IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN LAROQUE, ANTHONY CUOMO, JOHN NIX, KLAY NORTHRUP, LEE RAYNOR, and KINSTON CITIZENS FOR NON-PARTISAN VOTING, Plaintiffs, v. ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, Defendant.	)	Civil Action No. 1:10-0561 (JDB)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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Plaintiffs challenge the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c ("Section 5"), both on its face and as applied to the Attorney General's decision to object to a proposed voting change adopted pursuant to a 2008 referendum in the City of Kinston, North Carolina ("Kinston" or the "City"). Plaintiffs lack standing to bring either challenge to Section 5. In addition, even if Plaintiffs had standing, there is no right of action for private individuals to challenge the constitutionality of Section 5 as applied to the Attorney General's decision to object to a voting change submitted by the City of Kinston. Plaintiffs' complaint should accordingly be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction.

I. BACKGROUND

A. Statutory Framework of Section 5 of the Voting Rights Act.

Congress enacted the Voting Rights Act of 1965 (the "Act"), 42 U.S.C. 1973 et seq., to "rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). To this end, Section 5 prohibits certain jurisdictions[1] from implementing a voting change without first obtaining preclearance from the United States Attorney General or a declaratory judgment from this Court that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. §§ 1973c(a); 1973*l*(b). Section 5 is designed "'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless

[1] The list of Section 5 covered jurisdictions is set forth in the Appendix to the Procedures for the Administration of Section 5. *See* 28 C.F.R. pt. 51, App. Where a county is covered by Section 5, all subjurisdictions of that county are likewise covered. *See United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110 (1978). Although Section 5 coverage determinations are not subject to judicial review, *see Briscoe v. Bell*, 434 U.S. 404 (1977), a jurisdiction that meets the statutory criteria set out in Section 4(a) of the Act, 42 U.S.C. § 1973b(a), can file a declaratory judgment action in this Court to "bail out" from Section 5 coverage. *See Nw. Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2509-10 (2009).

the changes can be shown to be nondiscriminatory.'" *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997) (quoting *Beer v. United States*, 425 U.S. 130, 140 (1976)).

Congress originally enacted Section 5 as part of the Voting Rights Act of 1965, and has reauthorized Section 5 on four occasions, most recently in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580-81. As the Supreme Court has stated, the Section 5 preclearance procedure was adopted "in large part because of the acknowledged and anticipated inability of the Justice Department – given limited resources – to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act." *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). Covered jurisdictions, therefore, bear the burden of proving that a voting change complies with Section 5. *See Georgia v. United States*, 411 U.S. 526, 538 & n.9 (1973).

If the Attorney General interposes an objection to a proposed voting change, the submitting jurisdiction may at any time ask the Attorney General to reconsider his determination, *see* 28 C.F.R. § 51.45(a), or may in the alternative file a declaratory judgment action in this Court for a *de novo* determination of whether the proposed voting change has a racially discriminatory purpose or retrogressive effect. *See* 42 U.S.C. § 1973c(a); *County Council of Sumter County v. United States*, 555 F. Supp. 694, 706-07 (D.D.C. 1983) (three-judge court). Such a declaratory judgment action is available to the "applicant-jurisdiction" only. *City of Rome v. United States*, 450 F. Supp. 378, 381 (D.D.C. 1978) (three-judge court).

Over the last forty-five years, courts have repeatedly held Section 5 to be constitutional. *See Lopez v. Monterey County*, 525 U.S. 266, 282-85 (1999); *City of Rome v. United States*, 446 U.S. 156, 173-83 (1980); *Georgia v. United States*, 411 U.S. 526, 535 (1973); *South Carolina v.*

Katzenbach, 383 U.S. 301, 334-37 (1966); *see also Reaves v. U.S. Dep't of Justice*, 355 F. Supp. 2d 510, 515-16 (D.D.C. 2005) (three-judge court) ("[I]n the face of challenges by the states [the Supreme Court] has upheld Section 5 as a valid exercise of Congress' power to enforce the guarantees of the Fifteenth Amendment against infringement by the states."); *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 265 (D.D.C. 2002) ("The Supreme Court has repeatedly upheld the constitutionality of Section 5 of the Voting Rights Act"). Just two years ago, after an exhaustive examination of the vast legislative record, a three-judge panel of this Court affirmed the constitutionality of Section 5; on direct appeal, the Supreme Court declined to address the constitutional issue and instead resolved the case on a statutory ground. *See Nw. Austin Mun. Utility Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 278-79 (D.D.C. 2008) (three-judge court), *rev'd on other grounds sub nom. Nw. Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009). In addition, the Supreme Court has favorably compared Section 5 with other remedial legislation in the course of reviewing the constitutionality of federal statutes. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 519 n.4 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737-38 (2003); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001); *United States v. Morrison*, 529 U.S. 598, 626-27 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 518-19, 525-33 (1997).

B. The 2008 Kinston Referendum.

In November 2008, voters in Kinston passed a referendum to amend the city charter to change local elections from a partisan to a nonpartisan system. Compl. ¶¶ 1, 14-15. Kinston is subject to the provisions of Section 5 because it is a subjurisdiction of Lenoir County, which is a covered jurisdiction. *See* 28 C.F.R. pt. 51, App.; 30 Fed. Reg. 9897 (Aug. 7, 1965) (coverage determination for Lenoir County, North Carolina); Compl. ¶ 11. Neither Kinston nor Lenoir

County has sought or obtained a declaratory judgment allowing them to bail out under Section 4(a) of the Act, 42 U.S.C. § 1973b(a).

After the referendum passed, the City submitted its proposed voting change for review under Section 5, choosing to seek such review from the Attorney General rather than from this Court. Compl. ¶ 16. The Attorney General reviewed the proposed voting change and interposed an objection to it on August 17, 2009. *Id.* ¶ 18. The City could have sought either administrative reconsideration of that objection, *see* 28 C.F.R. § 51.45(a), or a declaratory judgment from this Court authorizing the proposed change, *see* 42 U.S.C. § 1973c(a), but the Kinston City Council voted in November 2009 not to pursue either course. *See* Certified Copy of Minutes from Kinston City Council Meeting of Nov. 16, 2009, at 19 ("Minutes") (attached as Ex. 1).[2]

Plaintiffs are five private individuals and a private association, all of whom supported the Kinston referendum. Compl. ¶¶ 1-7. Plaintiffs filed this action against the Attorney General on April 7, 2010, and asserted two claims: that Section 5 is unconstitutional on its face because it exceeds Congress' enforcement authority, and that Section 5 is unconstitutional as applied to the Attorney General's objection to the proposed voting change in the Kinston referendum. *Id.* at ¶¶ 1, 27-30, 34, 36. Plaintiffs seek a declaratory judgment that Section 5 is unconstitutional and injunctive relief prohibiting the Attorney General from enforcing Section 5 against Kinston's proposed voting change. *Id.* at 12 (Request for Relief).

II. STANDARD OF REVIEW

To prevail on a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), Plaintiffs bear the burden of establishing the Court's jurisdiction to hear the

[2] The Court may take judicial notice of facts in public records such as the publicly-available minutes of a City Council meeting. *See United States v. Eagleboy*, 200 F.3d 1137, 1140 (8th Cir. 1999).

case. *See Spencer v. Kemna*, 523 U.S. 1, 10-11 (1998); *In re Swine Flu Immunization Prods. Liab. Litig.*, 880 F.2d 1439, 1442-43 (D.C. Cir. 1989). The Court must accept as true the complaint's material allegations and construe them in the plaintiff's favor. *Scandinavian Satellite Sys., AS v. Prime TV Ltd.*, 291 F.3d 839, 844 (D.C. Cir. 2002); *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 92 (D.D.C. 2007). Because subject-matter jurisdiction focuses on the Court's power to hear the claim, however, the Court must scrutinize those allegations closely. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003). In resolving a motion to dismiss for lack of subject-matter jurisdiction, the Court may consider not only the facts alleged in the complaint, but also facts outside the pleadings if those facts are undisputed. *See Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

This Court may deny jurisdiction on any ground that shows the lack of a case or controversy – Article III standing, prudential standing, or any other jurisdictional deficiency – and nothing obligates the Court to address any of these jurisdictional issues in any particular order. *Parker v. District of Columbia*, 478 F.3d 370, 377-78 (D.C. Cir. 2007).

III. ARGUMENT

This Court should dismiss Plaintiffs' claims for lack of subject-matter jurisdiction. First, Plaintiffs lack Article III standing to challenge Section 5's constitutionality. Their alleged injuries – whether as voters, potential candidates, or proponents of the Kinston referendum – are not sufficient to confer standing. Nor can Plaintiffs' alleged injuries be fairly traced to the Attorney General's objection, given that Plaintiffs' elected representatives in Kinston could have sought administrative reconsideration or judicial preclearance of the proposed voting change, but chose not to do so. In addition, it is entirely speculative that the relief Plaintiffs seek, if granted, would redress their injuries by restoring the precise electoral system they prefer. Absent any one of these elements, Plaintiffs cannot establish Article III standing. Second, even if Plaintiffs did

meet the constitutional requirements to challenge Section 5, prudential considerations would still deprive them of standing to assert third-party claims that ultimately belong to Kinston. Third, there is no private right of action for Plaintiffs to challenge the constitutionality of the Attorney General's application of Section 5. This Court lacks the authority to review the Attorney General's Section 5 determinations or any alleged unconstitutional effects flowing from them. The complaint should therefore be dismissed under Rule 12(b)(1).

A. Plaintiffs Lack Article III Constitutional Standing.

The jurisdiction of federal courts is limited to actual cases or controversies between proper litigants. U.S. Const. art. III, § 2; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Constitutional standing requires that a party have suffered an actual or threatened injury, which may be fairly traced to the challenged action and which is "likely to be redressed by a favorable decision" of the court. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 661 (D.C. Cir. 1996) (en banc) (quoting *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). These requirements – injury, causation, and redressability – are an "irreducible constitutional minimum," and the absence of any one of these elements defeats standing. *Lujan*, 504 U.S. at 560-61. It is Plaintiffs' burden to establish each of the required elements. *See id.* at 561.

Plaintiffs assert two related constitutional challenges to Section 5. First, they claim with scant support that Section 5 is unconstitutional because it is not an appropriate means to enforce the Fourteenth and Fifteenth Amendments' nondiscrimination requirements. Compl. at ¶ 34. Second, they allege that Section 5 is unconstitutional "as enforced" by the Attorney General. Compl. at ¶¶ 1, 27-30, 35, 36. Because Plaintiffs have failed to demonstrate that they have suffered a legally cognizable harm, they lack standing to bring these claims. Moreover, to the

extent that they have suffered any harm, it is neither fairly traceable to the statute or the Attorney General's actions, nor is it one that can appropriately be redressed by this Court. Accordingly, Plaintiffs lack standing and their claims should be dismissed.

1. Plaintiffs Lack Standing to Challenge the Constitutionality of Section 5 Because They Have Suffered No Cognizable Harm.

The Supreme Court has explained that to demonstrate "injury in fact," plaintiffs must suffer "an invasion of a legally protected interest" which is "concrete and particularized" and "'actual or imminent.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The alleged injury must affect plaintiffs "in a personal and individual way." *Id.* at 560 n.1. Plaintiffs assert that Section 5 and the Attorney General's objection have harmed them as "voters, prospective candidates, and proponents of citizen referenda in the city of Kinston[.]" Compl. ¶ 1; *see also id.* ¶¶ 2-6, 28-29. None of these alleged injuries establishes standing under Article III because they do not state a cognizable harm and therefore Plaintiffs' complaint should be dismissed.

a. Plaintiffs Have Not Been Harmed as Voters.

Plaintiffs allege that they are harmed as voters because the Attorney General's objection "impose[s] additional burdens and costs on candidates they support" and "burden[s] their right to politically associate, or refrain from associating, with others." Compl. ¶ 29. As an initial matter, the Supreme Court has already rejected the argument that Section 5 imposes any harm at all of the type Plaintiffs allege. In *City of Rome*, the Supreme Court held that Section 5 "does not restrict private political expression or prevent a covered jurisdiction from holding elections; rather, it simply provides that elections may be held either under electoral rules in effect on November 1, 1964, or under rules adopted since that time that have been properly precleared." 446 U.S. at 182-83. Here, the Attorney General's objection did not impair Plaintiffs' rights to

engage in the political process; they remain free to associate politically and may support any candidate (regardless of political affiliation), cause, party, or organization they choose.

Even if the alleged burden on political association does state a colorable harm, any such harm is insufficiently "concrete and particularized" to establish an injury in fact. *Lujan*, 504 U.S. at 560. The Supreme Court has

> consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.

Lance v. Coffman, 549 U.S. 437, 439 (2007) (quoting *Lujan*, 504 U.S. at 573-74); *see also Nolles v. State Comm. for the Reorganization of Sch. Dists.*, 524 F.3d 892, 899-900 (8th Cir. 2008) (holding that plaintiffs could not demonstrate injury in fact where they asserted "a generalized grievance shared in common by all the voters" who sought to repeal a state statute). An injury to voters' ability to influence the political process or achieve their desired outcome is precisely the type of generalized injury that falls short of establishing injury in fact. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 226-27 (2003) (rejecting plaintiffs' claim that campaign finance law caused a "curtailment of the scope of their participation in the electoral process," and holding that plaintiffs' claim of injury was "not to a legally cognizable right"), *overruled on other grounds by Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998) (holding that "the [voters'] supposed injury to their 'ability to influence the political process' rests on gross speculation and is far too fanciful to merit treatment as an 'injury in fact'") (quoting *Kardules v. City of Columbus*, 95 F.3d 1335, 1348-53 (6th Cir. 1996)).

Similarly, Plaintiffs' allegation that they are derivatively injured because the Attorney General's objection burdens their preferred candidates also falls short of demonstrating concrete

harm. The D.C. Circuit has held that a claim of harm to voters' preferred candidates will only support standing if "the voters have themselves suffered a concrete and personalized injury," which Plaintiffs here have not alleged. *Gottlieb*, 143 F.3d at 622. Other courts are in accord:

> As to the argument of [former Presidential candidate Ralph] Nader's supporters that they suffer derivatively from his injury, . . . such argument sweeps too broadly. Regardless of Nader's injury, his supporters remain fully able to advocate for his candidacy and to cast their votes in his favor…. The only derivative harm Nader's supporters can possibly assert is that their preferred candidate now has less chance of being elected. Such 'harm', however, is hardly a restriction on voters' rights and by itself is not a legally cognizable injury sufficient for standing.

Becker v. FEC, 230 F.3d 381, 390 (1st Cir. 2000) (citations omitted). It is the same here – Plaintiffs' claim that they are harmed as voters "sweeps too broadly" and is not an injury sufficiently particularized to establish standing.

In *Giles*, this Court rejected equally vague injuries as insufficient to establish standing to challenge the constitutionality of the Voting Rights Act, explaining

> [t]he type of vague injuries that [the plaintiff] alleges – negative stereotypes, diminished economic opportunities, perceptions of continuing racism – even if true, could essentially affect anyone within a covered jurisdiction under the Voting Rights Act (more than 146 million people in nine states). That is simply not the type of personalized injury required to establish standing.

Giles, 193 F. Supp. 2d at 263; *see also Lance*, 549 U.S. at 441-42 (holding that voter plaintiffs who alleged a violation of the Elections Clause of Article I, § 4 of the Constitution did not have standing because their only injury was the "undifferentiated" allegation "that the law – specifically the Elections Clause – has not been followed"). Plaintiffs' generalized assertions of harm as voters simply fail to establish any cognizable harm.

Moreover, Plaintiffs' claim 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," Compl. ¶ 30, is also unsupported and insupportable. First, they fail to allege that any denial of race-neutral treatment affected them personally. *See United States v. Hays*, 515 U.S. 737, 743-44 (1995) (holding that injury resulting from governmental action, even if racially discriminatory, "accords a basis for standing only to those persons who are *personally* denied equal treatment by the challenged discriminatory conduct") (emphasis added). For instance, Plaintiffs aver no facts to support their view that Section 5 resulted in their being treated differently from voters of any other race. To the contrary, they assert just the opposite – they claim that the referendum they supported was supported equally by white and minority voters. Compl. ¶¶ 15, 23. Second, Plaintiffs fail to allege they belong to any specific racial group and thus fail to establish any basis for a racial discrimination claim. Absent any personal harm from the alleged denial of race-neutral treatment, Plaintiffs cannot demonstrate injury in fact. *See Allen v. Wright*, 468 U.S. 737, 755-56 (1984) (holding that plaintiffs could not demonstrate the requisite injury to create standing to seek stricter enforcement of IRS regulations concerning racially discriminatory private schools, because "[i]f the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school").

If Plaintiffs' vague assertions regarding the alleged denial of equal treatment sufficed to create standing, any resident of a covered jurisdiction could compel courts to render constitutional determinations regarding Section 5. The "injury in fact" requirement is intended to prevent precisely this kind of attempt at turning the federal courts into "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding." *Valley Forge*, 454 U.S. at 473. Accordingly, Plaintiffs as voters lack standing.

b. Plaintiffs Have Not Been Harmed as Potential Candidates for Future Kinston Elections.

Two of the Plaintiffs allege they may run for Kinston City Council in November 2011, and that the Attorney General's objection harms those Plaintiffs as prospective candidates. Compl. ¶¶ 1, 3-4. In particular, Plaintiffs claim that they are harmed because each prefers to run "on a ballot where he is unaffiliated with any party, against opponents similarly unaffiliated, and without the preliminary need to either run in a party primary or obtain sufficient signatures to obtain access to the ballot as a candidate." *Id.* ¶¶ 3-4. Plaintiffs further claim that the Attorney General's objection burdens their freedom of political association, "forces them to anticipate and respond to a broader range of competitive tactics," and "harms their chances for election." *Id.* ¶ 28.

These allegations cannot establish standing. First, none of the alleged hindrances to Plaintiffs' potential future candidacies is a cognizable harm. As noted, Section 5 does not burden Plaintiffs' rights of political association. *City of Rome*, 446 U.S. at 182-83. And Plaintiffs' concern that the partisan electoral system does not maximize their individual chances of success is similarly ineffectual. The Supreme Court has made clear that no candidate is guaranteed his or her ideal, or even preferred, electoral system. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (upholding ban on write-in candidacies); *Bullock v. Carter*, 405 U.S. 134, 144-45 (1972) (upholding limits on the number of candidates on the ballot); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding a requirement that candidates demonstrate a "significant modicum of public support"). The mere fact that one facially valid electoral system is chosen over another, thus impacting the competitive environment or the burdens associated with running for electoral office, does not alone impair any legally protected interest.

Even if Plaintiffs' asserted injuries were cognizable, the allegation that these harms may occur if Plaintiffs run for Kinston City Council in November 2011 – some nineteen months after the date they filed their complaint in this action – is a conjectural and hypothetical claim of possible future injury, rather than the "actual or imminent" harm needed to establish injury in fact. *Lujan*, 504 U.S. at 560. The Supreme Court has rejected claims by similarly situated plaintiffs who sought to rely on the possibility of a future candidacy to establish standing. *See McConnell*, 540 U.S. at 230 (holding that plaintiffs lacked standing because "none . . . is a candidate in an election affected by [a challenged portion of the statute] . . . and it would be purely 'conjectural' for the court to assume that any plaintiff ever will be") (quoting *Lujan*, 504 U.S. at 560); *cf. Golden v. Zwickler*, 394 U.S. 103, 109 (1969) (rejecting standing to challenge a ban on certain election literature where the plaintiff's claim depended on the possible future candidacy of a former Congressman).[3]

c. Plaintiffs Have Not Been Harmed as Proponents of The Kinston Referendum.

Plaintiffs finally claim that they are harmed as "proponents of citizen referenda in the city of Kinston." Compl. ¶ 1. Plaintiffs allege that the Attorney General's objection "nullified" their efforts in support of the referendum and their right "to participate in the electoral, political and law-making process through citizen referenda." *Id.* ¶ 29.

[3] In some circumstances, a plaintiff may be able to demonstrate injury as an actual candidate for election, as for example, where the plaintiff challenges statutory disclosure requirements and has already declared his candidacy and been compelled to make the disclosures in question. *See Davis v. FEC*, 128 S. Ct. 2759, 2768-69 (2008). Here, by contrast, Plaintiffs have not identified any present or actual injury – they do not allege that they are current or former City Council members, have established political committees, filed papers, made public declarations or disclosures, printed campaign literature, appealed for funds, or undertaken any campaign-related activities whatsoever. Compl. ¶¶ 2-6.

Plaintiffs cannot demonstrate injury based on their status as supporters of the Kinston referendum. A plaintiff's "interest in protecting the results of the referendum is not . . . of such a personal stake" to establish the necessary injury in fact. *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 318 (6th Cir. 2005); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997) (expressing "grave doubts" about whether referendum proponents have standing to defend the constitutionality of a state constitutional measure they supported, and noting that the Supreme Court has never "identified initiative proponents as Article-III-qualified defenders of the measures they advocated"); *Nolles*, 524 F.3d at 900 ("Plaintiffs fail to allege a specific individualized injury necessary to establish standing in federal court resulting from the allegedly unfair election, that is, an injury not shared by all the voters who voted as they did in the referendum election"). Accordingly, Plaintiffs' support for the referendum to change Kinston's election system does not establish standing.

To the extent Plaintiffs claim an injury based on the nonspecific intent to sponsor *future* citizen referenda, *see* Compl. ¶ 2 (asserting that Plaintiff "LaRoque intends to offer additional positive changes to Kinston's electoral system in the future"), this claim also fails to establish the requisite injury. Such a prediction of possible future harm is too attenuated to constitute an actual or imminent injury. *See Whitmore*, 495 U.S. at 158-60 (reviewing cases and noting "what we have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art. III").

Because Plaintiffs' alleged harms as voters, potential candidates, and proponents of the Kinston referendum all fail to establish a cognizable injury in fact, Plaintiffs lack standing to challenge the constitutionality of Section 5, and their claims should be dismissed for lack of subject-matter jurisdiction.

2. Plaintiffs' Alleged Harms Are Not Fairly Traceable to the Attorney General's Objection Nor Would a Favorable Outcome Here Likely Redress Those Harms.

In addition to showing an injury in fact, Plaintiffs are also required to establish a "causal connection between the injury and the conduct complained of" – that is, that the injury is fairly traceable to the challenged action, and is not the result of the independent action of an absent third party. *Lujan*, 504 U.S. at 560 (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Plaintiffs cannot demonstrate that the Attorney General's objection caused their alleged injuries, both because any injuries were the result of independent actions and decisions by the City of Kinston, and because injuries that result from Plaintiffs' own personal preferences for a nonpartisan voting system are not fairly traceable to the Attorney General's objection.

After the Attorney General objected to Kinston's proposed voting change under Section 5, the City could have sought either administrative reconsideration of that objection, *see* 28 C.F.R. § 51.45(a); or a declaratory judgment from this Court preclearing the proposed change, *see* 42 U.S.C. § 1973c(a). Instead, the Kinston City Council voted not to pursue either course. *See* Minutes at 19 (Ex. 1). It was this decision by the City Council that ended the Section 5 review process for the voting change arising from the Kinston referendum, and any resulting injury was therefore caused not by the Attorney General's objection but by the City's independent actions. Because any alleged harm was caused by "unfettered choices made by independent actors not before the court[] and whose exercise of broad and legitimate discretion the court[] cannot presume either to control or to predict," that harm is not fairly traceable to the Attorney General's decision. *Lujan*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)); *see also Young America's Found. v. Gates*, 560 F. Supp. 2d 39, 51 (D.D.C. 2008) (holding that plaintiffs could not establish causation "where a

plaintiff's injury results from the independent act" of a third party) (quoting *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388, 397 (D. Conn. 2004)).

In addition, Plaintiffs' alleged injuries turn entirely on their personal preference for nonpartisan local elections. *See* Compl. ¶¶ 1-7, 28-29. An injury caused entirely by personal choice cannot be characterized as fairly traceable to the Attorney General's conduct. In *McConnell*, for instance, plaintiffs challenged a statutory provision that increased hard-money campaign contribution limits on the ground that they did not wish to solicit large amounts of money, and the statute therefore diminished their ability to compete in the political process. *McConnell*, 540 U.S. at 228. The Supreme Court held that those plaintiffs could not show "that their alleged injury is 'fairly traceable'" to the statute, because their "alleged inability to compete stems not from the operation of [the statute], but from their own personal 'wish' not to solicit or accept large contributions, *i.e.*, their personal choice." *Id.* Plaintiffs' alleged injuries here similarly stem *not* from the operation of Section 5, but rather from their "personal choice" to prefer nonpartisan as opposed to partisan elections. *Id.*; *see* Compl. ¶¶ 1-7, 28-29. They therefore cannot demonstrate that any of their alleged injuries – whether as voters, as potential candidates, or as referendum supporters – can be fairly traced to the Attorney General's objection.

Moreover, Plaintiffs similarly fail to meet their burden of establishing that a favorable judgment from this Court would redress their claimed injuries. To satisfy the redressability requirement, Plaintiffs "must establish that it is likely, as opposed to merely speculative, that a favorable decision by this Court would redress the injury suffered."[4] *America's Cmty. Bankers*

[4] Although the causation and redressability inquiries can merge in some cases, *see Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990), each of these elements of the constitutional standing inquiry has a distinct focus. The causation element examines the

v. FDIC, 200 F.3d 822, 827 (D.C. Cir. 2000). As the Supreme Court emphasized in *Lujan*, when a plaintiff's alleged harms "hinge" on discretionary choices made by regulated third parties not before the Court, causation and redressability, are "substantially more difficult to establish." *Lujan*, 504 U.S. at 562; *see Gottlieb*, 143 F.3d at 621.

Here, redress for Plaintiffs' grievance lies with the Kinston City Council and not with the Attorney General. The City – and not the Attorney General – decided to end the Section 5 process, rather than seek administrative reconsideration or judicial preclearance in this Court. This Court, however, lacks authority to require Kinston, a third party not before the Court, to resume the Section 5 process by seeking administrative reconsideration of the Attorney General's decision or judicial preclearance in this Court. That route to relief, instead, belongs to Plaintiffs and all other Kinston voters, to whom the City Council is ultimately accountable. Kinston may seek reconsideration of the Attorney General's objection at any time. 28 C.F.R. § 51.45(a).

Moreover, an injunction against Section 5's enforcement in Kinston will not necessarily guarantee Plaintiffs the voting system they prefer now or ensure its future survival. There is simply no way to determine from Plaintiffs' allegations what voting system Kinston will implement, how long it will remain in place, and how Plaintiffs or other voters and candidates will choose to act within it or any adopted alternatives. *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (holding that it must "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision") (citation omitted); *America's Cmty. Bankers*, 200 F.3d at 822. Nor can these Plaintiffs make any representation as to what actions Kinston, as the real party in interest here, might take in response to a ruling favorable to Plaintiffs here. *See Nat.*

"connection between the assertedly unlawful conduct and the alleged injury," whereas the redressability element examines the "connection between the alleged injury and the judicial relief requested." *Allen*, 468 U.S. at 753 n.19.

Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 129 (D.D.C. 2003) (emphasizing that "the core principles of standing doctrine require the Court to exercise particular caution in adjudicating standing questions where the actions and interests of third parties not before the Court are implicated"), *aff'd*, 366 F. 3d 930 (D.C. Cir. 2004). In short, Plaintiffs cannot demonstrate that a favorable ruling here is likely to ensure the immediate or on-going use of the voting system they prefer. Any claims otherwise would be purely speculative.

Because Plaintiffs cannot show a causal connection between the asserted harms and the Attorney General's objection, or that an order prohibiting the Attorney General from enforcing Section 5 is likely to redress their alleged harms, they cannot establish Article III standing.

The Supreme Court has repeatedly cautioned that standing requirements must be especially strictly construed when a plaintiff raises a constitutional challenge to an Act of Congress, out of "[p]roper regard for the complex nature of our constitutional structure." *Valley Forge*, 454 U.S. at 473-74. Accordingly, because Plaintiffs do not allege any concrete or particularized harm that is fairly traceable to the Attorney General and likely to be redressed by a favorable decision, they lack standing to challenge Section 5's constitutionality – on its face or as applied.[5] This Court therefore should dismiss their claims for lack of subject-matter jurisdiction.

[5] Plaintiffs' general allegation that Section 5 is not a congruent or proportional means to enforce the 14th and 15th Amendments is also untenable because it lacks a sufficient factual basis. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). Accordingly, in addition to the fact that Plaintiffs lack standing, their legal conclusions as to the Voting Rights Act and the record before Congress must be discarded as baseless and insufficiently unsupported. *See Cassirer* v. *Kingdom of Spain*, 580 F.3d 1048, 1052 n. 2 (9th Cir. 2009) (applying *Iqbal* to a motion to dismiss for lack of personal and subject matter jurisdiction); *see also Bridges Public Charter School* v. *Barrie*, No. CIV.A.10-0108, 2010 WL 1803735, at *2 (D.D.C. May 6, 2010) (citation omitted) (holding that Court need not accept "a legal conclusion couched as a factual allegation," or "naked assertions [of unlawful misconduct] devoid of further factual enhancement") (quoting *Iqbal*, 129 S. Ct. at 1949-50 (internal quotation marks omitted) and

3. Plaintiff KCNV Does Not Have Associational Standing.

One of the Plaintiffs, KCNV, alleges that it is a membership association dedicated to eliminating partisan affiliation in Kinston elections. Compl. ¶ 7. Its members include Kinston registered voters who supported the 2008 referendum as well as prospective candidates who would like to run in nonpartisan elections. *See id.* Each individual plaintiff is a KCNV member. *See id.* Because KCNV's members do not have standing to bring their challenge, KCNV itself lacks associational standing.

An association has standing to sue on behalf of its members when its members otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members to participate in the lawsuit. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000). KCNV has alleged no injuries or interests distinct from those alleged by the individual Plaintiffs – none of whom have standing to sue in their own right. *See* Parts III.A.1 & III.A.2, *supra*. Because no individual KCNV member has standing, KCNV does not have associational standing. *See Arizonans for Official English*, 520 U.S. at 65-66 (holding that the plaintiff association lacked associational standing where its individual members did not "have standing to sue in their own right," because the "requisite concrete injury" was not present); *GrassRoots Recycling Network, Inc. v. EPA*, 429 F.3d 1109, 1111 (D.C. Cir. 2005) ("Because . . . no member of GrassRoots has standing to sue in his or her own right, GrassRoots lacks associational standing and its petition must be dismissed.").

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citing *Aktieselskabet AF 21. November 2001* v. *Fame Jeans Inc.*, 525 F.3d 8, 17 n. 4 (D.C. Cir. 2008) (the court has "never accepted legal conclusions cast in the form of factual allegations")).

B. Prudential Principles Against Adjudication of a Third Party's Rights Bar This Court's Review of Plaintiffs' Constitutional Challenge.

Even if Plaintiffs could establish Article III standing to challenge the constitutionality of Section 5, their claim should be dismissed because the prudential standing doctrine bars review of Plaintiffs' effort to assert a third party's rights.

In addition to the constitutional requirements identified in Part III.A, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge*, 454 U.S. at 474-75. This prudential standing doctrine requires that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* at 474 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). This rule allows courts to avoid adjudicating rights "which those not before the Court may not wish to assert." *Elk Grove v. Newdow*, 542 U.S. 1, 15 n.7 (2004) (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978)). The rule also assures courts that the most effective advocate of the rights at issue – the party whose legal rights are at stake – "is present to champion them." *Id.* This prudential limitation on standing "'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,' and it assures the court that the issues before it will be concrete and sharply presented." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)) (citation and footnote omitted).

Plaintiffs' claim that Section 5 exceeds Congress' enforcement authority under the Fourteenth and Fifteenth Amendments rests not on their own claimed rights, but on the asserted legal rights of jurisdictions covered by the preclearance requirement. *See* Compl. ¶ 34 (alleging, among other claims, that Section 5 imposes "extraordinary burdens on and denials of local self-

governance"; "selectively visit[s] those burdens on certain jurisdictions based on electoral results from many decades ago"; and "impos[es] on covered jurisdictions alone race-conscious requirements in tension with the Constitution[.]"); *see also id.* ¶ 23 (alleging that "[t]he preclearance process is costly and burdensome and . . . deprives local jurisdictions of essential attributes of self-governance").

Whatever the merits of these claimed impositions on the legal rights of covered jurisdictions, no such jurisdiction is present in this litigation. Plaintiffs are not themselves subject to Section 5's requirements, and Plaintiffs' allegations on behalf of covered jurisdictions are therefore insufficient to support their challenge as to the alleged burdens that Section 5 imposes. *See Warth*, 422 U.S. at 509-10 (holding that plaintiffs lacked third-party standing because they were not themselves subject to the defendant's zoning practices); *see also Kowalski v. Tesmer*, 543 U.S. 125, 127, 129-34 (2004) (holding that plaintiffs lacked third-party standing to challenge, on behalf of hypothetical indigent clients, the constitutionality of a state procedure for appointing appellate counsel). Plaintiffs' attempt to assert the legal interests of another party should be rejected.

Courts have infrequently recognized a narrow exception to the rule against third-party standing where the party asserting the right has a "close relationship" with the third party, and where there exists some hindrance to the third party's ability to protect its own interests. *Kowalski*, 543 U.S. at 130. These circumstances are not present here.

First, Plaintiffs cannot demonstrate that they have a "close relationship" with the Kinston City Council sufficient to support third-party standing. To be "sufficiently close" for prudential standing purposes, the relationship at issue must reflect "an identity of interests" such that the court can be assured of effective advocacy "for the third party's interest." *Lepelletier v. FDIC*,

164 F.3d 37, 43-44 (D.C. Cir. 1999). A citizen's relationship with elected officials is not sufficiently close for standing purposes; it is simply "too vague and general."[6] *Quilter v. Voinovich*, 981 F. Supp. 1032, 1038 (N.D. Ohio 1997) (holding that "there is no 'special' relationship" between elected officials and voters that would establish identity of interest), *aff'd*, 523 U.S. 1043 (1998). In addition, a sufficiently close relationship cannot exist where there is an actual conflict between the plaintiff's interests and those of the third party. *See Clifton Terrace Assoc., Ltd. v. United Techs. Corp.*, 929 F.2d 714, 721 (D.C. Cir. 1991) (affirming dismissal on prudential standing grounds where the plaintiff's "interests in the subject of this suit to some extent conflict with those of the tenants whose rights it purports to advance"). Here, Plaintiffs' interests are in direct conflict with the City's: Plaintiffs seek to compel the adoption of a nonpartisan election system, whereas the Kinston City Council affirmatively voted *not* to seek administrative reconsideration or judicial preclearance for that same proposed voting change. *See* Minutes at 19 (Ex. 1). Plaintiffs effectively seek to override the City Council vote – a conflict that defeats any claim to identity of interests.

Second, there is no hindrance to Kinston's own assertion of its legal rights in this context. As noted, any covered jurisdiction can seek judicial preclearance of a voting change *de novo*, before or after an objection by the Attorney General, *see* 42 U.S.C. §§ 1973c, 1973*l*(b); 28 C.F.R. § 51.44; and can also seek administrative reconsideration of the Attorney General's objection, *see* 28 C.F.R. § 51.45(a). Thus, while Kinston had an unimpaired right to seek judicial preclearance of the proposed change to nonpartisan elections, or seek to overturn the

[6] The limited types of protected relationships that have been recognized to satisfy this narrow exception include the parent-child relationship, *see Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 408-09 n.1 (1977), and the doctor-patient relationship, *see Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

Attorney General's objection administratively, it chose not to do so. Nor is there any hindrance to Kinston's assertion of any proper constitutional claim concerning the application of Section 5; it could have asserted such claims in a declaratory judgment action to this Court, but has never done so. *See Sumter County*, 555 F. Supp. at 707-08 (three-judge court considered a covered jurisdiction's claims for judicial preclearance of voting changes under Section 5, and also took jurisdiction over alternative claims challenging Section 5's constitutionality); *City of Rome v. United States*, 472 F. Supp. 221, 235-36 (D.D.C. 1979) (three-judge court considering jurisdiction's claims for preclearance and bailout also considered alternative constitutional challenges to Section 5).

Because Plaintiffs are simply "concerned bystanders" seeking to assert the interests of a third party that has chosen not to invoke this Court's jurisdiction, there is no exception to the prudential bar on Plaintiffs' constitutional challenge. *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

C. Plaintiffs Do Not Have a Cause of Action to Challenge the Constitutionality of Section 5 as Applied to the Attorney General's Determination on the Voting Change in Kinston.

For the reasons discussed above, Plaintiffs lack standing to challenge the constitutionality of Section 5 either on its face or as applied by the Attorney General in Kinston. Even if Plaintiffs had standing, however, to the extent plaintiffs' assertions can be construed as a challenge to the Attorney General's decision to deny preclearance of the voting change arising from the Kinston referendum, such a claim is not cognizable by this Court because Congress has not created a cause of action to allow individual voters to challenge a preclearance decision.

1. There is No Cause of Action Under Section 5 for These Plaintiffs to Challenge the Attorney General's Determination.

As this Court has recognized, there are only three types of cases authorized by Section 5. *See LaRoque v. Holder*, No. 1:10-cv-00561, slip op. at 2 (D.D.C. May 12, 2010) (denying Plaintiffs' application for three-judge court). Section 5 authorizes (1) declaratory judgment suits by jurisdictions seeking judicial preclearance to alter their election practices; (2) injunctive actions by the Attorney General to prohibit the enforcement of a voting change that has not been precleared; and (3) suits by private citizens or the Attorney General to determine whether a voting change is in fact covered by Section 5. *See id.* The Court has already held that the present action does not fall within any of the types of actions authorized by Section 5. *Id.* at 2-5. Indeed, under Section 5, the only judicial route available to "overturn" the Attorney General's denial of preclearance of a submitted voting change is for *the submitting jurisdiction* to file a declaratory judgment action in this Court seeking judicial preclearance *de novo*. *Sumter County*, 555 F. Supp. at 700, 706; *City of Rome*, 450 F. Supp. at 382 n.3. Plaintiffs, therefore, do not have a cause of action under Section 5 to declare unlawful or enjoin the Attorney General's objection to the proposed voting change in Kinston.

2. There is No Other Cause of Action Under Which These Plaintiffs Can Challenge the Attorney General's Determination, Which is Discretionary and Unreviewable in This Court.

In addition, Plaintiffs do not have a cause of action under any other federal statute or the Constitution to enjoin the Attorney General's Section 5 objection in Kinston. The Supreme Court has explained that the Attorney General's administrative determinations under Section 5 are not subject to judicial review. *See Morris v. Gressette*, 432 U.S. 491, 501-07 & n.24 (1977) (holding that "Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act" under Section 5). Part of the rationale for this rule is that

the Attorney General's determination is not "conclusive," in that the submitting jurisdiction can seek administrative reconsideration or judicial preclearance *de novo* if dissatisfied with the Attorney General's objection. *Id.* at 505 n.21 ("[A]n objection on the part of the Attorney General is not conclusive with respect to the invalidity of the submitted state legislation under the Constitution or the Voting Rights Act. After receiving an objection from the Attorney General, a covered jurisdiction retains the option of seeking a favorable declaratory judgment from the District Court for the District of Columbia"). Under *Morris*, Plaintiffs' request for a declaration that the Attorney General's "specific refusal to permit Kinston's change to nonpartisan elections" is unconstitutional, Compl. at 12, is thus squarely foreclosed. *See Morris*, 432 U.S. at 501-07.

This Court has repeatedly rejected claims similar to those asserted here. In *Sumter County*, the Attorney General objected to a proposed voting change that would have instituted at-large elections for members of the Sumter County Council. 555 F. Supp. at 698-700. Despite that objection, the County held a referendum election at which voters approved the adoption of at-large elections for County Council members. Rather than seek administrative preclearance of the referendum, the County Council and two county officials brought a declaratory judgment action in this Court to seek judicial preclearance of the change. Plaintiffs alleged, among other things, that the Attorney General's prior objection to the change to at-large elections "impaired their constitutional right to vote and the similar right of all of the other citizens who voted in the 1978 referendum for the at-large system, and effectively denied their rights to vote" in future at-large elections. *Id.* at 706. This Court viewed plaintiffs' constitutional claims as tantamount to an attack on the Attorney General's discretion, and declined to address those claims, holding: "We cannot sit in judgment here upon whether the Attorney General's refusal to preclear

violated rights asserted by plaintiffs. Plaintiffs are not entitled to any declaratory judgment about the *effect* on them of defendants' refusal to grant Section 5 preclearance." *Id*. at 706-07. (emphasis added) (citation omitted).

This Court's decision in *City of Rome* is also instructive. Plaintiffs in *City of Rome*, among other claims, sought to challenge the Attorney General's objection to a submitted voting change. 450 F. Supp. at 380-81. Plaintiffs alleged that the Attorney General's actions violated the Constitution. This Court rejected plaintiffs' argument that the presence of constitutional claims established jurisdiction:

> Plaintiffs have argued that *Morris* . . . must be distinguished from the instant case because here plaintiffs challenge the Attorney General's actions as violative of the Constitution rather than as violative of some statute, such as the Administrative Procedure Act.… Plaintiffs' argument is wholly untenable. Congress has neither totally insulated the Attorney General's actions from judicial scrutiny nor totally deprived plaintiffs of judicial redress. Congress merely has established an exclusive means of obtaining 'review' of the Attorney General's determination – a de novo proceeding in the District Court for the District of Columbia.

Id. at 382 n.3. Other courts have consistently followed the same command. *See, e.g.*, *Harris v. Bell*, 562 F.2d 772 (D.C. Cir. 1977) (applying *Morris*); *Reaves v. U.S. Dept. of Justice*, 355 F. Supp.2d 510, 514 (D.D.C. 2005) ("Congress intended that the Attorney General's decision whether or not to object to a proposed voting change under Section 5 to be discretionary and unreviewable"); *Jones v. Edwards*, 674 F. Supp. 1225, 1228 (E.D. La. 1987) ("an administrative determination by the Attorney General is not judicially reviewable"); *Dotson v. City of Indianola*, 521 F. Supp. 934, 941 (N.D. Miss. 1981) ("*Morris* has been relied upon by the lower courts as precluding judicial review of the Attorney General's actions in a variety of factual circumstances").

Because Plaintiffs' claims do not arise under Section 5, and because the Supreme Court has made clear that judicial review of the Attorney General's discretionary decision-making in this context is foreclosed, Plaintiffs cannot state a cause of action that would permit them to bring their as-applied challenge.

IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court dismiss Plaintiffs' complaint with prejudice for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Respectfully submitted,

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