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

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| STEPHEN LAROQUE, ANTHONY CUOMO, JOHN NIX, KLAY NORTHRUP, LEE RAYNOR, and KINSTON CITIZENS FOR NON-PARTISAN VOTING, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civ. No.: 1:10-CV-00561-JDB |
| ERIC H. HOLDER, JR. ATTORNEY GENERAL OF THE UNITED STATES | ) | |
| Defendant. | ) | |

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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## INTRODUCTION

Plaintiffs challenge the constitutionality of the 2006 extension of Section 5 of the Voting Rights Act, *see* 42 U.S.C. § 1973c, and their entitlement to do so is simple and straightforward. Plaintiffs, along with a supermajority of the voters of the City of Kinston, successfully adopted a referendum to amend the Kinston city charter to switch from partisan to nonpartisan local elections. *See* Complaint ¶¶ 1-6, 11-15. Plaintiffs did so, in part, because the use of nonpartisan contests would eliminate a variety of specific electoral disadvantages that burdened them and their preferred candidates in local partisan contests. *See id.* ¶¶ 28-29. Yet Plaintiffs have been stripped of those concrete benefits as candidates and voters in the upcoming City Council election, and their tangible support of the nonpartisan-elections referendum has been completely nullified. *See id.* ¶¶ 2-6, 28-29. The cause of these deprivations was Congress' 2006 extension of Section 5, which presumptively preempted Kinston's nonpartisan-elections referendum from taking effect, subject to federal preclearance under a statutory standard that the Attorney General has concluded the referendum fails to satisfy. *See id.* ¶¶ 1, 8, 16-19, 23-27.

The Supreme Court recently admonished, however, that the new Section 5's "preclearance requirements and … coverage formula raise serious constitutional questions." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2513 (2009). Consequently, in order to eliminate the injuries they suffered when Section 5 nullified Kinston's nonpartisan-elections referendum, Plaintiffs have brought two constitutional claims: *first*, they allege that Section 5, as extended in 2006, exceeds Congress' authority to enact "appropriate" legislation to "enforce" the Civil War Amendments, because the coverage formula and the preclearance standard no longer bear any rational relationship to preventing or remedying intentional racial voting discrimination, *see id.* ¶¶ 21-26, 30, 32-34; and *second*, they allege that the 2006 preclearance standard transforms Section 5 into a race-based minority-entitlement scheme that violates their equal protection rights, *see id.* ¶¶ 24-26, 30, 35-37. Plaintiffs therefore request that this Court declare Section 5 invalid on its face and as applied to Kinston's nonpartisan-elections referendum and that it enjoin the Attorney General from enforcing Section 5 against voting changes in Kinston that have not been precleared, including the referendum. *See id.* §§ VI-VII. If such an order is entered in this case,

Plaintiffs will regain the benefits they derived from nonpartisan elections, because Section 5 is the *only* reason that Kinston officials have not yet satisfied their *mandatory state-law duty* to implement the voter-approved referendum. *See id.* ¶ 27; *see also* N.C. Gen. Stat. §§ 160A-104, 160A-108.

The Government, plainly desperate to avoid a resolution of this case on the constitutional merits of Section 5, makes a variety of transparently baseless arguments for why Plaintiffs' complaint must be dismissed on antecedent grounds. Its initial gambit is to throw out a scattershot of reasons why Section 5's preemption of the nonpartisan-elections referendum does not impose *any* cognizable Article III injury on *any* Plaintiff. *See* MTD Memo. at 6-13. But its assertions in this regard are uniformly wrong: *all* of the Plaintiffs have suffered *myriad* injuries that are judicially cognizable, including well-recognized injuries to their interests both as candidates and voters in the upcoming Kinston City Council election and as referendum proponents whose support has been nullified. Indeed, no doubt for this reason, the existence of Article III injury is not the primary focus of the Government's motion.

Rather, the Government's central theme is that, *even if* Section 5's nullification of the nonpartisan-elections referendum imposes a concrete and particularized injury on Plaintiffs, they nevertheless cannot challenge Section 5's preemption of the referendum, because *the City of Kinston* is the *only* party that may do so, and it has *chosen* not to. The Government trots out this argument again and again, dressed in the guise of the Article III "causation" requirement, *see id.* at 14-15, the Article III "redressability" requirement, *see id.* at 16-17, the prudential standing bar on the assertion of third-party constitutional rights, *see id.* at 19-20, and the permissible scope of Plaintiffs' cause of action, *see id.* at 22-26. Regardless of form, however, the Government's fixation with the rights of the City of Kinston is nothing more than a red herring, an extended exercise in distraction that tries to use the complexity of Section 5's preclearance scheme to obscure the simplicity of Plaintiffs' underlying claim of injury.

This Court should not be fooled. Plaintiffs have *individual* constitutional rights to freedom from injury caused by federal action that is neither authorized by the Constitution's affirmative grants of power nor permitted by the Constitution's negative restrictions on discrimination. Yet the Government is arguing that Plaintiffs lack the ability to seek judicial redress of their *federally* imposed injuries, and must

rely instead on the litigation *whims* of their *local* government, simply because the particular method by which the federal government *personally* injured Plaintiffs was the *preemption* of a beneficial local law. That astonishing assertion has no legal basis whatsoever, which is why the Government does not and cannot cite a single case so holding and why numerous cases cited below unequivocally refute it.

More fundamentally, this Court should be crystal clear about the radical consequences of the Government's theory. According to the Government, so long as Congress allows local officials to seek federal preclearance of state laws under federally established standards, Congress could presumptively preempt *any* state-law change and yet there would be no judicial relief for individuals *actually injured* by the preemption whenever local officials choose to acquiesce in Congress' unconstitutional nullification of their local laws. For example, Congress could unconstitutionally preempt *voter-enacted referenda* that *reduce* the amount of state taxation or that make it *easier* for racial minorities to vote, yet directly aggrieved state taxpayers and minority voters could not themselves challenge the federal law and would be completely out of luck if state officials were pleased to be rid of referenda, which they did not enact and did not support, without incurring the political costs of repealing the popular laws themselves. Whether or not the Civil Rights Division of the Justice Department truly means to take the position that Congress' power to meddle in such local affairs is judicially unreviewable—and it is hard to believe that it does—the law certainly does not agree.

Accordingly, for the foregoing reasons, as well as others discussed below, this Court should deny the Government's motion to dismiss Plaintiffs' complaint.

**ARGUMENT**

The Government's motion to dismiss makes three over-arching contentions: 1) Plaintiffs lack standing to bring their constitutional claims, *see* MTD Memo. at 6-22; 2) Plaintiffs lack a cause of action to the extent they are challenging the Attorney General's decision to deny preclearance, *see id.* at 22-26; and 3) Plaintiffs' allegations are too general or conclusory to state a claim that Congress exceeded its enforcement powers when extending Section 5 in 2006, *see id.* at 17 n.5. All three points are meritless.

## I. PLAINTIFFS SUFFICIENTLY ALLEGED STANDING

"'For purposes of ruling on a motion to dismiss for want of standing, both 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 v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). "'At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice' because courts assume plaintiffs can back up their general claims with specifics at trial." *Am. Soc. for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 336 (D.C. Cir. 2003) (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 question on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Muir*, 529 F.3d at 1105. A proper application of these well-settled standards demonstrates that Plaintiffs adequately pled the existence of standing to litigate their constitutional claims.

### A. Plaintiffs Sufficiently Alleged Article III Standing

In order for a Plaintiff to satisfy the Article III standing requirements, it must plead (and later prove) that it has (1) "personally suffered some actual or threatened injury"; (2) "which may be fairly traced to the challenged action"; and (3) "is likely to be redressed by a favorable decision of the court." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 661 (D.C. Cir. 1996) (en banc) (internal quotation marks and ellipses omitted); *accord Defenders of Wildlife*, 504 U.S. at 560-61. Although "the presence of *one party* with standing is *sufficient* to satisfy Article III," *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("*FAIR*") (emphases added), in this case, *all* of the Plaintiffs have adequately pled the three elements of Article III standing.

#### 1. The Individual Plaintiffs Sufficiently Alleged Injury

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) (citing *Defenders of Wildlife*, 504 U.S. at 560).

Here, for each of their two constitutional claims, the individual Plaintiffs adequately pled the existence of *multiple* well-accepted injuries in fact.

**(a) The Individuals Plaintiffs Properly Pled Injury for Their Claim That Congress Exceeded Its Enforcement Authority**

Plaintiffs' first constitutional claim is that Section 5, as extended in 2006, exceeds Congress' authority to enact "appropriate" legislation to "enforce" the Civil War Amendments, because the coverage formula and the preclearance standard no longer bear any rational relationship to preventing or remedying intentional racial voting discrimination. *See* Complaint ¶¶ 21-26, 30, 32-34; *see also infra* at 40-41 (discussing these allegations in more detail). For this claim, the individual Plaintiffs have three separate and independent bases for Article III injury: 1) Plaintiffs Nix and Northrup have a cognizable injury as candidates in the 2011 Kinston City Council election who have been deprived of the benefits of nonpartisan elections; 2) all five of the individual Plaintiffs have a cognizable injury as voters in the 2011 Kinston City Council election who have been deprived of the benefits of nonpartisan elections; and 3) Plaintiffs LaRoque, Cuomo, and Reynolds have a cognizable injury as proponents of the federally nullified nonpartisan-elections referendum.

**(i) Plaintiffs Nix and Northrup Properly Pled Injury as Candidates in Kinston's 2011 Election**

The complaint specifically avers that Plaintiffs Nix and Northrup "intend[] to run for election to the Kinston City Council in November of 2011." *See* Complaint ¶¶ 3, 4. It further alleges that Section 5's preemption of nonpartisan elections causes *three* distinct types of cognizable injury to their candidacies.

*First*, and most simply, Plaintiffs alleged that Section 5 has "directly increase[d] the burdens and costs … to be placed on the ballot." *See id.* ¶ 28. Under the nonpartisan-elections scheme adopted by the Kinston referendum, Nix and Northrup could have gained access to the ballot simply by filing a notice of candidacy and paying a filing fee. *See id.* (citing N.C. Gen. Stat. §§ 163-292, 163-294.2). But, because Section 5 prevented the nonpartisan-elections scheme from going into effect, Nix and Northrup must instead run under the old partisan-elections scheme, which requires that they garner either 40% of the vote in a party primary or signatures from 4% of all registered voters as unaffiliated candidates. *See id.*

(citing N.C. Gen. Stat. §§ 163-106, 163-111, 163-122, 163-291, 163-296). This *pre-condition* to ballot access is especially burdensome because, if they choose to run in a party primary but fail to win, they are completely barred from running as unaffiliated candidates, *see* N.C. Gen. Stat. § 163-122(a), whereas if they choose to run as unaffiliated candidates, they then of course must run against candidates with the full backing of the various political parties.

It is black-letter law that such "[b]allot eligibility requirements" impose "a concrete and personalized injury" on "candidates," since they force them to expend limited campaign resources and may even "prevent[]" them "from appearing on [the] ballot altogether." *See Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998); *see also Krislov v. Rednour*, 226 F.3d 851, 857-58 (7th Cir. 2000) (restriction on types of individuals who could solicit necessary signatures to place candidates on ballot imposed cognizable injury-in-fact on candidates because it "required [them] to allocate additional campaign resources to gather signatures"); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 640-41 (3d Cir. 2003) (filing fee was cognizable injury-in-fact for candidate because it "impact[ed] … the candidate'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" was the type of "economic injury [that] is a quintessential injury upon which to base standing"). Consequently, it is beyond reasonable dispute that Nix and Northrup have a cognizable interest in being able to run for the Kinston City Council without the pre-condition of either winning a party primary or obtaining sufficient signatures to qualify as unaffiliated candidates under the partisan-elections scheme. And it warrants emphasis that this interest, *by itself*, is enough to establish their Article III injury.

*Second*, because "Section 5's perpetuation of the partisan election scheme fundamentally alters the competitive environment in which Plaintiffs Nix and Northrup will run," they also alleged that Section 5 "forces them to anticipate and respond to a broader range of competitive tactics and issues than otherwise would be necessary." *See* Complaint ¶ 28. For example, it "forces [them] to associate with a political party or disassociate from all of them, thus burdening their freedom of political association." *Id.*

In *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), the D.C. Circuit squarely held that such distortion

of the electoral playing field constitutes a cognizable injury-in-fact. There, two Congressmen challenged the FEC's regulations implementing the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, claiming that the FEC's regulations unlawfully allowed campaign practices that BCRA had prohibited. *See Shays*, 414 F.3d at 79. The Congressmen alleged that, due to the FEC's regulations, "they [were] 'open to attack' by BCRA-banned advertising, face[d] the 'strong risk' that opponents [would] use improper soft money spending against them, and generally [had to] 'raise money [and] campaign …' in an environment rife with practices Congress had proscribed." *Id.* at 85. The D.C. Circuit held that such "illegal structuring of a competitive environment" is a "type of injury … sufficient to support Article III standing." *Id.* The court reasoned that "fundamentally alter[ing] the environment in which rival parties defend their concrete interests" forces the candidates to "anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Id.* at 86.

Here, just as the Congressmen in *Shays* were able to "challenge … elementary distortions that alter[ed] the competitive environment's overall rules" due to the effect on their campaign strategy, *see id.* at 86, so too Nix and Northrup may challenge Section 5's "illegal [re]structuring" of Kinston's "competitive environment," *see id.* at 85. They have alleged that there are strategic, political, and expressive differences between running in partisan and nonpartisan elections. *See* Complaint ¶ 28. Plaintiffs can and will "back up [these] general claims" in their complaint "with specifics" at later stages of the litigation. *See Ringling Bros.*, 317 F.3d at 336. But the key point now is that such electoral effects are judicially cognizable. *See Shays*, 414 F.3d at 86; *see also Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006) (political party and its chairman had cognizable interest in avoiding forced expressive association with non-party-members during party primary); *Krislov*, 226 F.3d at 857-58 (ban on use of non-registered, non-resident solicitors for ballot-eligibility petition imposed cognizable injury-in-fact on candidates due to the restriction on their right to expressively associate with such solicitors); *cf. Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008) (adjudicating on the merits a constitutional challenge brought by political parties alleging that a nonpartisan-elections scheme injured them by forcing them to expressively associate with nonmember candidates).

*Third*, Nix and Northrup also alleged that Section 5's preemption of Kinston's nonpartisan elections "substantially harms their chances for election by, among other things, making party affiliation a factor in voter's choices." *See* Complaint ¶ 28. That allegation is supported by the Justice Department's own objection letter, which was premised on a statistical conclusion that partisan elections benefited Democrats, particularly black Democrats, at the expense of white Republicans and independents. *See id.* ¶¶ 3-4, 19; *see also* Letter from Loretta King, Acting Assistant Attorney General of the Civil Rights Division, to James P. Cauley, Kinston City Attorney (Aug. 17, 2009), http://www.justice.gov/crt/voting/sec_5/ltr/l_081709.php. More generally, as the Justice Department's objection letter all but conceded, the undisputed fact that Kinston's "electorate is overwhelmingly Democratic" was the "partisan" "motivating factor for this change." *See* Complaint ¶ 19 (quoting letter). Thus, it is clear and undisputed that partisan elections in Kinston substantially harm the electoral chances of unaffiliated and Republican candidates for a variety of reasons, such as "the ability" of Democratic-leaning residents "to vote a straight ticket" rather than have to make individual decisions on candidates. *See id.*

It is well established that such probabilistic harm to a candidate's electoral prospects constitutes a cognizable injury-in-fact. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 473-75 (1987) (candidate who desired to disseminate certain movies classified as "political propaganda" by Justice Department had standing to challenge designation due to the fact that it "would substantially harm his chances for reelection"); *Shays*, 414 F.3d at 91-92 (candidates had standing because of the "distinct risk" that challenged FEC rules would be "to their disadvantage" in the campaign); *Miller v. Moore*, 169 F.3d 1119, 1122 (8th Cir. 1999) (candidate had standing to challenge "pejorative ballot label" that "would seriously jeopardize his chances of reelection"). Thus, for this reason as well, Nix and Northrup adequately alleged, and will later prove, a cognizable injury from Section 5's preemption of the nonpartisan-elections referendum.

The Government nevertheless insists that candidates Nix and Northrup have failed to plead an Article III injury. *See* MTD Memo. at 11. The Government reasons that "[t]he 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," because

"no candidate is guaranteed his or her ideal, or even preferred, electoral system." *See id.* That assertion, of course, flies in the face of the wall of controlling and persuasive authority cited above. Indeed, that wall remains unbroken, for the Government does not, and cannot, cite *a single Article III standing case* supporting its absurd position that candidates lack a *judicially cognizable interest* in challenging the legality of election practices that have demonstrably negative effects on their own campaigns. Instead, the Government merely cites a handful of cases where, *on the merits*, these types of negative effects have sometimes been held insufficient, *on their own*, to constitutionally invalidate the ballot access requirements that caused them. *See id.*

The Government therefore commits the cardinal error of confusing the merits of the constitutional claim asserted with the underlying Article III injury, essentially "decid[ing] the question on the merits … against the plaintiff, [rather than] … assum[ing] that on the merits the plaintiffs would be successful in their claims." *Muir*, 529 F.3d at 1105. To put the matter differently, for purposes of Article III injury, this Court must assume that Kinston's current partisan-elections regime is *not* a "facially valid electoral system," MTD Memo. at 11, because it is being *unconstitutionally* preserved by Section 5, which nullified the nonpartisan-elections referendum that would have replaced it. The relevant standing question thus is whether candidates Nix and Northrup have alleged a "concrete and particularized" "judicially cognizable interest" in challenging the *preservation* of the partisan-elections regime. *Bennett*, 520 U.S. at 167. And, as shown above, it is plainly sufficient that they alleged that the regime imposes significant relative burdens on their candidacies. Indeed, as the Government itself notes, the Supreme Court in *Jenness v. Fortson*, 403 U.S. 431 (1971), adjudicated constitutional challenges brought by putative candidates against a partisan-elections scheme that, like Kinston's, imposed the electoral pre-condition of either winning a party primary or obtaining a sufficient number of petition signatures. *See id.* at 432, 434, 442. Although the Court ultimately decided that the burdens imposed by such regimes do not themselves violate the First Amendment or Equal Protection Clause, the mere fact that the Court *considered* the candidates' claims supports the myriad cases above holding that such burdens are *cognizable Article III injuries-in-fact*. And thus Nix and Northrup have standing to challenge the

imposition of those burdens here, based on their allegation that those burdens were caused by Section 5's unconstitutional nullification of Kinston's nonpartisan-elections referendum.

The Government, likely recognizing the deficiencies in its primary contention that the candidates' alleged injuries are *categorically* non-cognizable, alternatively contends that, given the *timing* of this case, their injuries are "conjectural and hypothetical" rather than "actual or imminent." *See* MTD Memo. at 12. It reasons that the election in which Nix and Northrup intend to run is still seventeen months away, such that they are relying "on the possibility of a future candidacy to establish standing" without having yet "undertaken any campaign-related activities whatsoever." *Id.* at 12 & n.3. Once again, however, the Government's defense is unfounded and unprecedented.

Numerous cases refute the Government's claim that Nix and Northrup's specific intent to run for reelection in seventeen months is too "conjectural" and "hypothetical." For example, in *Ringling Brothers*, the D.C. Circuit upheld at the motion to dismiss stage a generic allegation that a *former* elephant handler at a circus wanted to "'visit'" the elephants whose mistreatment by the circus gave rise to his alleged injury in fact, even though his complaint did "not spell[] out" "what sort of 'visit' he ha[d] in mind," let alone identify a *fixed date in the future* when he intended to make the visit. *See* 317 F.3d at 433-36. Likewise, in *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001), the court upheld the standing of a pro-life group to bring suit challenging a campaign-finance regulation "fifteen months" before an election, even though the group "planned to produce radio advertisements that would air one week before the election." *See id.* at 381-82, 389; *see also ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1190-95 (11th Cir. 2009) (describing various Eleventh Circuit cases drawing the line between "actual or imminent" injuries and "conjectural or hypothetical" ones, including a voting-rights case where standing was upheld even though "[t]he injury … would have occurred when voters were prevented from registering and voting in an election that was to be held on a specific date fourteen months after the complaint … was filed"); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 594-97 (E.D. Va. 2004) (illegal immigrant had standing in February of 2004 to challenge admissions policies at schools to which he planned to apply for admission by January of 2005).

Moreover, the Government's argument would place candidates in an untenable position. It is well established that it generally takes at least two years to fully resolve federal-court litigation. *See, e.g.*, *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996). But it is equally obvious that most political campaigns do not begin two years before the election, and especially not campaigns for local offices. Consequently, if prospective candidates wait to sue until the period in which they would *normally* "undertake[] … campaign-related activities," MTD Memo. at 12 n.3, their case will not be finished by the time of the election. Courts thus will be faced with the difficult task of adjudicating requests for *preliminary relief* in the run-up to an election, *see Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (per curiam), and, indeed, will risk having their efforts wasted if the case is mooted post-election because the alleged injury to the particular plaintiff will not be "capable of repetition," *see Burlington*, 75 F.3d at 689. Alternatively, if candidates start their campaign activities *unnaturally* early simply in order to confirm their standing with sufficient time to spare before the actual election, they will be needlessly forced to fritter away limited campaign resources on a local electorate that would not yet be focused on an election more than a year away. Article III does not impose such a Hobson's Choice on prospective candidates, so long as they can concretely allege that they intend to run for re-election within two years time. It certainly does not do so at the motion to dismiss stage, based on nothing more than the *Government's conjecture* that the candidates will not follow through on their specific allegation.

The three cases upon which the Government relies are not even remotely to the contrary. *See* MTD Memo. at 12. In two of them, the alleged injury was "conjectural," *not* merely because it was in the *future*, but because it depended on the future hypothetical actions of a *third-party* candidate. Specifically, in *McConnell v. FEC*, 540 U.S. 93 (2003), an alleged injury from the "millionaire provisions" of BCRA was "conjectural" because it would arise *only* if plaintiffs' *future* "*opponent[s] cho[se]* to spend the triggering amount" under those provisions. *See id.* at 229-30 (emphasis added). The Government evades this fatal language from *McConnell* by misleadingly bracketing it out of their quotation. *See* MTD Memo. at 12. Likewise, in *Golden v. Zwickler*, 394 U.S. 103 (1969), the alleged injury from a restriction on anonymous handbills was "conjectural" because it would arise *only* if a former Congressman, who had

been the "sole concern" of the plaintiff's handbills, chose to run for re-election in the future—a "prospect" that "was neither real nor immediate," given that the former Congressman was by then a sitting State Supreme Court Justice *with a 14-year term*. *See id.* at 109 & n.4. The *only* case the Government cites where the plaintiffs' *own* alleged future actions were held to be "conjectural" is *Defenders of Wildlife*, and that case is clearly distinguishable due to its procedural posture as well as its unique facts. There, the alleged injury to plaintiffs' ability to observe endangered species in certain foreign countries was "conjectural" because, even *at the summary judgment stage*, the plaintiffs' *only evidence* that the injury would *ever* occur was their vague and unsubstantiated "profession of an 'intent' to return to the [countries]," which the Supreme Court rightly derided as nothing more than "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be." *Defenders of Wildlife*, 504 U.S. at 563-64. That holding in no way supports rejecting, *at the motion to dismiss stage*, Nix and Northrup's *concrete* allegations that they intend to run for the Kinston City Council *in November of 2011*, which is the *next upcoming election*. *See* Complaint ¶¶ 3-4.

Accordingly, based on the adverse effect on their intended candidacies, Plaintiffs Nix and Northrup have sufficiently alleged a judicially cognizable interest in Section 5's unconstitutional preemption of nonpartisan elections in Kinston.

**(ii) The Individual Plaintiffs All Properly Pled Injury as Voters in Kinston's 2011 Election**

Similarly, the individual Plaintiffs also all pled cognizable injuries as voters in the upcoming City Council election. In particular, they alleged that "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." *See* Complaint ¶ 29. Additionally, they objected that "[p]artisan primaries and general elections also burden their right to politically associate, or refrain from associating, with others." *See id.*

Plaintiffs have already demonstrated that their allegations concerning the electoral effects of partisan elections are *factually* sufficient for now. *See supra* at 5-8. And it is *legally* well settled that

voters can establish standing based on electoral harms to their preferred candidates. After all, voters do not vote merely to exercise their right to cast a ballot; they primarily vote because they want *their candidate to win*. Accordingly, the Supreme Court has repeatedly recognized that "laws that affect candidates always have at least some theoretical, correlative effect on voters." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). And courts thus have found standing for voters when their preferred candidate is harmed by restrictive ballot access practices, *see, e.g.*, *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988); *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), as well as when a challenged election practice will "greatly diminish[] the likelihood that the[ir] candidate[] … will prevail in the election," *Miller*, 169 F.3d at 1123 ("pejorative ballot labels"); *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). Furthermore, wholly apart from the correlative harm to their preferred candidates, the direct interest voters have in avoiding forced expressive association with political parties is also cognizable for purposes of standing. *See Duke*, 5 F.3d at 1402-03 & n.2 (voters had cognizable interest in expressively associating with presidential candidate); *see also supra* at 7.

Although the Government cites a myriad of cases that it claims foreclose Plaintiffs' standing as voters, *see* MTD Memo. at 7-9, none of them actually do.

*First*, several of the Government's cases involved voters who, unlike Plaintiffs, had failed to allege that the challenged election practice would adversely affect either themselves or their preferred candidates in a specific and personalized way. Such voters thus raised only an "undifferentiated, generalized grievance against the conduct of government" in running elections, which the Supreme Court consistently "ha[s] refused to countenance" because plaintiffs must have a "particularized stake in the litigation." *See Lance v. Coffman*, 549 U.S. 437, 441-42 (2007) (per curiam) (voters alleged that judicial displacement of the legislature's right to draw congressional districts was unconstitutional, but did *not* allege that electoral prospects of their preferred candidates (or anything else) would have been any different in a district drawn by the legislature); *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 263-64 (D.D.C.

2002) (*pro se* voter challenging constitutionality of Section 5 alleged "vague" and "abstract injuries" shared by all citizens of covered jurisdictions, but did *not* allege that preclearance had specifically altered jurisdiction's election laws in a way that personally harmed him); *Nolles v. State Comm'n for the Reorganization of Sch. Dists.*, 524 F.3d 892, 898-900 (8th Cir. 2008) (voters alleged that implementation of a state law violated due process by practically mooting a vote on a referendum to repeal the law, but that "harm" was shared equally by every voter in the ineffectual referendum and plaintiffs failed to allege that the effect of the state law itself caused them any personalized injury). Thus, these "generalized grievance" cases are irrelevant in light of Plaintiffs' personalized allegations about partisan elections.

*Second*, in *Gottlieb*, the voters did specifically allege that the challenged electoral practice benefited the opponent of their preferred candidates, but the D.C. Circuit rejected that particular allegation as "rest[ing] on gross speculation" that was "far too fanciful." 143 F.3d at 621. Specifically, voters challenged Bill Clinton's receipt of certain public matching funds during the 1992 presidential campaign, and the court observed that any past injury to his opponents would have "rest[ed] on a series of hypothetical occurrences"—concerning how his campaign had spent the funds and what his campaign would have done without the funds—"none of which [the voters could] demonstrate came to pass." *See id.* at 619, 621. To the extent the Government is suggesting that *Gottlieb* held that allegations of past or future injury to candidates are *inherently* speculative, that erroneously overbroad interpretation of *Gottlieb* is flatly irreconcilable with the Supreme Court's decision in *Keene* and the D.C. Circuit's decision in *Shays*. *See supra* at 8. In short, *Gottlieb* simply had no occasion to consider whether voters have standing where, as here, they have concretely and non-speculatively alleged (based in part on the Justice Department's own reasoning in its objection letter) that there exists a substantial likelihood of future injury to their preferred candidates. *See supra* at 5-8.[1]

[1] Although *Becker v. FEC*, 230 F.3d 381 (1st Cir. 2000), does appear to have rejected standing for voters in such circumstances, *see id.* at 390, that conclusion was essentially *dicta*. The court had already held that the candidate himself had standing, *see id.* at 389, and so it was *legally irrelevant* whether the voters *also* had standing, *see FAIR*, 547 U.S. at 52 n.2. In any event, the First Circuit's decision in *Becker* is wrong, because voters have a cognizable Article III interest in their preferred candidate's *victory*, over and above their general interest in casting a ballot.

*Third*, in *McConnell*, certain voters challenged BCRA's increase of federal hard-money contribution limits, arguing that it "deprive[d] them of an equal ability to participate in the election process based on their economic status," since they could not afford to make the larger contributions while wealthier voters could. 540 U.S. at 226-27. The Court rejected that "broad and diffuse injury" as non-cognizable for standing purposes, because it had "never recognized a legal right [that was] comparable." *See id.* That holding, aside from being "perplexing,"[2] is entirely inapposite here. The abstract and unknown "equal participation" interest alleged and rejected in *McConnell* bears no relationship to Plaintiffs' concrete and established interest in electoral victories for their preferred candidates (or to Plaintiffs' equally specific and settled interest in avoiding forced expressive association with political parties). Indeed, the difference is crystal clear from *McConnell* itself. Certain candidates there *additionally* alleged a "competitive injury" from BCRA's increase of the hard-money caps—namely, that it would be "more difficult for them to compete in elections" because they "d[id] not wish to solicit or accept large campaign contributions as permitted by BCRA." *See id.* at 228. And the Court rejected the alleged "competitive injury," *not* because such injury is categorically non-cognizable, but because *that* specific "competitive injury" was not "fairly traceable" to BCRA; it flowed instead from the plaintiff-candidates' "personal choice" "not to solicit or accept large contributions." *See id. McConnell* thus provides no support at all for the proposition that voters lack a cognizable interest in the electoral prospects of their preferred candidates or in their own freedom from compelled expressive association.

*Finally*, in *City of Rome v. United States*, 446 U.S. 156 (1980) ("*Rome II*"), the Supreme Court rejected a frivolous constitutional challenge to Section 5 brought by voters whose specific complaint was that their city had held "*no* elections" since the 1975 reauthorization. *See id.* at 182-83 (emphasis added). The Court explained that the city's total "failure to hold elections can only be attributed to its own officials, and not to the operation of [Section 5]," because Section 5 *permitted* the city "to conduct elections under its electoral scheme in effect on November 1, 1964," and "the Attorney General [had]

[2] It has rightly been described as "perplexing" because it seems to rest on "unambiguously merits propositions." *See Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 365 (D.C. Cir. 2005) (Williams, J., concurring).

offered to preclear any technical amendments [that might be] … necessary" in this regard. *See id.* That indisputably correct ruling is totally irrelevant here. Plaintiffs are not arguing that Section 5 entirely "prevent[s] [Kinston] from holding elections," *id.* at 182, or that Section 5 completely eliminates their "right[] to engage in the political process," *see* MTD Memo. at 7-8. Rather, they are making the narrower argument that Section 5 is unconstitutionally preventing Kinston from holding the *nonpartisan* elections that Kinston's voters overwhelmingly adopted by referendum, and Plaintiffs are injured because that electoral system is better for their concrete interests as voters than the *partisan* elections that Section 5 unconstitutionally preserves. The Supreme Court recently held that Plaintiffs' arguments raise "serious constitutional questions" notwithstanding *Rome II*, *see Nw. Austin*, 129 S. Ct. at 2513, and, more importantly for present purposes, nothing in *Rome II* in any way suggests that Plaintiffs lack *standing* to raise those questions in this case.

In sum, this Court should sidestep the onslaught of inapposite cases that the Government throws its way. Plaintiffs adequately alleged a judicially cognizable interest in Section 5's unconstitutional preemption of Kinston's nonpartisan elections, based on the adverse effects on their participation as voters in the upcoming City Council election.

**(iii) Plaintiffs LaRoque, Cuomo, and Raynor Properly Pled Injury as Proponents of Kinston's Referendum**

Section 5's unconstitutional preemption of the nonpartisan-elections referendum imposes another cognizable injury for Plaintiffs LaRoque, Cuomo, and Raynor. As they alleged, Section 5 "completely nullified all of [their] efforts in support of the referendum"—including sponsoring it, promoting it, and voting for it—thereby "nullif[ying] and infring[ing] their right under North Carolina law to participate in the electoral, political, and law-making process through citizen referenda." *See* Complaint ¶¶ 1-2, 5-6, 14, 29. This injury is cognizable under the doctrine of legislative standing, which has been established by the Supreme Court and the D.C. Circuit and applied to citizen initiatives by the Ninth Circuit.

The doctrine of legislative standing was first recognized in *Coleman v. Miller*, 307 U.S. 433 (1939). There, the Lieutenant Governor of Kansas broke a tie vote in the Kansas Senate on a proposed

amendment to the U.S. Constitution, casting his vote in favor of the amendment. *See id.* at 435-36. The losing state senators filed a mandamus petition in the Supreme Court of Kansas, arguing that it was unconstitutional for the Lieutenant Governor to cast the deciding vote. *See id.* After that court entertained the action on the merits but denied relief, the senators sought and obtained certiorari review from the U.S. Supreme Court. *See id.* at 437. Of primary importance here, the Court held that the senators had standing to seek relief in federal court. *See id.* at 438-46. The Court reasoned that "these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes," which "ha[d] been overridden and virtually held for naught[,] although if they are right in their contentions their votes would have been sufficient to defeat ratification." *Id.* at 438.

Although the broad "effectiveness" language in *Coleman* originally created some confusion about the scope of its holding, the Court in *Raines v. Byrd*, 521 U.S. 811 (1997), later clarified that *Coleman* was based on the conclusion that a legislator's vote is "deprived of all validity" and "completely nullified" when "legislative action" that he successfully voted "to defeat (or enact)" nevertheless "goes into effect (or does not go into effect)." *See id.* at 822, 823, 826. Thus, although the Court in *Raines* rejected "a drastic extension of *Coleman*" to legislators who were merely challenging reductions in their "effectiveness" based upon "abstract dilution[s] of institutional legislative power," it did not disturb *Coleman*'s core holding concerning outright "vote nullification." *See id.* at 825-26.[3]

The D.C. Circuit has applied *Coleman* where the vote of an individual legislator has been nullified by Presidential action that prevents a law for which the legislator voted from going into effect. In the leading case, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), the court held that an individual Senator had standing to challenge the validity of a "pocket veto" by the President, which was preventing a bill from becoming law that the Senator had voted for and that had been approved by both Houses of

[3] The reason the *Raines* Court was skeptical of a broader "effectiveness" standard was that legislators arguably lack a personalized interest in the consequences that flow from their official actions, since legislators could be said to take those actions on behalf of the public at large. *See Raines*, 521 U.S. at 821, 826. Of course, that separation-of-powers notion is wholly inapposite when it is *individual* citizens whose votes on a *referendum* are nullified. *Cf. id.* at 824 n.8 (observing that separation-of-powers concerns were arguably reduced in *Coleman* because the case involved state legislators and originated in state court).

Congress. *See id.* at 432-433. Since the Senator was "alleg[ing] that conduct by officials of the executive branch amounted to an illegal nullification … of [his] exercise of his power" to "vote[] for … proposed legislation," the court relied on *Coleman* and held that the Senator had standing "to vindicate the effectiveness of his vote." *See id.* at 434-36. As the D.C. Circuit described *Kennedy* in the wake of *Raines*, because "the President's veto" in *Kennedy* "prevented the bill" for which the Senator had voted "from becoming law," *Kennedy* can be viewed as an application of the "vote nullification" interpretation of *Coleman* adopted in *Raines*. *See Chenoweth v. Clinton*, 181 F.3d 112, 116-17 (D.C. Cir. 1999).

Here, the individual citizens of Kinston who voted for the nonpartisan-elections referendum are directly analogous to the individual legislators in *Coleman* and *Kennedy* whose votes were "nullified" because laws that they successfully voted either to defeat or to enact were, respectively, permitted to go into effect or prevented from going into effect. In North Carolina, "[a]ll political power is vested in and derived from the people," N.C. Const. Art. I, § 2, and "[t]he people" have reserved the political power to "initiate a referendum on proposed charter amendments" for their local government, which "shall [be] adopt[ed]" "[i]f a majority of the votes cast in [a] special election shall be in favor of the proposed changes," N.C. Gen. Stat. § 160A-104. Accordingly, Section 5's preclearance requirement, which the nonpartisan-elections referendum does not satisfy, "prevented th[at] [referendum] from becoming law." *See Chenoweth*, 181 F.3d at 116-17. It thereby "complete[ly] nullif[ied]" the legislative power of Kinston citizens to vote to adopt that referendum, *see id.*, no differently than the Lieutenant Governor's tie-breaking decision in *Coleman* or the President's pocket veto in *Kennedy*. And thus the individual voters of Kinston who supported the referendum have standing to challenge the constitutionality of that vote nullification, because they "have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman*, 307 U.S. at 438; *accord Kennedy*, 511 F.2d at 436.

In the only case squarely presenting the issue, the Ninth Circuit agreed that *Coleman*'s "vote nullification" principle for legislators applies to proponents of citizen initiatives. *See Yniguez v. Arizona*, 939 F.2d 727, 731-33 (9th Cir. 1991), *rev'd on other grounds by Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) ("*Arizonans*"). In *Yniguez*, after a district court had held an Arizona ballot

initiative unconstitutional, the organization that sponsored the initiative moved to intervene and appeal, because the State had chosen not to appeal the adverse judgment. 939 F.2d at 730. The Ninth Circuit, relying on *Coleman*, held that the ballot sponsor had standing to appeal the district court's judgment, which "essentially nullified the considerable efforts [the sponsor] made to have the initiative placed on the ballot and to obtain its passage." *See id.* at 732-33. The court's holding that the organizational sponsor of the initiative had standing applies *a fortiori* to individual citizens who voted for the initiative, since they are even more directly analogous to the individual legislators in *Coleman* and *Kennedy* whose actual votes were "nullified."

To be sure, as the Government observes, *see* MTD Memo. at 13, the Supreme Court in *Arizonans* expressed "grave doubts" about the Ninth Circuit's conclusion that the initiative sponsors had standing, although it ultimately reversed on mootness grounds without "definitively resolv[ing] the [standing] issue." *See* 520 U.S. at 64-67. The Court's concern, however, is inapposite under binding D.C. Circuit precedent. The *Arizonans* Court was troubled by the fact that it did not appear that the initiative sponsors were apparently not "authorize[d]" by "state law … to represent the State's interests" "as agents of the people of Arizona … in lieu of public officials." *See id.* at 65. But, as the D.C. Circuit correctly held in *Kennedy*, it was legally irrelevant that the individual Senator there "ha[d] not been authorized to prosecute [his] suit on behalf of the Senate or the Congress," because the interest upheld in *Coleman* was *not* the interest of the State qua State in enforcing its laws. *See* 511 F.2d at 433-35. Rather, it was the interest of the "*individual legislator* … [in] protect[ing] the effectiveness of his vote" from "illegal nullification." *See id.* at 435, 436 (emphasis added). And if *that* is the judicially cognizable interest—as *Coleman*, *Kennedy*, and *Raines* all squarely held—then individual voters have no need for state-law authorization to challenge the unconstitutional "nullification" of an initiative, because they are defending their personal interest in their vote, rather than the State's general interest in its law. *See also supra* at 17 n.3. More importantly for present purposes, the Supreme Court's *unresolved* "doubts" in *Arizonans*, however "grave" they may have been, simply do not and cannot abrogate the D.C. Circuit's binding *holding* in *Kennedy* that *Coleman* applies *regardless* of authorization from the State. Thus, this Court must follow

that holding, which compels the conclusion that initiative proponents have an individual interest in preventing their votes from being nullified that is in no way dependent on authorization from the State.

Contrary to the Government's contention, *see* MTD Memo. at 13, such a ruling would not be in conflict with the (non-binding) decisions of the Eighth Circuit in *Nolles*, *see supra* at 14, or the Sixth Circuit in *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309 (6th Cir. 2005). Although those decisions both involved voter referenda, they did *not* involve the "vote nullification" injury upheld in *Coleman* and *Kennedy*, which explains why they never even discuss those cases.

In *Nolles*, a state law was implemented before a referendum seeking to repeal it, thereby essentially mooting the referendum and rendering it *practically* "ineffective." *See* 524 F.3d at 898-900. But the votes cast in the referendum were *not* "nullified" within the meaning of *Coleman* and *Kennedy*, because they still had the *legally operative effect* of repealing the state law. Here, on the other hand, Section 5 does "nullify" Plaintiffs' votes for Kinston's nonpartisan-elections referendum, because it imposes a barrier preventing the referendum from becoming legally operative, just like the Lieutenant Governor's tie-breaking decision in *Coleman* and the President's pocket-veto in *Kennedy*.

*Providence Baptist Church* is inapposite for the same reason. There, a church initially had persuaded a municipality to enact ordinances rezoning property that it wished to purchase, but those ordinances were immediately subjected to a voter referendum, which automatically suspended their operation until the vote. *See* 425 F.3d at 311-12. During the interim period, the church sued the municipality, alleging that the old zoning laws were unlawful. *See id.* at 312. The municipality desired to settle the litigation by entering into a permanent consent decree containing terms similar to the rezoning plan that had been adopted in the suspended ordinances at the behest of the church. *See id.* But, in the meanwhile, the voters in the referendum chose to rescind the suspended ordinances and to retain the old zoning laws. *See id.* The putative sponsor of the referendum therefore attempted to intervene in the case and appeal the consent decree, claiming that it needed to "protect[] … the results of the [referendum]," which supposedly were "nullified" by the settlement's adoption of the church's preferred zoning laws. *See id.* at 312, 316. The Sixth Circuit, however, correctly concluded that the referendum sponsors had

nothing left to protect, because the passage of the referendum by the voters had successfully rescinded the suspended ordinances as a matter of state law. *See id.* at 317-18. In other words, while the municipality's *subsequent* decision to settle the lawsuit on terms favorable to the church rendered the result of the referendum a *temporary* victory for voters, that decision did *not* stop the referendum from taking *legal effect*, and so the sponsor's efforts on behalf of the referendum were not "nullified" within the meaning of *Coleman* and *Kennedy*.

Accordingly, Plaintiffs LaRoque, Cuomo, and Raynor adequately alleged a judicially cognizable interest in avoiding Section 5's unconstitutional nullification of the nonpartisan-elections referendum that they had supported. And when that interest is added to the interest of Plaintiffs Nix and Northrup as candidates in the upcoming City Council election, *see supra* at 5-12, as well as the interest of all of the individual Plaintiffs as voters in the upcoming election, *see supra* at 12-16, there can be no doubt that Plaintiffs have sufficiently alleged an Article III injury to support their raising the constitutional claim that Congress exceeded its enforcement authority when it extended Section 5 in 2006.

**(b) The Individual Plaintiffs Properly Pled Injury for Their Claim That Section 5 Violates Their Equal Protection Rights**

As their second constitutional claim, Plaintiffs alleged that "Section 5, as amended in 2006, … authorizes denial of preclearance to changes which improve (or do not diminish) minority voting and strength and … also affirmatively prohibits all changes which diminish the ability of select minority groups to elect their preferred candidates, [thereby] violat[ing] the nondiscrimination requirements of the Fifth, Fourteenth, and Fifteenth Amendments, particularly as enforced by the Attorney General." *See* Complaint ¶ 36. In particular, by banning any change that "diminish[es] the ability" of minority citizens "to elect their preferred candidates of choice," the 2006 preclearance standard "established a floor for minority electoral success in all covered jurisdictions until 2031." *See id.* ¶ 25; *see also id.* ¶ 26 (explaining how the "discriminatory purpose" prong of the 2006 standard "constitutes at least an implicit command for covered jurisdictions to engage in race-based voting practices and procedures"). And it was this mandatory requirement for preserving minorities' electoral preferences and successes, imposed by the

2006 amendments, that preempted Kinston's nonpartisan-elections referendum. Indeed, the express grounds for the Justice Department's objection was that the "elimination of party affiliation on the ballot will likely reduce the ability of blacks to elect candidates of choice." *See id.* ¶ 19. Under the 2006 quota floor, it was legally irrelevant that "blacks constitute a[t] least 62.6% of the total population …, 58.8% of the voting age population and 64.6% of registered voters" in Kinston, and it was equally irrelevant that the "motivating factor" for the change was a "partisan" desire to weaken the Democratic stranglehold on a city where the "electorate is overwhelmingly Democratic." *See id.* Accordingly, Plaintiffs alleged that the 2006 version of "Section 5, particularly as implemented by the Attorney General, 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." *See id.* ¶ 30.

The foregoing plainly constitutes a sufficient allegation of Article III injury to support Plaintiffs' standing to raise the equal protection defects with Section 5. Plaintiffs alleged that the 2006 preclearance standard preempted the nonpartisan-elections referendum in order to "intentionally provid[e] minority voters and their preferred candidates a preferential advantage in elections." *See id.* "[T]he denial of equal treatment resulting from the imposition of [a] barrier" "that makes it more difficult for members of one group to obtain a benefit" is a cognizable injury-in-fact. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Moreover, due to Section 5's exclusive fixation on the interests of minority groups, Plaintiffs also alleged that the preemption of the referendum "subject[ed] them to a racial classification." *See* Complaint ¶ 30. Because Section 5 preserved partisan elections "solely to effectuate the perceived common interests of one racial group," it imposed the "type of racial classification" that creates "representational harms" wherein "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *United States v. Hays*, 515 U.S. 737, 744 (1995). The Supreme Court has held that "[a]ny citizen able to demonstrate that he or she, personally, has been injured by that kind of racial classification has standing to challenge the classification in federal court." *Id.*

The Government has two counter-arguments. *First*, it claims that Plaintiffs "fail to allege that any denial of race-neutral treatment affected them personally." *See* MTD Memo. at 10 (citing *Hays*). That is nonsensical. Unlike the plaintiffs in *Hays*, who lived *outside* the racially gerrymandered district and thus were neither racially classified nor racially burdened, *see* 515 U.S. at 745-46, Plaintiffs are voters in Kinston whose *own* election scheme was preempted by the federal government solely in order to benefit minority voters. *Second*, the Government contends that "Plaintiffs fail to allege they belong to any specific racial group and thus fail to establish any basis for a racial discrimination claim." *See* MTD Memo. at 10. This is doubly wrong. As an initial matter, because of the "representational harms" caused by "racial classifications" of the sort alleged by Plaintiffs, "[a]ny citizen" subjected to "that kind of racial classification" has Article III injury, even if they are of the race that is the purported beneficiary of the classification. *See Hays*, 515 U.S. at 744; *see also Shaw v. Reno*, 509 U.S. 630, 650 (1993). In any event, Plaintiffs are in fact white, as they thought they made clear when they alleged that they were "denie[d] … equal, race-neutral treatment," not just because Section 5 "subject[ed] them to a racial classification," but *also* because it "intentionally provid[ed] minority voters and their preferred candidates a preferential advantage in elections." *See* Complaint ¶ 30. Given that there is certainly nothing in Plaintiffs' complaint to the contrary, the Government's blinkered construction of the complaint is inconsistent with this Court's obligation to "construe the complaint in favor of the complaining party." *Muir*, 529 F.3d at 1105. Moreover, if the Court nevertheless believes that Plaintiffs "omitted from [their] complaint … that [they] are white," it may simply take "judicial notice of [that] fact." *See Shaw*, 509 U.S. at 638.

In sum, Plaintiffs have sufficiently alleged an Article III injury that allows them to raise the constitutional claim that the 2006 preclearance standard in Section 5 violates their equal protection rights.

**2. The Individual Plaintiffs Sufficiently Alleged Causation**

The "causation" element of Article III standing requires that the injury-in-fact alleged has to be fairly traceable to the challenged action, rather than result from the independent action of an absent third party. *See Defenders of Wildlife*, 504 U.S. at 560-61. Here, Plaintiffs alleged that, "[b]ut for Section 5's presumptive invalidation of the change to nonpartisan elections and the Attorney General's refusal to

eliminate that barrier by preclearing the change, Kinston would now have such nonpartisan elections." *See* Complaint ¶ 27. That allegation of "causation" is irrefutable, because the causal connection between Plaintiffs' alleged injuries and Section 5 is direct and immediate. When Kinston's voters passed the nonpartisan-elections referendum, they triggered a mandatory state-law duty for Kinston's officials to implement the referendum. *See* N.C. Gen. Stat. §§ 160A-104, 160A-108. It is Section 5, and *only* Section 5, that presumptively preempts the referendum and subjects it to preclearance under a race-based standard that the Attorney General has found it does not satisfy. *See* 42 U.S.C. § 1973c. Accordingly, it is beyond reasonable dispute that Plaintiffs' various cognizable injuries from the displacement of the referendum are "fairly traceable" to Section 5. *See Defenders of Wildlife*, 504 U.S. at 560-61.

The Government nonetheless makes two counter-arguments, *see* MTD Memo. at 14-15, but they are both patently erroneous. The Government's primary counter-argument is that Plaintiffs' injuries are not fairly traceable to Section 5 because they instead are supposedly attributable to the decision of the City of Kinston not to seek preclearance from this Court. *See id.* at 14. This counter-argument is based on two premises: the major premise is that a plaintiff lacks standing to challenge an injury directly caused by federal action simply because an independent third party could have eliminated that injury after the fact; the minor premise is that the City of Kinston could have eliminated Plaintiffs' injuries by filing a preclearance action. Both premises are fatally flawed.

The major premise of the Government's claim suffers from a fundamental analytical error. The Government's "causation" analysis focuses on whether an independent third party—here, the City of Kinston—can *redress* an alleged injury, even when it is undisputed that the injury *never* would have occurred in the first place *but for* the act challenged in the lawsuit—here, Section 5's presumptive preemption of Kinston's referendum subject to federal preclearance. That focus, however, incorrectly interprets the role of the "independent actor" in the Article III "causation" inquiry. *See Defenders of Wildlife*, 504 U.S. at 560-61. The proper analysis is whether the "independent actor" would have caused the alleged injury *regardless* of the challenged act, not whether the "actor" can *cure* the defendant's injury. *See id*; *see also infra* at 26-27.

The Government's misplaced focus would allow Congress to eviscerate the rights of individual citizens whenever those rights are related in some respect to a third party who potentially could provide *ex post* relief from the Congressionally imposed injury. For example, assume that flat-tax advocates in Congress purported to preempt all deductions in the North Carolina tax code, but gave the North Carolina Governor the right to request a statutory exemption or to challenge the constitutionality of the law himself. Under the Government's misguided theory of "causation," state taxpayers forced to pay increased taxes as a direct consequence of a federal law would *not* have Article III standing to challenge that law as exceeding Congress' Article I powers. Rather, it is purportedly the Governor's *decision to acquiesce* in the federal invalidation of state law that "caused" the cognizable injury to state taxpayers, *not* Congress' antecedent decision to preempt state law. Even worse, the Government's argument would be exactly the same if Congress' abrogation of North Carolina tax deductions were limited to *black* taxpayers, since the Governor still would have the ability to protect his constituents and would purportedly bear the causal responsibility if he chose not to do so. In short, the rights of individual citizens against the *federal* government would inexplicably be left to the mercy of *state* governments, even in situations where the individuals injured were discrete and insular minorities that lacked political power or protection at *either* level of government. That the Civil Rights Division of the Justice Department would adopt such a litigation position is shocking.

Not surprisingly, courts have repeatedly rejected the Government's Orwellian theory of Article III "causation." Of particular relevance here, there are numerous cases holding that, *so long as* the invalidation of a state law by a federal court causes concrete and personalized injury to a private party, that party has standing to intervene and appeal the invalidation, *despite* the state's independent and intentional decision not to appeal the invalidation. *Compare, e.g.*, *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428-30 (6th Cir. 2008) (wine wholesalers had standing to appeal a federal court judgment invalidating, under the Dormant Commerce Clause, a state law prohibiting direct shipment of wine from producers to consumers), *United States v. Texas*, 158 F.3d 299, 303-04 (5th Cir. 1998) (residents had standing to appeal a federal court judgment invalidating, under a federal school desegregation decree, a

state-law annexation of their neighborhood by neighboring school district), *and Schulz v. Williams*, 44 F.3d 48, 52-53 (2d Cir. 1994) (political party chairman had standing to challenge a federal court judgment invalidating, under the First Amendment, a state-law administrative determination that a competing party's candidate had failed to qualify for the ballot), *with, e.g.*, *Diamond v. Charles*, 476 U.S. 54, 64-67 (1986) (denying standing to pro-life doctor seeking to appeal the invalidation of a state abortion statute, because he could not identify a personalized, non-speculative injury that he would incur due to the absence of the abortion statute). On the Government's theory, however, there was no Article III "causation" in *any* of those cases, because each private party's injury was supposedly not attributable to the federal court's initial invalidation of state law, but rather was due to each state's subsequent decision to abandon its law on appeal. Likewise, in *Kennedy*, the nullification of the individual Senator's vote on the bill due to the President's pocket-veto could have been redressed had Congress decided to override that veto. *See* 511 F.2d at 432-36. Thus, on the Government's theory, there was no causation in *Kennedy* because the legislator's injury was purportedly attributable to Congress' subsequent choice not to do so, as opposed to the President's attempted exercise of the veto in the first place. The Government's argument, in short, is irreconcilable with case law as well as common sense.

Accordingly, the few cases cited by the Government are inapposite. *See* MTD Memo. at 14. They merely, and properly, denied standing where the challenged governmental action was *not the but-for cause* of the plaintiff's injury *at all*, because a third party could just as well have caused that injury independent from the challenged action. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-44 (1976) (finding lack of causation where organization supporting indigent medical patients challenged a Treasury regulation concerning hospital taxation, but could only speculate as to whether third-party hospitals were providing less services to the indigent than they would have provided but for the regulation); *Young America's Found. v. Gates*, 560 F. Supp. 2d 39, 50-51 (D.D.C. 2008) (finding lack of causation where student organization harmed by disruptive students protests challenged the federal government's failure to cut off federal funding to their schools under the Solomon Amendment, but could only speculate as to whether the schools were doing less to stop the student protests than they would have

done had federal funds been cut off); *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 614-15 (1989) (opinion of Kennedy, J.) (finding lack of redressability where taxpayers and teachers' association challenged a state statute that allegedly reduced the amount of taxes the state received, but could only speculate as to whether, if the statute were invalidated, the state would use any increased revenues received to reduce taxes on, or increase spending for, the plaintiffs). Thus, none of these cases support the Government's meritless argument that there is a causation defect whenever a third party could independently redress an injury that never would have occurred *but for* the challenged action.

Moreover, the Government's minor premise—that the City of Kinston could redress Plaintiffs' injury by filing a preclearance action—is disingenuous. A preclearance action by Kinston could eliminate Plaintiffs' injuries if, *and only if*, the City *were to prevail* in that action. But the Government is not suggesting that Kinston would or should prevail in a preclearance action in this Court, since its objection letter is premised on precisely the opposite conclusion. *See* 28 C.F.R. § 51.52 ("[T]he Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under Section 5."). And Plaintiffs fully agree with the Attorney General that the racial quota floor in the 2006 version of Section 5 mandates preserving preferential advantages for minorities, which the Civil Rights Division concluded encompasses partisan elections in Kinston. *See* Complaint ¶¶ 19, 24-26. Thus, it is simply baffling how the Government could argue that the cause of Plaintiffs' injuries is the City's failure to take a step that the Government itself believes would be *futile*.

As noted, the Government does have a backup counter-argument on "causation." Namely, it claims that Plaintiffs' alleged injuries "stem … from their 'personal choice' to prefer nonpartisan as opposed to partisan elections," and thus "cannot be characterized as fairly traceable to" Section 5. *See* MTD Memo. at 15 (quoting *McConnell*, 540 U.S. at 228). That is downright frivolous. In *McConnell*, BCRA *raised* the limits on the amount of hard-money contributions that candidates could receive, but certain candidates nevertheless challenged the increase because they personally did not want to take advantage of the increased limits, yet were worried that their opponents would do so and thus gain an electoral advantage. *See* 540 U.S. at 228. The Court held that, when a candidate's "competitive injury"

flows from his "personal choice" not to *avail himself of a benefit* that Congress had made *equally available to all candidates*, that self-inflicted "injury" is not "fairly traceable" to Congress because it is not a result of "the operation of" the law Congress enacted. *See id.* Here, however, Plaintiffs are not refusing benefits from the partisan-elections scheme locked into place by Section 5 and then blaming Section 5 for a self-imposed electoral dilemma. Rather, they are objecting due to concrete and unavoidable *burdens* on their electoral prospects that are imposed by partisan elections. *See supra* at 5-8, 12. These burdens most definitely exist by "operation of" Section 5, since there is *no* "personal choice" that Plaintiffs could make under the partisan-elections regime to evade them: for example, Nix and Northrup have no way of avoiding the pre-condition on their candidacies that they must either win a party primary or obtain sufficient qualifying signatures as unaffiliated candidates. *See supra* at 5-6. For the Government to say that these cognizable burdens imposed by Section 5 are the result of Plaintiffs' "'personal choice' to prefer nonpartisan as opposed to partisan elections" is no different than for it to say that the injury from attending separate but equal elementary schools "stem[med] *not* from the operation of [*de jure* segregation], but rather from [the school children's] 'personal choice' to prefer [integrated schools] as opposed to [segregated schools]." *See* MTD Memo. at 15. It is almost impossible to fathom that the Civil Rights Division of the Justice Department not only agrees with Professor Wechsler's infamous criticism of *Brown v. Board of Education*, 347 U.S. 483 (1954), *see* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 32-34 (1959), but would *extend* that critique to deny the *Brown* plaintiffs *standing* to sue *at all*.

Although the foregoing is surely sufficient to refute the Government's outrageous argument, it must be noted that the D.C. Circuit has unambiguously rejected a similar attempt by a federal agency to misapply *McConnell*'s "personal choice" holding to situations where plaintiffs have no way to avoid the injury caused by the challenged governmental act. Specifically, in *Shays*, the FEC shockingly contended that the candidates could have avoided any competitive injury by simply engaging in the same BCRA-prohibited actions that they were alleging the FEC's regulations *unlawfully* permitted their opponents to perform; the court was forced to explain to the FEC that the candidates' refusal to fight fire with fire was

no mere "personal choice" when the flames were federally outlawed. *See* 414 F.3d at 88-90, 92-94. This case, of course, is even easier than *Shays*, because Plaintiffs have no choice *at all*—legal or otherwise—to avoid the judicially cognizable electoral injuries caused by Section 5's preemptive effect.

In sum, this Court should flatly reject the Government's pernicious counter-arguments and hold that Plaintiffs have adequately alleged that their injuries from the preemption of nonpartisan elections in Kinston are fairly traceable to Section 5.

**3. The Individual Plaintiffs Sufficiently Alleged Redressability**

The "redressability" element of Article III standing requires that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *See Defenders of Wildlife*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). As noted above, Plaintiffs alleged that, "[b]ut for Section 5's presumptive invalidation of the change to nonpartisan elections and the Attorney General's refusal to eliminate that barrier by preclearing the change, Kinston would now have such nonpartisan elections." *See* Complaint ¶ 27. They thus requested that this Court enter an order declaring Section 5 invalid on its face and as applied to Kinston's nonpartisan-elections referendum and accordingly enjoining the Attorney General from enforcing Section 5. *See id.* at §§ VI-VII. Plaintiffs' allegation that this relief will satisfy the "redressability" requirement is irrefutable, because such relief will *necessarily* result in Kinston's effectuation of the nonpartisan-elections referendum. As discussed, Kinston officials are *required* by state law to implement the referendum, *see* N.C. Gen. Stat. §§ 160A-104, 160A-108, and their *only* justification for not having done so is that Section 5 preempts state law, *see* 42 U.S.C. § 1973c. Accordingly, once Section 5 is invalidated, Kinston officials will have no choice but to implement the nonpartisan-elections referendum, and so it is beyond reasonable dispute that Plaintiffs' various cognizable injuries from the displacement of the referendum will "likely" be "redressed by a favorable decision" in this case. *See Defenders of Wildlife*, 504 U.S. at 561.

Once again, however, the Government makes two counter-arguments in an attempt to refute the irrefutable, *see* MTD Memo. at 16-17, and, once again, they are both patently erroneous. The initial counter-argument is simply a reprise of the Government's primary rejoinder on causation—namely, that

this Court cannot redress Plaintiffs' injuries because it lacks the power to order the City of Kinston to seek preclearance. *See id.* at 16. The contention is just as misguided when packaged as a "redressability" objection as it was when shopped as a "causation" objection. *See supra* at 24-27. Plaintiffs are not asking this Court to order Kinston to file a preclearance action because this Court *need not do so* to redress Plaintiffs' injuries. (Indeed, the Government itself believes that such an order would *not* redress Plaintiffs' injuries, because a preclearance action by the City would be an exercise in futility. *See supra* at 27.) Instead, to repeat, Plaintiffs seek an order from this Court declaring Section 5 unconstitutional on its face and as applied to Kinston's nonpartisan-elections referendum and accordingly enjoining the Attorney General from enforcing Section 5. Such relief will likely—indeed, certainly—redress Plaintiffs' injuries because, once Section 5 is struck down, the City will implement the referendum, having no further legal basis for failing to comply with its state-law obligation to do so.

But, in its second counter-argument, the Government insists that this is not so. It claims that "[t]here is simply no way to determine from Plaintiffs' allegations what voting system Kinston will implement," because Plaintiffs cannot "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* MTD Memo. at 16-17. The Government's self-serving profession of uncertainty is absurd. As already noted, North Carolina law unambiguously requires the City of Kinston to implement the nonpartisan-elections referendum. *See* N.C. Gen. Stat. §§ 160A-104, 160A-108. Although Section 5 currently serves as the justification excusing the City from complying with that state-law duty, once Section 5 is invalidated, there is simply no conceivable reason for believing that the City will openly defy state law and refuse to implement the referendum. To the contrary, federal courts' normal presumption is that States enforce their own laws. *See Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). And that should be the end of the matter here, for "redressability" is impaired by "choices made by independent actors" only to the extent that they are "exercis[ing] … *legitimate discretion* [that] the courts cannot presume either to control *or to predict*." *See Defenders of Wildlife*, 504 U.S. at 562 (emphases added). Certainly none of the cases cited by the Government, *see* MTD Memo. at 16-17, support the counter-

intuitive proposition that federal courts should decline to find redressability because a local government might inexplicably choose to transgress state law, particularly because the potential for such future transgressions in this case is based on nothing more than the Government's bald speculation. It simply "is beyond all reason" for the Government to so argue, because "[s]tanding is not an ingenious academic exercise in the conceivable." *See Defenders of Wildlife*, 504 U.S. at 566 (internal quotation marks omitted). The ultimate question is not whether the Government can hypothesize some bizarre scenario where Kinston officials will turn a blind eye to the state laws they have sworn to uphold. Sanctioning such speculation by defendants would essentially "preclude[]" standing *whenever* a "third party" was involved, contrary to the Supreme Court's express admonition. *See id.* at 562. Rather, the proper question is merely whether it is "likely" that Kinston officials will faithfully adhere to state law and implement the referendum once Section 5 is invalidated here. *See id.* at 561.

Because the only reasonable answer to that question is "yes," this Court should hold that Plaintiffs have adequately alleged that their requested relief will likely redress their injuries from Section 5's nullification of the nonpartisan-elections referendum.

**4. Plaintiff KCNV Sufficiently Alleged Associational Standing**

In order for a membership association to have standing to sue on behalf of its members, it must satisfy three requirements: (1) "its members would otherwise have standing to sue in their own right"; (2) "the interests it seeks to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Here, Plaintiff KCNV alleged all three of these elements. *See* Complaint ¶¶ 7, 31. The Government does not challenge either the second or third elements, which are plainly satisfied. *See* MTD Memo. at 18. And the Government's challenge to the first element is wholly duplicative of its arguments for why the individual Plaintiffs lack standing, *see id.*, and thus is wrong for all of the reasons discussed above. Accordingly, this Court should hold that Plaintiff KCNV, like all of the individual Plaintiffs, adequately alleged Article III standing.

**B. Plaintiffs' Claims Are Not Barred By The Prudential Standing Doctrine**

The Government argues that, even if Plaintiffs have Article III standing to challenge the constitutionality of Section 5, their constitutional claims are based "on the asserted legal rights of jurisdictions covered by the preclearance requirement" and thus are foreclosed by "the prudential standing doctrine bar[ring] review of … third party[] rights." *See* MTD Memo. at 19-20. The Government, however, fundamentally mischaracterizes Plaintiffs' constitutional claims.

As a threshold matter, the Government's third-party standing objection is facially inapposite with respect to Plaintiffs' constitutional claim that their *equal protection rights* were violated because the 2006 preclearance standard subjects Plaintiffs to a racial classification and intentionally provides minority voters with a preferential advantage in elections. *See supra* at 21-22. Particularly given the "basic principle" that the nondiscrimination guarantees in "the Fifth and Fourteenth Amendments … protect *persons*, not *groups*," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), the Government cannot possibly argue that Plaintiffs' equal protection rights actually belong to the *covered jurisdictions*. Thus, the Government's prudential standing argument has no application to this claim.

Nor does the Government's prudential standing argument fare any better as applied to Plaintiffs' constitutional claim that Congress exceeded its enforcement authority under the Civil War Amendments when it reauthorized Section 5 in 2006. *See supra* at 5. There, too, Plaintiffs are exercising an *individual* right—the right to be free from injury caused by federal action that is unauthorized by the Constitution.

The Framers wisely recognized that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). In other words, "federalism secures *to citizens the liberties* that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (emphasis added). Accordingly, "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States." *Id.* "To the contrary," the proper "understanding of the fundamental purpose served by our Government's federal structure" is that "the Constitution divides authority between federal

and state governments *for the protection of individuals*." *Id.* (emphasis added).

For this reason, when a federal law imposes a concrete and particularized injury on a private individual, it has never even been suggested that prudential standing principles preclude that individual from challenging the law as exceeding Congress' limited and enumerated grounds for enacting legislation. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 551-52 (1995); *United States v. Morrison*, 529 U.S. 598, 601-07 (2000). Moreover, and of particular importance here, in *Morrison*, which likewise involved private parties challenging the scope of Congress' enforcement powers under the Civil War Amendments, the private parties prevailed in part by specifically attacking Congress' failure *to tailor* its law to the individuals residing in those *States* for which prophylactic enforcement legislation was *appropriate*. *See* 529 U.S. at 626-27. Although this holding in *Morrison* would be "troubling" from a prudential standing perspective *if* the true tailoring injury belonged to the State, *see New York*, 505 U.S. at 181, it is perfectly appropriate once one acknowledges that there exists an *individual* constitutional right to be free from personal injury caused by federal action unauthorized by the Constitution, because "unconstitutional infringement" of *that* right obviously "cannot be ratified by the 'consent' of state officials," *see id.* at 181-82.

"An analogy to the separation of powers among the branches of the Federal Government clarifies this point." *Id.* at 182. Private parties repeatedly have been allowed to challenge federal action that causes them concrete and particularized injury on the ground that the federal action is inconsistent with the constitutional separation of powers. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 659-69 (1988); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 08-861, slip op. at 5-7, 33-34 (U.S. June 28, 2010); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 262-65 (1991) ("*MWAA*"). And private parties may do so even though such claims often entail expressly invoking the infringement of *the President's* right to appoint and remove executive officers or to execute the law. *See, e.g.*, *Olson*, 487 U.S. at 670-73, 685-96; *Free Enter. Fund*, slip op. at 10-29; *MWAA*, 501 U.S. at 272-77. Indeed, private parties have *prevailed* in such suits even when the President *opposes* them and argues that the federal action does *not* violate his rights. *See, e.g.*, *Free Enter. Fund*, slip op. at

21-27. Once again, the reason that prudential standing does not bar private parties from asserting the President's rights, including in the face of Presidential disapprobation, is because "[t]he ultimate purpose of th[e] separation of powers," like the ultimate purpose of federalism, "is to protect *the liberty and security of the governed*." *MWAA*, 501 U.S. at 272 (emphasis added); *see also Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("The Framers recognized that … structural protections against abuse of power [are] critical to preserving liberty."); *Free Enter. Fund*, slip op. at 16 ("[T]he separation of powers does not depend on the views of individual Presidents … [or] on whether the 'encroached-upon branch approves the encroachment.'" (quoting *New York*, 505 U.S. at 182)).

Consequently, under *Morrison*, *Olson*, *Free Enterprise Fund*, and *MWAA*, Plaintiffs would not lack prudential standing *even if* the Government were correct that Plaintiffs are *solely* arguing that the reason Congress exceeded its enforcement authority under the Civil War Amendments was because it violated the "*legal rights* of jurisdictions covered by the preclearance requirement." *See* MTD Memo. at 19-20 (emphasis added). That said, while Plaintiffs certainly will argue that "a departure from the fundamental principle of equal sovereignty requires a showing that [Section 5]'s disparate geographic coverage is sufficiently related to the problem that it targets," *Nw. Austin*, 129 S. Ct. at 2512, their constitutional argument is by no means limited to invoking the "legal rights" of the covered jurisdictions. Plaintiffs' constitutional objection is also that the 2006 extension of Section 5 is not "appropriate" legislation to "enforce" the Civil War Amendments because it imposes "extraordinary burdens on and denials of" the right of "*local self-governance*" possessed by the *individual voters* of covered jurisdictions and, moreover, that it does so without any "continuing justification" or "rational reason for selectively visiting those burdens … based on electoral results from many decades ago." *See* Complaint ¶¶ 33-34 (emphasis added). In short, Plaintiffs are not exclusively invoking the *sovereignty* of the covered jurisdictions, but are relying as well on their *own* right to self-determination outside the limited areas to which they, "the people," *delegated* power to the federal government. *See U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819). Indeed, that point is driven home in this case by the fact that Plaintiffs are challenging the federal

nullification of a *voter-adopted referendum*. *See* N.C. Const. Art. I, § 2; N.C. Gen. Stat. § 160A-104.

Yet again, the Government fails to cite a single case supporting its flawed contrary position. It could marshal only two cases in defense of its invocation of the third-party standing bar, *see* MTD Memo. at 20, but neither case even involved a constitutional claim that Congress had exceeded its enumerated powers. In *Warth*, the plaintiffs, who were taxpayers in one municipality, were raising the equal protection and due process rights of indigent residents in a neighboring municipality. *See* 422 U.S. at 509-10. Their claims were rightly subject to the prudential standing bar because they were unambiguously raising the individual rights of third-parties. *See id.* Likewise, in *Kowalski v. Tesmer*, 543 U.S. 125 (2004), prudential standing prevented attorneys from raising the individual equal protection and due process rights of future hypothetical clients. *See id.* at 127, 129-34.

The evil consequences of the Government's proposed rule bear repeating. If only the States have primary standing to challenge Congress for exceeding its enumerated powers when preempting state law, then citizens will lack federal judicial redress whenever State officials are unwilling to challenge federal preemption that oversteps Congress' authority, regardless of the severity of the injury imposed on individuals. As a result, the States could cajole Congress into repealing politically popular local laws that State officials disliked—including, and perhaps especially, voter-adopted referenda—while avoiding direct political accountability to the local electorate for so doing. Such "powerful incentives" to shift "personal responsibility," however, are precisely why the Framers insisted on a rigid "intergovernmental allocation of authority." *New York*, 505 U.S. at 182-83. Nor are these concerns merely hypothetical. Recall the very facts of this case. The voters of Kinston adopted a nonpartisan-elections referendum that threatened to break the Democratic Party's stranglehold on the city. *See* Complaint ¶ 19. Quite predictably, the Democratic officeholders in Kinston declined to defend the referendum against federal preemption by the Democratic officials in the Justice Department. And now those Democratic officials in the Justice Department insist that the foxes are the *only* ones permitted to guard the hen-house. So much for the "healthy balance of power between the States and the Federal Government … reduc[ing] the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458.

Accordingly, there is nothing to the Government's spurious invocation of the prudential standing bar on the assertion of third-party rights. Plaintiffs are asserting their individual constitutional rights, and they have Article III standing to do so for the reasons discussed above. *See supra* at 4-31.

## II. PLAINTIFFS HAVE A VALID CAUSE OF ACTION

In analyzing whether Plaintiffs possess a cause of action to raise their constitutional claims, it is important at the outset to be clear about what the Government is and is not arguing. The Government does *not* purport to dispute, and cannot possibly dispute, the bedrock proposition that private individuals have a general "implied private right of action directly under the Constitution" for injunctive and declaratory relief against the unconstitutional enforcement of federal law by federal officers. *See Free Enter. Fund*, slip op. at 10 n.2, 27-29 (citing cases and invalidating federal law in such an action); *see also Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-20 (1912) ("The principle [that courts have the power to enjoin] state officers [from] seeking to enforce unconstitutional enactments" is "equally applicable to a Federal officer acting … under an authority not validly conferred."). Accordingly, the Government implicitly concedes that, so long as Plaintiffs have standing, this Court has *the power* to declare Section 5 unconstitutional, both on its face and as applied to Kinston's nonpartisan-elections referendum, as well as to enjoin the Attorney General from enforcing Section 5's preemption of voting changes in Kinston that have not been precleared, including the referendum. Instead, the Government's *sole* argument is that, "to the extent" Plaintiffs are "challeng[ing] … 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." *See* MTD Memo. at 22 (emphasis added); *see also id.* at 23-26.

As a threshold matter, the narrow issue flagged by the Government is irrelevant. Plaintiffs' injury in this case will be redressed so long as Section 5 is declared unconstitutional and the Attorney General is enjoined from enforcing it, because the invalidation of Section 5, on its face and as applied to Kinston's nonpartisan-elections referendum, will free Kinston officials to comply with their mandatory state-law duty to implement that referendum. *See supra* at 29-31. In other words, striking down the *obligation* to

preclear Kinston's laws will moot any need to "review" the Attorney General's *past* decision to deny preclearance for the referendum. That "denial" will have no remaining legal consequence once the underlying statute that authorized it and made it relevant has been invalidated. The Attorney General's objection letter will be nothing but a vestigial remnant of a bygone era of unconstitutionality.

In any event, to the extent that it is somehow deemed relevant, the Government's assertion is also legally erroneous. Although the text of Section 5 does not create a *statutory* cause of action for private individuals to seek review of the Attorney General's statutory decisions applying the Section 5 preclearance standard, *see LaRoque v. Holder*, No. 1:10-cv-00561, slip op. at 2 (D.D.C. May 12, 2010), neither does the text of Section 5 purport to confer *blanket immunity* on the Attorney General from the general implied cause of action, noted above, that private individuals possess to seek redress from the unconstitutional enforcement of federal law by federal officials. *See* 42 U.S.C. § 1973c. The Government, however, brazenly asserts that *Morris v. Gressette*, 432 U.S. 491 (1977), and its progeny provided the Attorney General with a unique *implied* immunity to apply Section 5 in ways that violate the constitutional rights of *individual* citizens while leaving those injured citizens with *no individual means* of judicial redress. Those cases say nothing of the sort. Indeed, they strongly suggest the exact opposite.

In *Morris*, minority plaintiffs in a related case had sought APA review of the Attorney General's failure to object to a submitted change, which constitutes a grant of preclearance for the change. *See id.* at 499-500. The *Morris* Court held that those plaintiffs should not have received judicial relief vacating that past preclearance decision, because the Attorney General's *grant* of preclearance for a submitted change is not judicially reviewable. *See id.* at 500-07. The Court concluded that judicial review of the Attorney General's grant of preclearance would undermine the 60-day period for administrative preclearance, which was designed an "expeditious alternative to declaratory judgment actions" under Section 5, thereby "unavoidably extend[ing] [the statutory] period" for preclearance and "dragging out … the extraordinary federal remedy beyond the period specified in the statute." *See id.* at 504-05. Critically, however, the Court emphasized that the inability of minority plaintiffs to challenge the Attorney General's grant of preclearance for a proposed electoral change *never* leaves them unable to seek judicial redress if the

change does in fact violate their constitutional rights; it simply means that the enacted state law must "be challenged in traditional constitutional litigation." *See id.* at 506-07. Notably, most of the cases cited by the Government are simply carbon copies of *Morris*, where minority plaintiffs likewise were barred from directly challenging the grant of preclearance, yet retained the ability to challenge the constitutionality of the underlying electoral change in a separate suit. *See 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); *Jones v. Edwards*, 674 F. Supp. 1225, 1226-28 (E.D. La. 1987).

Thus, *Morris*'s rejection of judicial review of the Attorney General's grant of preclearance for proposed changes does not support the altogether different proposition advanced by the Government here. *Morris* stressed that judicial review of the Attorney General's *grant* of preclearance would *not* foreclose minority plaintiffs from challenging unconstitutional election-law changes in a normal lawsuit. But the Government is arguing here that the Attorney General may *deny* preclearance in ways that violate the nondiscrimination and federalism rights of individual citizens, with *no* individual means for seeking judicial redress of that wrongdoing by the federal government.

To be sure, the Government does cite a few cases where the plaintiffs were challenging the Attorney General's *denial* of preclearance, but these cases likewise did not involve situations where immunizing the Attorney General's denial from review would have had the alleged consequence of wholly foreclosing those very plaintiffs from challenging the federal government's unconstitutional preemption of local law. For example, in *City of Rome v. United States*, 450 F. Supp. 378 (D.D.C. 1978) ("*Rome I*"), a covered jurisdiction and its officials claimed in one count of their complaint that the Attorney General had interposed an objection without conducting a hearing or making any findings. *See id.* at 380-81. This Court held that the claim for "judicial review" of the "objection" was non-cognizable, because it made no sense in that case to review the result of an "administrative preclearance procedure" that was "entirely optional" and for which the covered jurisdiction "need not [have] appl[ied]." *See id.* at 381. Instead, Plaintiffs could "obtain full and adequate redress" of Section 5's preemption of their local laws simply "by means of … a *de novo* proceeding" in this Court. *See id.* at 382 n.3. Thus, ignoring "the

Attorney General's actions" in that case did not "totally deprive[] plaintiffs of judicial redress." *See id.* Indeed, this Court stressed that the Supreme Court had "emphasized the fact that the Attorney General's decision [was] … not conclusive of … constitutionality[,] … [which could] at any time be challenged in 'traditional constitutional litigation.'" *See id.* at 381 (quoting *Morris*, 432 U.S. at 507). And, in fact, the plaintiffs in *Rome I* did bring their constitutional challenges to the federal government's preemption of their local laws, though those challenges were ultimately unsuccessful. *See Rome II*, 446 U.S. at 173-83. Similarly, the availability of an alternative, more direct method for the plaintiffs themselves to bring any constitutional challenges to Section 5 explains the refusal to "review" the Attorney General's objections in the two remaining cases cited by the Government, both of which expressly relied upon *Rome I*. *See County Council of Sumter County v. United States*, 555 F. Supp. 694, 706-07 (D.D.C. 1983); *Dotson v. City of Indianola*, 521 F. Supp. 934, 941-43 (N.D. Miss. 1981).

In short, to the extent that the Government contends that "challenging" or "reviewing" the Attorney General's objection decision is *necessary* to redress Plaintiffs' constitutional claims, *but see supra* at 36-37, that can clearly be done as part of the bedrock cause of action possessed by individual citizens to seek injunctive and declaratory relief against unconstitutional enforcement of federal law by federal officials. The Government cannot cite a single case holding that Section 5 somehow implicitly abrogates that traditional cause of action or otherwise immunizes the Attorney General from constitutional challenge. Once more, a hypothetical that tweaks Section 5 will help clarify the audaciousness of the Government's position and why it cannot possibly be the law. Assume that Section 5 allowed preclearance only if the proposed change did not reduce *white* voting power. Further assume that minority voters in a covered jurisdiction enacted a referendum *to repeal* a voter identification law because the burdens from such laws "fall[] disproportionately on minority voters," but that the Attorney General denied preclearance for precisely that reason. *Cf.* Letter from Loretta King, Acting Assistant Attorney General of the Civil Rights Division, to Thurbert E. Baker, Attorney General of Georgia (May 29, 2009), http://www.justice.gov/crt/voting/sec_5/ltr/l_052909.php (denying preclearance because of the alleged retrogressive effect on racial minorities of Georgia's voter verification program). And finally

assume that the city officials chose to acquiesce in that decision because they were content with the status quo. The Civil Rights Division's position in this case would mean that the minority voters who enacted the referendum would not be able to "challenge … the Attorney General's decision to deny preclearance," *see* MTD Memo. at 22, *even if* such review were somehow necessary to obtain federal judicial redress of the patently unconstitutional federal preemption of the referendum. This Court should decisively reject the Justice Department's contention that the Section 5 preclearance scheme creates a legal black hole in which Congress, the Attorney General, and local officials can somehow collectively strip *individual citizens* of their constitutional rights and the federal courts are *powerless* to do anything about it.

Accordingly, Plaintiffs possess a cause of action to challenge the unconstitutional application of Section 5 to nullify Kinston's nonpartisan-elections referendum, and this is true whether or not they must, for some unexplained reason, specifically challenge the Attorney General's past decision to deny preclearance to the referendum.

## III. PLAINTIFFS DID NOT FAIL TO STATE THEIR CLAIMS

Finally, the Government briefly contends that Plaintiffs' congressional power claim (but not their equal protection claim) suffers from a pleading deficiency *on the merits*: Plaintiffs' complaint supposedly "lacks a sufficient factual basis," such that "their legal conclusions as to the Voting Rights Act and the record before Congress must be discarded as baseless and insufficiently supported." *See* MTD Memo. at 17 n.5 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). It is for good reason that the Government is so embarrassed by this claim that it buries it in a footnote. The alleged pleading defect is itself baseless.

Plaintiffs' complaint included, among other things, the following three allegations in support of their claim that Congress exceeded its enforcement authority:

1) "[t]he preclearance process is costly and burdensome and requires unnecessary and disruptive delays," yet Congress "relied on generalized findings which do not specifically identify evidence of continuing intentional discrimination in covered jurisdictions," *see* Complaint ¶¶ 21, 23;

2) Congress "did [not] have evidence that adequately distinguished conditions in covered jurisdictions from those in non-covered jurisdictions in a way that would justify the continuing difference in treatment for another twenty-five years, *see id.* ¶ 21; and

3) the 2006 preclearance standard "coerce[s] jurisdictions to maintain and adopt race-based electoral schemes that prefer certain groups," *see id.* ¶ 24.

Likewise, in *Nw. Austin*, the Supreme Court identified three basic "concerns" about Section 5 that "raise[d] serious constitutional questions" about its "preclearance requirements and … coverage formula." 129 S. Ct. at 2513. Not coincidentally, those three "concerns" closely mirror Plaintiffs' three allegations:

1) at least "[s]ome" of the "exceptional conditions" that originally warranted Section 5 "ha[d] unquestionably improved," which called into doubt the continued propriety of "impos[ing] [the] substantial federalism cost[]" of "suspending *all changes* to [covered jurisdictions'] election law—however innocuous—until they have been precleared by federal authorities," *see id.* at 2510, 2511 (internal quotation marks omitted);

2) "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance," "[b]ut a departure from the fundamental principle of equal sovereignty requires a showing that [Section 5]'s disparate geographic coverage is sufficiently related to the problem that it targets," *see id.* at 2512; and

3) these "federalism concerns are underscored" by Justice Kennedy's observation that covered jurisdictions, in order to "save [their electoral changes] under § 5," had often been forced to make "considerations of race" "predominant," even though such race-based decisionmaking plainly "would be unconstitutional" in non-covered jurisdictions, *see id.* (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring)).

Since not even the Government would have the audacity to argue that the Supreme Court's constitutional concerns are so "baseless and insufficiently supported" that they "must be discarded" at the motion to dismiss stage, the Government's argument can only be that Plaintiffs failed to include in their complaint the subsidiary "factual basis" underlying the Court's concerns. *See* MTD Memo. at 17 n.5. But the Court expressly cited the supporting legislative history and academic sources, *see Nw. Austin*, 129 S. Ct. at 2511-13, and Plaintiffs should not and cannot be required to cut and paste those voluminous materials into their complaint. Any such requirement would result in the very antithesis of "a short and plain statement of the claim showing that [Plaintiffs are] entitled to relief," *Iqbal*, 129 S. Ct. at 1949, without meaningfully providing the Government any "fair[er] notice of … the grounds upon which [Plaintiffs' claim] rests," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Accordingly, because Plaintiffs have sufficiently alleged the reasons why Section 5's "current burdens" cannot "be justified by current needs," *Nw. Austin*, 129 S. Ct. at 2512, they have adequately stated their claim that Congress exceeded its enforcement powers.

**CONCLUSION**

For the foregoing reasons, the Defendant's motion to dismiss should be denied.[4]

[4] Although Plaintiffs firmly believe that the allegations in their complaint are legally sufficient, to the extent this Court disagrees, Plaintiffs should be allowed and hereby request leave to amend their complaint to cure any pleading deficiencies that this Court identifies. *See Warth*, 422 U.S. at 501-02 (standing); *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1386 (D.C. Cir. 1981) (merits).

July 1, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on July 1, 2010, I served a true and correct copy of the foregoing via this Court's ECF system, to Defendant's counsel:

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