[Oral Argument Not Yet Scheduled]

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))

BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellants—Stephen LaRoque, Anthony Cuomo, John Nix, Klay Northrup, Lee Raynor, and Kinston Citizens for Non-Partisan Voting—certify as follows:

1. Parties and Amici

Stephen LaRoque, Anthony Cuomo, John Nix, Klay Northrup, Lee Raynor, and Kinston Citizens for Non-Partisan Voting were Plaintiffs in the court below and are Appellants in this Court. Eric H. Holder, Jr., Attorney General of the United States, was the Defendant in the court below and is an Appellee in this Court. Joseph M. Tyson, W.J. Best, Sr., A. Offord Carmichael, Jr., George Graham, Julian Pridgen, William A. Cooke, and the North Carolina Conference of Branches of the National Association for the Advancement of Colored People were Defendant-Intervenors in the court below and are Appellees in this Court. There were no amici below and none have filed an appearance in this Court.

Appellant Kinston Citizens for Non-Partisan Voting is an unincorporated membership association dedicated to eliminating the use of partisan affiliation in local elections in Kinston, North Carolina. Its members consist of registered voters in Kinston who have joined the association because they agree with its objectives and its means for achieving them. Its members are natural persons who have no ownership interests and who have issued no shares or debt securities to the public.

2. Ruling Under Review

The ruling under review is an Order granting the Defendants' motions to dismiss and dismissing the case. The Order, issued by Judge John D. Bates and dated December 16, 2010, was entered as Dkt. No. 41 in the court below and is located at JA 152. A Memorandum Opinion explaining the Order was issued on December 20, 2010. It has not yet been published in the Federal Supplement, but it was entered as Dkt. No. 42 in the court below, and it is located at JA 153 and available on Westlaw at 2010 WL 5153603.

3. Related Cases

The case under review has not previously been before this Court or any other court. There are two related cases pending in the United States District Court for the District of Columbia. *See Shelby Cnty. v. Holder*, No. 10-651; *Georgia v. Holder*, No. 10-1970.

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants brought a facial constitutional challenge to Section 5 of the Voting Rights Act of 1965, as reauthorized and amended in 2006, 42 U.S.C. § 1973c. JA 153. 28 U.S.C. § 1331 conferred subject-matter jurisdiction. On December 16, 2010, the district court entered final judgment dismissing the case as non-justiciable. JA 152. Plaintiffs' notice of appeal was timely filed on December 21, 2010. *Id.* 206. 28 U.S.C. § 1291 confers appellate jurisdiction.

STATEMENT OF ISSUES

Section 5 is preempting implementation of a nonpartisan-elections referendum in Kinston, North Carolina, which would eliminate ballot-access restrictions and other electoral disadvantages under the existing partisan-elections regime. The issues for review are:

(1) Whether a candidate in Kinston's November 2011 City Council election has alleged cognizable Article III injuries from Section 5's preemption of the referendum, and whether voters in the election and proponents of the referendum have done likewise;

(2) Whether an order facially invalidating Section 5 and enjoining its enforcement against Kinston's referendum will likely redress Plaintiffs' injuries; and

(3) Whether a cause of action exists for Plaintiffs to bring their facial constitutional challenge to Section 5.

STATEMENT OF PERTINENT AUTHORITIES

Section 5, some of its implementing regulations, and various provisions of North Carolina law are reproduced in the addendum hereto.

STATEMENT OF FACTS AND CASE

A. Section 5's Preclearance Regime

1. When Congress enacted the Voting Rights Act of 1965, it faced the problem that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting" in the "areas where voting discrimination ha[d] been most flagrant." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 328 (1966). "[O]bstructionist tactics [were] invariably encountered in these lawsuits," including "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.* at 328, 335. "Under the compulsion of these unique circumstances," *id.* at 335, Congress "decided … to shift the advantage of time and inertia from the perpetrators of the evil to its victim, by freezing election procedures in [the worst] areas unless [later] changes [could] be shown to be nondiscriminatory," *Beer v. United States*, 425 U.S. 130, 140 (1976) (internal quotation marks omitted).

Congress did so through Section 5, which imposes a "preclearance requirement" that "suspend[s] all changes in state election procedure" in certain covered jurisdictions "until they [a]re submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2509, 2511 (2009). In particular,

Section 5 provides that "no person shall be denied the right to vote for failure to comply with" a newly enacted "qualification, prerequisite, standard, practice, or procedure" in any covered jurisdiction, "unless and until" that jurisdiction: either (1) "institute[s] an action in the United States District Court for the District of Columbia for a declaratory judgment" that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race," and the court "enters such judgment"; or (2) "submit[s]" the change "to the Attorney General[,] and the Attorney General [either does] not interpose[] an objection within sixty days … [or] affirmatively indicate[s] that such objection will not be made." *See* 42 U.S.C. § 1973c(a); *see also* 28 C.F.R. § 51.52 (the Attorney General "shall [base objection decisions on] the same determination that would be made by the [D.C. District Court] in an action for a declaratory judgment").

2. In "suspending" any election-law change in covered jurisdictions "until [it has] been precleared by federal authorities," *Nw. Austin*, 129 S. Ct. at 2511, Section 5 *on its face* preemptively "prohibit[s] implementation of [a] change" that "has not been precleared," *Lopez v. Monterey Cnty.*, 519 U.S. 9, 20 (1996). By contrast, the preclearance decisions of the Attorney General or the D.C. District Court *under* Section 5 *do not preempt* the submitted change. Rather, they either grant preclearance and bring "to an end" *the statute's* "extraordinary remedy of postponing the implementation of validly enacted state legislation,"

Morris v. Gressette, 432 U.S. 491, 504 (1977), or they deny preclearance and leave in place that statutory barrier to implementation. It is because the preclearance decisions of the Attorney General and the D.C. District Court merely eliminate, rather than independently impose, preemption that they are characterized as "alternative methods" for jurisdictions to "comply with" Section 5. *See id.* at 502; *see also* 28 C.F.R. § 51.52.

To be sure, for jurisdictions seeking to end Section 5's suspension of a change, the time-restricted administrative method is a more "expeditious alternative" than the deliberative judicial method. *Morris*, 432 U.S. at 504. Accordingly, even though Section 5 contains no express bar on judicial review, the Supreme Court held that, when administrative preclearance is granted, Congress implicitly precluded "review of the Attorney General's exercise of discretion under § 5," which would "drag[] out" the process "beyond the [60-day] period specified in the statute." *Id.* at 501, 504, 507. And courts then extended *Morris*'s logic to the denial of administrative preclearance, reasoning that it is more straightforward under "[t]he legislative scheme … as a whole" for jurisdictions to seek judicial preclearance under Section 5 or to bring "traditional constitutional litigation" against Section 5, rather than needlessly litigating over the "entirely optional" "administrative preclearance procedure." *E.g.*, *City of Rome v. United States*, 450 F. Supp. 378, 381 (D.D.C. 1978) ("*Rome I*"). In short, since each statutory method

for ending Section 5's preemption is "coequal," excluding the Attorney General's discretionary decision from judicial review *never* "totally deprive[s] plaintiffs of judicial redress." *Id.* at 382 & n.3.

3. Because Section 5 was initially enacted due to "dire" and "exceptional conditions," Congress made it a "temporary provision[]" that was "expected to be in effect for only five years." *Nw. Austin*, 129 S. Ct. at 2510. Thus limited, the Supreme Court upheld it in 1966 as an appropriate exercise of Congress' authority to enforce the nondiscrimination guarantees of the Reconstruction Amendments. *Id.* Congress then "reauthorized [Section 5] in 1970 (for 5 years), 1975 (for 7 years), and 1982 (for 25 years)," and the Court rejected certain challenges to those reauthorizations as well. *Id.*

In 2006—1 year before the 1982 reauthorization's expiration and 41 years after the "temporary" provision was originally created—Congress reauthorized Section 5 for yet another 25 years. *Id.* Congress did not revisit which jurisdictions were covered, *id.*, leaving the preclearance requirement in place for the 16 States wholly or partially covered since 1972, *see* 28 C.F.R. Pt. 51 App. But, for the first time, Congress made the substantive preclearance standard more demanding: it abrogated two Supreme Court decisions that had interpreted the statutory grounds for denying preclearance in ways that reduced the degree to which Section 5 itself required or coerced covered jurisdictions into making race-based electoral

decisions. *See* Pub. L. No. 109-246, §§ 2(b)(6), 5, 120 Stat. 577, 578, 580-81 (2006); 42 U.S.C. § 1973c(b)-(d); *see also Georgia v. Ashcroft*, 539 U.S. 461, 479-85 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328-36 (2000).

There was an immediate challenge to the "appropriateness" of Section 5's 2006 reincarnation as "enforcement" legislation under the Reconstruction Amendments, but the case was decided on statutory grounds that obviated resolution of the constitutional issue. *Nw. Austin*, 129 S. Ct. at 2508, 2513-17. Before the Supreme Court did so, however, it discussed several "concerns" about the 2006 enactment that "raise[d] serious constitutional questions" about Section 5's "preclearance requirements and … coverage formula." *Id.* at 2511-13.

B. Kinston's Nonpartisan-Elections Referendum

1. In November 2008, a substantial majority of voters in Kinston, North Carolina—including the majority in 5 of 7 of Kinston's majority-black precincts—enacted a referendum to switch from partisan to nonpartisan local elections. JA 4-5, 156. The City Council has a state-law duty to "amend[] the charter to put [the referendum] into effect." *See* N.C. Gen. Stat. §§ 160A-104, 160A-108.

Nonpartisan elections would have two significant effects in Kinston. *First*, candidates could get on the general-election ballot cheaper and easier: under nonpartisan elections, putative candidates need only file a candidacy notice and pay a filing fee, *id.* §§ 163-292, 163-294.2, whereas, under partisan elections,

candidates must expend additional money and time to win a party primary or obtain signatures from 4% of voters, *id.* §§ 163-291, 163-296. JA 4-5, 11, 156, 183, 190. *Second*, the chances of victory for non-Democratic candidates would substantially improve: Democratic candidates would lose the benefit of party-line straight-ticket voting and other strategic advantages stemming from their overwhelming registered-voter advantage. *Id.* 8, 11, 47-48, 157, 183-84, 186-87.

2. Had Congress not reauthorized Section 5 in 2006, the Kinston City Council could and would have complied with its state-law duty to implement the nonpartisan-elections referendum in 2008. But because Congress reauthorized Section 5 and the City of Kinston is covered, *id.* 156-67, Kinston is "prohibit[ed] [from] implement[ing]" the referendum as North Carolina law requires it to do, unless and until federal authorities preclear the referendum, *Lopez*, 519 U.S. at 20.

Kinston sought administrative preclearance, but the Attorney General objected. JA 157. As the district court explained, the Attorney General concluded that the referendum would "have a racially discriminatory effect" because it "would negatively impact Democratic candidates." *See id.* Specifically, nonpartisan elections will prevent "appeal[s] to … party loyalty" and "the ability to vote a straight [party-line] ticket" in a city whose "electorate is overwhelmingly Democratic," which the Attorney General deemed discriminatory because "'black-preferred candidates' tend to be Democratic" and they "will receive fewer white

cross[-]over votes" from Democrats once the partisan cue is removed. *See id.*; *see also id.* 42-44. After administrative preclearance was denied, Kinston declined to seek judicial preclearance. *Id.* 38, 157-58. It thus remains barred by Section 5 from complying with its state-law duty to implement the referendum.

C. The Litigation Below

1. Once it became clear the referendum would not be precleared, Plaintiffs-Appellants—five Kinston citizens and a private membership association—brought this lawsuit challenging the facial constitutionality of Section 5. *Id.* 4-6, 14, 153, 159. Plaintiffs contend that Congress' 2006 reauthorization and amendment of Section 5 exceeded its enforcement authority under the Reconstruction Amendments and also violated the Constitution's nondiscrimination guarantees. *Id.* 9-14, 159.

They make two constitutional arguments in particular. *First*, they claim that the mere *unchanged extension* of Section 5's preclearance procedure for another 25 years in 2006 was not permissible enforcement legislation: the greatly improved conditions in the covered jurisdictions as of 2006 do not permit Congress' selective intrusion on local self-governance by the citizens of those jurisdictions. *Id.* 9, 12-13. *Second*, they claim that the *substantive expansion* of the preclearance standard also rendered Section 5 impermissible enforcement legislation and itself perpetrated racial discrimination: it was plainly inappropriate for Congress to

adopt a more stringent standard in 2006 than in 1965, especially given the Supreme Court's warning that the new standard mandates and coerces the use of race-based quotas for minority electoral success. *Id.* 10-11, 13-14; *see also supra* at 5-6.

As the foregoing demonstrates, Plaintiffs contend that Congress' 2006 reauthorization of Section 5 was *facially* unconstitutional. Indeed, below, they made 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. JA 106-07, 129-30, 146-48. That said, although Plaintiffs' facial constitutional claims raise questions of general, nationwide importance concerning the scope of federal power, Plaintiffs sued to vindicate specific, personal interests. In various ways, they are being injured by the particular unconstitutional application of Section 5 that is preempting Kinston's nonpartisan-elections referendum.

Most importantly, Plaintiff John Nix is a registered Republican running in the November 2011 Kinston City Council election as a candidate unaffiliated with any party. *Id.* 5, 11, 50-53. His candidacy thus is directly harmed by the more burdensome ballot-access restrictions (and electoral disadvantages) imposed by the partisan-elections regime retained by Section 5. *See supra* at 6-7. Because the time needed for an orderly adjudication required Plaintiffs to file suit well before the November 2011 election, Nix had not begun active campaign operations when

the complaint was filed in April 2010, and so he simply alleged that he "intend[ed] to run for election to the Kinston City Council in November of 2011." JA 5, 11, 15. But, since then, the record documents numerous campaign steps that he has taken, including the expenditure of money and time gathering ballot-access signatures that would be unnecessary in nonpartisan elections. *Id.* 50-53.[1]

Plaintiffs also have two voting-related interests. *First*, they successfully sponsored, promoted, and voted for the referendum, but Section 5 is nullifying those efforts. *Id.* 4-5, 11. *Second*, they are voters in the November 2011 election, and Section 5 makes it harder for their preferred candidates to get on the ballot and win election, and also denies Plaintiffs equal race-neutral treatment and opportunity. *Id.* 12.

2. The Government and private intervenors moved to dismiss the case for lack of standing and a cause of action. *Id.* 16-17, 58-59, 159 & n.3. The district court granted the motion on both grounds. *Id.* 152, 154, 169-71. Its decision rested on three critical premises.

First, the court strongly suggested that Plaintiff Nix failed to allege cognizable Article III injury as a candidate. *Id.* 179-91. To be clear, the court did

[1] At the time of suit and the decision below, Plaintiff Klay Northrup was also running in the November 2011 Kinston City Council election. JA 5, 11, 54-57, 181. Northrup, however, recently decided he must end his candidacy due to increased family and work obligations, though he will remain as a Plaintiff.

not dispute that Section 5's preemption of the referendum makes it harder for Nix to get on the ballot (and to win the City Council election). *See id.* 183-91. Instead, the court expressed "serious doubts" whether those harms are "legally protected interests" for Article III injury in this context: it emphasized that the ballot-access restrictions (and electoral disadvantages) in partisan elections are not substantively "*unlawful*," even if retained only due to Section 5's unconstitutional preclearance "procedure[]." *See id.* Likewise, the court voiced "serious concerns" that Nix's candidacy was "too remote temporally" to satisfy the Article III requirement of "actual or imminent" injury: the court questioned the adequacy of the April 2010 complaint's generic allegation that Nix intended to run in the November 2011 election, and the court believed that it could not consider the specific post-complaint campaign activities proving Nix's intent. *See id.* 180-83. (The court additionally held that Plaintiffs' voting-related injuries are not judicially cognizable under Article III. *Id.* 172-79, 191-94.)

Second, the court held that "the 'redressability' requirement of Article III" is not satisfied because "facially invalidating Section 5 in all its applications" would not "'resurrect' Kinston's referendum." *Id.* 196. It reasoned that, "[u]nder the statutory scheme created by Section 5," the referendum "has been nullified" "as a result of the Attorney General's objection" and "would need to be re-passed by Kinston voters in order to have any legal effect." *See id.* 196-97.

Third, the court held that Plaintiffs lack a cause of action to bring their facial constitutional challenge to Section 5. *See id.* 167-70, 198-205. It first reasoned that Plaintiffs could not bring that facial challenge without challenging the Attorney General's objection, because any Article III injury supporting their facial challenge exists due to the Attorney General's adverse application of Section 5 to the referendum. *See id.* 167-70, 199-202, 205. And then it decided it was barred from "reviewing" the objection, based upon the cases holding that Congress implicitly precluded review of the Attorney General's discretionary preclearance decisions. *See id.* 168, 198-99, 202-05; *see also supra* at 4-5.

In sum, the court's holding necessarily means that no "private person[]" is "able to challenge the constitutionality of Section 5." JA 170. Because the statute "regulates the conduct of covered jurisdictions" rather than "individual voters or candidates," any "injury" to individuals "stems from [specific] application[s] of Section 5," which only the covered jurisdictions can "decide[] … to challenge." *Id.*; *see also id.* 135-36.

3. Plaintiffs appealed, *id.* 206, and moved for expedited briefing and argument given Kinston's imminent November 2011 election and the looming effect of Section 5 on the 2011-2012 redistricting cycle. This Court granted that motion on January 14, 2011.

SUMMARY OF ARGUMENT

Section 5 is preempting the implementation of Kinston's nonpartisan-elections referendum, thereby directly harming candidate Nix by reviving a defunct partisan-elections regime that requires him to spend more money and time to get on the ballot (and subjects him to strategic electoral disadvantages). Those harms will be directly eliminated by an order facially invalidating Section 5 and enjoining its enforcement against the referendum, as that will clear the way for the state-law-mandated implementation of the less-costly (and more-favorable) nonpartisan-elections regime. Nix plainly has standing to challenge these concrete and redressable injuries caused by Section 5. *E.g.*, *Storer v. Brown*, 415 U.S. 724, 738 n.9 (1974); *Shays v. FEC*, 414 F.3d 76, 83-95 (D.C. Cir. 2005); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940-41 (D.C. Cir. 2004). Equally plainly, Nix has a well-established cause of action for injunctive and declaratory relief against this unconstitutional federal statute. *E.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010) ("*FEF*"); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-20 (1912).

The district court, however, mangled that hornbook law and instead reached the breathtaking conclusion that federal courts are powerless to remedy harm to private individuals from Section 5's unconstitutional preemption of local law. That conclusion was based on three facially erroneous premises, each contrary to

binding precedent and common-sense.

First, the court suggested that Nix's candidacy-related injuries are not judicially cognizable: it indicated that being forced by Section 5 to run in a costly (and disadvantageous) partisan-elections regime does not invade Nix's "legally protected interests" because he is challenging only the procedural legality of Section 5 rather than the substantive legality of partisan elections; it also implied that Nix's candidacy is insufficiently imminent when assessed solely on the complaint's allegations. *See supra* at 10-11. These suggestions are baseless:

> (1) the procedurally unlawful imposition of a judicially cognizable injury-in-fact supports standing, even absent violation of a substantive right, *e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 426, 430-31 (1998);
>
> (2) the unlawful deprivation of a concrete state-law benefit creates injury-in-fact, even absent substantive federal entitlement to that benefit, *e.g.*, *Schulz v. Williams*, 44 F.3d 48, 50-53 (2d Cir. 1994);
>
> (3) imminence is satisfied at the motion-to-dismiss stage if the complaint generally alleges the intent to perform an injury-incurring activity in the future, *e.g.*, *ASPCA v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334, 336-38 (D.C. Cir. 2003); and
>
> (4) courts should consider post-complaint record evidence of imminent injury rather than blinding themselves to reality and dismissing a complaint that will just be refiled, *e.g.*, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830, 837 (1989).

Second, in absurdly circular reasoning, the court held that any injuries suffered because of Section 5's unconstitutional invalidation of the referendum could not be "redressed" because Section 5 had unconstitutionally invalidated the

referendum. *See supra* at 11. That is like saying courts cannot redress an unconstitutional federal statute voiding inter-racial contracts because the plaintiff's contract has already been nullified. To the contrary, it is black-letter law that unconstitutional federal acts are legal nullities that cannot repeal validly enacted laws. *E.g.*, *Clinton*, 524 U.S. at 426, 430-31; *Conlon v. Adamski*, 77 F.2d 397, 399 (D.C. Cir. 1935). Moreover, even by its terms, Section 5 merely "delay[s] implementation of validly enacted state [laws]," rather than permanently nullifying them. *Morris*, 432 U.S. at 501.

Third, the court held that Section 5 implicitly precludes a challenge to its facial constitutionality by Plaintiffs, because any injuries they have suffered from the referendum's suspension exist only due to the non-reviewable objection of the Attorney General. *See supra* at 12. This is wrong at every level. Plaintiffs need not challenge the Attorney General's exercise of statutory discretion concerning administrative preclearance in order to challenge Congress' constitutional authority to enact the preclearance requirement in the first place. *E.g.*, *City of Rome v. United States*, 446 U.S. 156, 182-83 (1980) ("*Rome III*"); *Clinton*, 524 U.S. at 426, 430-31. That is particularly true in the Section 5 context, where the Attorney General did not himself cause Plaintiffs' injury by preempting the referendum, but merely declined *to cure* Plaintiffs' injury by "end[ing]" *the statute's* "postpone[ment] [of] the [referendum's] implementation." *Morris*, 432 U.S. at

504. In any event, Congress can immunize its own acts from constitutional review, if at all, only through the clearest expression in a court-stripping provision. *E.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987). Yet not only does Section 5 lack that clear statement, but courts instead have emphasized that it never "totally deprives" plaintiffs of "judicial redress" because they can *always* receive "full and adequate redress" in "traditional constitutional litigation." *E.g.*, *Rome I*, 450 F. Supp. at 381, 382 n.3.

Collectively, these myriad individual errors are especially egregious. For they inexorably led to the astonishing conclusion that *only* covered jurisdictions can challenge Section 5, never private individuals. *See supra* at 12. That is a direct assault on "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971). "[T]he Constitution divides authority between federal and state governments," *not* "for the benefit of the States or state governments as abstract political entities," but "for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). "[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front" and "secure[] to citizens the liberties that derive from the diffusion of sovereign power." *Id.* Consequently, "[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." *Id.* at 182. Yet that is precisely what the court below

has allowed, by shielding Congress' reauthorization of Section 5 from any challenger other than covered jurisdictions. And this case illustrates the Supreme Court's prescience in rejecting such a regime: the Kinston City Council incumbents, by "consenting" to Section 5's unconstitutional preemption of a *voter-enacted* referendum benefiting their *future opponents*, starkly underscored "the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests." *Id.*

In sum, Section 5 is not an unprecedented statute silently barring courts from considering its facial validity and magically nullifying local law even after the facial invalidation of its preclearance requirement. Thus, because Section 5's forced retention of ballot-access costs (and electoral disadvantages) injures Nix's candidacy for City Council, Nix may challenge Section 5's constitutionality.

That alone compels reversal of the judgment below, since "the presence of one party with standing" and a cause of action "is sufficient to satisfy Article III." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("*FAIR*"). In any event, the remaining Plaintiffs also have cognizable injuries, as successful referendum proponents whose votes are being nullified, *e.g.*, *Kennedy v. Sampson*, 511 F.2d 430, 434-36 (D.C. Cir. 1974); *Chenoweth v. Clinton*, 181 F.3d 112, 116-17 (D.C. Cir. 1999), as voters derivatively suffering from harm to their preferred candidates, *e.g.*, *Anderson v. Celebrezze*, 460 U.S.

780, 786 (1983); *Miller v. Moore*, 169 F.3d 1119, 1122 (8th Cir. 1999), and as voters being denied race-neutral electoral treatment and opportunity, *e.g.*, *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *United States v. Hays*, 515 U.S. 737, 744 (1995).

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the grant of a motion to dismiss for lack of standing or a cause of action. *E.g.*, *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008); *Stewart v. NEA*, 471 F.3d 169, 173 (D.C. Cir. 2006). "[B]oth the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Muir*, 529 F.3d at 1105. "'At the pleading stage, general factual allegations of injury [for standing] may suffice' because courts assume plaintiffs can back up their general claims with specifics at trial." *ASPCA*, 317 F.3d at 336 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). And in deciding "the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiffs, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Muir*, 529 F.3d at 1105. Accordingly, this Court must assume that Congress' 2006 reauthorization of Section 5 was facially unconstitutional.

II. CANDIDATE NIX SUFFICIENTLY ALLEGED INJURY-IN-FACT SUPPORTING HIS STANDING TO CHALLENGE THE FACIAL CONSTITUTIONALITY OF SECTION 5

A. The Increased Ballot-Access Costs And Electoral Disadvantages That Section 5 Imposes On Nix's Candidacy In The Kinston City Council Election Are Judicially Cognizable Injuries

The "injury in fact" element of Article III standing requires the "invasion of a judicially cognizable interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Section 5 imposes two well-established forms of such injury-in-fact on Nix due to his candidacy in the November 2011 Kinston City Council election.

First, it is undisputed that it is *more costly and time-consuming to get on the ballot* under the partisan-elections regime frozen by Section 5 than under the preempted nonpartisan-elections regime. The partisan regime forces Nix to gather signatures from 4% of voters or win a party primary. In contrast, the nonpartisan regime requires only that Nix file a notice of candidacy and pay the filing fee (which is also required under the partisan regime). *See supra* at 6-7.

It is black-letter law that candidates "have ample standing" to challenge the imposition of "signature requirement[s]" and other ballot-access restrictions that consume campaign resources. *Storer*, 415 U.S. at 739 n.9. Such ballot-access requirements impose an "injury in fact," not only because non-compliance prevents "candidates" from "appear[ing] on the … ballot," but also because even

compliance requires "significant amounts of time, money, personnel, and energy," which are limited "campaign resources" that could have been "allocate[d]" elsewhere. *Krislov v. Rednour*, 226 F.3d 851, 856-58 (7th Cir. 2000); *see also Belitskus v. Pizzingrilli*, 343 F.3d 632, 640-41 (3d Cir. 2003) (filing fee is cognizable injury-in-fact for candidate because it "impact[s] … campaign strategy and allocation of resources"); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (the "need to raise and expend additional funds and resources to prepare a new and different campaign" is the type of "economic injury [that] is a quintessential injury upon which to base standing").

Second, it is also undisputed that Section 5's preemption of nonpartisan elections *substantially harms Nix's chances of victory*. Because Kinston's voters are overwhelmingly registered Democrats, partisan elections provide Nix's Democratic opponents with numerous strategic advantages, such as party-line straight-ticket voting. *See supra* at 7. Indeed, the Attorney General himself denied preclearance because nonpartisan elections would deprive Democratic candidates, especially "black Democratic candidate[s]," of the electoral benefits from "appeal[ing] to party loyalty [and] … vot[ing] a straight ticket." JA 43.

Again, it is black-letter law that such probabilistic harm to a candidate's prospects is a cognizable injury-in-fact. *E.g.*, *Meese v. Keene*, 481 U.S. 465, 473-75 (1987) (candidate desiring to disseminate movies designated as "political

propaganda" had standing to challenge designation given the "substantial[] harm [to] his chances for reelection"); *Shays*, 414 F.3d at 85-86, 91-92 (candidates had standing to challenge campaign-finance regulations allegedly permitting conduct barred by statute, because that "illegal structuring of a competitive environment" forced them to "anticipate and respond to a broader range of competitive tactics" and created the "distinct risk" that those tactics would be "to their disadvantage"); *Miller*, 169 F.3d at 1122 (candidate had standing to challenge "pejorative ballot label" that "would seriously jeopardize his chances of reelection").

B. The District Court Erroneously Suggested That Nix's Candidate-Related Injuries Are Not Legally Protected Interests

The court acknowledged that Section 5 costs candidates like Nix money, time, and competitive opportunity by reinstating ballot-access restrictions (and electoral disadvantages) that the voters eliminated, but it distinguished the myriad cases cited above because the similar burdens held judicially cognizable there had invaded "legally protected interests." *See* JA 183-91. Specifically, the court reasoned that, whereas the injurious burdens in those cases were directly challenged as *substantively "unlawful,"* Plaintiffs here are "only challeng[ing] the legality of the *procedures* (namely, Section 5) which enable[s] *lawful* [burdens] to remain in effect." *See id.* 190 (some emphases added); *see also id.* 186-88 (Section 5's reinstatement of partisan elections does not confer an "assertedly illegal benefit" on Nix's opponents). That distinction, however, is fundamentally flawed.

1. This Court recently emphasized that, "when the Supreme Court used the phrase 'legally protected interest' as an element of injury-in-fact [in *Lujan*], it made clear it was referring only to a 'cognizable interest[,]'" the existence of which is determined "without considering whether the plaintiffs ha[ve] a legal *right*." *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007). In other words, if the injury that exists *in fact* is sufficiently concrete and personalized—here, the undisputed loss of money, time, and competitive opportunity caused by Section 5's retention of partisan elections—Article III does not further mandate that the injury have been caused *in law* by substantive, rather than procedural, illegality. Such an added requirement would contradict the long-established principle that there need not be any "subject-matter nexus between the right asserted and the injury alleged." *E.g.*, *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 78-79 (1978).

Accordingly, countless cases hold that plaintiffs like Nix may challenge the procedurally unconstitutional imposition of a cognizable injury-in-fact even though that injury itself is substantively lawful. For example, in the line-item-veto case, the plaintiffs previously had lawfully incurred a tax liability to the State of New York that was contingent on the size of the State's Congressional Medicaid funding. *Clinton*, 524 U.S. at 422, 426. Thus, when Congress enacted a law concerning the State's funding that resolved the contingency in the plaintiffs'

favor, their tax liability would have disappeared, but then the President revived that liability by cancelling the funding law using a line-item veto. *Id.* at 422-23, 426. The taxpayers responded by challenging the line-item veto on bicameralism-and-presentment grounds. *Id.* at 421, 426. And the Supreme Court unanimously held that they had standing due to the monetary harm caused by the cancellation, *id.* at 430-31; *see also id.* at 463 (Scalia, J., concurring in part and dissenting in part), notwithstanding that the taxpayers were, in the words of the district court here, "only challeng[ing] the legality of the procedures (namely, [the line-item veto]) which enabled *lawful* [contingent tax liabilities] to remain in effect," JA 190. In fact, the injury here is even more concrete than in *Clinton*, since the monetary harms revived by Section 5—the increased ballot-access costs—are not contingent, but rather are unavoidable and occurring already.

Likewise, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), residents aggrieved by an airport flight plan that would have "result[ed] in increased noise, pollution, and danger of accidents" brought a separation-of-powers challenge because the agency that created the plan was subject to veto by a Congressionally-staffed Board of Review. *Id.* at 255, 264-65. Even though the adoption of a plan causing such harms was not substantively unlawful, the Supreme Court held the residents had standing because the mere "knowledge that the master plan was subject to the veto

power undoubtedly influenced [the agency] when it drew up the plan." *Id.* at 265; *see also, e.g., FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822-24 (D.C. Cir. 1993) (entity subjected to a monetary civil penalty by the FEC had standing to raise a separation-of-powers claim challenging the membership on the FEC of non-voting, *ex officio* legislative agents).

Indeed, any distinction between Nix's substantive and procedural rights is particularly misguided because Article III injury-in-fact exists even when the plaintiff's harm is caused by the violation of a *third-party's* rights. For example, as Justice Scalia recently observed for a unanimous Court, "in the Article III sense" of "injur[y]," "a shareholder [can] sue a company" for violating the Title VII rights of "a valuable employee [who was fired] for racially discriminatory reasons, so long as he [can] show that the value of his stock decreased as a consequence." *Thompson v. N. Am. Stainless, LP*, No. 09-291, 2011 WL 197638, at *5 (U.S. Jan. 24, 2011); *see also, e.g.*, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109-11 (1979) (municipality had Article III standing to challenge Title VIII "racial steering" violation by realtors in "the housing market," because it would be "directly injure[d] … by [the] "diminish[ment] [of] its tax base" if "property values" "reduc[ed]" due to the "'changing' neighborhood").

In short, given that Congress monetarily and competitively harmed Nix by violating *his* constitutional right as a "citizen[] [to] the liberties that derive from the

diffusion of sovereign power" "between the States and the Federal Government," *New York*, 505 U.S. at 181-82, he plainly has the requisite injury-in-fact. *E.g.*, *United States v. Morrison*, 529 U.S. 598, 626-27 (2000); *FEF*, 130 S. Ct. at 3149, 3155-57 (same for separation-of-powers claim, which similarly "preserv[es] liberty" through the "diffusion of power" within the federal government).

2. In addition to Nix's judicially cognizable interest in avoiding burdens imposed by a statute exceeding Congress's delegated powers, Kinston's referendum conferred upon Nix a "legally protected interest" *under state law—i.e.*, his personal interest in the concrete election-related benefits from the nonpartisan-elections regime lawfully enacted by Kinston's voters. He therefore has Article III injury because Section 5 deprived him of those benefits by preempting the referendum. Once again, numerous cases hold that a party who concretely and personally benefits from state law has standing to challenge the federal preemption of that law, even where *the State declines* to do so itself. *E.g.*, *United States v. Texas*, 158 F.3d 299, 303-04 (5th Cir. 1998) (loss of "private right … gained [under] state [law]" "easily fulfill[s] … standing").

Of particular relevance here, when a federal court invoked the First Amendment to enjoin a state election board from enforcing its administrative decision that the Libertarian Party had failed to comply with statutory ballot-access requirements, the Second Circuit held that the Conservative Party had independent

standing to intervene and appeal that federal invalidation of state law because of the harm to its electoral prospects from the increased competition. *Schulz*, 44 F.3d at 50-53. Similarly, in *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008), when a federal court invoked the Dormant Commerce Clause to enjoin Kentucky's statutory ban on direct wine shipment from producers to consumers, the Sixth Circuit held that a wine wholesaler had independent standing to intervene and appeal due to the business it would lose. *Id.* at 428-30. Although the intervenor-appellants in *Schulz* and *Cherry Hill* lacked a federal "right" to freedom from electoral or economic competition and so their injuries were not federally "unlawful," they had standing to challenge the federal government's invalidation of *state laws* that "protected" their "interests" in avoiding such injuries. Likewise, here, Nix's monetary and electoral benefits from the referendum support his standing to challenge Section 5's preemption of the referendum.

3. The district court did not cite a single contrary case supporting its perplexing suggestion that "legally protected interests" might not be invaded when the unconstitutional preemption of state law causes undisputed monetary and electoral harms to a private party. None of the court's cases involve, let alone resolve, whether standing exists in such circumstances. *See* JA 183-91. Indeed, to the extent those case are even relevant, they *support* Plaintiffs' standing.

Most notably, the district court principally relied (JA 186-87, 190) on

Jenness v. Fortson, 403 U.S. 431 (1971), but that case implicitly refutes the court's holding. To be sure, the Supreme Court there rejected, on the merits, claims that the Constitution proscribes ballot-access requirements similar to the ones locked in place in Kinston by Section 5. *Id.* at 432, 434, 438, 440. But the very fact that the Court *adjudicated the merits* of the candidates' claims demonstrates that it viewed the monetary and electoral *injuries-in-fact* caused by such requirements to be judicially cognizable. In contrast, the district court's reliance on the substantive validity of the partisan-elections regime in *Jenness* would lead to the absurd result that Congress could compel every jurisdiction in the country to adopt that "lawful" regime, and yet no candidate could sue to avoid the increased burdens associated with a signature requirement that was "higher than the percentage of support required to be shown in many States as a condition for ballot position." *Id.* at 442.

Also unavailing is the district court's reliance (JA 187-88) on the "personal choice" ruling in *McConnell v. FEC*, 540 U.S. 93 (2003), which held that a challenge to Congress' relaxation of a limit on campaign contributions could not be brought by candidates who were unwilling to take advantage of the increased limits, but were worried their opponents would gain an electoral advantage by so doing. *Id.* at 226-28. The Court explained that when "competitive injury" flows from a candidate's "personal choice" not to avail himself of *a benefit* made *equally available* to all candidates, his *self-inflicted* "injury" is not "fairly traceable" to

"the operation of" the challenged law. *Id.* at 228. Here, in obvious contrast, Kinston's partisan-elections regime imposes *burdens*, not benefits, and Nix has no "choice" to escape them because they are unconstitutionally locked in place by Section 5. Given Nix's complete lack of choice concerning those burdens, *McConnell*'s "personal choice" holding is inapposite under this Court's decision in *Shays*. There, the FEC invoked *McConnell* because the plaintiff-candidates *theoretically* could have avoided the competitive injury from unlawfully permissive campaign-finance regulations that their opponents could exploit, but this Court nevertheless rejected the analogy because the candidates could avoid the injury *only* by themselves engaging in the unlawful conduct. 414 F.3d at 88-90, 92-94. Since *Shays* holds that *McConnell*'s "personal choice" rule does not even require candidates to fight fire with fire, it surely allows Nix to call upon the firefighters when he has no fire with which to defend himself.

Similarly, the district court plucked wholly out of context (JA 186) the "assertedly illegal benefit" phrase in *Gottlieb v. FEC*, 143 F.3d 618, 620-21 (D.C. Cir. 1998). *Gottlieb* simply held that a PAC could not have suffered any competitive harm from President Clinton's "assertedly illegal benefit" in receiving certain federal funds, because the PAC was not a candidate and thus did not compete against Clinton *at all*. *Id.* at 621. *Gottlieb* provides no support for the unprecedented conclusion that an actual candidate cannot challenge a competitive

burden that, while substantively "legal" under federal law, is imposed due to an unconstitutionally "unlawful" procedure that preempts state-law benefits.

C. The District Court Erroneously Suggested That Nix's Candidate-Related Injuries Are Not Sufficiently Imminent

The court also opined that Nix's candidacy might be "too remote temporally" to satisfy the Article III requirement of "actual or imminent" injury, because the complaint "does not specify any preparations undertaken by Nix … in anticipation of a run for local political office" and "contains no more than the bare allegation that [he] plan[ned] to seek election to the Kinston City Council in November 2011." *See* JA 180-83. The court was primarily concerned that upholding the complaint's sufficiency would mean "that any individual can meet the imminence criterion for an Article III injury in fact simply by alleging that he intends to run for political office at some point within the next year and a half." *See id.* 182. Moreover, the court refused to alleviate its concern by considering the ample post-complaint record evidence of Nix's campaign activities—including the injuries he is incurring on an ongoing basis while trying to satisfy the unconstitutionally retained ballot-access requirements, *id.* 50-53—because it believed that standing must always be "determined at the time the complaint is filed." *See id.* 181. Each step of that reasoning was erroneous.

1. Nix's general allegation in the April 2010 complaint that he intended to run for the Kinston City Council in the November 2011 election is plainly

sufficient to defeat the motions to dismiss. "'At the pleading stage, general factual allegations of injury … may suffice' because courts assume plaintiffs can back up their general claims with specifics at trial." *ASPCA*, 317 F.3d at 336 (quoting *Lujan*, 504 U.S. at 561). And that is particularly true when assessing *imminence*: because "the underlying purpose of the imminence requirement 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,'" "the central question is the immediacy rather than the specificity of the plan" alleged. *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 1994) ("*ALDF*") (quoting *Lujan*, 504 U.S. at 564 n.2).

This Court's application of these principles in *ASPCA* compels reversal here. In that case, a former elephant handler at a circus challenged his previous employer's continuing mistreatment of the elephants. 317 F.3d at 335-36. The district court dismissed the complaint for lack of a concrete and imminent injury, but this Court reversed. *Id.* at 336-38. Emphasizing the plaintiff's minimal burden at the pleading stage, this Court held that the handler's generic allegation that he "would like to 'visit'" the elephants in the future was sufficient, even though his complaint did "not spell[] out" "what sort of 'visit' he ha[d] in mind." *Id.*

In particular, this Court inferred that the handler intended to "attend[] the circus as any member of the public would, by purchasing a ticket and viewing the

show from the audience." *Id.* at 337. Notably, it accepted that implied allegation of intent without any additional allegation that the former employee had ever "visited" the elephants in the capacity of a *paying customer*. *Id.* at 335. Likewise, due to "the lesser standard required to show standing on a motion to dismiss," this Court held that the handler's "desire to visit the elephants[] ma[de] his injury present or imminent," notwithstanding the absence of an alleged *specific future date* when the customer "visit" would occur. *Compare id.* at 338, *with Lujan*, 504 U.S. at 563-64 (rejecting at the *summary-judgment stage* that type of "'some day' intention[]—without any description of concrete plans, or indeed even any specification of *when* the some day will be"). In short, given that *ASPCA* held sufficient for imminence a former elephant handler's implied allegation of a "some day" intent to visit the circus as a paying customer for the first time, *ASPCA* requires upholding Nix's expressly alleged intent to run for the Kinston City Council in November of 2011, which is the next upcoming election and was less than two years away when the complaint was filed. JA 5, 11, 15.

Furthermore, the district court's requirement that first-time candidates must engage in some campaign activity before suing would place courts and candidates in an untenable position. It generally takes at least two years to resolve federal-court litigation. *E.g.*, *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996). But most political campaigns do not begin two years before

the election, and especially not campaigns for local offices by novice candidates. Accordingly, if such candidates wait to sue until they would *normally* "undertake[]" "preparations … in anticipation of a run for local political office," JA 180, their case will not be resolved before the election. Courts then will be faced with the difficult task of adjudicating requests for preliminary relief in the election's shadow. *E.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (*per curiam*). Alternatively, if candidates start their campaign activities *unnaturally* early to timely confirm their standing, they will fritter away limited campaign resources on a local electorate that will not yet be focused on a seemingly distant election.

Article III does not impose that Hobson's Choice. So long as prospective first-time candidates allege in good-faith that they intend to run for election within two years, the post-complaint record will reveal, by the time for merits resolution, whether they followed through on their intent or whether the case is one where "no injury [will] occur[] at all." *ALDF*, 23 F.3d at 500. Indeed, the facts here present a paradigmatic example of how standing could and should be reassessed at "the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Whereas the post-complaint record confirms that Plaintiff Nix is currently campaigning and incurring injury due to the signatures he must gather under the partisan-elections regime, JA 50-53, it reveals that personal circumstances have forced Plaintiff Northrup to end his candidacy, *see supra* at 10 n.1, which plainly changes the

analysis of his injury's imminence, *see infra* at 37 n.2. This vividly illustrates that the usual sequential process for ascertaining standing would have worked perfectly, so there was no reason for the district court to disallow at the outset the express, specific, and good-faith allegations that each Plaintiff intended to run in the upcoming Kinston City Council election.

The district court's only response to the foregoing arguments was that it had not "located" any "case in which a court has ever found standing based on an alleged injury to a prospective candidate who 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." JA 183. True enough, but nor did the district court identify any case *denying* standing in those specific circumstances. Indeed, the *only* case the court cited rejecting a prospective candidate's suit on imminence grounds was the part of *McConnell* dismissing a claim by an incumbent Senator whose alleged injury would have accrued, if at all, only *4.5 years* after resolution of the merits by the Supreme Court. 540 U.S. at 225-26. Notably, Appellees never even cited that holding below, presumably recognizing its obvious inapplicability: dismissal there "ensure[d] that the court … d[id] not render an advisory opinion." *ALDF*, 23 F.3d at 500. No such concern is present here, where suit was filed within nineteen months of the election, *see*

Burlington, 75 F.3d at 690, and the record demonstrates that Nix is already incurring injury. Consequently, in the absence of any apposite candidate-standing case, the district court should have followed this Court's controlling decision in *ASPCA* that complaints may contain general allegations of future intent to engage in somewhat novel activities. *See supra* at 30-31. Instead, however, the court completely ignored *ASPCA*, JA 180-83, even though Plaintiffs repeatedly invoked it, *e.g.*, *id.* 102-04, 112-16.

2. Wholly apart from the sufficiency of the complaint's general allegation of intent, the district court also erred by willfully blinding itself to the post-complaint record evidence confirming the existence of Nix's candidacy-related injuries. *Id.* 50-53. The court asserted that it was required to ignore reality because the Supreme Court in *Lujan* supposedly mandated that "'the existence of federal jurisdiction … depends on the facts *as they exist when the complaint is filed*.'" JA 181 (ellipsis added by the district court). But the court's ellipsis misleadingly deletes a single, critical word from the quoted sentence: "ordinarily." *Compare id.*, *with Lujan*, 504 U.S. at 569 n.4 (plurality opinion) (quoting *Newman-Green*, 490 U.S. at 830). The Supreme Court's use of the word "ordinarily" was no mere slip of the pen to be silently erased by the district court. "Like most general principles," explained the Court, the time-of-complaint rule "is susceptible to exceptions." *Newman-Green*, 490 U.S. at 830. And the ever-changing status of

temporal imminence logically warrants such an exception, especially in the context of a complaint containing a general allegation of the plaintiff's future intent concerning his own conduct.

By its very nature, the imminence of a plaintiff's alleged injury changes over time. Consequently, because facts outside the complaint may be considered when resolving a motion to dismiss for lack of standing, *see Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992), and because standing must be reconsidered at "the successive stages of the litigation," *Lujan*, 504 U.S. at 561, the only sensible way to adjudicate the imminence of a plaintiff's own intended conduct is to consider the best evidence of the facts as they exist, rather than focusing on a moribund snapshot from the past. After all, Nix's post-complaint declaration is already in the record and forcing him to copy its contents into a refiled complaint serves no purpose other than delay and inconvenience.

Newman-Green strongly supports this conclusion. There, the Court was confronted with the question whether "a court of appeals may grant a motion to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction." 490 U.S. at 827. The Court held that such curative action post-complaint—indeed, *post-judgment*—was permissible, reasoning that "the practicalities weigh heavily in favor of th[at] decision." *Id.* at 837. Specifically, if "the entire suit were dismissed," the plaintiff "would simply refile in the District Court" after dropping

the non-diverse party, and the case would then "proceed to a preordained judgment." *Id.* The Court wisely held that plaintiffs "should not be compelled to jump through these judicial hoops merely for the sake of hypertechnical jurisdictional purity." *Id.* Here too, given the inherently temporal nature of imminence, Nix "should not be compelled to jump through the[] judicial hoop[]" of refiling a supplemented complaint "merely for the sake of … jurisdictional purity" that is "hypertechnical" at best and logically inapposite at worst.

Tellingly, the district court could not cite a single case refusing to consider post-complaint record evidence of imminence that confirmed the accuracy of a complaint's generalized allegation of intent. JA 181. To the contrary, the only imminence case the court cited for that counter-intuitive proposition, *National Law Party of U.S. v. FEC*, 111 F. Supp. 2d 33 (D.D.C. 2000), directly *refutes* it. The court there unhesitatingly relied upon the plaintiffs' specific "May 1999" "declara[tion] [of] their intent to run … in the 2000 election," even though their "complaint was filed" "in 1998." *Id.* at 44-45. That, of course, is precisely what Plaintiffs urged here, yet what the court concluded it could not do.

Indeed, the contrary approach adopted below at the behest of Appellees leads to the absurd conclusion that the imminence of the candidacy-related injuries of Plaintiffs Nix and Northrup must be identically determined based on the state of affairs at the time of the complaint, notwithstanding that Nix is still running while

Northrup has since dropped out. *See supra* at 9-10 & n.1. Plaintiffs highly doubt that Appellees will embrace that logical consequence of their position. Likewise, Appellees would have this Court conclude that, even though the plaintiffs in *Lujan* had no concrete plans to visit the foreign animals *at the time of summary judgment*, Justice Scalia nevertheless would have upheld their standing so long as they could have proved that they previously had such plans *at the time of the complaint*. 504 U.S. at 563-64. Article III does not compel such foolish fixation on the past when assessing the imminence of future injuries. Instead, just as it is plainly proper to acknowledge that Northrup is no longer running when determining the imminence of his candidate-related injuries, it is equally appropriate to acknowledge that Nix is actively campaigning and incurring those injuries.[2]

3. At a minimum, a mere defect in imminence cannot justify the district court's dismissal of the *action* rather than the complaint. JA 17, 152. Given the uncontested record evidence that Nix is currently campaigning and incurring injury, he should have been allowed to supplement his complaint, *e.g.*, *Warth v.*

[2] That is not to say that Northrup lacks candidate-related standing due to his decision to end his candidacy. For example, given the undisputed financial injuries he incurred before he dropped out, JA 55, and the complaint's request for any "just and proper" "relief," *id.* 14, he can still receive redress for his candidacy-related injuries. But this Court need not resolve that question now, because Nix plainly has candidate standing, Northrup and the other Plaintiffs have voter-related standing, *see infra* Part V, and only one party needs standing for prospective relief, *FAIR*, 547 U.S. at 52 n.2.

Seldin, 422 U.S. 490, 501-02 (1975), and, in any event, he can refile the complaint as supplemented if imminence was the sole defect in his standing. Thus, both legally and practically, this Court must review the other grounds for dismissal.

III. PLAINTIFFS' INJURIES WILL LIKELY BE REDRESSED BY AN ORDER FACIALLY INVALIDATING SECTION 5 AND ENJOINING ITS ENFORCEMENT AGAINST KINSTON'S REFERENDUM

A. Eliminating Section 5 Will Revive Kinston's State-Law Duty To Implement The Referendum

As noted earlier, Section 5 is a federal mandate that currently precludes the Kinston City Council from complying with its state-law duty to implement the validly enacted nonpartisan-elections referendum. *See supra* at 6-8. Accordingly, this is a quintessential case where causation and redressability exist because the "challenge[d] government action"—*i.e.*, Section 5's preclearance requirement—"permits or [requires] third-party conduct that would otherwise be illegal in the absence of the Government's action"—*i.e.*, Kinston's non-implementation of the referendum. *Nat'l Wrestling*, 366 F.3d at 940. This Court has explained that "[c]ausation and redressability … are satisfied in this category of cases, because the intervening choices of third parties are not truly independent of [the challenged] government policy." *Id.* at 941. In particular, here, once Section 5 is invalidated, Kinston "could only preclude redress if [it] took the extraordinary measure of continuing [its] injurious [non-implementation of the referendum] in violation of the law." *Id.*; *see also Shays*, 414 F.3d at 92-93. As no one would

contend Kinston is going to engage in such a program of massive resistance to its legal duties, it is "likely," to say the least, that Plaintiffs' "injur[ies] will be redressed by a favorable decision." *Bennett*, 520 U.S. at 167.

B. The District Court Erroneously Held That The Attorney General's Objection Permanently Nullified The Referendum

Incredibly, the court botched the simple analysis above because it believed that it was *legally powerless* to end Section 5's preemption of the referendum's implementation. Specifically, it held that "the 'redressability' requirement of Article III" is not satisfied because even an order "facially invalidating Section 5 in all its applications" cannot "'resurrect' Kinston's referendum": "[u]nder the statutory scheme created by Section 5," the referendum "has been nullified" "as a result of the Attorney General's objection" and "would need to be re-passed by Kinston voters in order to have any legal effect." *See* JA 196-97. That logic is not just circular; it is surreal.

1. Assuming, as this Court must, that the 2006 reauthorization of Section 5's "statutory scheme" was facially unconstitutional, Congress did "not validly confer[]" any "authority" on the Attorney General, *Stimson*, 223 U.S. at 619-20, and neither his objection, nor the statute itself, could possibly "nullify" the 2008 referendum enacted by Kinston's voters. Any first-year law student knows that "a void act cannot operate to repeal a valid existing [law], and [so] the law remains in full force and operation as if the repeal had never been attempted." *Conlon*, 77

F.2d at 399 (citing *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 526 (1929)).

For example, in the line-item-veto case, the "statutory scheme" authorized the President to cancel the Congressional Medicaid funding law, but the declaratory judgment facially invalidating the line-item-veto statute clarified that the Presidential cancellation was void and the Medicaid law was legally operative. *Clinton*, 524 U.S. at 421, 425 n.9, 426, 430-31. Likewise, in *INS v. Chadha*, 462 U.S. 919 (1983), the "statutory scheme" authorized the House of Representatives to veto the Attorney General's suspension of deportation, but the order facially invalidating the legislative-veto provision clarified that the Congressional veto was void and the Attorney General's deportation suspension was legally operative. *Id.* at 923-28. In short, the district court's redressability holding denies the core premise of judicial review: federal courts, not Congress, finally determine whether a "statutory scheme" is valid or void.

Conlon's elementary principle also resolves the district court's concern that "facially invalidating Section 5 would somehow automatically resurrect *all* prior referendums that have *ever* been invalidated under Section 5 since its initial enactment in 1965." *See* JA 196. Plaintiffs are challenging only the 2006 reauthorization of Section 5, *see supra* at 8-9, and so only local laws enacted *after* 2006 have been preempted under the auspices of a "void act" lacking any lawful force or effect. That is not the case with respect to local laws enacted *before* 2006,

which were preempted under pre-2006 versions of Section 5 that the Supreme Court has upheld. *Nw. Austin*, 129 S. Ct. at 2510.

Conversely, however, the district court's "nullification" theory leads to the absurd result that Kinston itself *could not bring a constitutional challenge* to Section 5's preemption of the referendum. The identity of the plaintiff obviously does not affect whether the Attorney General's objection has "nullified" the non-precleared referendum and thus defeated redressability. Consequently, this "nullification" theory is irreconcilable with Supreme Court precedent adjudicating constitutional challenges to Section 5 brought by covered jurisdictions only *after* the Attorney General had objected to the change at issue. *E.g.*, *Rome III*, 446 U.S. at 161-62, 173-82.

Finally, wholly apart from the legal impossibility of an unconstitutional federal statute nullifying a valid state law, the district court got matters backwards in concluding that Section 5's "statutory scheme" "nullified" the referendum, rather than "h[olding] [it] in abeyance." JA 196. Section 5 provides that "no person shall be denied the right to vote for failure to comply with" a new "qualification, prerequisite, standard, practice, or procedure" in a covered jurisdiction "*unless and until*" the change has been judicially or administratively precleared. *See* 42 U.S.C. § 1973c(a) (emphasis added). The statute thus does not "nullify" state laws. It merely, as the Supreme Court has repeatedly recognized,

"suspend[s]" covered changes, *Nw. Austin*, 129 S. Ct. at 2511, by "delay[ing] implementation of validly enacted state legislation until" preclearance is obtained, *Morris*, 432 U.S. at 501. And it was particularly wrong for the court below to attribute its faux "nullification" to the "Attorney General's objection," JA 196, since administrative preclearance is merely "an expeditious alternative" for covered jurisdictions "to … end" *the statute's* "postpon[ement] [of] the implementation of validly enacted state legislation." *Morris*, 432 U.S. at 504.

In sum, there is no basis whatsoever for the district court's bald assertion that Section 5 permanently "nullifies" the referendum, let alone that it miraculously accomplishes this feat even though it itself is unconstitutional.

2. The court also suggested there is a redressability problem because "plaintiffs no longer seek to have th[e] [c]ourt invalidate Section 5 as applied to the Attorney General's specific refusal to preclear Kinston's proposed voting change." JA 196-97. It is unclear what the court meant by this, which reflects its confusion about the Attorney General's role in Section 5's statutory scheme.

If the court merely meant that Plaintiffs have clarified they are not challenging the Attorney General's discretionary application of Section 5 during administrative preclearance, that is factually correct, but legally irrelevant to Plaintiffs' ability to obtain redress in their facial constitutional challenge. *See infra* Part IV.A. If, however, the court instead meant that Plaintiffs have abandoned any

constitutional claim against the particular statutory application of Section 5 that is preempting Kinston's referendum absent preclearance, that is patently false. Plaintiffs are not masochistically seeking to invalidate all applications of Section 5 *except* the one directly injuring them. As the court itself recognized, their "requested relief" is an order "facially invalidating Section 5 in all its applications," JA 196; *see also id.* 14, 159, which, of course, includes its application to Kinston's referendum. They did not abandon that request merely because, as the court emphasized, they disavowed any "as-applied" claim. *See id.* 159-61, 167-68, 199-200. Plaintiffs were simply making crystal clear that they are neither "asserting that there is anything uniquely unconstitutional about the application [of Section 5] to Kinston['s] [referendum]" nor seeking "review … in any way, shape, or form" of "the Attorney General['s]" exercise of statutory discretion to object to the referendum. *Id.* 106-07, 130. But their refusal to bring such narrow as-applied attacks in no way negates the fact that their "facial challenge" that Section 5 is "unconstitutional in all of its applications," *id.* 106, necessarily includes the claim that it is *equally* unconstitutional in the specific application preempting the referendum's implementation.

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

For more than a century, it has been settled that there is an "implied private right of action directly under the Constitution," *FEF*, 130 S. Ct. at 3151 n.2, for

injunctive and declaratory relief against the "enforce[ment] [of] unconstitutional enactments" by "Federal officer[s] acting … under an authority not validly conferred," *Stimson*, 223 U.S. at 619-20. The district court acknowledged the general existence of that cause of action, JA 166-67, but held that Section 5 implicitly precluded it in the specific context of a facial constitutional challenge brought by private parties, *id.* 167-70, 198-205.

The court first concluded that Plaintiffs could not bring a "facial challenge … to Section 5" without "examination of the Attorney General's specific refusal to preclear Kinston's [referendum]," because their "only 'direct injury' here stems from the Attorney General's particular application of Section 5 to Kinston." *Id.* 169-70; *see also id.* 167-68, 199-202, 205. And the court then ruled it was barred from "examining" the objection, because "'Congress intended to preclude all judicial review of the Attorney General's exercise of discretion' under Section 5." *Id.* 168 (quoting *Morris*, 432 U.S. at 507 n.24); *see also id.* 198-99, 202-05. This entire line of reasoning is riddled with error.

A. The District Court Erroneously Held That Plaintiffs Cannot Challenge Congress' Authority To Enact Section 5's Preclearance Requirement Without Seeking Review Of The Attorney General's Exercise Of Discretion To Deny Preclearance

1. It is certainly true that Plaintiffs cannot bring a facial challenge to Section 5 absent personal injury from an application of Section 5 that can be redressed. JA 168-69, 201-02. But Nix and the other Plaintiffs are suffering

personal injury from Section 5's preemption of Kinston's referendum, *see supra* Part II; *infra* Part V, and there is no conceivable reason why their challenge to the *statute* as facially beyond *Congress'* power requires reviewing whether or not the *Attorney General* properly applied that unconstitutional statute. Assuming, as this Court must, that Congress lacked the authority to impose the preclearance regime at all, it is utterly irrelevant whether the Attorney General acted properly in denying preclearance under that unconstitutional regime. Thus, Plaintiffs can seek redress for their injuries from the referendum's preemption by challenging Congress' power to enact Section 5, and judicial relief for those injuries can be provided by striking down Section 5. There is no need whatsoever to review the Attorney General's decision.

The district court reached the contrary conclusion due to its observation that, if the Attorney General had granted preclearance, then Kinston could have implemented its referendum, such that Plaintiffs would have had no injury enabling them to bring a constitutional challenge to Section 5. JA 169, 201-02. But, while the Attorney General theoretically could have exercised its statutory discretion in a way that would have *eliminated* the injury visited on Plaintiffs by Congress, he did not do so and so that statutory injury remains. Neither law nor logic requires Plaintiffs to challenge the Attorney General's failure to alleviate the statutorily imposed injury, in order to challenge Congress' infliction of that injury

in the first place.

2. *Rome III* vividly demonstrates the district court's fundamental error. There, after both the Attorney General and the D.C. District Court had denied preclearance for certain of Rome's election laws, Rome and several private plaintiffs raised a variety of statutory and constitutional claims in the Supreme Court. 446 U.S. at 161-62. Of particular importance here, the private plaintiffs raised a distinct constitutional challenge to Section 5 based upon an alleged injury that they were suffering due to Section 5's preemption of Rome's laws. *Id.* at 182-83. Although the Court rejected the challenge, *id.*, the very fact that it adjudicated the claim necessarily proves that claims by private plaintiffs alleging injuries from specific preemptive applications of Section 5 can be resolved without engaging in any prohibited "judicial review of the Attorney General's exercise of discretion under § 5," *Morris*, 432 U.S. at 507. Indeed, *Rome III* adjudicated *all* of the constitutional challenges to Section 5's suspension of Rome's laws *before* addressing whether those laws should have been judicially precleared, 446 U.S. at 173-87, which further underscores that it is unnecessary to decide whether a law should have been precleared under Section 5 when resolving a constitutional claim challenging Congress' authority to subject the law to preclearance.

Because the district court's holding dictates the conclusion that the private plaintiffs in *Rome III* lacked a valid cause of action, the court tried to distinguish

Rome III on the ground that the City of Rome was also a plaintiff there, which supposedly created "pendent jurisdiction" over the private parties' constitutional claim. JA 204 (quoting *City of Rome v. United States*, 472 F. Supp. 221, 236 (D.D.C. 1979) ("*Rome II*")). This is meritless for two reasons. *First*, the district court's theory would have denied Rome, no less than the private plaintiffs, a cause of action to challenge the constitutionality of Section 5. Rome's "injury" from the preemption of its laws equally flowed from the Attorney General's failure to eliminate that injury by granting preclearance, and so Rome's challenge equally implicated any prohibited "review" of the Attorney General's decision. *Rome III*, 446 U.S. at 161-62. Thus, taking the district court seriously, Rome's claim could not provide "jurisdiction" to which the private plaintiffs' claim could be "pendent." *Second,* in any event, there is no doctrine of "pendent jurisdiction" that somehow allows private plaintiffs without a valid cause of action to bring a distinct constitutional claim simply because their co-plaintiff has a valid cause of action for different claims. *Rome II* discussed "pendent jurisdiction," not because the private plaintiffs lacked a valid cause of action, but because of doubts whether their constitutional claim could be heard by the *three-judge* district court specially convened under Section 5, which had limited statutory jurisdiction. *Rome II*, 472 F. Supp. at 236 & n.67; *see also* JA 166.

3. More generally, there are countless cases where plaintiffs have

brought facial constitutional challenges to statutes even though their injury arose only from an adverse application of the statute made by a government official exercising non-reviewable discretion. For example, in *Clinton*, injured taxpayers successfully brought a facial challenge to the line-item-veto statute after they were injured by Presidential cancellation of the Medicaid funding law, despite the fact that the President's exercise of his statutory discretion in choosing spending laws to cancel was non-reviewable. 524 U.S. at 426, 430-31, 436-38, 443-44. Likewise, in *Chadha*, an injured alien successfully brought a facial challenge to a legislative-veto provision after he was injured by Congressional veto of the suspension of his deportation by the Attorney General, despite the fact that the House's exercise of its statutory discretion in choosing suspensions to veto was non-reviewable. 462 U.S. at 923-28, 952-53 & n.16. Similarly, while the exercise of prosecutorial discretion is virtually immune from judicial review, *see, e.g.*, *Wayte v. United States*, 470 U.S. 598, 607-08 (1985), prisoners can bring facial challenges to the statutes of conviction without attacking the prosecutors' choice to bring charges, *e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 562-64 (2003).

In all of these cases, the plaintiffs would not have been injured if the government actors whose statutory discretion was non-reviewable had chosen not to apply the statute to them. Nevertheless, each plaintiff was allowed to challenge the facial constitutionality of the statute once it was injured by the government

actor's application of the statute. So too here, Plaintiffs can challenge Section 5 because it is injuring them by preempting Kinston's referendum, even though they would not be injured had the Attorney General exercised his non-reviewable statutory discretion to grant preclearance.

4. Furthermore, it was particularly bizarre for the district court to treat review of the Attorney General's objection as a necessary condition to bringing a facial challenge to Section 5, because, unlike in the cases just discussed, the Attorney General's non-reviewable decision did not even *cause* Plaintiffs' injuries. Rather, it merely failed *to cure* pre-existing injuries imposed by Section 5 itself. Again, it is the statute that is injuring Plaintiffs by "postponing the implementation" of the referendum absent preclearance. *Morris*, 432 U.S. at 504. Kinston's request for administrative preclearance was simply "an expeditious alternative" that could have "end[ed]" Plaintiffs' injuries. *Id.* Indeed, if Kinston had never sought administrative preclearance *at all*, Plaintiffs' injuries from Section 5 would be exactly the same, and yet they could not possibly be said to flow from the Attorney General. In short, review of the Attorney General's objection is plainly unnecessary to resolve Plaintiffs' facial challenge to Section 5, because Plaintiffs are no worse off after that objection than they were before it—Section 5 was, and is, injuring them by "prohibiting implementation of" the referendum. *Lopez*, 519 U.S. at 20.

5. The district court thus was dead wrong that Plaintiffs must challenge the Attorney General's non-reviewable exercise of discretion during administrative preclearance in order to challenge Congress' constitutional authority to enact the preclearance requirement in the first place. And it warrants emphasis that the court failed to cite a single case so holding. The Section 5 cases it cited all involved challenges to how the Attorney General had exercised his discretion when applying the preclearance standard, rather than challenges to Congress' authority to enact the preclearance requirement itself. JA 198, 202-05; *see also infra* at 51-52. And the remaining cases the court cited just described the settled rule against claims asserting generalized grievances or third-party rights, JA 168-69, which merely begs the question whether Plaintiffs' *personal* injuries from Section 5 are non-redressable due to the non-reviewability of the Attorney General's objection.

B. The District Court Erroneously Held That Section 5 Implicitly Precludes A Facial Constitutional Challenge To The Statute Itself

As discussed above, "review" of the Attorney General's objection is unnecessary for Plaintiffs to bring their facial claim. If, however, such review somehow were necessary to challenge Congress' authority to enact Section 5, the district court gravely erred in holding that Section 5 implicitly bars that review.

It is a bedrock principle that Congress' "inten[t] to preclude judicial review of constitutional claims … must be clear," *Doe*, 486 U.S. at 603, given "the serious due process concerns that such preclusion would raise," *Bartlett*, 816 F.2d at 699.

Section 5, of course, contains no *textual* bar on judicial review. 42 U.S.C. § 1973c. Nor do *Morris* and its progeny interpret Section 5 to contain any *implied* bar on judicial review of constitutional challenges *to the statute itself*.

Rather, the *Morris* line of cases merely infers from the structure of the preclearance regime that Congress intended to preclude "judicial review" of claims challenging "the Attorney General's exercise of discretion under § 5" during administrative preclearance. *Morris*, 432 U.S. at 507. The consistent rationale behind those cases was that Congress intended *to streamline* the statutory preclearance process, *not* to shield constitutional violations from judicial review altogether, which is why the cases repeatedly admonish that "traditional constitutional litigation" remains available. *See, e.g.*, *id.*

Specifically, when the Attorney General grants preclearance, the bar on review inferred by courts *shortens* the "extraordinary" burden Section 5 imposes on covered jurisdictions, because additional judicial review would "drag[] out" the suspension of the change "beyond the [60-day] period specified in the statute." *Id.* at 504; *see also Harris v. Bell*, 562 F.2d 772 (D.C. Cir. 1977) (*per curiam*); *Reaves v. U.S. Dep't of Justice*, 355 F. Supp. 2d 510, 513-14 (D.D.C. 2005) (*per curiam*). Nevertheless, courts have stressed that aggrieved minority citizens may still "challenge[]" the change "in traditional constitutional litigation." *E.g.*, *Morris*, 432 U.S. at 506-07.

Similarly, when the Attorney General denies preclearance, the bar on review inferred by courts prevents *irrelevant and time-consuming diversions* during the subsequent judicial process. Because the "administrative preclearance procedure" is "entirely optional," courts recognized that it was more straightforward to ignore any discretionary errors made by the Attorney General and instead to focus on whether preemption of the submitted change was legally proper. *E.g.*, *Rome I*, 450 F. Supp. at 381-82; *see also Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 706-07 (D.D.C. 1983). Of paramount importance, that focus included "full and adequate redress" if "traditional constitutional litigation" demonstrated that Congress had exceeded its lawful authority. *Rome I*, 450 F. Supp. at 381, 382 n.3; *see also Rome III*, 446 U.S. at 173-83.

In short, the *Morris* line emphatically denies any possibility that the implied bar on review of the Attorney General's administrative decisions would leave plaintiffs "totally deprived" of "judicial redress." *Rome I*, 450 F. Supp. at 382 n.3. And, in keeping with that representation, no case has *ever* applied *Morris* to deny plaintiffs the ability to challenge the constitutionality of Section 5 itself.

Yet that is precisely what the district court held that *Morris* required here. *See* JA 198-205. Notably, it did not even mention, let alone attempt to satisfy, the requisite "heightened showing" that Congress intended such constitutionally dubious court-stripping. *Doe*, 486 U.S. at 603. Indeed, to the extent the court

recognized this problem at all, it merely suggested that Plaintiffs could obtain adequate redress if Kinston sued, *see* JA 203 & n.9, which vividly illustrates how the court's holding runs afoul of the fundamental principle that the structural protections of federalism are "for the protection of individuals" and "cannot be [surrendered] by the 'consent' of state officials." *New York*, 505 U.S. at 181-82.

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

As noted earlier, Plaintiff Nix's injuries to his candidacy are sufficient to compel reversal of the district court's dismissal. *FAIR*, 547 U.S. at 52 n.2. In any event, the individual Plaintiffs all have Article III injuries as proponents of Kinston's referendum and as voters in the November 2011 City Council election.[3]

A. Plaintiffs Have Judicially Cognizable Injuries As Proponents Of The Referendum Whose Votes Are Being Nullified

1. The Supreme Court has held that when a legislator's vote is "deprived of all validity"—*i.e.*, when "legislative action" that he successfully voted "to defeat (or enact)" nevertheless "goes into effect (or does not go into effect)"—the legislator has standing to challenge that "vote nullification." *Raines v. Byrd*, 521 U.S. 811, 822-23, 826 (1997) (citing *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). This Court likewise has applied the doctrine of legislative standing where

[3] Likewise, Plaintiff Kinston Citizens for Non-Partisan Voting has standing, because there is no dispute that the organization satisfies the test for associational standing so long as one of its members has standing. JA 5-6, 12, 197-98.

there is "an illegal nullification" of a legislator's "exercise of his power" to "vote[] for … proposed legislation." *Kennedy*, 511 F.2d at 434-36; *see also Chenoweth*, 181 F.3d at 116-17.

Here, Plaintiffs "successfully sponsored and voted for [the] referendum," but Section 5's preemption of the referendum is "completely nullif[ying] all of Plaintiffs' efforts in support of the referendum." JA 4-5, 11. In particular, Section 5 is "prevent[ing] the [referendum] from becoming law" and thereby constitutes "a complete nullification of their votes" "approv[ing]" the referendum. *Chenoweth*, 181 F.3d at 116-17. Nor can it reasonably be disputed that Plaintiffs' votes for the referendum were legislative in nature. "All political power" in North Carolina "is vested in and derived from the people," N.C. Const. Art. I, § 2, and Plaintiffs' votes for the referendum were cast pursuant to the political power that "[t]he people" reserved to "initiate a referendum on proposed charter amendments" for their local governments, which "shall [be] adopt[ed]" "[i]f a majority of the votes [are] cast … in favor," N.C. Gen. Stat. § 160A-104. Plaintiffs thus have legislative standing as successful referendum proponents whose votes Section 5 is nullifying.

2. The district court advanced several reasons for rejecting that conclusion, but they are all meritless. *First*, the court objected that Plaintiffs have not identified any cases holding that initiative voters are legislators for purposes of legislative standing. JA 176-78. But nor did the court identify any cases holding

to the contrary.[4] In the absence of any square holding on point, the court failed to identify any principled reason why a legislator exercising delegated power from the people should be permitted to defend against the "nullification" of his vote, but the people themselves cannot defend against the "nullification" of their votes. To the contrary, whereas it "may quite arguably be said" that legislators only vote "as trustee[s] for [their] constituents," there can be no question that a citizen's vote is "a prerogative of personal power." *Raines*, 521 U.S. at 821. Thus, citizens seemingly have *more* "personal, particularized, [and] concrete" interests in their votes than do legislators. *Id.* at 820.

Second, the court emphasized (JA 177) that the Supreme Court has voiced "grave doubts" about initiative-sponsor standing where sponsors are not "authorize[d]" by "state law … to represent the State's interests" "in lieu of public officials." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997). But this Court squarely held in *Kennedy* (albeit prior to *Arizonans*) that legislative standing does not require that the plaintiff have "been authorized to prosecute [his] suit on behalf of [the government]," because he is not protecting the interest of the

[4] Although the court did cite two cases from other circuits, the challenged practice in each case only rendered votes on a referendum *practically ineffective*, rather than *legally inoperative*; thus, neither case truly involved "vote nullification," which perhaps explains why neither one addressed the legislative-standing precedents. *Nolles v. State Comm'n for the Reorganization of Sch. Dists.*, 524 F.3d 892, 898-900 (8th Cir. 2008); *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 311-12, 316-18 (6th Cir. 2005)

State *qua* State, but rather his own interest as an "individual legislator … [in] protect[ing] … his vote" from "illegal nullification." 511 F.2d at 433-36. The district court thus erred in following the misplaced "doubts" of *Arizonans* rather than the well-reasoned holding of *Kennedy*.

Finally, the court observed that the Supreme Court in *Raines* rejected certain overly expansive interpretations of *Coleman*. JA 174-76, 179. But this is a red herring, because Plaintiffs are relying on the narrower test for legislative standing discussed in *Raines*, *see supra* at 53-54, and the court did not identify any reason why Plaintiffs fall outside of that test other than the illusory distinction, previously discussed, that they are not legislative *officials*.

B. Plaintiffs Have Judicially Cognizable Injuries As Voters In The Kinston City Council Election

1. Plaintiffs alleged that Section 5 will injure them as voters, because "the partisan election scheme perpetuated by Section 5 will, relative to nonpartisan elections, impose additional burdens and costs on candidates they support in running for, and being elected to, the relevant local offices." JA 12. The basis for this allegation was demonstrated at length above when explaining how Section 5 will injure candidates such as Nix in the upcoming election. *See supra* Part II.A.

Voters can assert these types of candidate-related injuries to support their standing because they do not vote merely for the sake of casting ballots, but primarily so *their chosen candidates will win*. Indeed, the Supreme Court has

emphasized that "laws that affect candidates always have at least some theoretical, correlative effect on voters." *Anderson*, 460 U.S. at 786. And courts thus have found standing for voters when their preferred candidate is harmed in the following ways: *first*, by restrictive ballot-access practices, *e.g.*, *Erum v. Cayetano*, 881 F.2d 689, 691 (9th Cir. 1989); *Duke v. Cleland*, 5 F.3d 1399, 1402-03 & n.2 (11th Cir. 1993); and *second*, by election practices that will "greatly diminish[] the likelihood that the[y] … will prevail in the election," *Miller*, 169 F.3d at 1123 ("pejorative ballot labels"); *McLain v. Meier*, 851 F.2d 1045, 1047-48 (8th Cir. 1988) ("chosen candidate … not fairly presented to the voting public"); *cf. Texas Democratic Party*, 459 F.3d at 586-87 & n.4 (political parties have "direct standing" to challenge practices that "harm" the "election prospects" of their candidates).

2. The district court acknowledged that voters have standing to challenge the exclusion of their preferred candidates from the ballot, but claimed that "there [was] no allegation that Nix … [is] unable to have [his] name[] appear on the ballot." JA 194. The court, however, failed to "construe the complaint in favor of" Plaintiffs, *Muir*, 529 F.3d at 1105, who did allege that Section 5 increased the "burdens and costs" "to be placed on the ballot" and "in running for … office," JA 11-12. Favorably construed, Plaintiffs alleged a threatened injury that their preferred candidates will be unable to meet the increased "burdens and costs" imposed by Section 5 and thus will fail "to be placed on the ballot." In any event,

as discussed next, the mere imposition of added ballot-access requirements on voters' preferred candidates is sufficient to confer standing on voters, whether or not the candidates can divert sufficient resources to comply.

The district court flatly rejected the proposition that voters have standing based on the "derivative" harms to the electoral prospects of their preferred candidates. JA 194. Although it believed that this Court's decision in *Gottlieb* had so held, that is incorrect. In *Gottlieb*, the voters' allegations of electoral harm to their preferred candidates "rest[ed] on gross speculation" that was "far too fanciful," 143 F.3d at 621, and so this Court had no occasion to consider whether voters have standing where they concretely and non-speculatively allege a substantial likelihood of injury to their preferred candidates. But the Eighth Circuit's decisions in *Miller* and *McLain*, as well as the Supreme Court's recognition in *Anderson* of the connection between candidates and voters, strongly support upholding standing in such circumstances.

3. Finally, at a minimum, Plaintiffs sufficiently alleged standing as voters with respect to their claim that Section 5 violates the Constitution's nondiscrimination guarantees. *See supra* at 8-9. They unambiguously alleged that Section 5 "denies [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." JA 12. This allegation indisputably stated equal-protection injuries, *e.g.*, *City of Jacksonville*, 508 U.S. at 666; *Hays*, 515 U.S. at 744, and the district court simply ignored it.

CONCLUSION

At bottom, a single Supreme Court decision, *Clinton v. City of New York*, demonstrates the three key errors underlying the district court's judgment:

> (1) Just as the taxpayers had Article III injury to challenge the legality of the line-item-veto procedure that retained a substantively lawful tax liability, candidate Nix has Article III injury to challenge the legality of the Section 5 procedure that is retaining substantively lawful electoral burdens;
>
> (2) Just as the President's unconstitutional cancellation of the Medicaid funding law did not "nullify" that law, the unconstitutional Section 5 cannot "nullify" Kinston's referendum; and
>
> (3) Just as the taxpayers brought a facial challenge to the line-item veto even though the President's cancellation discretion was non-reviewable, Plaintiffs can bring a facial challenge to Section 5 even though the Attorney General's preclearance discretion is non-reviewable.

Accordingly, this Court should reverse the judgment below.

February 4, 2011

Respectfully submitted

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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 13,987 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.

February 4, 2011

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CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of February, 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:

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ADDENDUM

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42 U.S.C. § 1973c:

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(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 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

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

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

28 C.F.R. § 51.52:

§ 51.52. Basic standard.

(a) Surrogate for the court. Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under Section 5: Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. See South Carolina v. Katzenbach, 383 U.S. 301, 328, 335 (1966).

(b) No objection. If the Attorney General determines that the submitted change does not have the prohibited purpose or effect, no objection shall be interposed to the change.

(c) Objection. An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect. This includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.

N.C. Const. Art. I, § 2:

§ 2. Sovereignty of the people

All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

N.C. Gen. Stat. § 160A-104:

§ 160A-104. Initiative petitions for charter amendments

The people may initiate a referendum on proposed charter amendments. An initiative petition shall bear the signatures and resident addresses of a number of qualified voters of the city equal to at least ten percent (10%) of the whole number of voters who are registered to vote in city elections according to the most recent figures certified by the State Board of Elections or 5,000, whichever is less. The petition shall set forth the proposed amendments by describing them briefly but completely and with reference to the pertinent provisions of G.S. 160A-101, but it need not contain the precise text of the charter amendments necessary to implement the proposed changes. The petition may not propose changes in the alternative, or more than one integrated set of charter amendments. Upon receipt of a valid initiative petition, the council shall call a special election on the question of adopting the charter amendments proposed therein, and shall give public notice thereof in accordance with G.S. 163-287. The date of the special election shall be fixed at not more than 120 nor fewer than 60 days after receipt of the petition. If a majority of the votes cast in the special election shall be in favor of the proposed changes, the council shall adopt an ordinance amending the charter to put them into effect. Such an ordinance shall not be subject to a referendum petition. No initiative petition may be filed (i) between the time the council initiates proceedings under G.S. 160A-102 by publishing a notice of hearing on proposed charter amendments and the time proceedings under that section have been carried to a conclusion either through adoption or rejection of a proposed ordinance or lapse of time, nor (ii) within one year and six months following the effective date of an ordinance amending the city charter pursuant to this Article, nor (iii) within one year and six months following the date of any election on charter amendments that were defeated by the voters.

The restrictions imposed by this section on filing initiative petitions shall apply only to petitions concerning the same subject matter. For example, pendency of council action on amendments concerning the method of electing the council shall not preclude an initiative petition on adoption of the council-manager form of government.

Nothing in this section shall be construed to prohibit the submission of more than one proposition for charter amendments on the same ballot so long as no proposition offers a different plan under the same option as another proposition on the same ballot.

N.C. Gen. Stat. § 160A-108:

§ 160A-108. Municipal officers to carry out plan

It shall be the duty of the mayor, the council, the city clerk, and other city officials in office, and all boards of election and election officials, when any plan of government is adopted as provided by this Article or is proposed for adoption, to comply with all requirements of this Article, to the end that all things may be done which are necessary for the nomination and election of the officers first to be elected under the new plan so adopted.

N.C. Gen. Stat. § 163-291:

§ 163-291. Partisan primaries and elections

The nomination of candidates for office in cities, towns, villages, and special districts whose elections are conducted on a partisan basis shall be governed by the provisions of this Chapter applicable to the nomination of county officers, and the terms "county board of elections," "chairman of the county board of elections," "county officers," and similar terms shall be construed with respect to municipal elections to mean the appropriate municipal officers and candidates, except that:

(1) The dates of primary and election shall be as provided in G.S. 163-279.

(2) A candidate seeking party nomination for municipal or district office shall file notice of candidacy with the board of elections no earlier than 12:00 noon on the first Friday in July and no later than 12:00 noon on the third Friday in July preceding the election, except:

> **a.** In the year following a federal decennial census, a candidate seeking party nomination for municipal or district office in any city which elects members of its governing board on a district basis, or requires that candidates reside in a district in order to run, shall file his notice of candidacy with the board of elections no earlier than 12:00 noon on the fourth Monday in July and no later than 12:00 noon on the second Friday in August preceding the election; and
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> **b.** In the second year following a federal decennial census, if the election is held then under G.S. 160A-23.1, a candidate seeking party nomination for municipal or district office shall file his notice of candidacy with the board of elections at the same time as notices of candidacy for county officers are required to be filed under G.S. 163-106.

No person may file a notice of candidacy for more than one municipal office at the same election. If a person has filed a notice of candidacy for one office with the county board of elections under this section, then a notice of candidacy may not later be filed for any other municipal office for that election unless the notice of candidacy for the first office is withdrawn first.

(3) The filing fee for municipal and district primaries shall be fixed by the governing board not later than the day before candidates are permitted to begin filing notices of candidacy. There shall be a minimum filing fee of five dollars ($5.00). The governing board shall have the authority to set the filing fee at not less than five dollars ($5.00) nor more than one percent (1%) of the annual salary of the office sought unless one percent (1%) of the annual salary of the office sought is less than five dollars ($5.00), in which case the minimum filing fee of five dollars ($5.00) will be charged. The fee shall be paid to the board of elections at the time notice of candidacy is filed.

(4) The municipal ballot may not be combined with any other ballot.

(5) The canvass of the primary and second primary shall be held on the seventh day following the primary or second primary. In accepting the filing of complaints concerning the conduct of an election, a board of elections shall be subject to the rules concerning Sundays and holidays set forth in G.S. 103-5.

(6) Candidates having the right to demand a second primary shall do so not later than 12:00 noon on the Thursday following the canvass of the first primary.

N.C. Gen. Stat. § 163-292:

§ 163-292. Determination of election results in cities using the plurality method

In conducting nonpartisan elections and using the plurality method, elections shall be determined in accordance with the following rules:

(1) When more than one person is seeking election to a single office, the candidate who receives the highest number of votes shall be declared elected.

(2) When more persons are seeking election to two or more offices (constituting a group) than there are offices to be filled, those candidates receiving the highest number of votes, equal in number to the number of offices to be filled, shall be declared elected.

(3) If two or more candidates receiving the highest number of votes each receive the same number of votes, the board of elections shall determine the winner by lot.

N.C. Gen. Stat. § 163-294.2:

§ 163-294.2. Notice of candidacy and filing fee in nonpartisan municipal elections

(a) Each person offering himself as a candidate for election to any municipal office in municipalities whose elections are nonpartisan shall do so by filing a notice of candidacy with the board of elections in the following form, inserting the words in parentheses when appropriate:

"Date ___;

I hereby file notice that I am a candidate for election to the office of _____ (at large) (for the ___ Ward) in the regular municipal election to be held in _____ (municipality) on ___, _____

Signed _____
(Name of Candidate)

Witness: _____

For the Board of Elections"

The notice of candidacy shall be either signed in the presence of the chairman or secretary of the board of elections or the director of elections of that county, or signed and acknowledged before an officer authorized to take acknowledgments who shall certify the notice under seal. An acknowledged and certified notice may be mailed to the board of elections. The candidate shall sign the notice of candidacy with his legal name and, in his discretion, any nickname by which he is commonly known, in the form that he wishes it to appear upon the ballot but substantially as follows: "Richard D. (Dick) Roc." A candidate may also, in lieu of his legal first name and legal middle initial or middle name (if any) sign his nickname, provided that he appends to the notice of candidacy an affidavit that he has been commonly known by that nickname for at least five years prior to the date of making the affidavit, and notwithstanding the previous sentence, if the candidate has used his nickname in lieu of first and middle names as permitted by this sentence, unless another candidate for the same office who files a notice of candidacy has the same last name, the nickname shall be printed on the ballot immediately before the candidate's surname but shall not be enclosed by parentheses. If another candidate for the same office who filed a notice of candidacy has the same last name, then the candidate's name shall be printed on the ballot in accordance with the next sentence of this subsection. The candidate shall also include with the affidavit the way his name (as permitted by law) should be listed on the ballot if another candidate with the same last name files a notice of candidacy for that office.

(b) Only persons who are registered to vote in the municipality shall be permitted to file notice of candidacy for election to municipal office. The board of elections shall inspect the voter registration lists immediately upon receipt of the notice of candidacy and shall cancel the notice of candidacy of any candidate who is not eligible to vote in the election. The board shall give notice of cancellation to any candidate whose notice of candidacy has been cancelled under this

subsection by mail or by having the notice served on him by the county sheriff.

(c) Candidates seeking municipal office shall file their notices of candidacy with the board of elections no earlier than 12:00 noon on the first Friday in July and no later than 12:00 noon on the third Friday in July preceding the election, except:

> **(1)** In the year following a federal decennial census, candidates seeking municipal office in any city which elects members of its governing board on a district basis, or requires that candidates reside in a district in order to run, shall file their notices of candidacy with the board of elections no earlier than 12:00 noon on the fourth Monday in July and no later than 12:00 noon on the second Friday in August preceding the election; and
>
> **(2)** In the second year following a federal decennial census, if the election is held then under G.S. 160A-23.1, candidates seeking municipal office shall file their notices of candidacy with the board of elections at the same time as notices of candidacy for county officers are required to be filed under G.S. 163-106.

Notices of candidacy which are mailed must be received by the board of elections before the filing deadline regardless of the time they were deposited in the mails.

(d) Any person may withdraw his notice of candidacy at any time prior to the filing deadline prescribed in subsection (c), and shall be entitled to a refund of his filing fee if he does so.

(e) The filing fee for the primary or election shall be fixed by the governing board not later than the day before candidates are permitted to begin filing notices of candidacy. There shall be a minimum filing fee of five dollars ($5.00). The governing board shall have the authority to set the filing fee at not less than five dollars ($5.00) nor more than one percent (1%) of the annual salary of the office sought unless one percent (1%) of the annual salary of the office sought is less than five dollars ($5.00), in which case the minimum filing fee of five dollars ($5.00) will be charged. The fee shall be paid to the board of elections at the time notice of candidacy is filed.

(f) No person may file a notice of candidacy for more than one municipal office at the same election. If a person has filed a notice of candidacy for one office with the board of elections under this section, then a notice of candidacy may not later be filed for any other municipal office for the election unless the notice of candidacy for the first office is withdrawn first.

N.C. Gen. Stat. § 163-296:

§ 163-296. Nomination by petition

In cities conducting partisan elections, any qualified voter who seeks to have his name printed on the regular municipal election ballot as an unaffiliated candidate may do so in the manner provided in G.S. 163-122, except that the petitions and affidavits shall be filed not later than 12:00 noon on the Friday preceding the seventh Saturday before the election, and the petitions shall be signed by a number of qualified voters of the municipality equal to at least four percent (4%) of the whole number of voters qualified to vote in the municipal election according to the voter registration records of the State Board of Elections as of January 1 of the year in which the general municipal election is held. A person whose name appeared on the ballot in a primary election is not eligible to have his name placed on the regular municipal election ballot as an unaffiliated candidate for the same office in that year. The Board of Elections shall examine and verify the signatures on the petition, and shall certify only the names of signers who are found to be qualified registered voters in the municipality. Provided that in the case where a qualified voter seeks to have his name printed on the regular municipal election ballot as an unaffiliated candidate for election from an election district within the municipality, the petition shall be signed by four percent (4%) of the voters qualified to vote for that office.