknowable contingencies.¹⁰ That claim does not satisfy Article III’s injury-in-fact requirement.

c. Nix also lacks standing because he has not established that his alleged injuries are “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560. *McConnell* held that the candidate plaintiffs lacked standing to allege that the hard money limitations allowed their opponents to raise more money and thereby put the plaintiffs at a competitive disadvantage, because plaintiffs could not establish causation. 540 U.S. at 228. The Court explained that the candidates’ “alleged inability to compete stems not from the operation of §

¹⁰ Plaintiffs attempt to bolster their claim of injury by asserting that “Kinston’s referendum conferred upon Nix a ‘legally protected interest’ *under state law*.” Appellants’ Br. 25 (emphasis in original). But plaintiffs’ description of that supposed state-law interest makes clear that it has nothing to do with state law but instead simply restates Nix’s general, and highly speculative and contingent, claim of candidate-related injury: “his personal interest in the concrete election-related benefits from the nonpartisan election regime lawfully enacted by Kinston’s voters.” *Ibid*.

307, but from their own personal ‘wish’ not to solicit or accept large contributions, *i.e.*, their personal choice.” *Ibid.* Thus, the Court held, they had failed to allege an injury that was traceable to the statute.

Nix’s alleged injuries are also traceable to his own choice. Under Kinston’s current election system, Nix can choose whether to run for office as either a partisan or a nonpartisan candidate. Any disadvantages he may suffer as a result of that choice are caused by his own action, not the operation of Section 5, the Attorney General’s objection, or Kinston’s election system. Unlike in *Shays v. FEC*, 414 F.3d 76, 88-90 (D.C. Cir. 2005), this is not a case where Nix “could avoid the injury *only* by [himself] engaging in * * * unlawful conduct.” Cf. Appellants’ Br. 28.

Nix has failed to establish causation for another reason. Plaintiffs allege that their “injury flows from the fact that Congress reauthorized Section 5.” J.A. 107; see Appellants’ Br. 9. But they acknowledge that their injuries “would have been eliminated had the Attorney General not objected.” J.A. 107. In fact, a *series* of events led to Kinston’s retention of its partisan election system: first, after the referendum passed, Kinston submitted it to the Attorney General for preclearance; second, the Attorney General interposed an objection to the proposed change; and third, the Kinston City Council voted not to seek reconsideration of the objection or to seek a declaratory judgment that the change to nonpartisan elections did not

have a discriminatory purpose or effect. Kinston's decision to continue its partisan election system was therefore "the independent action of [a] third party not before the court," *Lujan*, 504 U.S. at 560, that is, the City of Kinston.

2. *Nix Lacks Prudential Standing To Assert The Rights Of The City Of Kinston*

Even assuming Nix's alleged injuries as a candidate are sufficient to establish Article III standing, prudential standing rules bar his claim that Congress lacked the authority to enact the 2006 Reauthorization because that claim rests on the "legal rights or interests of third parties." *Warth*, 422 U.S. at 499. If, like the party raising a constitutional challenge in *Bond v. United States*, No. 09-1227 (S. Ct.) (argued Feb. 22, 2011), Nix were personally prosecuted under the statute he was challenging, he would be asserting "own right to be free from punishment under a statute that is invalid, either facially or as applied to [him], because it exceeds Congress's legislative authority." U.S. Br. 11, *Bond v. United States* (Dec. 3, 2010). But Section 5 does not even regulate, much less authorize prosecution and punishment of, private individuals. Cf. *id.* at 32 (explaining that "an individual subject to imminent loss of liberty or property as the result of a federal statute *that regulates her primary conduct* has standing to argue the statute exceeded Congress's Article I authority") (emphasis added). Instead, it imposes its requirements on the covered jurisdictions directly. Accordingly, Nix's claim that the extension of the statute exceeds Congress's authority does not invoke his own

rights but only the rights of the City of Kinston and perhaps the State of North Carolina against “interfer[ence] with a specific aspect of state sovereignty.” *Id.* at 43. Nix lacks standing to assert that claim. See *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 135-136, 144 (1939).

As the Supreme Court has emphasized, “[t]here are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated – the avoidance of the adjudication of rights which those not before the Court may not wish to assert.” *Elk Grove*, 542 U.S. at 15 n.7 (citation omitted). The City of Kinston and the other covered jurisdictions may well have quite different views than plaintiffs as to, for example, whether Section 5 preclearance remains necessary in the covered jurisdictions; whether the “preclearance process is costly and burdensome and requires unnecessary and disruptive delays,” and whether it “deprives [them] of essential attributes of self-governance.” J.A. 9. In the absence of these real parties in interest, prudential standing limitations bar this claim.

Notwithstanding these prudential limitations, plaintiffs may sometimes assert the rights of third parties when Congress has created a “statutory right or entitlement * * * even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.” *Warth*, 422 U.S. at 514. Congress did just that, for example, when it enacted the “broad definition of ‘person aggrieved’”

in the Fair Housing Act, 42 U.S.C. 3610(d) (1982 ed.); see *Warth*, 422 U.S. at 512-513 (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972)).

Thus, plaintiffs who have suffered actual injury, such as deprivation of the benefits of integrated living or economic injuries stemming from real estate steering practices, may bring an action under the Fair Housing Act based on discrimination against third parties. *Trafficante*, 409 U.S. 205, 209-210; *Gladstone, Realtors v. City of Bellwood*, 441 U.S. 91, 110-111 (1979); see *id.* at 103 n.9 (“If * * * Congress intended standing under [the Fair Housing Act] to extend to the full limits of Art. III, the normal prudential rules do not apply; as long as the plaintiff suffers actual injury as a result of the defendant’s conduct, he is permitted to prove that the rights of another were infringed.”).¹¹

¹¹ Plaintiffs’ quotation (Appellants’ Br. 24) from the Court’s recent opinion in *Thompson v. North American Stainless, L.P.*, No. 09-291, 2011 WL 197638, at *5 (Jan. 24, 2011) is materially incomplete. In *Thompson*, the Court declined to give the same expansive interpretation to the term “person aggrieved” in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), as it had to the same term in the Fair Housing Act. The court explained, “*If any person injured in the Article III sense by a Title VII violation could sue, absurd consequences would follow.* For example, a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence. * * * We * * * therefore conclude that the term ‘aggrieved’ must be construed more narrowly than the outer boundaries of Article III.” *Ibid.* (emphasis on the sentence omitted from Appellants’ brief).

No statute authorizes private parties such as Nix to assert the rights of the City of Kinston or the other covered jurisdictions. Thus, he may not assert his claim that Congress lacks the authority to enact the 2006 Reauthorization.

B. Plaintiffs Lack Standing As Voters

Plaintiffs allege that the perpetuation of Kinston's partisan election system will harm them as voters because it will "impose additional burdens and costs on candidates they support," and because it "burden[s] their right to politically associate, or refrain from associating, with others." J.A. 12. Plaintiffs lack standing as voters to challenge Congress's authority to enact the 2006 Reauthorization because these allegations do not satisfy the injury in fact or causation elements of Article III standing. In addition, these alleged injuries are just the kind of generalized grievances the prudential standing rules are meant to preclude. And, for the same reasons as plaintiff Nix's claim as a candidate, this claim is barred because it is based upon the legal interests of a third party – the City of Kinston (see pp. 39-41, *supra*).

Plaintiffs' claim that they will suffer derivative harm based on the burdens allegedly imposed upon their favored candidates by the partisan election system is inadequate to establish injury in fact. As this Court has explained, there are instances in which "the interests of candidates and voters are so intertwined that an injury to the candidate causes correlative harm to voters." *Gottlieb v. FEC*, 143

F.3d 618, 622 (D.C. Cir. 1998). But such harm to the voters occurs only “when the candidate is prevented from appearing on a ballot altogether,” thereby “directly impinging on the voters’ ability to support that candidate.” *Ibid.*; see also *Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000) (voters lacked standing where, “[r]egardless of [the candidate’s] injury, his supporters remain fully able to advocate for his candidacy and to cast their votes in his favor”), cert. denied, 532 U.S. 1007 (2001). Plaintiffs do not allege that any of their favored candidates will be unable to run for office under Kinston’s partisan system. Thus plaintiffs will remain able to support and vote for their favored candidates.

As with plaintiff Nix, there is simply no basis for plaintiffs’ allegation that their freedom of association will be burdened by the partisan election system. Under Kinston’s current partisan election system, plaintiffs are free to support and to vote for any candidates they choose. See n.9, *supra*.

C. Plaintiffs Lack Standing As Referendum Supporters

Plaintiffs allege that “[t]he denial of Section 5 preclearance has completely nullified [their] efforts in support of the referendum” and “nullified and infringed their right under North Carolina law to participate in the electoral, political and law-making process through citizen referenda.” J.A. 11-12. Plaintiffs lack standing as referendum supporters to challenge Congress’s authority to enact the 2006 Reauthorization because these allegations do not satisfy the injury in fact or

causation elements of Article III standing. In addition, these alleged injuries are the kind of generalized grievances the prudential standing rules are meant to preclude. And, for the same reasons as plaintiff Nix's claim as a candidate, this claim is barred because it is based upon the legal interests of a third party – the City of Kinston (see pp. 39-41, *supra*).

The Supreme Court and this Court have accorded standing to legislators to challenge actions that have nullified their votes as legislators. See, *e.g.*, *Coleman v. Miller*, 307 U.S. 433, 436-438 (1939); *Raines v. Byrd*, 521 U.S. 811, 821-824 (1997); *Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999). But neither this Court nor the Supreme Court has ever recognized such standing for citizen supporters of referenda or initiatives. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (“Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.”). Indeed, the Court in *Arizonans* noted that it had summarily dismissed “for lack of standing, [an] appeal by an initiative proponent from a decision holding the initiative unconstitutional.” *Ibid.* (citing *Don't Bankrupt Washington Comm. v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 460 U.S. 1077 (1983)). And the Court expressed “grave doubts” that initiative proponents have Article III standing to defend the constitutionality of an initiative they supported. *Id.* at 66.

Two courts of appeals have concluded that referendum proponents do not have such standing. See *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 312, 318 (6th Cir. 2005); *Nolles v. State Comm. for the Reorganization of Sch. Dists.*, 524 F.3d 892, 900 (8th Cir.), cert. denied, 129 S. Ct. 418 (2008). The only contrary authority is *Yniguez v. Arizona*, 939 F.2d 727, 731-733 (9th Cir. 1991). And that decision was vacated as moot by the Supreme Court in *Arizonans*, 520 U.S. at 66-80.

D. Plaintiff KCNV Lacks Standing

The organization KCNV is an association of voters, referendum supporters, and prospective candidates who favor nonpartisan elections in Kinston. J.A. 5-6. Its claims are based entirely on the alleged harms to its members. J.A. 12. KCNV lacks standing to challenge Congress's authority to enact the 2006 Reauthorization because, for the reasons stated in parts I.A. - C., *supra*, none of its members have standing to assert this claim. See *Arizonans*, 520 U.S. at 65-66.

II

PLAINTIFFS' CLAIM THAT THE 2006 AMENDMENTS TO SECTION 5 EFFECT UNCONSTITUTIONAL RACIAL DISCRIMINATION IS NOT PROPERLY BEFORE THE COURT

Plaintiffs allege that Section 5, as amended in 2006, and "particularly as enforced by the Attorney General," violates the nondiscrimination requirements of the Constitution. J.A. 13-14. They allege that amended Section 5, "particularly as

implemented by the Attorney General,” harms them by denying them “equal, race-neutral treatment, and an equal opportunity to political and electoral participation, by subjecting them to a racial classification and by intentionally providing minority voters and their preferred candidates a preferential advantage in elections.” J.A. 12; see J.A. 10-11 (alleging that the 2006 Amendments are racially discriminatory).

A. *Because They Have Not Been Injured By The 2006 Amendments To Section 5, Plaintiffs Have No Standing To Challenge Those Amendments*

Plaintiffs lack standing to challenge the constitutionality of the 2006 Amendments for all of the same reasons they lack standing to challenge the 2006 extension of the statute (see Part I-A, *supra*), plus one more: As with their first claim, plaintiffs’ alleged harms must result from the application of Section 5 to the Kinston nonpartisan election referendum and the Attorney General’s objection to that submission. Otherwise, they are simply asserting a generalized grievance that they share with the voters of Kinston and all the covered jurisdictions. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975). But plaintiffs have not alleged facts sufficient to demonstrate that the 2006 Amendments affected the preclearance process for the referendum in any way. They thus cannot satisfy either the causation or the redressability prongs of the standing requirements.

Plaintiffs’ failure is most obvious as to the addition of Section 5(c), which provides that the purpose prong of the preclearance standard requires a jurisdiction

to prove that its submission was not motivated by any discriminatory purpose. See p. 9, *supra*. In this case, the objection to Kinston's submission was based solely on the retrogressive *effect* of the proposed change. See J.A. 43 (“[W]hile the motivating factor for this change may be partisan, the effect will be strictly racial.” J.A. 43). Thus, the record in this case affirmatively establishes that the Attorney General would have objected to the submission whether or not Section 5(c) had been added to the statute. Even assuming plaintiffs have demonstrated that they suffered harm as a result of the objection, any such injury was not caused by the existence of Section 5(c). Nor would any such injury be redressed by a ruling that Section 5(c) is unconstitutional. Plaintiffs therefore lack standing to assert a claim that this provision violates equal protection.

Plaintiffs also have failed to allege that Kinston's proposed change to nonpartisan elections would have been precleared but for the addition of Section 5(b) to Section 5. This provision clarifies, in the wake of *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that a covered jurisdiction may not destroy existing gains achieved by minority voters by reducing the number of districts from which those voters are able to elect the candidates of their choice, and replace them with districts in which those voters may do nothing more than potentially influence the outcome of an election. Nothing in plaintiffs' complaint or affidavits alleges that the addition of Section 5(b) affected the application of Section 5 to Kinston's

proposed change to nonpartisan voting. Nor does the objection letter substantiate any such affect. As it has been since its enactment, a major purpose of Section 5 is “to insure that (the gains thus far achieved in minority political participation) shall not be destroyed through new (discriminatory) procedures and techniques.” *Beer v. United States*, 425 U.S. 130, 141 (1976) (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 19 (1975)). The Attorney General’s objection to Kinston’s change to nonpartisan elections was simply a straightforward application of that principle, unaffected by the 2006 Amendments.

*B. Plaintiffs Cannot Establish That The 2006 Amendments Are Facially Unconstitutional*¹²

As set forth above, while plaintiffs’ complaint asserted both as-applied and facial challenges to the constitutionality of Section 5, plaintiffs have now disavowed any intention to challenge the constitutionality of Section 5 as applied. See pp. 11-12, *supra*. In particular, plaintiffs have made it “crystal clear” that they “are not alleging that the Attorney General *misapplied* the *statutory* preclearance standard to Kinston’s referendum or that Section 5’s *application* to that referendum is in any way *uniquely* unconstitutional,” (Appellants’ Br. 9) and that they “would be bringing the same exact claim if Kinston had never sought preclearance in the

¹² The Attorney General did not make this argument below because plaintiffs did not state until after briefing on the motion to dismiss was complete that they were limiting their claims to a facial challenge to the statute’s constitutionality.

first place” (J.A. 107). Thus, it is the preclearance requirement – as expressed in Sections 5(b) and 5(c) – that plaintiffs’ challenge, not any particular application of those provisions.

Because they have limited their claims to a facial challenge, plaintiffs must demonstrate that Section 5, as amended, is unconstitutional in all its applications, or at a minimum, that it lacks “a plainly legitimate sweep.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (citation & internal quotation marks omitted). This means that they cannot rely upon allegations about the manner in which the Attorney General has applied Section 5 in the past, the way in which it was applied to the Kinston referendum, or how they expect the Attorney General will apply Section 5 in the future. Rather, they must demonstrate that Section 5 – and, in particular, the 2006 Amendments – is unconstitutional on its face. Yet plaintiffs’ claim that the 2006 Amendments are unconstitutional rests upon allegations concerning the manner in which the Attorney General has applied the statute in the past and how he is likely to apply it in the future. See J.A. 10-11, 13-14.

The new Section 5(c) provides that Section 5 preclearance should be denied to a voting change that was motivated by “any discriminatory purpose.” The language of this provision is not facially race-conscious, let alone unconstitutional. Indeed, it simply incorporates the Supreme Court’s own standard for identifying

unconstitutional racial discrimination. See *City of Mobile v. Bolden*, 446 U.S. 55, 61-64 (1980); *Washington v. Davis*, 426 U.S. 229, 242 (1976). Plaintiffs’ contention that Section 5(c) nonetheless is unconstitutional depends upon their allegation that the Attorney General applied the purpose prong of the preclearance standing improperly in the past and a prediction that he will do so in the future. See J.A. 10-11 (“Particularly given the Justice Department’s Section 5 enforcement record concerning changes that do not increase minority-preferred candidates’ success to the maximum practicable extent, this expansion of Section 5’s scope constitutes at least an implicit command for covered jurisdictions to engage in race-based voting practices and procedures.”). Given the facially-neutral language of Section 5(c), however, it would be improper for a court to presume that a coordinate branch of government will apply the new purpose prong unconstitutionally and in a manner inconsistent with its plain text.¹³ See *Washington State Grange*, 552 U.S. at 449-450 (“In determining whether a law is facially invalid, we must be careful not to go beyond the statute’s facial

¹³ The Court made it clear in *Miller v. Johnson*, 515 U.S. 900, 924 (1995), and *Shaw v. Hunt*, 517 U.S. 899, 911-913 (1996), that when a jurisdiction adheres to traditional districting principles, its failure to create additional majority-minority districts does not constitute intentional discrimination and does not violate Section 5. The Attorney General acknowledges that principle and, since those decisions, has consistently applied it in enforcing Section 5. See e.g., *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act*, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001); 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). Nothing in the new Section 5(c) purports to alter the rulings in *Miller* or *Shaw*.

requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.”). To do so would be to “short circuit the democratic process by preventing [a] law[] embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Id.* at 451; see *Sumter County*, 555 F. Supp. at 706 (court has no authority “to anticipate or rule on” Attorney General’s future application of the statute). If, in the future, the Department misapplies the purpose prong and demands that a jurisdiction violate the Constitution, the jurisdiction can obtain complete relief by seeking judicial preclearance. 42 U.S.C. 1973c(a). If such a jurisdiction were to choose to submit to such an improper demand, a private party with standing to do so could sue the jurisdiction for the constitutional violation. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 909 (1995). Any claim that Section 5(c) is unconstitutional must await such a concrete application. Cf. *id.* at 915-916 (describing the complex, fact-based inquiry a court must conduct in assessing whether a redistricting plan is unconstitutionally race-based).

Plaintiffs’ claim that Section 5(b) will result in unconstitutionally race-based application of the retrogression prong of the preclearance requirement must also await a concrete application of the statute for adjudication. It has long been established that the “effect” prong of the preclearance standard precludes only changes that “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*,

425 U.S. 130, 141 (1976). Plaintiffs do not assert that the retrogression principle itself is unconstitutional. See *LULAC v. Perry*, 548 U.S. 399, 517-519 (2006) (Scalia, J., concurring in the judgment in part & dissenting in part) (compliance with non-retrogression mandate justified to remedy past discrimination). Rather, they contend that the addition of Section 5(b) has made the retrogression standard unconstitutional, and particularly as applied by the Attorney General. See J.A. 10 (“This 2006 amendment thus established a floor for minority electoral success in all covered jurisdictions until 2031.”); J.A. 13 (“Section 5, as amended in 2006 * * * violates the nondiscrimination requirements of” the constitution, “particularly as enforced by the Attorney General”).

Nothing in the language of Section 5(b) requires that it be applied as plaintiffs predict. In particular, Section 5(b) does not, by its terms, deny preclearance in the absence of electoral *success*; rather it identifies a change as retrogressive if it diminishes minority voters’ “*ability* * * * to elect their preferred candidates of choice.” 42 U.S.C. 1973c(b) (emphasis added). But ability does not invariably lead to success. The amended retrogression prong thus leaves intact the settled principle that “[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it merely mandates that the minority’s opportunity to elect representatives of its choice not be diminished.” *Bush v. Vera*, 517 U.S. 952, 983 (1996) (O’Connor, J.) (plurality).

Indeed, the Attorney General recognized long before the decision in *Ashcroft* that the prohibition on retrogression does not “require the reflexive imposition of objections in total disregard of the circumstances involved or the legitimate justifications in support of changes that incidentally may be less favorable to minority voters.” *Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 486, 488 (Jan. 6, 1987). In particular, the Department of Justice has long recognized that retrogression can be justified when a plan that maintains preexisting minority voting strength would violate the Constitution: “in the redistricting context, there may be instances occasioned by demographic changes in which reductions of minority percentages in single-member districts are unavoidable, even though ‘retrogressive,’ i.e., districts where compliance with the one person, one vote standard necessitates the reduction of minority voting strength.” *Ibid.* Even before *Ashcroft*, the Department publicly explained that a retrogressive redistricting plan must nonetheless be precleared if the only alternative is a plan that subordinates traditional districting principles and violates the principles articulated in *Shaw* and *Miller*. See *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act*, 66 Fed. Reg. at 5413 (explaining that “preventing retrogression under Section 5 does not require jurisdictions to violate *Shaw v. Reno*, [509 U.S. 630 (1993)] and related cases”).

Thus, as with Section 5(c), any claim that Section 5(b) is unconstitutional must await a case in which the provision has actually been applied. Because plaintiffs disavow any intention to challenge the Attorney General's objection to the Kinston referendum, they cannot assert such a claim in this case.

III

PLAINTIFFS HAVE FAILED TO STATE A VIABLE CAUSE OF ACTION

This Court reviews *de novo* the dismissal of a complaint for failure to state a claim. *Stewart v. National Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

As explained above, neither covered jurisdictions nor private individuals, such as plaintiffs here, have a cause of action seeking judicial review of the Attorney General's decision to preclear or not to preclear a proposed voting change. See pp. 5-6, *supra*; see *Morris v. Gressette*, 432 U.S. 491, 501-505 (1977); *Harris v. Bell*, 562 F.2d 772, 773-774 (D.C. Cir. 1977); *City of Rome v. United States*, 450 F. Supp. 378, 380-382 (D.D.C. 1978) (*City of Rome I*), *aff'd*, 446 U.S. 156 (1980). When private plaintiffs seek to challenge a voting change that has been precleared by the Attorney General, they may do so only in an action attacking the constitutionality of the proposed change, *Morris*, 432 U.S. at 503, or in an action under Section 2 of the Voting Rights Act, *e.g.*, *Major v. Treen*, 574 F. Supp. 325, 327 & n.1 (E.D. La. 1983); see 42 U.S.C. 1973c(a). As with a declaratory judgment action brought by a jurisdiction, the issue to be adjudicated in

such an action is not the merits of the Attorney General's exercise of his discretion, but the lawfulness of the underlying voting change. *Morris*, 432 U.S. at 506-507.

Here, plaintiffs allege that Section 5 is facially unconstitutional, but they do so in the context of the Attorney General's objection to a specific voting change, and based upon alleged injuries that arise only as a result of that objection. See J.A. 11-12. Plaintiffs contend that their injuries stem from Section 5 itself, and that they would have suffered the same injuries and could have brought the same claims if Kinston had never submitted the change for preclearance. See J.A. 107; Appellants' Br. 9, 45. Whatever the merits of those contentions, Kinston did submit the change for preclearance and the Attorney General did interpose an objection. If he had not done so, or if Kinston had sought judicial preclearance or reconsideration of the Attorney General's objection and prevailed, the nonpartisan election system would be in effect today and plaintiffs would not have instituted this action. Thus, however they may try, plaintiffs cannot neatly excise the Attorney General's objection from this case.

In both *City of Rome v. United States*, 472 F. Supp. 221 (D.D.C. 1979), (*City of Rome II*), aff'd, 446 U.S. 156 (1980), and *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983), three-judge courts addressed private plaintiffs' efforts to assert constitutional claims arising from the Attorney General's objection to a voting change. In *City of Rome II*, the court

stated that it was “doubtful” that, as a three-judge court convened pursuant to Section 5 of the Voting Rights Act, it had jurisdiction to consider either the City’s or the private plaintiffs’ constitutional claims. 472 F. Supp. at 236. Because the constitutional claims and the Section 5 claims arose from a “common nucleus of operative fact,” however, the court determined that it could “take jurisdiction over the claims on a pendent jurisdiction theory.” *Ibid.* (citation omitted). The individual plaintiffs contended that they had been deprived of rights because there had been no regularly scheduled elections in Rome for an extended period. *Id.* at 241. In addressing this claim, the court concluded that the plaintiffs’ injury was “at least as much the result of the actions of Rome’s elected officials as of the Voting Rights Act.” *Ibid.* The court then discussed the merits of the private plaintiffs’ claim in conditional terms: “Even if we agreed that the injuries complained of result from operation of the Voting Rights Act, we would find little merit to the plaintiffs’ arguments.” *Id.* at 242. Thus, *City of Rome II* provides scant, if any, support to plaintiffs’ contention that they have a cause of action.

In *Sumter County*, the court squarely declined to adjudicate the private plaintiffs’ claims. *Sumter County* was a declaratory judgment action filed by a covered jurisdiction and private plaintiffs, seeking judicial preclearance of an at-large voting system that had been adopted by referendum, and to which the Attorney General had interposed an objection. 555 F. Supp. at 698. The court

denied a motion for summary judgment on the preclearance claim, and indicated that it would decide that claim, *de novo*, after a trial on the merits. *Id.* at 704-706. The private plaintiffs also alleged that the Attorney General’s “refusal to preclear the method of election for which the individual plaintiffs voted in the 1978 referendum denied and impaired their constitutional right to vote.” *Id.* at 706. The court declined to adjudicate this claim, stating that its “role must be limited to *de novo* consideration of whether the method of election violates rights protected by the Voting Rights Act or the Constitution. We cannot sit in judgment here upon whether the Attorney General’s refusal to preclear violated rights asserted by plaintiffs.” *Id.* at 706-707 (citing *Morris*, 432 U.S. at 501-505; *City of Rome I*, 450 F. Supp. at 380-382).

As in *Sumter County*, plaintiffs in this case allege that their rights were violated when a voting provision adopted in a referendum for which they voted was not precleared by the Attorney General. They do not seek review of the Attorney General’s objection. Rather, like the plaintiffs in *Sumter County*, they seek to raise constitutional claims that arise only as a result of the Attorney General’s objection. The district court here correctly declined to address those claims.

This is not to say that private plaintiffs will always lack a remedy when they contend that they have been injured by a jurisdiction’s failure to implement a

voting change as a result of Section 5. Assuming such plaintiffs have standing (but see Parts I, II.A, *supra*), their remedy would be to bring an action against the jurisdiction to challenge the lawfulness of the retention of the existing voting system, not an action against the Attorney General. Cf. *Morris*, 432 U.S. at 503 (private plaintiffs seeking to challenge voting procedure precleared by the Attorney General may do so only in an action attacking the lawfulness of the proposed change itself); *Shaw v. Reno*, 509 U.S. 630, 641-642 (1993) (affirming dismissal of private plaintiffs' claims against federal defendants but recognizing cause of action against a covered jurisdiction to challenge constitutionality of redistricting plan adopted after Section 5 objection). While such an action might implicate the constitutionality of Section 5, the constitutional question would arise in the context of an as-applied challenge to a particular voting practice, as adopted or retained by the jurisdiction.

CONCLUSION

The district court's judgment dismissing plaintiffs' complaint should be affirmed.

Respectfully submitted,

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

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
JULIE A. FERNANDES
Deputy Assistant Attorneys General

/s/ Linda F. Thome
DIANA K. FLYNN
LINDA F. THOME
Attorneys
Civil Rights Division
U.S. Department of Justice
Appellate Section
P.O. Box 14403
Ben Franklin Station
Washington, D.C. 20044-4403
(202) 514-4706

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 13,975 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ Linda F. Thome
LINDA F. THOME
Attorney

Date: March 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2011, the foregoing BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE was filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia using the CM/ECF.

I further certify that I will cause eight paper copies of the foregoing document to be hand delivered to the Clerk of the Court on March 8, 2011.

Furthermore, I certify that the CM/ECF system will serve a copy of the foregoing on the parties below:

J. Gerald Herbert
The Campaign Legal Center
215 E. St. N.E.
Washington, DC 20002

Arthur Barry Spitzer
American Civil Liberties Union
1400 20th Street, N.W., Suite 119
Washington, DC 20036

Michael A. Carvin
Noel J. Francisco
Hashim M. Mooppan
Jones Day
51 Louisiana Ave., N.W.
Washington, DC 20001

Michael E. Rosman
Michelle E. Scott
Center for Individual Rights
1223 20th St., N.W., Suite 300
Washington, DC 20036

/s/ Linda F. Thome
LINDA F. THOME
Attorney

ADDENDUM

REPRODUCED AUTHORITIES

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REGULATIONS:

28 C.F.R. 51.451A

STATUTES:

N.C. Gen. Stat. 163-278.40A2A

N.C. Gen. Stat. 163-278.40B3A

28 C.F.R 51.45:

(a) The submitting authority may at any time request the Attorney General to reconsider an objection.

(b) Requests may be in letter or any other written form and should contain relevant information or legal argument.

(c) Notice of the request will be given to any party who commented on the submission or requested notice of the Attorney General's action thereon and to interested parties registered under § 51.32. In appropriate cases the Attorney General may request the submitting authority to give local public notice of the request.

N.C. Gen. Stat. 163-278.40A:

(a) Each candidate and political committee in a city election shall appoint a treasurer and, under verification, report the name and address of the treasurer to the board. A candidate may appoint himself or any other individual, including any relative except his spouse, as his treasurer. If the candidate fails to designate a treasurer, the candidate shall be deemed to have appointed himself as treasurer. A candidate or political committee may remove his or its treasurer.

(b) The organizational report shall state the bank account and number of such campaign fund. Each report required by this Part shall reflect all contributions, expenditures and loans made in behalf of a candidate. The organizational report shall be filed with the county board of elections within 10 days after the candidate files a notice of candidacy with the county board of elections, or within 10 days following the organization of the political committee, whichever occurs first.

N.C. Gen. Stat. 163-278.40B:

In any city election conducted on a partisan basis in accordance with G.S. 163-279(a)(2) and 163-291, the following reports shall be filed in addition to the organizational report:

- (1) Thirty-five-day Report. - The treasurer shall file a report with the board 35 days before the primary.
- (1a) Pre-primary Report. - The treasurer shall file a report with the board no later than the tenth day preceding each primary election.
- (2) Pre-election Report. - The treasurer shall file a report 10 days before the election, unless a second primary is held and the candidate appeared on the ballot in the second primary, in which case the report shall be filed 10 days before the second primary.
- (3) Repealed by Session Laws 1985, c. 164, s. 2.
- (4) Semiannual Reports. - If contributions are received or expenditures made during any part of a calendar year, for which no reports are otherwise required by this section, any and all those contributions and expenditures shall be reported on semiannual reports due on the last Friday in July, covering the period through June 30, and due on the last Friday in January, covering the period through December 31 of the previous year.