

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)
STEPHEN LAROQUE, ANTHONY))
CUOMO, JOHN NIX, KLAY))
NORTHROP, LEE RAYNOR, and))
KINSTON CITIZENS FOR NON-))
PARTISAN VOTING,))
	<i>Plaintiffs,</i>)
)
	<i>v.</i>)
)
ERIC HOLDER, JR.)	No. 1:10-CV-00561-JDB
ATTORNEY GENERAL OF THE))
UNITED STATES,))
	<i>Defendant.</i>)
)
	<i>and</i>)
)
JOSEPH M. TYSON, et al.,))
)
	<i>Proposed Defendant-Intervenors</i>)
<hr/>)

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

Plaintiffs challenge the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, facially and as applied when the Attorney General of the United States interposed an objection to a voting change submitted for review under Section 5 by the City of Kinston, North Carolina. Plaintiffs lack standing to bring this challenge, and thus, this Court lacks subject jurisdiction to consider this matter. Plaintiffs fail to state a claim for relief because they have no cause of action to review the Attorney General's objection under

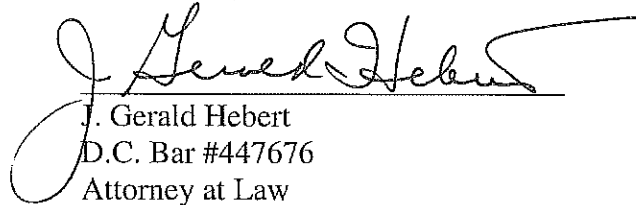
Section 5 of the Voting Rights Act. Accordingly, Plaintiff's Complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

The grounds for this motion are set forth more fully in the memorandum of law filed today with this motion in accordance with Local Rule 7.1(a). Additionally, a proposed order pursuant to Local Rule 7.1(c) is attached.

WHEREFORE the Proposed Defendant-Intervenors request that their motion to dismiss be granted.

This 7th day of July, 2010.

Respectfully Submitted,



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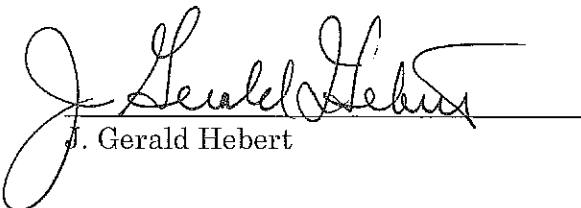
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

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

Defendant.

and

JOSEPH M. TYSON, et al.,
Proposed Defendant-Intervenors

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

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS
BY PROPOSED DEFENDANT-INTERVENORS JOSEPH M. TYSON, W.J. BEST, SR., A.
OFFORD CARMICHAEL, JR., GEORGE GRAHAM, JULIAN PRIDGEN, WILLIAM A.
COOKE and NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE**

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I. INTRODUCTION

The private plaintiffs in this case have asked the court to (1) declare that Section 5 of the Voting Rights Act, 42 U.S.C. §1973c (“Section 5”) as amended, unconstitutionally exceeds Congress’ authority and violates the Fifth, Fourteenth and Fifteenth Amendments to the U.S. Constitution both facially and as applied to Attorney General Holder’s decision to interpose an objection to a proposed voting change in Kinston, North Carolina (“Kinston”); (2) enjoin the Attorney General from “enforcing Section 5 against Kinston’s change to nonpartisan elections;” and (3) allow Kinston to bailout from Section 5 coverage, by “enjoining any enforcement of Section 5 against Kinston in the future.” Compl. at p.12 . This Court is not only precluded from reviewing and enjoining enforcement of the Attorney General’s Section 5 objection, but the plaintiffs, as private citizens, lack standing to bring a declaratory judgment action for preclearance under Section 5 or to seek bailout from Section 5 coverage for the City of Kinston. Moreover, these private citizens do not have standing to challenge the constitutionality of Section 5 because they cannot demonstrate an injury-in-fact resulting from the enforcement of Section 5 of the Voting Rights Act.

Proposed Defendant-Intervenors Joseph M. Tyson, W.J. Best, Sr., A. Offord Carmichael, Jr., George Graham, Julian Pridgen, William A. Cooke, and the North Carolina State Conference of Branches of the NAACP (“Proposed Tyson Intervenors”) have moved to intervene in order to assert their rights to an equal opportunity to participate in the political process in Kinston guaranteed by the Voting Rights Act. In the context of an electorate that bears the present effects of past discrimination in voting, where racially polarized voting persists, and where African-American voters are underrepresented in local government, the plaintiffs in this case erroneously assert that they have a right to a non-partisan election method which they concede will make black voters worse off. *See* Mem. of P. & A. in Opp’n to Def’s Mot. to Dismiss (Docket # 12) at 27. They then turn the Fourteenth Amendment on its head and argue that any attempt to prevent further discrimination against black voters is, in their view, intentional racial discrimination against them as white voters. *Id.* at 23. Because plaintiffs lack standing to bring this action, even assuming at this stage that all the allegations of their complaint are true, and because they

have no cause of action to seek review of the Attorney General's decision to object to the proposed change to nonpartisan elections, the complaint should be dismissed for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim for relief under Fed. R. Civ. P. 12(b)(6).

II. STATEMENT OF FACTS

A. Section 5 of the Voting Rights Act and the 2008 Kinston Referendum

Proposed Tyson Intervenors adopt the factual description of the statutory framework of Section 5 of the Voting Rights Act, and the 2008 Kinston referendum set forth in the Memorandum in Support of Defendant's Motion to Dismiss filed herein, with one additional point. At its meeting on November 16, 2009, the Kinston City Council, including Proposed Defendant-Intervenor City Councilman Joseph M. Tyson, voted not to pursue administrative reconsideration of the Attorney General's objection under Section 5, and not to seek a declaratory judgment from this Court that the new election method merits preclearance. *See* Certified Copy of Minutes from Kinston City Council Meeting of Nov. 16, 2009, at 19 ("Minutes") (attached as Ex. 1 to Memorandum in Support of Defendant's Motion to Dismiss). During the citizen comment portion of that meeting, Plaintiffs Raynor, Northrup, and Laroque encouraged the City Council to "appeal" the Department of Justice decision. Minutes at 5-7. The Council decided not to do so.

B. Alleged Facts Relevant to Plaintiffs' Standing

The five individual plaintiffs are all citizens and registered voters residing in the City of Kinston, North Carolina. Compl. ¶¶ 2-6. Plaintiffs Nix and Northrup intend to run for election to the Kinston City Council in November of 2011 and wish to do so without affiliating with a political party, without having to obtain enough signatures to be on the ballot and without having to run in a party primary. *Id.* at ¶¶ 3-4. All of the plaintiffs supported the referendum to change the method of election to City Council to non-partisan elections. *Id.* at ¶¶ 2-6. Plaintiff Kinston Citizens for Non-Partisan Voting is an unincorporated association of Kinston voters, including all of the individual plaintiffs, who support having non-partisan city elections. *Id.*, at ¶ 7.

Partisan elections impose additional costs on unaffiliated candidates who wish to run for city council. *Id.*, at ¶ 28. The plaintiffs assert a right under North Carolina law to participate in the law-making process through citizen referenda that is frustrated by having to comply with the federal Voting Rights Act. *Id.*, at ¶29. Finally, plaintiffs allege that Section 5 denies them equal, race-neutral treatment, that they are subjected to a racial classification, and that the law “intentionally provid[es] minority voters and their preferred candidates a preferential advantage in elections.” *Id.*, at ¶30. Significantly, plaintiffs concede in their opposition to the motion to dismiss that the non-partisan method of election for Kinston City Council, adopted by the referendum they supported, is retrogressive and therefore violates Section 5 of the Voting Rights Act. *See* Mem. of P. & A. in Opp’n to Def’s Mot. to Dismiss (Docket # 12) at 27.

III. STANDARD OF REVIEW

Proposed Tyson Intervenors adopt the standard of review analysis set forth in the Memorandum in Support of Defendant’s Motion to Dismiss.

IV. ARGUMENT

A. This Court Is Precluded from Reviewing the Attorney General’s Section 5 Objection

In *Morris v. Gressette*, 432 U.S. 491, 501 (1977), the Supreme Court noted that “Congress did not intend the Attorney General’s actions under that provision [Section 5] to be subject to judicial review.” *See also id.* at 507 n.24 (“Congress intended to preclude all judicial review of the Attorney General’s exercise of discretion” under Section 5). Recent decisions reaffirm this point. *See, e.g., LULAC v. Perry*, 548 U.S. 399, 480 (2006) (“voters may not directly challenge the Attorney General’s decision”). The District of Columbia Courts and other courts have consistently applied the preclusion rule articulated in *Morris v. Gressette*. *See, e.g., Harris v. Bell*, 562 F.2d 772, 774 (D.C. Cir. 1977) (“there is to be no review of the Attorney

General's application of the section 5 standards"); *City of Rome v. United States*, 450 F.Supp. 378, 381 (D. D.C. 1978) ("the Attorney General's exercise of discretion under section 5 of the Voting Rights Act" is precluded from judicial review); *County Council of Sumter County, S.C. v. United States*, 555 F.Supp. 694, 706 (D. D.C. 1983) ("we have no authority either to review, or to preview, decisions of the Attorney General under Section 5"); *Reaves v. U.S. Dept. of Justice*, 355 F.Supp.2d 510, 514 (D. D.C. 2005) ("the Supreme Court has clearly held that Congress intended the Attorney General's decision whether or not to object to a proposed voting change under Section 5 to be discretionary and unreviewable"); *Jones v. Edwards*, 674 F.Supp. 1225, 1228 (E.D. La. 1987) ("it is clear that such an administrative determination by the Attorney General is not judicially reviewable"); *Dotson v. City of Indianola*, 521 F.Supp. 934, 941 (N.D. Miss. 1981) ("judicial review of the Attorney Generals' actions . . . is necessarily precluded").

In essence, the complaint in this action asks the court to enjoin the enforcement of the Attorney General's objection to Kinston's change to nonpartisan elections. As *Morris v. Gressette* and the cases applying it make clear, this Court is precluded from granting such relief.

Plaintiffs first suggest that *Reaves*, *Jones*, and similar cases do not apply here because those involved black plaintiffs seeking review of the Department of Justice's decision to preclear a proposed change, rather than review of the Department's decision to interpose an objection. See Mem. of P. & A. in Opp'n to Def's Mot. to Dismiss (Docket # 12) at 37-38. This Court in *City of Rome* also considered this argument and rejected it, finding that this distinction does not "vitate the precedential force of the jurisdictional principle established in *Morris*, and followed in *Briscoe* and *Harris*." *City of Rome*, 450 F. Supp. at 381 (citing *Briscoe v. Bell*, 432 U.S. 404, 53 L. Ed. 2d 439, 97 S. Ct. 2428 (1977), and *Harris v. Bell*, 183 U.S. App. D.C. 253, 562 F.2d 772 (1977)). In short, the statutory scheme that Congress enacted in 1965 and reauthorized numerous

times since then has never contemplated that the Attorney General's decision to object or to preclear a particular submission can be subjected to judicial review. Instead, a jurisdiction subject to the Act can seek preclearance *de novo* by filing a declaratory judgment action.

Plaintiffs' second argument on this point was likewise raised in *City of Rome*, and rejected by this Court. Plaintiffs argue that because their claim is that their constitutional rights are abridged by the Attorney General's action, they have the right to seek review. *See* Mem. of P. & A. in Opp'n to Def's Mot. to Dismiss (Docket # 12) at 38-39. This Court found that exact argument "wholly untenable" in *City of Rome*, holding that "Congress has neither totally insulated the Attorney General's actions from judicial scrutiny nor totally deprived plaintiffs of judicial redress. Congress merely has established *an exclusive means* of obtaining 'review' of the Attorney General's determination -- a *de novo* proceeding in the District Court for the District of Columbia." *City of Rome*, 450 F. Supp. at 382.

Finally, plaintiffs' seek to distinguish *City of Rome* from the instant case because there, the city had an avenue of redress under Section 5 but here, as individual plaintiffs, they do not, suggesting that the result would be to "*strip individual citizens* of their constitutional rights." *See* Mem. of P. & A. in Opp'n to Def's Mot. to Dismiss (Docket # 12) at 39 (emphasis in original). The conclusion, however, is not that individual citizens must therefore have a valid cause of action to enjoin the Attorney General from enforcing Section 5 against the change to non-partisan elections. The only possible conclusion is that individual citizens in these circumstances do not have a cause of action to challenge or seek judicial review of the Attorney General's determination in this case. That does not mean they have no recourse under the Voting Rights Act. If the plaintiffs had facts sufficient to show that the partisan method of election for Kinston City Council denies them an equal opportunity to participate in the election process because of

their race, they could bring an individual claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. If filed in federal court, that claim would need to be brought before the federal court in the Eastern District of North Carolina. *See* 42 U.S.C. § 1973j(f).

Thus, the plaintiffs do not have a cause of action entitling them to seek an injunction barring enforcement of the Attorney General's objection to the change to non-partisan, at-large elections for the Kinston City Council proposed by the referendum at issue here. If it were true that the current method of election violates their rights on the basis of their race, their appropriate remedy would be to file an action under Section 2 of the Voting Rights Act.

B. Plaintiffs Lack Standing to Bring a Section 5 Declaratory Judgment Action

The District of Columbia Court can grant preclearance in a declaratory judgment action brought by a covered jurisdiction. *Morris v. Gressette*, 432 U.S. at 502. However, such an action can only be brought by "the chief legal officer or other appropriate official of such State or subdivision." 42 U.S.C. § 1973c. This requirement has been repeatedly cited and applied by the courts. *See, e.g., City of Richmond v. United States*, 422 U.S. 358, 361 n.1 (1975); *City of Lockhart v. United States*, 460 U.S. 125, 128 n.2 (1983); *City of Pleasant Grove v. United States*, 479 U.S. 462, 464 n.1 (1987).

In *Dodson v. Graham*, 462 F.2d 144, 148 (5th Cir. 1972), in applying § 1973c, the court held that a county attorney was an "appropriate" official for purposes of making a Section 5 submission because he had acted "at the suggestion of the state attorney general." Here, the plaintiffs are not only private citizens and not public officials, but they are not acting on the authority of the City of Kinston or any of its any public officials. Indeed, Kinston has itself expressly declined to seek judicial preclearance of the voting change. The plaintiffs in this case

plainly lack standing to file a Section 5 declaratory judgment action on behalf of the City of Kinston.

C. Private Citizens Cannot Seek Review of a Section 5 Objection in the D.C. District Court.

When the authority to decide whether or not to litigate is vested with a governmental entity, a private citizen may not force that governmental entity to appeal a decision it does not wish to appeal. *Lawyer v. Department of Justice*, 521 U.S. 567, 569 (1997). In *Lawyer*, Appellant was one of several plaintiffs challenging a Florida legislative district under the Equal Protection Clause. *Id.* All the parties but Appellant reached a settlement agreement and a three-judge District Court approved the remedial redistricting plan devised by the settlement agreement. *Id.* at 573. Appellant argued that, by approving the settlement agreement plan, the District Court acted without affording the State a chance to create its own legislative plan. *Id.* at 576.

The United States Supreme Court expressly held that, in agreeing to the plan set forth by the settlement agreement, “the State exercised the choice to which it was entitled under our cases.” *Id.* at 569. The State decided to settle the case, and the Court noted that disregarding that decision to settle and instead requiring formal adjudication would “burden its exercise of choice.” *Id.* at 578. The Court held that no line of reasoning from its previous cases required such a burdening. *Id.* The Court bluntly stated that Appellant was “trying to do what we have previously said he may not do: to demand an adjudication that the State of Florida, represented by the attorney general, could indeed have demanded...but instead waived.” *Id.* at 580 (internal citations omitted). The *Lawyer* case is analogous to the current case. Plaintiffs essentially seek

to force the city council to appeal a Section 5 objection interposed by the Attorney General. The Kinston City Council—an elected body—voted to waive their right to pursue preclearance in this Court, analogous to a *de novo* appeal. The authority to make that decision lies with the city council, and the city council alone.

Plaintiffs' present lawsuit attempts to undermine the authority of the city council to decide whether to appeal a Section 5 objection. Other courts have recognized that the decision not to appeal, made by an elected body, is a balancing decision that such an elected body has the authority to make. The Ninth Circuit has noted:

In the case before us the decision not to appeal was in effect a decision to acquiesce in the court decree—a decision made by the very board affected by the decree. The decision was made by a board of elected representatives of the residents of the school district, including these appellants. It was made following public hearings at which appellants had full opportunity to influence the board's decision. That decision was within the competence of the board in balancing many competing factors against the relatively modest degree of restraint imposed by the decree.

Spangler v. Pasadena City Bd. of Educ., 427 F.2d 1352, 1354 (9th Cir. 1970) (holding that dissatisfied parents could not intervene to challenge a school board's decision not to appeal a trial court's order to compel racial integration of the school system).

In *Brooks v. State Board of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994), civil rights advocates alleged that a statewide system of electing state judges in Georgia violated both Sections 2 and 5 of the Voting Rights Act. *Id.* at 1551. Plaintiffs and Defendants came to a settlement agreement, but Plaintiff-Intervenors objected to the settlement and challenged the authority of the parties, including the Defendants Governor and state Attorney General, to approve such an agreement. *Id.* at 1552. The Court found that the Attorney General and the Governor did have the power to settle the case, noting: “[t]he Parties have not presented, nor has

the Court uncovered, any specific constitutional, statutory, caselaw, or other authority, that expressly grants to the Georgia Attorney General the power to settle a law suit on behalf of the State. Nonetheless, the mere absence of an express grant of power is not always determinative.” *Id.* at 1562. The Court found that this power was inherent within the duties and responsibilities of the Attorney General, and the Governor represented the State. *Id.*

Similarly, the Kinston City Council represents and governs Kinston. They are charged with complying with federal law, including Section 5 of the Voting Rights Act. Inherent within that duty is the power to choose to appeal objections interposed by the United States Attorney General to any voting changes they make. In performing the delicate balancing act and discretionary assessment of what best serves all citizens of the city that it is charged with making, the Kinston City Council decided not to appeal. Dissatisfied residents of Kinston do not have standing to override the decision of the elected city council. It is well within the authority of the city council to acquiesce to a Section 5 objection and to choose not to litigate the matter.

D. North Carolina General Statutes Vest the Authority to Enact New Plans of City Government Solely with the City Council and City Officials.

North Carolina law clearly vests the authority to enact new plans of city government, including compliance with the laws governing the enactment of such plans, solely with the city council and city officials. The proposed plan to move to nonpartisan elections is one such plan of city government. North Carolina General Statutes §160A-108 states:

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

This North Carolina statute clearly sets out the powers and authority of the city in these circumstances. When the people have initiated a referendum on a charter amendment, and that referendum passes at election, the duty to enact new methods of election for city officials explicitly belongs to the city council. The duty to comply with state and federal governing law also binds the city council. And, under Section 5, it is the responsibility of the covered jurisdiction—here, the city of Kinston, not its residents—to submit a proposed change to the Department of Justice and to prove that the change is not retrogressive. Thus, the city, governed by the city council, is charged both with enacting local laws and complying with federal law—a difficult balancing act best reserved for that kind of legislative body, not private individuals. Ultimately, after being informed that the new plan is in violation of federal law and may not be administered, the decision whether or not to litigate the issue also rests with the city council.

The plaintiffs argue that because they voted in favor of the referendum, they have legislative standing to seek relief in federal court. *See* Mem. of P. & A. in Opp'n to Def's Mot. to Dismiss (Docket # 12) at 16-21. However, that argument simply does not square with North Carolina law, which does not authorize individual citizens to act in these circumstances.

E. Plaintiffs Lack Standing to Seek Bailout

As the Supreme Court held in *Northwest Austin Mun. Utility Dist. v. Holder*, 129 S.Ct. 2504, 2513 (2009), “Section 4(b) of the Voting Rights Act authorizes a bailout suit by a ‘State or political subdivision.’ 42 U.S.C. § 1973b(a)(1)(A).” The Court further held that “*all political subdivisions*-not only those described in § 14(c)(2)-are eligible to file a bailout suit.” *Id.* at 2516 (emphasis added). But nothing in the opinion suggests that anyone other than states or political

subdivisions are eligible to file a bailout suit; the right to seek bailout was reserved by Congress for them.

The private plaintiffs in this action are obviously neither a state nor a political subdivision. Accordingly, they lack standing to seek bailout or exempt the City of Kinston from Section 5 coverage.

F. Plaintiffs Have Failed to Allege Particularized Injury in Fact Sufficient to Establish Article III Standing.

This Court should dismiss the plaintiffs' complaint for lack of subject-matter jurisdiction because both the individual plaintiffs and their association lack standing to challenge the constitutionality of Section 5. At this stage of the proceedings, the plaintiffs must allege "general factual allegations of injury resulting from the defendant's conduct." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Supreme Court recently explained that: "Article III standing requires an injury that is (i) concrete, particularized, and actual or imminent, (ii) fairly traceable to the challenged action, and (iii) redressable by a favorable ruling." *Monsanto v. Geertson Seed Farms*, 561 U.S. ____, (2010), 2010 U.S. Lexis 4980, slip op. at 7. (citing *Horne v. Flores*, 557 U.S. ____, ____, 129 S. Ct. 2579, 2592, 174 L. Ed. 2d 406.). Moreover, where, as here, the plaintiff is not himself the object of the government action at issue, but rather asserts an injury based on the government's allegedly unlawful regulation of someone else, "standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562, (citing *Allen v. Wright*, 468 U.S. 737, 758, (1984); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976). *Warth v. Seldin*, 422 U.S. 490, 505 (1975). Here, it is the government's action with regard to the City of Kinston that plaintiffs assert has caused them alleged harm.

The plaintiffs allege in their complaint two types of injury, neither of which meets the Article III standing requirements. First, plaintiffs Nix and Northrup allege that they are injured by having to participate in a partisan election process that requires them to either run in a partisan primary or seek sufficient signatures to be included on the ballot as an unaffiliated candidate. However, the very fact that plaintiffs do not have a right to a non-partisan election process under state or federal law, and that North Carolina's ballot access provisions are well within standards previously articulated by the Supreme Court, *see, e.g., Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding requirement that independent candidates obtain signatures amounting to 5% of the total registered voters), means that there is no legally cognizable injury to those plaintiffs' rights. Similarly, voters who support them, or their associations, cannot demonstrate legally cognizable injury in these circumstances.

Second, plaintiffs assert that enforcement of Section 5 of the Voting Rights Act constitutes an impermissible racial classification by the government that intentionally violates their equal protection rights on account of their race. The problem with this assertion is that there are simply no facts alleged in the complaint to demonstrate the alleged injury. The plaintiffs state that they do not have "an equal opportunity to political and electoral participation," Compl. ¶ 30, on account of their race, but by any possible measure of vote dilution, the plaintiffs as white voters are *overrepresented* on the Kinston City Council. They do not allege any of the facts relevant to a vote dilution claim under Section 2 of the Voting Rights Act, *see generally, Thornburg v. Gingles*, 478 U.S. 30 (1986). They do not allege that they face disadvantages such as lack of access to election resources, cars, telephones, or meeting space that hinders their ability to field candidates and articulate their positions. They do not allege that racially polarized voting for city elections keeps them from being able to elect candidates of their

choice. There are no facts whatsoever in the complaint that indicate why, in Kinston City Council elections, white voters cannot participate equally in a partisan election process because of their race. Indeed, plaintiffs assert in their brief that the change to a non-partisan system will be retrogressive for black voters, and thus will make it harder for them to participate equally in city council elections, although they use inflammatory language to suggest that Section 5 involves a “racial quota floor” and that black voters already have some undefined “preferential advantages” under the current system. Mem. of P. & A. in Opp’n to Def’s Mot. to Dismiss (Docket # 12) at 27. These assertions, without any factual allegations to back them up, express nothing more than a generalized disagreement with the findings of Congress that Section 5 of the Voting Rights Act continues to be necessary to protect the voting rights of previously disenfranchised black voters in certain parts of the country. They do not suffice to meet Article III standing. *See Giles v. Ashcroft*, 193 F. Supp. 2d 258, 263-64 (D. D.C. 2002) (vague and abstract allegations of injury not sufficient to establish standing to challenge constitutionality of Section 5 of the Voting Rights Act); *cf. Bone Shirt v. Hazeltine*, 444 F. Supp. 2d 992, 996-997 (D.S.D. 2005) (state of South Dakota cannot demonstrate Article III injury from failure to obtain Attorney General’s preclearance of federal court’s remedial order in voting rights case).

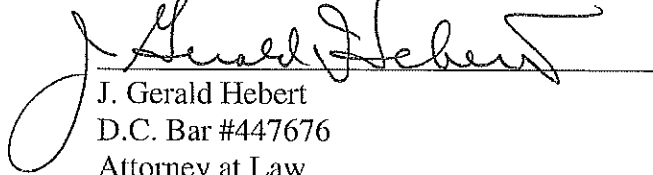
The rights at stake in this litigation are the rights of minority voters to be free from racially discriminatory voting practices. Those rights are the rights protected by Section 5 of the Voting Rights Act. The City of Kinston’s elected leaders made a decision to abide by federal law and not seek to implement a change in their method of election that would make it more difficult for black voters to participate in local elections. The plaintiffs in this case, failing to allege any legally cognizable injury in fact, do not have standing in these circumstances to challenge the constitutionality of Section 5 of the Voting Rights Act.

V. CONCLUSION

For the foregoing reasons, the Proposed Tyson Intervenors respectfully request that the Court grant their Motion to Dismiss under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

This 7th day of July, 2010.

Respectfully submitted,



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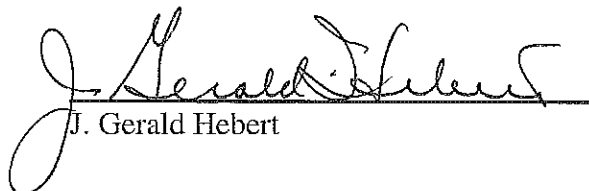
CERTIFICATE OF SERVICE

I hereby certify that on this day, July 7, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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