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))

APPELLANTS' MOTION TO EXPEDITE THE APPEAL

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

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

Counsel for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

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

STATUTES

RULES AND REGULATIONS

INTRODUCTION

This Court will expedite an appeal (1) when "the public" at large has "an unusual interest in prompt disposition" that is "strongly compelling" or (2) when "delay will cause irreparable injury" to the appellant and "the decision under review is subject to substantial challenge." *See* D.C. Cir. Handbook of Practice & Internal Procedures at 33. This appeal perfectly exemplifies both situations.

The case presents a facial constitutional challenge to the 2006 Congressional reauthorization of Section 5 of the Voting Rights Act of 1965, which preempts the implementation of any change in election procedures in certain state and local jurisdictions unless and until the change is precleared by federal authorities. *See* Mem. Op., Dkt. No. 42, at 1-3; *see also* 42 U.S.C. § 1973c; *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2509-10 (2009). Appellants are candidates (and their supporters) in the City Council election this year in Kinston, North Carolina. *See* Mem. Op. at 6, 29. They brought this constitutional challenge because Section 5 has preempted the implementation of a voter-enacted referendum in Kinston that would have eliminated certain ballot-access restrictions and electoral disadvantages that they faced under the old, superseded electoral regime. *See id.* at 4-7. But the district court refused to adjudicate Section 5's constitutionality, dismissing the case due to an erroneous holding that Appellants lack standing and a cause of action. *See id.* at 2, 17-19.

Both Appellants and the public have a compelling interest in the prompt judicial resolution of the "serious constitutional questions" concerning the facial validity of Section 5's "preclearance requirements and … coverage formula." *Nw. Austin*, 129 S. Ct. at 2513. If the district court does not strike down Section 5 before November of 2011, then Section 5's unconstitutional preemption of Kinston's referendum will directly injure Appellants in the City Council election. And if the federal courts do not definitively strike down Section 5 in advance of the November 2012 elections, then Section 5 will have a sweeping effect on this decade's redistricting process and the resulting electoral landscape nationwide—and any attempt to retroactively remedy the unconstitutional taint of Section 5 after districts are drawn and elections are held will create electoral chaos.

It will be nearly impossible, however, for the judiciary to adjudicate the constitutional validity of Section 5 before those deadlines have passed unless this Court expedites its treatment of the district court's threshold justiciability holding. Under a normal schedule, this Court likely will not be able to rule upon the dismissal until the Fall of 2011 (if not later). A reversal at that point will come too late, given the time needed for a remand and subsequent appeal of the merits. Thus, for the merits to be resolved in a sufficiently timely fashion, this Court must rule on this justiciability appeal *before the Summer of 2011 (if not sooner)*.

That will not be difficult for this Court, since the dismissal of Appellants'

suit was manifestly erroneous. Although the district court did not dispute that Section 5's preemption of Kinston's validly enacted referendum makes it harder for Appellants to get on the ballot and to win election to the City Council, the court nevertheless reached the astonishing conclusion that Appellants lack standing to seek judicial redress of this injury and that Section 5 impliedly precludes the cause of action that the Constitution itself confers to private individuals seeking injunctive relief from an unconstitutional federal law. *See* Mem. Op. at 13-19. This breathtaking holding that federal courts are powerless to provide a remedy to private individuals harmed by Section 5's unconstitutional preemption of local law is contrary to an unbroken wall of binding precedent.

Appellants thus move for this Court to expedite its resolution of their appeal. They respectfully submit that: (1) Appellants' opening brief should be due 21 days after this Court grants this motion; (2) Appellees' response briefs should be due 21 days thereafter; (3) Appellants' reply brief should be due 10 days thereafter; and (4) oral argument should be scheduled as soon thereafter as is practicable.

BACKGROUND

In November of 2008, the voters of Kinston, North Carolina, overwhelmingly enacted a referendum to amend the city charter to switch from partisan to nonpartisan municipal elections. *See* Mem. Op. at 4. The referendum would have at least two significant effects on local elections in Kinston. *First*, it

would make it cheaper and easier for candidates to get on the ballot: under the new nonpartisan-elections scheme, a putative candidate would only have to file his notice of candidacy and pay a filing fee, whereas, under the old partisan-elections scheme, the candidate also must expend additional money and time to win a party primary or to obtain the signatures of 4% of the city's registered voters. *See id.* at 4, 31, 38. *Second*, the referendum would improve the chances of victory for non-Democratic candidates: nonpartisan elections would deprive Democratic candidates of the benefit of party-line straight-ticket voting and other strategic advantages stemming from the fact that the city's voters are overwhelmingly registered Democrats. *See id.* at 5, 31-32, 34-35.

But because the City of Kinston is covered by Section 5, it is preempted from implementing its validly enacted referendum, unless and until the City obtains preclearance approval, from either the D.C. District Court or the Attorney General, that the change does not have the purpose or effect of denying racial minorities the right to vote. *See id.* at 2-5. The City requested administrative preclearance, but the Attorney General objected because eliminating partisan elections in overwhelmingly Democratic Kinston would harm black-preferred candidates; the City then declined to seek judicial preclearance. *See id.* at 5-6.

In order to end Section 5's preemption of Kinston's nonpartisan-elections referendum, Appellants—five citizens of Kinston and a private membership

association—brought this lawsuit challenging the facial constitutionality of Section 5. *See id.* at 1, 6-7. They argued that Congress' reauthorization and amendment of Section 5 in 2006 exceeded its enforcement authority under the Reconstruction Amendments and also violated the Constitution's nondiscrimination guarantees. *See id.* at 7. Two of the Appellants—John Nix and Klay Northrup—are running for Kinston City Council, and they are directly injured by the more burdensome ballot-access restrictions (and electoral disadvantages) that are imposed by the partisan-elections scheme that remains in place because Section 5 preempts implementation of the nonpartisan-elections referendum. *See id.* at 4-5, 31-32.[1]

The Government, as well as private intervenors, moved to dismiss Appellants' complaint for lack of standing and a cause of action. *See id.* at 7 & n.3. The district court granted the motion on both grounds. *See id.* at 2, 17-19. Notably, the court *did not dispute* that Section 5's preemption of Kinston's nonpartisan-elections referendum makes it harder for Nix and Northrup to get on the ballot and to win the City Council election in November of 2011. *See id.* at 31-39 (never questioning the *existence* of those election-related harms). Instead, the

[1] When the complaint was initially filed, Nix and Northrup had not yet begun active campaign operations, because they filed their complaint more than a year and a half before the November 2011 election to account for the time necessary for an orderly adjudication of Section 5's facial constitutionality. *See* Mem. Op. at 28. Since then, however, they have taken numerous campaign steps, documented in the record, to further their candidacies. *See id.* at 28-29.

court's dismissal rested on three critical premises:

> (1) the 2006 reauthorization of Section 5, *even if unconstitutional*, somehow permanently nullified the 2008 referendum and thus *immunized* that unconstitutional usurpation from judicial *redress*, *see id.* at 44-45;
>
> (2) Section 5 *impliedly precludes* Appellants from bringing a facial constitutional challenge against the 2006 Congressional reauthorization of that very statute, *see id.* at 15-19, 46-53; and
>
> (3) the candidates' election-related harms may not be "legally protected interests" for Article III injury, because a partisan election's ballot-access restrictions and electoral disadvantages are not "*unlawful*," even if their retention is due to *Section 5's unconstitutional process*, *see id.* at 31-39.

Each of these premises is demonstrably wrong and contrary to black-letter law. Collectively, they led the court to the untenable conclusion that there is no judicial relief for private citizens when Congress injures them by unconstitutionally preempting a local law that personally benefits them.[2]

ARGUMENT

This Court has authority to "expedite the consideration" of an appeal for "good cause." *See* 28 U.S.C. § 1657(a); D.C. Cir. R. 2. At least two circumstances constitute such cause: *first*, when "the public" at large has "an unusual interest in prompt disposition" that is "strongly compelling"; or *second*, when "delay will

[2] The district court also raised "serious concerns" about whether the candidacies of Nix and Northrup are sufficiently "imminent" for Article III injury. *See* Mem. Op. at 28-31. Those "concerns" were completely unfounded, but Appellants will not detail the reasons in this motion, because, regardless, any "imminence" defect could be cured by allowing them to amend their complaint to include the facts already in the record concerning their recent and ongoing campaign activities. *See id.* at 29; *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975).

cause irreparable injury" to the appellant and "the decision under review is subject to substantial challenge." *See* D.C. Cir. Handbook of Practice & Internal Procedures at 33. This appeal easily satisfies both of those criteria.

I. THE ENTIRE NATION HAS A STRONGLY COMPELLING INTEREST IN A DEFINITIVE JUDICIAL RESOLUTION OF THE FACIAL CONSTITUTIONALITY OF SECTION 5 BEFORE THE COMPLETION OF THE 2011-2012 REDISTRICTING CYCLE

A. The immediate pendency of nationwide redistricting after the 2010 Census requires a prompt and definitive judicial resolution of whether Congress acted constitutionally when it reauthorized Section 5 in 2006. Section 5's requirement that federal authorities must preclear all redrawn electoral districts in covered jurisdictions will have an obvious and significant impact on post-census redistricting in the 16 States wholly or partially covered. *See* 28 C.F.R. Pt. 51 App. And that will not only have a profound effect on all local, state, and federal legislative districts *within* those jurisdictions, but also on the partisan composition (if not control) of the entire U.S. Congress. *See, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 466-75 (2003); *Shaw v. Reno*, 509 U.S. 630, 633-39 (1993).

Given Section 5's sweeping effect on the 2011-2012 redistricting process and the resulting electoral landscape for the next decade, it is imperative for the judiciary to reach a final determination of the facial validity of Section 5 before the 2012 elections, so that districts can be drawn and elections can be conducted free of any unconstitutional taint from Section 5. As noted at the outset, however, such

a timely resolution of the merits will be possible in this case only if the current appeal of the district court's non-merits dismissal is resolved before the Summer of 2011 (if not sooner), due to the time needed for a remand and subsequent appeal. Conversely, if Section 5 is reviewed and invalidated *after* the 2012 elections, that will create tremendous uncertainty and disruptions because the districts and elections unconstitutionally affected by Section 5 will have to be remedied and redrawn in the middle of the decade, after districts have been drawn and elections held. Moreover, the likelihood that Section 5 will be invalidated is hardly remote, since *every* member of the Supreme Court opined just two Terms ago that the 2006 reauthorization of Section 5 at least "raise[s] serious constitutional questions." *See Nw. Austin*, 129 S. Ct. at 2513; *see also id.* at 2517 (Thomas, J., concurring in the judgment in part and dissenting in part) (opining that Section 5 is unconstitutional).

B. A full and timely consideration of Section 5's constitutionality is not otherwise possible unless this appeal is expedited. Although there remains pending one facial challenge to Section 5, *see Shelby Cnty. v. Holder*, No. 10-651 (D.D.C.), the plaintiff there has not advanced an important, free-standing argument against Section 5's constitutionality that Appellants here have made. And it would be clearly contrary to the public's interest in electoral certainty during the redistricting cycle if the judiciary were to reject the arguments made in *Shelby County* and thus purportedly uphold Section 5, only later to invalidate Section 5

here once Appellants' additional argument is considered. Accordingly, as it makes no sense from anyone's perspective to prolong or disguise the potential uncertainty concerning Section 5's fate, this Court should expedite this appeal to facilitate the contemporaneous adjudication of Section 5's validity in *Shelby County* and in this case (at least at the appellate level, if not in the district court).

Shelby County exclusively advances the argument that the mere *unchanged extension* of Section 5's preclearance procedure for another 25 years was not permissible enforcement legislation under the Reconstruction Amendments in 2006: the County contends that the greatly improved conditions in the covered jurisdictions as of 2006 do not permit the selective imposition on those jurisdictions of any preclearance requirement, wholly apart from the particular substantive standard for preclearance. *See* Mem. in Support of Pltf. Mot. for S.J. in *Shelby Cnty. v. Holder*, No. 10-651 (D.D.C.), Dkt. No. 5, at i, 3-7, 17-43.

Although Appellants here have also made that argument, they have supplemented it with a separate, free-standing challenge to Congress's *substantive expansion* of the preclearance standard. In 2006, Congress made the substantive preclearance standard *more* demanding by abrogating two Supreme Court decisions that had narrowly construed the statutory grounds for denying preclearance. *See* Pub. L. No. 109-246, §§ 2(b)(6), 5, 120 Stat. 577, 578, 580-81 (2006). Appellants argue that this change renders Section 5 impermissible

enforcement legislation and violates the Constitution's nondiscrimination guarantees: they contend that it cannot possibly be appropriate for Congress to have adopted a more stringent standard in 2006 than it originally did in 1965, especially since the Supreme Court has warned repeatedly that the new standard Congress has chosen will mandate and coerce the use of race-based quotas for minority electoral success. *See* Pltfs. Mem. in Support of S.J., Dkt. No. 23, at i-ii, 1-2, 13, 25-45; *see also* Complaint, Dkt. No. 1, at ¶¶ 24-26, 30, 32-37.

It warrants emphasis that Appellants' additional argument is squarely grounded in two of the "serious constitutional questions" that the Supreme Court has raised about the 2006 reauthorization of Section 5: whether the "current burdens" Section 5 "imposes" can "be justified by current needs" and whether Section 5 makes "considerations of race" "the predominant factor in redistricting" and other electoral decisionmaking. *See Nw. Austin*, 129 S. Ct. at 2511-13.

C. Notably, even the district court below was persuaded by the foregoing arguments about the importance of a single definitive judicial pronouncement on Section 5's facial constitutionality before the culmination of the 2011-2012 redistricting cycle. It expedited its resolution of this case, per Appellants' request, to ensure that, if possible, the case would be finally adjudicated on the merits before the 2012 elections and contemporaneously with *Shelby County*. *See* Pltfs. Letter to Judge Bates, Dkt. No. 36-1; Scheduling Order, Dkt. No. 38.

II. APPELLANTS WILL SUFFER IRREPARABLE INJURY IN THE NOVEMBER 2011 KINSTON CITY COUNCIL ELECTION IF REVIEW OF THE DISTRICT COURT'S MANIFESTLY ERRONEOUS DISMISSAL IS NOT EXPEDITED

A. Expedited Review Is Necessary To Free Candidates Nix And Northrup From The Ballot-Access Restrictions And Electoral Disadvantages That Section 5 Has Locked In Place In Kinston

The Kinston City Council election in November of 2011 requires a prompt resolution of the district court's dismissal of Appellants' case on justiciability grounds. Section 5, by preempting the implementation of the validly enacted nonpartisan-elections referendum, has ossified the rejected partisan-elections regime, which directly increases the burden on Nix and Northrup to get on the ballot (and reduces their chances of winning office). *See supra* at 3-4. Because the district court erroneously held that Appellants lack standing and a cause of action, the only way that Appellants can obtain relief from those looming election-related harms is for this Court to reverse the district court's non-merits dismissal with sufficient time remaining for the district court on remand to decide the merits of Appellants' claims before the November 2011 election. Once again, practically, that requires resolving this appeal before the Summer of 2011 (if not sooner).

The appropriateness of expediting an appeal in these circumstances is vividly illustrated by considering this Court's treatment of appeals involving preliminary injunctive relief. When preliminary injunctive relief is denied, this Court is *required* to expedite the appeal. *See* 28 U.S.C. § 1657(a); D.C. Cir. R.

47.2(a). Here, the only reason that Appellants did not seek such preliminary relief is that they reasonably filed their suit well before the November 2011 election so as to allow an orderly adjudication of the merits free from the time pressures that all too frequently plague election-related litigation. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (*per curiam*). Now, however, the district court's erroneous dismissal on justiciability grounds has created the precise problem posed by appeals involving requests for preliminary injunctive relief: the merits of Appellants' claims might not be resolved before Appellants are injured. Thus, just as this Court must expedite appeals involving the denial of preliminary injunctive relief, it should expedite the appeal of the district court's non-merits dismissal here, in order to facilitate a timely adjudication of the merits on remand.

B. The District Court's Grounds For Dismissal Are Subject To Substantial Challenge

As noted, Section 5 directly injures candidates Nix and Northrup because, by preempting Kinston from implementing its nonpartisan-elections referendum, it preserves a partisan-elections system that requires them to spend more money and time to get on the ballot (and also subjects them to strategic electoral disadvantages). A judicial order facially invalidating Section 5 will directly redress this injury by clearing the way for the state-mandated implementation of the less-costly ballot-access regime. *See* N.C. Gen. Stat. 160A-104. Thus, Nix and Northrup plainly have standing to challenge this concrete and redressable injury

caused by Section 5. *See, 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). Equally plainly, they have a well-established cause of action for injunctive and declaratory relief against this unconstitutional law. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010).

The district court mangled this black-letter law based on two facially erroneous conclusions. *First*, in absurdly circular reasoning, it held that the 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* Mem. Op. at 44-45. That would be like saying a federal court cannot redress an unconstitutional federal statute voiding inter-racial contracts because the plaintiff's contract had already been nullified by the statute. *Second*, the court held that Section 5 statutorily precludes Appellants from challenging its own facial constitutionality. *See id.* at 15-19, 46-53. But, of course, Congress can immunize its own acts from constitutional review (if at all) only through the clearest expression in such court-stripping provisions, yet neither Section 5 nor any case even suggests that the statute prevents injured private parties from bringing a facial claim against it.

In short, for the reasons elaborated on below, Section 5 is not an unprecedented statute that silently bars courts from considering its facial validity

and that magically nullifies local law even after its preclearance requirement itself has been voided as facially unconstitutional.

1. As noted, the district court held that "the 'redressability' requirement of Article III" was not satisfied because an order "facially invalidating Section 5 in all its applications" still would not "'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 it "would need to be re-passed by Kinston voters in order to have any legal effect." *See id.* at 44-45. That is surreal.

If Congress' 2006 reauthorization of Section 5 was facially unconstitutional, then it could "not validly confer[]" any "authority" on the Attorney General, *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-20 (1912), and neither his objection, nor the statute itself, could possibly "nullify" the referendum that Kinston's voters validly enacted in 2008. "[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 v. Adamski*, 77 F.2d 397, 399 (D.C. Cir. 1935) (citing *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 526 (1929)).[3]

Conlon's elementary principle also resolves the district court's concern that

[3] In any event, Section 5 does not even purport to "*nullify*" Kinston's referendum. Rather, it simply "prohibit[s] implementation of [a] change" that "has not been precleared," thereby temporarily rendering it not "enforceable." *See Lopez v. Monterey Cnty.*, 519 U.S. 9, 20 (1996); *see also* 42 U.S.C. 1973c(a).

"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* Mem. Op. at 44. Appellants are challenging only the *2006 reauthorization* of Section 5, and so it is only those local laws enacted *after* 2006 that 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. *See 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 nonpartisan-elections referendum. For whether Section 5 has "nullified" the referendum, and thus defeated redressability, cannot possibly turn on who the plaintiff is. Consequently, the court's theory conflicts with the Supreme Court's adjudication of constitutional challenges to the preemptive application of Section 5 to particular state laws. *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 161-62, 173-83 (1980).

The district court also seemed briefly to suggest that it could not redress Appellants' injuries because Appellants had abandoned any claim that the specific application of Section 5 to Kinston's referendum was unconstitutional. *See* Mem. Op. at 44-45. But, of course, Appellants were not masochistically seeking to

invalidate all applications of Section 5 *except* the one directly injuring them. As the court itself recognized, their "requested relief" was an order "facially invalidating Section 5 in all its applications," *id.* at 44; *see also id.* at 7, which, of course, includes its application to Kinston's referendum. Although the court repeatedly invoked Appellants' disavowal of any "as-applied" claim, *see id.* at 7-9, 15-16, 47-48, it misunderstood the import of that denial. Appellants 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. *See id.* at 8-9. 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 its applications," *id.* at 8, necessarily includes the claim that it was *equally* unconstitutional when it was applied to preempt Kinston from implementing nonpartisan elections.

2. The district court's holding that Appellants lack a cause of action to bring their facial constitutional claim is equally erroneous. *See id.* at 15-19, 46-53. It first interpreted *Morris v. Gressette*, 432 U.S. 491 (1977), to hold that Congress has impliedly precluded judicial review of any *as-applied* challenge to the Attorney General's refusal to preclear Kinston's referendum. *See* Mem. Op. at 46-47, 50-53. And it then reasoned that such a judicial-review bar also necessarily

precluded Appellants from bringing a *facial* challenge to Section 5, since their alleged Article III *injury* flows only from the adverse *application* of Section 5 to the referendum. *See id.* at 7-9, 15-16, 47-50. Every step of this reasoning is fundamentally flawed.

At the outset, the district court completely ignored the bedrock principle that Congress' "inten[t] to preclude judicial review of constitutional claims … must be clear," *Webster v. Doe*, 486 U.S. 592, 603 (1988), given "the serious due process concerns that such preclusion would raise," *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987). Yet Section 5 contains no *textual* bar on judicial review. 42 U.S.C. § 1973c. And *Morris* and its progeny do not 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 that Congress intended to preclude "judicial review" of claims challenging "the Attorney General's exercise of discretion under § 5" to grant or deny preclearance. *See, e.g.*, *Morris*, 432 U.S. at 504-07. But that is because "review" of the Attorney General's *discretionary decision under Section 5* is an irrelevant *diversion* in a *constitutional challenge to Section 5*. Since the "administrative preclearance procedure" is "entirely optional" and "not conclusive of … constitutionality," courts recognized they could ignore any discretionary errors made by the Attorney General and instead directly adjudicate in "'traditional constitutional litigation'" whether *the statute itself* was

unconstitutionally preempting local law, which would be sufficient to provide "full and adequate redress." *See, e.g.*, *City of Rome v. United States*, 450 F. Supp. 378, 381, 382 n.3 (D.D.C. 1978) (quoting *Morris*, 432 U.S. at 507).

Here, in stark contrast, the district court has "totally deprived" Appellants of "judicial redress" for their claim that Section 5 is facially unconstitutional. *See id.* at 382 n.3. Absolutely nothing about Section 5 supports the inference that Congress intended *that* constitutionally dubious result, let alone has the requisite "heightened showing" of such an intent been satisfied. *See Doe*, 486 U.S. at 603.

Likewise, the district court was dead wrong that Appellants cannot bring a facial constitutional challenge to Section 5 without being forced to seek prohibited review of the Attorney General's discretionary application of the statute to Kinston's referendum, simply because their Article III injury to bring a facial challenge flows from the statute's adverse application to the referendum. That is like saying a criminal defendant cannot challenge the facial constitutionality of the statute of conviction unless he also both raises a sufficiency-of-the-evidence claim and argues that the statute's application to him is uniquely unconstitutional. To the contrary, whether the Attorney General's refusal to preclear the referendum was a *proper* "exercise of discretion under § 5," *Morris*, 432 U.S. at 507, is *entirely irrelevant* to Appellants' facial challenge and their standing to raise that claim: either way, Section 5 continues to preempt Kinston's implementation of the

referendum, Appellants have been injured by that preemption, and Congress acted unconstitutionally in reauthorizing Section 5 in 2006.

3. Finally, the district court tried to bolster its judgment by intoning "serious doubts" about whether Nix and Northrup's election-related harms—their loss of money, time, and competitive advantage—constituted "legally protected interests" for Article III injury. *See* Mem. Op. at 31-39. The court suggested that the fact that the ballot-access restrictions (and electoral disadvantages) of the partisan-elections scheme are not "inherently unlawful" distinguishes the myriad cases treating such burdens as cognizable Article III injuries: whereas the injurious burdens in those cases were challenged as *substantively "unlawful,"* Appellants here are "only challeng[ing] the legality of the *procedures* (namely, Section 5) which enabled *lawful* [burdens] to remain in effect." *See id.* at 38 (some emphases added); *accord id.* at 34-36. That distinction is wholly untenable.

Article III does not require that a judicially cognizable injury have been caused by substantive, rather than procedural, illegality. Countless cases hold that plaintiffs can challenge the procedurally unconstitutional imposition of a cognizable injury even though the burden imposed is substantively lawful. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 422-23, 430-31 (1998) (standing to challenge Presidential line-item veto of a Congressional tax subsidy). That is because there is no required "subject-matter nexus between the right asserted and

the injury alleged." *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 78-79 (1978); *see also Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007) ("[T]he phrase 'legally protected interest[,]' … refer[s] only to a 'cognizable interest[,]'" the existence of which is determined "without considering whether the plaintiffs ha[ve] a legal *right*").

In any event, Kinston's referendum *did* confer upon Nix and Northrup a "legally protected interest" *under state law—i.e.*, their interest in the concrete benefits from nonpartisan elections—and so they have Article III injury because Section 5 deprived them of those benefits by preempting the referendum. The right to protect such state-law benefits is precisely why third-party intervenors have Article III standing to appeal federal-court orders invalidating state laws that personally benefit them. *See, e.g., United States v. Texas*, 158 F.3d 299, 303-04 (5th Cir. 1998); *Schulz v. Williams*, 44 F.3d 48, 52-53 (2d Cir. 1994).

CONCLUSION

Appellants' motion to expedite the appeal should be granted. Appellants respectfully submit that: (1) Appellants' opening brief should be due 21 days after this Court grants this motion; (2) Appellees' response briefs should be due 21 days thereafter; (3) Appellants' reply brief should be due 10 days thereafter; and (4) oral argument should be scheduled as soon thereafter as is practicable.

January 06, 2011

Respectfully submitted

/s/ Michael A. Carvin

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

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

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of January, 2011, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system, and I also filed four copies of the foregoing document, by hand delivery, with the clerk of this Court.

I further certify that, on this 6th day of January, 2011, I caused the foregoing document to be served via regular and electronic mail on the lead counsel (in the court below) for Appellee-Defendant Eric H. Holder, Jr., Attorney General of the United States (as no counsel with an electronic mailing address for that appellee is currently designated on the CM/ECF system):

Richard Alan Dellheim
U.S. Department of Justice
Civil Rights Division, Voting Section
Room 7254 – MWB
950 Pennsylvania Ave. N.W.
Washington, DC 20530
(202) 305-1734
richard.dellheim@usdoj.gov

I further certify that, on this 6th day of January, 2011, I electronically served the foregoing document via the CM/ECF system on the following currently designated counsel in this Court for Appellee-Defendant-Intervenors 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:

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

January 06, 2011

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