

[Oral Argument Scheduled for May 6, 2011]

No. 10-5433

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

STEPHEN LAROQUE, ET AL.,

Appellants,

v.

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

Appellees.

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

REPLY BRIEF FOR APPELLANTS

MICHAEL E. ROSMAN
MICHELLE A. SCOTT
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. N.W., Suite 300
Washington, DC 20036
Telephone: (202) 833-8400

MICHAEL A. CARVIN
Lead Counsel
NOEL J. FRANCISCO
HASHIM M. MOOPAN
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Email: macarvin@jonesday.com

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT1

ARGUMENT2

I. PLAINTIFF NIX’S CANDIDACY-RELATED INJURIES ARE CONCRETE, PERSONAL, AND IMMINENT2

 A. Nix’s Injury Is Concrete2

 B. Nix’s Right Is Personal7

 C. Nix’s Candidacy Is Imminent12

II. PLAINTIFFS’ INJURIES ARE CAUSED BY SECTION 5 AND WILL LIKELY BE REDRESSED BY INVALIDATING SECTION 5.....16

III. PLAINTIFFS HAVE A CAUSE OF ACTION TO CHALLENGE THE FACIAL CONSTITUTIONALITY OF SECTION 522

IV. PLAINTIFFS SUFFICIENTLY ALLEGED VOTING-RELATED INJURIES SUPPORTING THEIR STANDING24

V. PLAINTIFFS’ NONDISCRIMINATION CLAIM SHOULD NOT BE DISMISSED25

CONCLUSION31

CERTIFICATE OF COMPLIANCE33

CERTIFICATE OF SERVICE34

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995).....	26
<i>Animal Legal Defense Fund, Inc. v. Espy</i> , 23 F.3d 496 (D.C. Cir. 1994).....	13, 14
* <i>ASPCA v. Ringling Bros. and Barnum & Bailey Circus</i> , 317 F.3d 334 (D.C. Cir. 2003).....	13, 14
<i>Bond v. United States</i> , No. 09-1227 (U.S.)	11, 12
<i>Burlington N. R.R. Co. v. Surface Transp. Bd.</i> , 75 F.3d 685 (D.C. Cir. 1996).....	13
<i>Chenoweth v. Clinton</i> , 181 F.3d 112 (D.C. Cir. 1999).....	24
* <i>City of Rome v. United States</i> , 446 U.S. 156 (1980).....	20, 22
* <i>Clinton v. City of New York</i> , 524 U.S. 417 (1998).....	3, 4, 22
<i>Comm. for Effective Cellular Rules v. FCC</i> , 53 F.3d 1309 (D.C. Cir. 1995).....	14
<i>Cnty. Council of Sumter Cnty. v. United States</i> , 555 F. Supp. 694 (D.D.C. 1983).....	22, 23
<i>Del Monte Fresh Produce Co. v. United States</i> , 570 F.3d 316 (D.C. Cir. 2009).....	15

* Authorities upon which we chiefly rely are marked with asterisks.

<i>Don't Bankrupt Wash. Comm. v. Continental Ill. Nat. Bank & Trust Co. of Chicago,</i> 460 U.S. 1077 (1983).....	25
* <i>Equal Rights Ctr. v. Post Properties, Inc.,</i> No. 09-5359 (D.C. Cir. Mar. 8, 2011)	5, 13, 15, 16, 19
<i>Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,</i> 130 S. Ct. 3138 (2010).....	9
* <i>Georgia v. Ashcroft,</i> 539 U.S. 461 (2003).....	26, 27, 28, 29, 31
<i>Grutter v. Bollinger,</i> 539 U.S. 306 (2003).....	29
<i>INS v. Chadha,</i> 462 U.S. 919 (1983).....	22
<i>Krislov v. Rednour,</i> 226 F.3d 851 (7th Cir. 2000)	3
<i>Lawrence v. Texas,</i> 539 U.S. 558 (2003).....	22
<i>Lujan v. Defenders of Wildlife,</i> 504 U.S. 555 (1992).....	13, 14
<i>McConnell v. FEC,</i> 540 U.S. 93 (2003).....	4, 6, 19
<i>Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.,</i> 501 U.S. 252 (1991).....	9
<i>Miller v. Johnson,</i> 515 U.S. 900 (1995).....	28
<i>Morris v. Gressette,</i> 432 U.S. 491 (1977).....	30
<i>Morrison v. Olson,</i> 487 U.S. 654 (1988).....	9

<i>Muir v. Navy Fed. Credit Union</i> , 529 F.3d 1100 (D.C. Cir. 2008).....	21, 28
<i>Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.</i> , 366 F.3d 930 (D.C. Cir. 2004).....	17, 18
* <i>New York v. United States</i> , 505 U.S. 144 (1992).....	7, 8, 9, 10, 18, 20
<i>Newman-Green, Inc. v. Alfonzo-Larrain</i> , 490 U.S. 826 (1989).....	15
<i>Nolles v. State Comm. for the Reorganization of Sch. Dists.</i> , 524 F.3d 892 (8th Cir. 2008)	25
<i>Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville</i> , 508 U.S. 656 (1993).....	30
* <i>Nw. Austin Mun. Util. Dist. No. 1 v. Holder</i> , 129 S. Ct. 2504 (2009).....	21, 27, 28, 30
<i>Providence Baptist Church v. Hillandale Comm., Ltd.</i> , 425 F.3d 309 (6th Cir. 2005)	25
* <i>Raines v. Byrd</i> , 521 U.S. 811 (1997).....	24, 25
<i>Reno v. Bossier Parish Sch. Bd.</i> , 528 U.S. 320 (2000).....	28
* <i>Schulz v. Williams</i> , 44 F.3d 48 (2d Cir. 1994)	7
* <i>Shays v. FEC</i> , 414 F.3d 76 (D.C. Cir. 2005).....	5, 6, 7, 19, 20
<i>Truitt v. Dep’t of State</i> , 897 F.2d 540 (D.C. Cir. 1990).....	29
<i>United States v. Comstock</i> , 130 S. Ct. 1949 (2010).....	8, 9

<i>United States v. Hays</i> , 515 U.S. 737 (1995).....	29, 30
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	1
<i>United States v. Morrison</i> , 529 U.S. 598 (2000).....	8, 9
* <i>United States v. Texas</i> , 158 F.3d 299 (5th Cir. 1998)	17, 18
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	8
FEDERAL STATUTES	
*42 U.S.C. § 1973c	26, 27, 29
OTHER AUTHORITIES	
39 Op. Att’y Gen. 22 (1937).....	21

SUMMARY OF ARGUMENT

It is undisputed that if Congress had not reauthorized Section 5's preclearance requirement in 2006, then candidate Nix would not be required to spend as much money and time as he must currently spend to get on the November 2011 general-election ballot for the Kinston City Council. In particular, the ballot-access requirements of the 2008 nonpartisan-elections referendum that Section 5 is preempting—*i.e.*, a candidacy notice and filing fee—are less burdensome than the ballot-access requirements of the partisan-elections regime that Section 5 is locking in place—*i.e.*, either winning a party primary or obtaining signatures from 4% of voters. Pltfs. Br. 6-7.

The Government and the Intervenors nevertheless defend the district court's holding that Nix lacks standing and a cause of action to challenge the facial constitutionality of Section 5 in order to eliminate these increased burdens on his limited campaign resources. Notably, however, Appellees abandon many of the court's key premises and advance several alternative arguments. Yet Appellees' reformulated justifications ultimately fare no better than the court's original rationales for its fatally flawed judgment.

Before addressing these arguments individually, it is worth "paus[ing] to consider the[ir] implications" collectively. *United States v. Lopez*, 514 U.S. 549, 564 (1995). Specifically, under Appellees' radical regime, if Congress required

that all local tax reductions be precleared as “fiscally sound” by the D.C. District Court or the U.S. Treasury Department, and then Treasury denied preclearance to a Kinston referendum that would have cut local taxes in half, Kinston taxpayers suffering a direct monetary loss after Kinston’s “acquiescence” could not challenge that unconstitutional federal preclearance requirement. According to Appellees, these local taxpayers would have no standing or cause of action because, like Plaintiffs: (1) their monetary injuries would arise under a previously valid Kinston law locked in place by the preclearance regime; (2) Kinston would not have challenged its new referendum’s preemption; and (3) administrative preclearance decisions would be implicitly non-reviewable under the preclearance regime’s structure. That cannot be the law, and it is not.

For this reason and others, this Court should reverse the judgment dismissing Plaintiffs’ case.¹

ARGUMENT

I. PLAINTIFF NIX’S CANDIDACY-RELATED INJURIES ARE CONCRETE, PERSONAL, AND IMMINENT

A. Nix’s Injury Is Concrete

Plaintiffs demonstrated that the district court fundamentally erred by suggesting that Nix lacks standing because Kinston’s partisan-elections regime is

¹ On February 20, 2011, Plaintiff Lee Raynor passed away. Her legal claims and injuries, however, were identical to those of the remaining voter-Plaintiffs.

not *substantively* “unlawful.” Plaintiffs have standing to challenge the *procedural* invalidity of Section 5, which injures them by preserving the more costly (and disadvantageous) partisan regime. Pltfs. Br. 21-29. The Government now concedes that the court erred because “a plaintiff need not identify the violation of a legal right to have standing.” Govt. Br. 35. But the Government tries to rehabilitate the court’s holding, arguing that Nix’s injuries under the partisan-elections regime are “speculative and contingent” and “broad and diffuse,” rather than “concrete[] and particularized.” *Id.* 32-37. That argument, however, is equally erroneous.

1. Most importantly, the *increased money and time* Nix must spend to gain ballot-access under the partisan-elections regime—by either gathering signatures or winning a party primary—is the quintessential “concrete” and “particularized” injury. Compliance with such requirements drains “significant amounts of time, money, personnel, and energy,” which are limited “campaign resources.” *Krislov v. Rednour*, 226 F.3d 851, 856-58 (7th Cir. 2000); *see also* Pltfs. Br. 19-20. Indeed, since these increased ballot-access costs are *unavoidable* under the partisan regime, Nix’s injury from their retention is *less* “contingent” than the injuries *upheld* in *Clinton v. City of New York*, 524 U.S. 417 (1998), where the City challenged the President’s reinstatement of a “contingent liability,” even though actual liability could still have been avoided if the State received a

Medicaid waiver. *Id.* at 430-31. Nor do Nix's *increased* ballot-access costs remotely resemble the "diffuse" injury in *McConnell v. FEC*, 540 U.S. 93 (2003), where Congress had not imposed any monetary burden on candidates or voters, but actually *increased* the amounts of permissible campaign contributions. *Id.* at 226-28. The challengers' alleged inability (or unwillingness) *to raise or donate* more money was hardly a governmentally created barrier. *Id.*

Tellingly, the Government does not argue that the partisan regime's increased monetary and temporal ballot-access costs, *standing alone*, are "contingent" or "diffuse." Instead, it suggests that this undisputed "burden" on Nix's "access to the general election ballot" may be outweighed by the potential "benefit" to "his ultimate electoral *success*" from the reduced "number of competitors in the general election ... in [the] partisan system." Govt. Br. 32. But that is irrelevant. Resource injury and competitive injury are *independent* grounds for a candidate's Article III injury-in-fact. Pltfs. Br. 19-21. Moreover, a plaintiff's cognizable injury cannot be eliminated by the defendant's paternalistic speculation concerning offsetting benefits: that cost-benefit analysis is for Nix to conduct. The Government could not possibly argue taxpayers lack standing whenever the Government suggests they might benefit from Congress' use of the increased tax revenues being challenged.

2. In any event, Nix also sufficiently alleged that partisan elections will

in fact substantially harm his overall electoral chances, by conferring strategic advantages upon his Democratic opponents in overwhelmingly Democratic Kinston. *Id.* 7, 20-21. The Government responds that Nix’s injuries are “speculative” because those disadvantages might not affect this particular election or might be outweighed by countervailing advantages. Govt. Br. 30 n.7, 32-33 & n.8. But it is the Government who is speculating—without any support whatsoever—and its unfounded conjectures are impermissible, particularly given the procedural posture.

As this Court recently reaffirmed, “the burden imposed on a plaintiff at the pleading stage is not onerous,” because judges must “presum[e] that general allegations embrace the specific facts that are necessary to support the claim.” *Equal Rights Ctr. v. Post Properties, Inc.*, No. 09-5359, slip op. at 9 n.3 (D.C. Cir. Mar. 8, 2011) (“*ERC*”). The Government’s threshold speculation that Nix will ultimately be unable to prove his injury is inconsistent with that basic principle.

Nor does that principle apply with less force to electoral injury. For example, in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), candidates adduced summary-judgment evidence that successfully supported their empirical prediction of a “distinct risk” that their opponents would employ challenged tactics such as “sham issue ad[s]” “to their disadvantage.” *Id.* at 84-86, 91-92. But the Government’s approach would have dismissed that alleged injury as speculative at

the outset, because it was *possible* the candidates might have benefited from their opponents' challenged tactics—*e.g.*, if going negative with a barrage of unfair ads backfired. Yet Nix's alleged electoral injuries are no more speculative than those in *Shays*, let alone so inherently speculative that they should be dismissed without adversarial fact-finding.

Indeed, Nix's injury allegations are inherently *more* plausible than those upheld in *Shays*, since they bear the imprimatur of the Attorney General's objection letter, which confirmed that partisan elections in Kinston benefit Democratic candidates because of "party loyalty" and "straight ticket" voting. JA 8, 11, 43. The Government now claims that partisan elections will not *necessarily* disfavor non-Democratic candidates in *every* "particular election." Govt. Br. 32 n.8. But the general pro-Democratic pattern is conceded, and the Government offers no evidence (or even reason to speculate) that Nix will be wholly unaffected by this general pattern.

Finally, to the extent the Government is independently arguing that Nix's (non-speculative) electoral injury is too "broad and diffuse" under *McConnell*, Govt. Br. 33-35, the Government "removes *McConnell*'s holding entirely from its context," *Shays*, 414 F.3d at 88. Unlike the ethereal "right" to an "equal ability to participate in the election process," *McConnell*, 540 U.S. at 226-28, Kinston's referendum "specifically protects the interest in [nonpartisan] contests that [Nix]

assert[s]” here, *Shays*, 414 F.3d at 88-89. And the Government has not disputed that federal deprivation of a state-law interest in freedom from electoral competition constitutes Article III injury. *Schulz v. Williams*, 44 F.3d 48, 50-53 (2d Cir. 1994); *see also* Pltfs. Br. 25-26.

B. Nix’s Right Is Personal

The Government contends that Nix’s claim is barred by the “prudential standing” rule against the assertion of the “legal rights or interests of third parties,” because his “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” against federal “interference” with its “sovereignty.” Govt. Br. 39-40. Not even the district court adopted this argument, which fundamentally misunderstands the nature of federalism.

1. “[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power,” because “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *New York v. United States*, 505 U.S. 144, 181 (1992). Thus, “[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States,” but “*for the protection of individuals.*” *Id.* (emphasis added).

Given that the Constitution prohibits federal “interference with ... state sovereignty” (Govt. Br. 40) in order to protect individual liberty, it follows that an individual whose liberty is infringed by such prohibited interference may seek judicial enforcement of *his personal right* to the protections of federalism. Thus, an individual concretely injured by a federal law possesses prudential standing to argue that the law exceeds Congress’ authority because it does not “properly account[] for state interests,” *United States v. Comstock*, 130 S. Ct. 1949, 1962-63 (2010), or is not “directed only to th[ose] State[s] where the evil [authorizing federal regulation] exist[s],” *United States v. Morrison*, 529 U.S. 598, 626-27 (2000). In such cases, there is no problem under the “prudential” “standing” limits on a “litigant assert[ing] the rights of third parties defensively,” *Warth v. Seldin*, 422 U.S. 490, 500 n.12 (1975), because the arguments advance the individual’s own federalism-based liberty claim, *not* the State’s third-party rights.

For this reason, “[w]here Congress exceeds its authority relative to the States, ... the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.” *New York*, 505 U.S. at 182. It thus is irrelevant to prudential standing that “covered jurisdictions may well have quite different views” than private parties as to the desirability of federal intrusion. Govt. Br. 40. Indeed, individuals injured by overreaching federal laws cannot be left at the mercy of their local officials, for “powerful incentives might lead both federal and

state officials to view departures from the federal structure to be in their personal interests.” *New York*, 505 U.S. at 182.

“An analogy to the separation of powers among the branches of the Federal Government clarifies th[ese] point[s]” about federalism. *Id.* Precisely because “[t]he ultimate purpose of th[e] separation of powers,” like federalism, “is to protect the liberty and security of the governed,” *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991), private parties injured by federal officials have repeatedly challenged those officials based *solely* on an alleged infringement of the *President’s* power to appoint, supervise, or remove them, *e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147-49, 3151-64 (2010) (“*FEF*”); *Morrison v. Olson*, 487 U.S. 654, 665-68, 670-76, 685-96 (1988). And they have *prevailed* even when the President argues that his executive prerogatives have *not* been violated. *E.g.*, *FEF*, 130 S. Ct. at 3155-61 (citing *New York*, 505 U.S. at 182).

2. These principles and precedent dictate that Nix has prudential standing to challenge the 2006 reauthorization of Section 5 as exceeding Congress’ enumerated powers. As in *Comstock*, *Morrison*, *FEF*, and *Olson*, the Federal Government is personally injuring Nix by violating *structural* constitutional limitations specifically designed to prevent intrusions on *his individual liberty*. And as in *New York* and *FEF*, Congress’ departure from the constitutional plan

cannot be defended on the ground that Kinston's officers, who merely possess an *official* interest in the matter, have *acquiesced* in the violation.

The Government, however, argues this case is different because Section 5 does not “directly” “regulate ... private individuals,” but rather “imposes its requirements on the covered jurisdictions.” Govt. Br. 39. That is a distinction without a difference. Whether the Congressional exercise of “excess power” injures private parties directly through regulation of their primary conduct or indirectly through preemption of local laws that concretely benefit them, it always deprives “citizens [of] the liberties that” “federalism secures,” and it can never “be ratified by the ‘consent’ of [local] officials.” *New York*, 505 U.S. at 181-82. Indeed, Section 5 dramatically poses “the risk of tyranny and abuse” when “Congress exceeds its authority,” *id.*, as it thwarts the electoral self-determination of the citizens in sixteen selectively-burdened states. Pltfs. Br. 2-3, 5-6, 8-9. Likewise, Section 5's preemption of a *voter-enacted referendum* benefiting the future non-Democratic *opponents* of the *incumbent* Kinston City Council members starkly underscores that the liberty of individual citizens, *not* the authority of local officials, is truly at stake when Congress exceeds its authority to preempt local law. *Id.* 16-17.

Moreover, the Government's arbitrary distinction would lead to untenable results. As noted earlier, taxpayers would lack prudential standing if Congress

indirectly raised their taxes by unconstitutionally preempting a local tax reduction. Even worse, a state criminal defendant would lack prudential standing if Congress indirectly caused his incarceration by unconstitutionally preempting an available state-law *defense*. See Govt. Br. 39.

Not surprisingly, the Government's argument here contradicts the official position of the United States, as expressed to the Supreme Court in *Bond v. United States*, No. 09-1227. There, the Solicitor General conceded that private plaintiffs have standing to bring "claims that Congress lacks the authority to legislate in a certain area" under its "enumerated power[s]," arguing instead that such plaintiffs were foreclosed only from advancing "claims that the federal government" has "intruded upon a specific aspect of state sovereignty" by "commandeering ... state ... officials." U.S. Br. 13-16, 20-21 (Dec. 3, 2010); *see also* Tr. of Oral Arg. at 19 (Feb. 22, 2011) (Deputy Solicitor General admitting that a non-commandeering "enumerated powers" claim is cognizable *even if* the challenger is arguing that the law "invade[s]" or "intrude[s] too heavily on ... State police power"). Here, of course, Plaintiffs are *not* making a "commandeering" claim, but instead arguing that Section 5 exceeds Congress' enumerated powers. Pltfs. Br. 5-6, 8-9.

Ultimately, however, the more fundamental point is that private parties with Article III injury *always* have prudential standing to raise a federalism claim. As Justice Kennedy forcefully explained to the Deputy Solicitor General in *Bond*:

The whole point of separation of powers, the whole point of federalism, is that it inheres to the individual and his or her right to liberty; and if that is infringed by a criminal conviction *or in any other way that causes specific injury*, why can't it be raised? I just don't understand your point.

Tr. of Oral Arg. at 20 (emphasis added). Plaintiffs wholeheartedly agree.

C. Nix's Candidacy Is Imminent

1. Appellees do not dispute that, as a matter of real-world fact and as detailed in Nix's summary-judgment affidavit, Nix is actively campaigning for the upcoming election, including by incurring the precise monetary and temporal injuries from signature gathering for which he is seeking redress. JA 11, 50-53; *see supra* at x-y. Nor do Appellees dispute that, consequently, the district court at least should have allowed Nix to supplement his complaint and that, regardless, Nix can simply refile his complaint after including the campaign activities listed in his affidavit. Pltfs. Br. 37-38. Thus, Appellees tacitly concede that the court's imminence ruling will, *at most*, result in mere delay and inconvenience for Nix, which should confirm for this Court that, as discussed below, Nix's allegations and evidence are already sufficient.

2. "[T]he central question" for Article III's "imminence requirement" "is the immediacy rather than the specificity of the plan" alleged, because "the underlying purpose ... is to ensure that the court in which suit is brought does not render an advisory opinion in 'a case in which no injury would have occurred at

all.”” *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 1994) (“ALDF”) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)). Accordingly, it was proper for Nix to allege generally in his April 2010 complaint that he intended to run in the November 2011 election. Pltfs. Br. 29-34. Because “18 months [is] too short for full litigation,” *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996), there was no risk the merits of his constitutional challenge to Section 5 would have been finally resolved before the alleged injuries to his candidacy were either occurring or not occurring. And because judges “at the pleading stage” must “presum[e] that general allegations embrace the specific facts that are necessary to support the claim,” *ERC*, slip op. at 9 n.3, the district court had no basis for speculating that Nix might end up not running, let alone merely because he “ha[d] never before held office” and had not yet “taken any preparations whatsoever in support of his candidacy,” JA 183. Notably, Appellees, like the court, have cited no case holding that a novice candidate intending to run in a local election the following year must first engage in some unspecified amount of campaign activity, and they also have not denied their rule imposes a Hobson’s Choice on such candidates. Pltfs. Br. 31-33.

Nor have Appellees materially distinguished *ASPCA v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003), which upheld a former elephant handler’s *implied* allegation of a “*some day*” intent to visit the circus *as a*

paying customer for the first time. Id. at 335-38; *see also* Pltfs. Br. 30-31. The Government's glib rejoinder is that it is easier to "buy[] a ticket to the circus" than "[t]o maintain a candidacy." Govt. Br. 31. That is factually correct, but legally irrelevant to whether the prospective nature of the intended conduct is more likely to cause "an advisory opinion" here than in *ASPCA. ALDF*, 23 F.3d at 500.

In fact, this case is *far less likely* to result in that outcome. Because standing must be reassessed at "the successive stages of the litigation," *Lujan*, 504 U.S. at 561, the passage of time here will *necessarily* demonstrate whether Nix has maintained his candidacy or whether the burdens of campaigning have grown too difficult. Pltfs. Br. 32-33. By contrast, the handler in *ASPCA* "would [have] like[d] to visit the elephants," but he was "unwilling to do so" "unless they [were] placed in a different setting or [were] no longer mistreated"—*i.e.*, not until *after* he won his lawsuit. 317 F.3d at 335; *see also Comm. for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315 (D.C. Cir. 1995) ("*CECR*") (similar). Thus, it was possible for him to win his case and then *never* follow through on the alleged visitation intended. To put it differently, under *ASPCA* and *CECR*, Nix could have had standing even if he never ran *at all*, simply by alleging that he "would like" to run in a nonpartisan election but is "unwilling" to undergo the burdens of a partisan election. It thus makes no sense to deny him standing when he is actually running and courts can *confirm* his injury *before* deciding the merits.

3. Regardless, the post-complaint record *confirms* Nix's allegations concerning his intended candidacy, and the district court's willful blindness to that evidence is unjustifiable. Because imminence changes over time by its very nature, Nix "should not be compelled to jump through the[] judicial hoop[]" of copying his summary-judgment affidavit into a refiled complaint "merely for the sake of ... jurisdictional purity" that is "hypertechnical" at best and logically inapposite at worst. *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 837 (1989); *see also* Pltfs. Br. 34-37.

The Government rejoins that *Newman-Green* involved "diversity jurisdiction" rather than "injury," but it provides no explanation why that distinction warrants refusing to apply the case's *reasoning* here. Govt. Br. 30 n.7. It likewise is unable to cite any case that has rejected *Newman-Green*'s reasoning in the context of imminence. Indeed, the only "time [of] suit" case the Government invoked in its brief employed the rule to *uphold* the plaintiff's standing against a mootness challenge. *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324-26 (D.C. Cir. 2009).

Nor does *ERC* provide late-breaking support for the Government's position that Nix's affidavit must be ignored. There, a fair-housing organization initially filed a disability-discrimination suit based on its mistaken belief that "investigation and litigation expenses" incurred were judicially cognizable injuries. Slip op. at 3,

7-9, 11. The organization tried to cure its mistake (after the close of discovery and approximately two years after the complaint) by proffering equivocal evidence of cognizable expenditures on *non-litigation* “counteraction programs.” *Id.* at 9-11 & n.6. This Court understandably refused to allow the belated transformation of the plaintiff’s theory of Article III injury. *Id.* at 10-11. The fact that summary-judgment affidavits cannot create a *new* “injury” that was never alleged in the complaint hardly suggests that Nix cannot provide an affidavit that *confirms the occurrence* of the precise activities and injuries forecast in his complaint. Moreover, *ERC* is fundamentally distinguishable because it is not an *imminence* case, where plaintiffs are *necessarily* asserting their future activities and injuries (and thus post-complaint affidavits inherently aid fact-finding). In contrast, the *ERC* plaintiff did not claim that its injuries post-complaint would be any different or more developed. *Id.* at 3.

II. PLAINTIFFS’ INJURIES ARE CAUSED BY SECTION 5 AND WILL LIKELY BE REDRESSED BY INVALIDATING SECTION 5

Plaintiffs demonstrated the absurd circularity and manifest error in the district court’s “redressability” holding that “facially invalidating Section 5” would not “‘resurrect’ Kinston’s referendum” because the referendum “has been nullified” “[u]nder the statutory scheme created by Section 5.” Pltfs. Br. 38-42. Both Appellees silently abandon this ludicrous logic, but again defend the indefensible with erroneous alternative arguments.

A. The Government argues that Section 5 is not the cause of Plaintiffs' injuries, because the Kinston City Council made an "independent" "decision to continue [the] partisan election system" by "vot[ing] not to seek" further administrative or judicial preclearance. Govt. Br. 38-39. Even the district court rejected this obviously flawed argument: "[a]ll of plaintiffs' alleged injuries stem directly from the operation of Section 5," and "the mere fact that Kinston was empowered—and chose not—to pursue actions that might have remedied plaintiffs' alleged injury does not mean that it is somehow Kinston alone, and not [Section 5], [that] *caused* plaintiffs' injury." JA 195.

Abundant and unrefuted precedent establishes that a State's refusal to challenge the federal preemption of local law does not deprive injured private parties of standing. *United States v. Texas*, 158 F.3d 299, 303-04 (5th Cir. 1998); *see also* Pltfs. Br. 25-26. This Court's "causation" precedent further bolsters that maxim. The plaintiffs in such preemption cases are "challeng[ing] [federal] government action that permits or [requires] third-party conduct that would otherwise be illegal in the absence of the Government's action"—here, the City Council's noncompliance with its state-law duty to implement the referendum. *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004). Consequently, "the intervening choices of [those] third parties"—here, the City Council's acquiescence in Section 5's preemption of the referendum—"are

not truly independent of [the challenged] government policy.” *Id.* at 941.

Once again, the Government’s contrary position would lead to patently absurd results. For example, as noted earlier, taxpayers would lack standing to challenge a federal law increasing their local taxes, because their local government would have “caused” their injury by “acquiescing” in the windfall revenues. Again, this vividly illustrates the “powerful incentives [that] might lead both federal and state officials to view departures from the federal structure to be in their personal interests.” *New York*, 505 U.S. at 182.

Finally, the “Civil Rights Div[ision’s]” renewal of this “specious” argument is not just “shame[ful],” *Texas*, 158 F.3d at 301, 303, but particularly disingenuous here. The purported “cause” of Plaintiffs’ injuries is the “failure” of Kinston to bring a judicial preclearance action, but the Division believes that such a challenge should *lose* because the referendum *violates* Section 5. Thus, the Division itself does not truly believe that Kinston’s inaction played a causative role in Plaintiffs’ injuries or that any action by Kinston would redress those injuries. And this underscores a fundamental point: whereas Congress’ 2006 reauthorization of “the operation of [the] Section 5” preclearance regime is the “‘but for’ cause of plaintiffs’ alleged injury,” judicial and administrative preclearance actions by Kinston are merely *statutory* means for “cur[ing]” that Congressionally imposed injury. JA 195; *see also* Pltfs. Br. 3-4, 44-45.

B. Both Appellees also argue that, under *McConnell*, Plaintiffs' injuries are attributable to their "personal choice," not Section 5. Govt. Br. 37-38; Inter. Br. 12-14. But the "competitive injury" alleged in *McConnell* was the candidates' "personal choice" because it was *self-inflicted*—the challengers could eliminate their "fundraising disadvantage" simply by ending their boycott of the additional fund-raising opportunities authorized by Congress. 540 U.S. at 228. For that reason, this Court has refused to extend *McConnell*'s "personal choice" holding to candidates who could avoid competitive injury only by violating the law themselves. *Shays*, 414 F.3d at 92-94. Moreover, this Court in *Equal Rights Center* just held—at the urging of the same Deputy Assistant Attorney General representing the Government here—that the mere fact that a plaintiff "voluntarily" "chose" to incur injury does not defeat standing if the "self-inflicted" injury was incurred "in response to, and to counteract, the effects of the [unlawful action]." Slip op. at 1, 7. It necessarily follows that *McConnell* does not extend to Plaintiffs, who cannot avoid Section 5's preemption of nonpartisan elections *at all*.

To be sure, Nix has the limited "choice" *under* the partisan-elections regime whether to seek ballot access via party primary or unaffiliated-signature petition. But satisfying either of those "choices" injures Nix's limited campaign resources *relative* to the *less burdensome* requirements of the nonpartisan-elections regime—*i.e.*, merely filing a candidacy notice and paying the filing fee (which are also

required in the partisan regime). It thus is irrelevant how Nix “choose[s]’ to negotiate the illegally structured environment in which [Section 5] has placed [him],” because that just affects the *extent* of his ballot-access-related injury, not its *existence*. *Shays*, 414 F.3d at 93; *cf. New York*, 505 U.S. at 176 (“A choice between two unconstitutional[] ... techniques is no choice at all.”). Furthermore, whether Nix runs as a Republican or unaffiliated candidate, he has *no* “choice” to avoid the *electoral* disadvantages of a partisan race against Democratic opponents.

C. Intervenors offer a minor variation on the district court’s redressability theme: they argue that, “if the Supreme Court ... reverse[s] its position on the constitutionality” of a federal law whose validity had been “well[]established,” rather than “novel,” there is “no precedent for enforc[ing]” every “state law that [had been] barred from implementation as contrary to [that] federal law,” and “it would be absurd to assume that every [such] law ... would be instantly back in place.” Inter. Br. 18-19.

First, Intervenors’ position is irreconcilable with *City of Rome v. United States*, 446 U.S. 156 (1980). There, the constitutional challenges to Section 5 were likewise brought in order *to revive specific state-law changes* that had been denied preclearance, yet the Court considered the claims on the merits, even while characterizing one of them as a request “to do nothing less than overrule [the 1966] decision” initially upholding Section 5. *Id.* at 161-62, 173-82. Moreover, this

misguided theory would bar even *Kinston* from defending the referendum.

Second, Intervenors' position falsely characterizes the status of Section 5 as settled law. The validity of the *2006 reauthorization* was certainly not "well established" when *Kinston's 2008 referendum* was preempted. Rather, the Supreme Court has explained that the "preclearance requirements and ... coverage formula raise serious constitutional questions," *including* "under [the] test" used in *Rome. Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2513 (2009). In any event, standing cannot turn on the purported "novelty" of the constitutional challenge, since that would impermissibly require courts to consider the merits. *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008).

Third, it is both irrelevant and incorrect for Intervenors to speculate that preempted state laws (such as abortion laws) continue to be non-enforceable when the long-standing federal requirements that had preempted them are belatedly eliminated. It is irrelevant because Plaintiffs are seeking only to invalidate the preemption of the *2008 referendum* under the *2006 reauthorization of Section 5*, not earlier implementations of the old Section 5. And it is incorrect because "[t]he decisions are practically in accord in holding that the courts have no power to repeal or abolish a statute ...; and that if a statute be declared unconstitutional and the decision so declaring it be subsequently overruled[,] the statute will then be held valid from the date it became effective." 39 Op. Att'y Gen. 22, 22-23 (1937).

III. PLAINTIFFS HAVE A CAUSE OF ACTION TO CHALLENGE THE FACIAL CONSTITUTIONALITY OF SECTION 5

A. Both logic and law demonstrate that a facial constitutional challenge to Section 5's preclearance requirement can be adjudicated without in any way "reviewing" the merits of the Attorney General's discretionary and implicitly non-reviewable preclearance decision. Pltfs. Br. 43-50.

The Government's primary response is that "plaintiffs cannot neatly excise the Attorney General's objection from this case," because, "[i]f he had not [objected] ..., the nonpartisan election system would be in effect today and plaintiffs would not have instituted this action." Govt. Br. 55. But, in the following facial constitutional challenges to statutory schemes, the Supreme Court had no problem "neatly excising" from its review: (1) the Attorney General's Section 5 objection in *Rome*, 446 U.S. at 161-62, 182-83, (2) the President's line-item veto in *Clinton*, 524 U.S. at 426, 430-31, 436-38, 443-44; (3) the House of Representatives' legislative veto in *INS v. Chadha*, 462 U.S. 919, 923-28, 952-53 & n.16 (1983); or (4) the prosecutor's charging decision in *Lawrence v. Texas*, 539 U.S. 558, 562-64 (2003). And, there, as here, if the opposite discretionary and non-reviewable decision had been made, each challenger would not have been injured and thus would never have challenged the statute.

Both Appellees also emphasize that *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983), held that courts could not "sit in

judgment ... upon whether the Attorney General's refusal to preclear [a change] violated rights asserted by plaintiffs." *Id.* at 706. But Plaintiffs are *not* seeking review of "the Attorney General's refusal to preclear" the referendum. Rather, they are seeking review of Congress' decision to reauthorize the Section 5 preclearance regime in the first place. And facially invalidating the preclearance requirement will render the administrative objection moot. Pltfs. Br. 42-45.

B. In any event, Section 5 completely lacks the requisite clarity to preclude the well-settled cause of action for injured parties seeking injunctive and declaratory relief against an unconstitutional federal statute. *Id.* 50-53.

Intervenors respond that *Kinston* may challenge the facial constitutionality of Section 5. Inter. Br. 21-23. But that is irrelevant, as it would still strip *Plaintiffs* of any judicial forum to bring *their* constitutional claims for redress of *their* rights, which are not dependent on or derivative of Kinston's rights. Intervenors provide no support for the breathtaking proposition that one person's right to bring constitutional challenges may be *implicitly* precluded because *someone else* is allowed to sue. And that is particularly outlandish here, since the interests of Kinston's officials and its citizens conflict. *See supra* Part I.B.

The Government, by contrast, suggests that "private plaintiffs" can seek a judicial "remedy," but only by "bring[ing] an action against [their covered] jurisdiction to challenge the lawfulness of the retention of the existing voting

system.” Govt. Br. 57-58. That is bizarre. Kinston, a victim of Section 5, is obviously not the proper defendant in a constitutional challenge to Congress’ authority to enact Section 5. Rather, the Attorney General plainly is, as the Executive Branch official responsible for enforcing Section 5. And the Government provides no logical reason for instead forcing Plaintiffs to sue Kinston in order to challenge Congress’ actions.

IV. PLAINTIFFS SUFFICIENTLY ALLEGED VOTING-RELATED INJURIES SUPPORTING THEIR STANDING

Appellees do not dispute that Section 5 “completely nullified” Plaintiffs’ “votes” for the referendum within the meaning of *Raines v. Byrd*, 521 U.S. 811 (1997), given that Plaintiffs’ votes had “enact[ed] a specific legislative Act,” but “that [referendum] ... d[id] not go into effect,” *id.* at 823, “[b]ecause [Section 5] ... prevented [it] from becoming law,” *Chenoweth v. Clinton*, 181 F.3d 112, 117 (D.C. Cir. 1999). Thus, the *only* question is whether there is a principled reason that initiative voters, unlike legislative officials, cannot challenge such “nullification.”

Appellees fail to provide one. Govt. Br. at 43-45; Inter. Br. at 14-16. *First*, they do not dispute that initiative voters are exercising constitutionally and statutorily “vested” legislative powers. Pltfs. Br. 54. *Second*, they do not dispute that, under *Raines*, a citizen voting for an initiative has a better claim to a “personal” interest in his vote than does a legislative official serving as a mere “trustee.” *Id.* 55. *Third*, they do not dispute that the Supreme Court’s “grave

doubts” about initiative-proponent standing were based on a state-law-authorization question that is both irrelevant under the theory of legislative standing and foreclosed under this Court’s precedent. *Id.* 55-56. *Fourth*, they do not cite a single case rejecting initiative-proponent standing where the plaintiffs satisfied the test in *Raines* for “vote nullification.” Specifically, in *Nolles v. State Committee for the Reorganization of School Districts*, 524 F.3d 892, 898-900 (8th Cir. 2008), and *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 311-12, 316-18 (6th Cir. 2005), the referendum at issue “d[id] ... go into effect,” *Raines*, 521 U.S. at 823 (emphasis added), and the challengers’ complaints were merely that some action had rendered the legally operative referendum *practically irrelevant*. And *Don’t Bankrupt Washington Committee v. Continental Illinois National Bank & Trust Co. of Chicago*, 460 U.S. 1077 (1983), was a summary dismissal where the appellant was an organization that merely sponsored an initiative, rather than individual citizens whose actual votes had been nullified.²

V. PLAINTIFFS’ NONDISCRIMINATION CLAIM SHOULD NOT BE DISMISSED

The Government also independently attacks Plaintiffs’ entitlement to facially challenge Section 5’s amended preclearance standard under the

² As for Plaintiffs’ standing as voters in Kinston’s upcoming election, Appellees’ arguments (Govt. Br. 42-43; Inter. Br. 16-17) merely parrot the district court’s errors, Pltfs. Br. 56-58, and Appellees’ own errors concerning Nix’s candidate-standing, *see supra* at Parts I.A-B, II.B.

Constitution's nondiscrimination guarantees. Govt. Br. at 45-54. The Civil Rights Division would plainly not advance this extraordinary argument if Plaintiffs were *minorities* challenging a "voting rights" law that had preempted a favorable referendum because it "diminish[ed] the ability" of *whites* "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Yet the Constitution mandates "consistency of treatment irrespective of the race of the burdened or benefited group," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), and Plaintiffs' claim is equally viable, as shown below.

A. Because the Government mischaracterizes the amended preclearance standard, it is necessary to clarify how the 2006 amendments transformed Section 5 from a voting-rights law into a racial-preference scheme. Congress effected that transformation in two ways.

First, Congress banned any change that "diminish[es] the ability" of minorities "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). By its text, this "ability to elect" standard unambiguously imposes an unyielding quota floor on minorities' electoral chances under a covered jurisdiction's pre-existing election practices. And that was Congress' avowed intent, for it was abrogating *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which had rejected the Justice Department's same "ability to elect" approach under the pre-2006 version of Section 5. Pltfs. Br. 5-6. Specifically, in *Ashcroft*, the Supreme Court held that

Section 5 required “an examination of all the relevant circumstances” concerning “retrogression of a minority group’s effective exercise of the electoral franchise.” 539 U.S. at 479. The Court emphasized that, contrary to the Justice Department’s approach, “court[s] should not focus solely on the comparative ability of a minority group to elect a candidate of its choice,” which “cannot be [a] dispositive or exclusive” “factor.” *Id.* at 480, 487. Notably, the Department’s fixation on minorities’ “ability to elect” prompted a concurrence from Justice Kennedy, who observed critically that “race [had been] a predominant factor” in preclearance, such that “considerations of race that would doom a [change] under the Fourteenth Amendment ... seem to be what save it under § 5.” *Id.* at 491. And, in *Nw. Austin*, the Supreme Court cited that concurrence for an “argument” that “the preclearance requirements” were “unconstitutional.” 129 S. Ct. at 2512.³

Second, Congress required covered jurisdictions to disprove that “any discriminatory purpose” motivated a change. 42 U.S.C. § 1973c(c). As the Supreme Court has recognized, the constitutional problem with authorizing “discriminatory purpose” objections under Section 5 is that it enables the “[t]he Justice Department” to implement a “policy” of “maximiz[ing]” (or otherwise

³ The Government observes that 42 U.S.C. § 1973c(b) does not preserve minorities’ “electoral *success*,” only their “*ability* ... to elect.” Govt. Br. at 52. But that is still a minority quota-preference; it is just tied to an election’s *ex ante* rules rather than its *ex post* results—*i.e.*, no rule changes that are *predicted* to result in reduced “success.”

increasing) minorities' ability to elect their preferred candidates, and that "implicit command that States engage in presumptively unconstitutional race-based [decisionmaking] brings the Act ... into tension with the Fourteenth Amendment." *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995). Tellingly, when the Court definitively rejected the "discriminatory purpose" interpretation of the pre-2006 version of Section 5, it cited *Miller* in suggesting the contrary interpretation could "rais[e] concerns about § 5's constitutionality." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000). Moreover, in his *Ashcroft* concurrence, Justice Kennedy explained that "[t]here is a *fundamental flaw ... in any scheme* in which the Department of Justice is *permitted* or directed to *encourage* or ratify a course of unconstitutional conduct." 539 U.S. at 491 (emphasis added). And, as noted, the *Nw. Austin* Court cited that concurrence for the "argument" that "the preclearance requirements" were "unconstitutional." 129 S. Ct. at 2512.

B. That said, Plaintiffs recognize that the proper understanding of the amended preclearance standard is a complex and critical question, and they respectfully submit this Court should not consider it now. After all, for standing, this Court must assume Plaintiffs' understanding is correct. *Muir*, 529 F.3d at 1105. And, dispositively, the merits were not pressed or passed upon below, Govt. Br. 48 n.12, so, under normal practice, this Court should "leave this issue for the District Court's consideration and resolution," "[p]articularly since the case must

be remanded” on Plaintiffs’ enumerated-powers claim. *Truitt v. Dep’t of State*, 897 F.2d 540, 547 n.51 (D.C. Cir. 1990)

If this Court nonetheless decides to initially consider the merits, it should be clear that the amended preclearance standard is facially unconstitutional. It is “patently unconstitutional” to engage in “outright racial balancing,” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), and yet, as explained, the new Section 5 standard has the “fundamental flaw” that, on its face, it either “direct[s]” such balancing (the “ability to elect” prong) or, at a minimum, “permit[s] ... [its] encourage[ment]” (the “discriminatory purpose” prong), *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Moreover, even assuming it does not racially *prefer* minorities, the new Section 5 clearly is an unconstitutional “racial classification,” because it compels “reliance on racial criteria” for assessing the validity of electoral practices and does so “to effectuate the perceived common interests of [certain] racial group[s].” *United States v. Hays*, 515 U.S. 737, 744-745 (1995). Thus, Plaintiffs’ claim does *not* “rest[] 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.” Govt. Br. 49. Rather, “the preclearance requirement—as expressed in [42 U.S.C. § 1973c(b)-(c)],” Govt. Br. 49—is inherently a racially classificatory “scheme” plagued by an explicitly racial balancing mandate and the “fundamental flaw” identified in Justice Kennedy’s *Ashcroft* concurrence, which

was cited by the *Nw. Austin* Court.

C. Plaintiffs plainly have standing to bring a facial nondiscrimination challenge against that scheme. Since Kinston's referendum was subjected to, and suspended by, Section 5's minority-preferring regime, Plaintiffs properly alleged (JA 12) that they suffered the "injury in fact" of "denial of equal treatment" through "the imposition of [a] barrier" "that ma[de] it more difficult for members of [their racial] group to obtain a benefit," *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993), and from being subjected to a "racial classification," *Hays*, 515 U.S. at 744.

Consequently, it is irrelevant whether "the 2006 Amendments affected the preclearance process." Govt. Br. 46. Plaintiffs' nondiscrimination rights were violated when Section 5 "postpon[ed] the implementation of [the] validly enacted [referendum]" in furtherance of Congress' minority-preferring regime, regardless of why the Attorney General *subsequently* declined to "end" that suspension. *Morris v. Gressette*, 432 U.S. 491, 504 (1977); *see also Jacksonville*, 508 U.S. at 666 (plaintiff "challenging [a racial] barrier need not allege that he would have obtained the benefit but for the barrier").

In any event, the racially discriminatory preclearance standard indisputably affected the Attorney General's objection to Kinston's referendum. Indeed, just as Congress intended when overruling *Ashcroft*, the "exclusive" and "dispositive ...

factor” (539 U.S. at 480) in the Attorney General’s letter was Kinston’s non-satisfaction of the “ability to elect” mandate: “the elimination of party affiliation on the ballot will likely reduce the ability of blacks to elect candidates of choice.”

JA 43.

CONCLUSION

Accordingly, this Court should reverse the judgment below.

March 17, 2011

Respectfully submitted

MICHAEL E. ROSMAN
MICHELLE A. SCOTT
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. N.W., Suite 300
Washington, DC 20036
Telephone: (202) 833-8400

/s/ Michael A. Carvin
MICHAEL A. CARVIN
Lead Counsel
NOEL J. FRANCISCO
HASHIM M. MOOPAN
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Email: macarvin@jonesday.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), as counted using the word-count function on Microsoft Word 2003 software.

March 17, 2011

/s/ Michael A. Carvin
MICHAEL A. CARVIN
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of March, 2011, I filed eight copies of the foregoing document with the clerk of this Court by hand delivery, and I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system, which will serve the following counsel for Appellees at their designated electronic mail addresses:

Diana K. Flynn (Diana.K.Flynn@usdoj.gov)
Linda F. Thome (linda.thome@usdoj.gov)
U.S. Department of Justice
Civil Rights Division, Appellate Section
P.O. Box 14403
Ben Franklin Station
Washington, DC 20044
(202) 514-4706

Counsel for Defendant-Appellee

J. Gerald Hebert (ghebert@campaignlegalcenter.org)
The Campaign Legal Center
215 E St. N.E.
Washington, DC 20002
(202) 736-2200

Arthur Barry Spitzer (artspitzer@aol.com)
American Civil Liberties Union
1400 20th Street, N.W., Suite 119
Washington, DC 20036
(202) 457-0800 x113

Counsel for Intervenor-Appellees

March 17, 2011

/s/ Michael A. Carvin
MICHAEL A. CARVIN
Counsel for Appellants