

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
No. 1:10-CV-00561-JDB

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

*Plaintiffs,*

*v.*

ERIC HOLDER, JR.  
ATTORNEY GENERAL OF THE  
UNITED STATES,

*Defendant.*

*and*

JOSEPH M. TYSON, et al.,

*Defendant-Intervenors*

Civil Action No. 1:10-0561 (JDB)

**REPLY OF DEFENDANT-INTERVENORS JOSEPH M. TYSON, W.J. BEST, SR., A. OFFORD  
CARMICHAEL, JR., GEORGE GRAHAM, JULIAN PRIDGEN, WILLIAM A. COOKE and  
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE TO PLAINTIFFS'  
OPPOSITION TO MOTION TO DISMISS**

Defendant-Intervenors Joseph M. Tyson, W.J. Best, Sr., A. Offord Carmichael, Jr., George Graham, Julian Pridgen, William A. Cooke, and the North Carolina State Conference of Branches of the National Association for the Advancement of Colored People (“Defendant-Intervenors”) respectfully submit their reply to the Plaintiffs’ Opposition to Defendant-Intervenors’ Motion to Dismiss.

**I. Introduction**

Plaintiffs seek to strike down one of the most important civil rights laws ever enacted in this country. This invalidation would lead to the loss of a vital tool for defending voting rights, and would be a devastating blow to the ability of racial and language minority groups to participate meaningfully in the electoral process. With so much at stake, this Court must act cautiously to ensure that such a matter is not brought before the Court by a group that is not the proper party to do so. Plaintiffs lack standing to bring this action and they have no cause of action to challenge the constitutionality of Section 5 as applied by the Attorney General to Kinston, NC, in this matter. As such, this Court should grant the Defendant-Intervenors’ Motion to Dismiss.

**II. Plaintiffs Have Not Established Article III Standing.**

Plaintiffs have a variety of arguments all intended to side-step a very basic requirement: that a party bringing an action such as this be the proper party to do so. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Plaintiffs are not proper parties. All of the arguments that Plaintiffs dismiss as “irrelevant” are, in fact, arguments that demonstrate the lack of jurisdiction of this Court to adjudicate the matter. The standing inquiry is not one that is met lightly, and the United States Supreme Court has noted that its “standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other

two branches of the Federal Government was unconstitutional.” *Id.* at 819-20. Contrary to this established recognition of judicial self-restraint in the face of broad constitutional challenge, Plaintiffs instead espouse an unprecedented theory of standing in which anyone living in a jurisdiction covered by Section 5 of the Voting Rights Act has standing to challenge its constitutionality. Under this incredibly expansive theory, standing would no longer winnow the universe of cases adjudicated by the courts. Anyone could facially challenge any law, at any time. The Supreme Court has held that “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 v. Sedin*, 422 U.S. 490, 499 (1975) (internal citations omitted). Under Plaintiffs’ approach, large classes of citizens would have standing to assert generalized grievances, in direct contradiction of the directions of the Supreme Court. The Plaintiffs’ theory of standing is unsupported by extensive case law outlining the very specific requirements to establish standing—requirements that Plaintiffs cannot meet.

First, Plaintiffs do not have Article III standing because there is no judicially cognizable interest in nonpartisan elections—not for potential candidates, not for voters, and not for proponents of the referendum mandating nonpartisan elections. Notably, Plaintiffs have not been able to cite a single case where, when conducting a standing analysis, a court has found a judicially cognizable interest in a nonpartisan election. In their response brief, Plaintiffs rely on *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), *rev’d on other grounds by Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), for the proposition that private proponents of a referendum can challenge its invalidation by a federal court even when the state did not appeal. But when the Supreme Court reversed that case on other grounds, the Court noted its “grave doubts” whether proponents of a referendum could ever establish Article III standing to defend

the referendum they proposed. *Arizonans for Official English v. Arizona*, 520 U.S. at 65-66. It is inconsistent for Plaintiffs to give such great weight to dicta from *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2512 (2009), regarding constitutional concerns surrounding Section 5 when they ignore similar comments issued by the Court regarding the standing of referendum proponents. *Arizonans for Official English v. Arizona*, 520 U.S. at 66.

Furthermore, Plaintiffs have failed to establish that causation sufficient to convey Article III standing. Even if the injuries alleged by Plaintiffs are concrete and particularized enough to confer standing, which they are not, the cause of Plaintiffs' alleged injuries is not the existence of Section 5—it is the decision of the Attorney General to object to the change to non-partisan elections and/or the decision of Kinston not to appeal that objection. Actions of independent actors break the causal chain. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Instead, Plaintiffs pin their hopes on an untenable interpretation of standing that is so broad that it encompasses even third-party standing. The Court has repeatedly and recently emphasized the “prohibition on a litigant’s raising another person’s legal rights.” *Elk Grove v. Newdow*, 542 U.S. 1, 12 (2004); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Warth v. Sedin*, 422 U.S. 490, 499 (1975). When it comes to standing, the only party with any legal rights that can be linked causally to the existence of Section 5 of the Voting Rights Act is the City of Kinston. There is no obstacle to the City asserting its own rights, and there is no special relationship between Plaintiffs and the City such that an exception to the bar on asserting third party rights would apply. *See Singleton v. Wulff*, 428 U.S. 106 (1976); *NAACP v. Alabama*, 357 U.S. 449 (1958). The City would have standing to challenge the constitutionality of Section 5, facially or as applied, but it has chosen not to do so. The City is the proper party, both under precedent defining standing and under North Carolina law, which vests sole authority to enact new plans of

city government. Defendant-Intervenors emphasis on this state law is highly relevant. It highlights the fact that Plaintiffs are not the proper party to bring this suit. In the end, Plaintiffs have an outcome-based theory of this case that ignores Article III standing requirements and creates a theory of standing so broad that the judiciary would be flooded with litigants were that theory actually supported by the law.

### **III. Plaintiffs Do Not Have a Cause of Action to Challenge the Constitutionality of Section 5 as Applied by the Attorney General to Kinston**

Plaintiffs have framed their attempt to seek judicial review of the Attorney General's objection in Kinston as an as applied challenge and requested injunction of the Attorney General's application of Section 5 to Kinston. Plaintiffs can try to paint a picture with broad strokes, but Congress and courts interpreting Section 5 have prohibited exactly what Plaintiffs attempt to do here—challenge the Attorney General's determination. *City of Rome v. United States*, 450 F. Supp. 378, 382 (D.D.C. 1978). Plaintiffs claim that they are not seeking review of the Attorney General's objection, but in their complaint, their alleged injuries are linked to “the Attorney General's refusal to eliminate that barrier by preclearing the change.” Comp. ¶ 1. This is exactly the kind of review precluded by *Morris v. Gressette*, 432 U.S. 491, 501-07 (1977).

In fact, the host of “irrelevant” arguments that Plaintiffs dismiss in the first two sections of their opposition brief, *see* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant-Intervenors' Motion to Dismiss (“Opp'n”) at 1-3 (Doc. No 26, filed September 2, 2010), are, in reality, points that a court in this circuit gave great weight to when refusing to entertain a very similar challenge in *County Council of Sumter County, S.C. v. United States*, 555 F. Supp. 694 (D.D.C. 1983). There, like here, plaintiffs framed their attack on the Attorney General's refusal to preclear as a constitutional challenge, but the court recognized the ploy. *Id.*

at 706-07. There, too, plaintiffs focused on individual constitutional rights. *Id.* The court declared that plaintiffs were “not entitled to any declaratory judgment about the effect on them of defendant’s refusal to grant Section 5 preclearance.” *Id.* Thus, for all their dismissive language and emphatic use of italics, Plaintiffs are being disingenuous about what they are asking this Court to do. Framing the question differently provides no safe harbor from the fact that they have no cause of action by which they can attack the Attorney General’s refusal to preclear the election method in Kinston. This attempted reframing of the question flies in the face of well-established case law from *Morris* and its progeny.

#### **IV. Conclusion**

For the foregoing reasons, and for the reasons stated in the Memorandum of Points and Authorities in Support of the Motion to Dismiss, the Defendant-Intervenors respectfully request that the Court grant their Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1).

This 13<sup>th</sup> day of September, 2010.

Respectfully submitted,

/s/ J. Gerald Hebert  
J. Gerald Hebert  
D.C. Bar #447676  
Attorney at Law  
191 Somerville Street, #405  
Alexandria, VA 22304  
Telephone: 703-628-4673  
E-mail: [hebert@voterlaw.com](mailto:hebert@voterlaw.com)

Anita S. Earls  
D.C. Bar #473453  
N.C. Bar #15597  
Allison J. Riggs  
N.C. Bar #40028  
Southern Coalition for Social Justice  
115 Market Street, Ste. 470  
Durham, North Carolina 27701  
Telephone: 919-323-3380 ext. 115

Facsimile: 919-323-3942  
E-mail: [anita@southerncoalition.org](mailto:anita@southerncoalition.org)  
[allison@southerncoalition.org](mailto:allison@southerncoalition.org)

Laughlin McDonald  
Meredith Bell-Platts  
D.D.C. Bar # MI0049  
American Civil Liberties Union  
Foundations, Inc.  
230 Peachtree Street, NW  
Suite 1440  
Atlanta, GA 30303-1227  
Telephone: 404-523-2721  
Facsimile: 404-653-0331  
E-mail: [lmcdonald@aclu.org](mailto:lmcdonald@aclu.org)  
[mbell@aclu.org](mailto:mbell@aclu.org)

Attorneys for Defendant-Intervenors

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, September 13, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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

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

Richard Dellheim (lead counsel)  
Attorney, Voting Rights Section  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
*Counsel for Defendants*

/s/ J. Gerald Hebert  
J. Gerald Hebert