

Defendant, United States of America, respectfully responds to this Court's December 7, 2011 minute order, and to Plaintiffs' Brief Regarding Suggestion of Mootness [hereinafter Plaintiffs' Brief Regarding Mootness]. Although the Court's order asked for briefing on the issue of mootness only, plaintiffs use their brief to relitigate standing. Accordingly, in addition to addressing the issue of mootness, the United States will respond briefly to plaintiffs' renewed standing arguments.

1. The United States agrees with plaintiffs that the passing of the 2011 general election in Kinston, North Carolina and Plaintiff John Nix's loss in that election do not moot either count of the Complaint. Nix's alleged injuries as a candidate running for office fall within the "capable of repetition yet evading review" exception to the mootness doctrine. *LaRouche v. Fowler*, 152 F.3d 974, 978-79 (D.C. Cir. 1997) (citations omitted); *see also Davis v. FEC*, 554 U.S. 724, 735-36 (2008); *Johnson v. FCC*, 829 F.2d 157, 159 n.7 (D.C. Cir 1987).

The "capable of repetition yet evading review" exception applies when "the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration" and "there is a reasonable expectation that the same complaining party will be subject to the same action again." *LaRouche*, 152 F.3d at 978. Where the challenged action involves an election, courts have generally found that action "is in its duration too short to be fully litigated prior to its cessation or expiration." *Id.* Plaintiff Nix's statement that he intends to run for the Kinston City council again in 2013, *see* ECF No. 67-3, in conjunction with the fact that he ran in 2011 shows that he, as the "same complaining party," may again be subject to the same action, i.e., partisan elections. *LaRouche*, 152 F.3d at 978. Thus, the election does not moot plaintiffs' Count I. Additionally, because plaintiffs' Count II "equal treatment" injury is a generalized allegation untethered to the 2011 election, the passing of the election does not moot plaintiffs' Count II.

2. As for the plaintiffs' renewed standing arguments, they allege two types of harm: injuries flowing from the suspension of the referendum and those occurring simply because plaintiffs are citizens living in a covered jurisdiction. Plaintiffs "must demonstrate standing for each claim [they] seek to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)). Neither alleged injury establishes plaintiffs' standing to challenge the constitutionality of the 2006 Amendments.

Plaintiff Nix's injuries relating to the suspension of the referendum were not caused by the 2006 Amendments nor will they be redressed by a finding that the Amendments are unconstitutional. As explained in the United States' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 55 at 22-25 [hereinafter United States' Opp. Brief] and in the United States' Reply in Opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 61 at 8-12 [hereinafter United States' Reply Brief], plaintiffs have not shown that any injuries suffered as a result of the suspension of the referendum were caused specifically by the 2006 Amendments or that the Amendments caused a different outcome than would have occurred under Section 5's preexisting standard. In this regard, what matters is not whether the 2006 Amendments were applied in this case, but rather whether the Amendments changed the Attorney General's ultimate decision whether to interpose an objection. Contrary to plaintiffs' contentions, plaintiffs carry the burden of establishing each element of standing, including causation, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), which "cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal quotations and citations omitted).

Regardless of whether plaintiffs can establish that any of their injuries relating to the

suspension of the referendum were caused by the 2006 Amendments, they certainly cannot show that those injuries will be redressed by a finding that the 2006 Amendments are unconstitutional. *See* United States' Opp. Brief at 25-31; United States' Reply Brief at 18-20. Because the Amendments are severable from the remainder of Section 5, a finding that they are unconstitutional would leave Section 5's suspension mechanism in place. *See* 42 U.S.C. § 1973c(a). The referendum would thus remain suspended because no voting change may take effect until it is precleared under Section 5, whether under the amended standard or the pre-2006 standard.¹

If the Amendments are struck and severed, the only way Kinston may implement non-partisan elections is to request administrative reconsideration of the Attorney General's 2008 objection, 28 C.F.R. § 51.54, or submit the change to the United States District Court for the District of Columbia, 42 U.S.C. § 1973c(a). The Attorney General or the United States District Court must then preclear the voting change under the pre-2006 standard. Plaintiffs, being private citizens, cannot seek reconsideration or submit the voting change to the District Court. Redressability of plaintiffs' alleged injuries thus rests on gross speculation about the future actions of a third party—the City of Kinston—which has so far declined to take any such action, as well as speculation about whether the Attorney General or the District Court would grant preclearance in the absence of the Amendments. *See* United States' Opp. Brief at 30; United States' Reply Brief at 18. Plaintiffs have failed to even allege, let alone demonstrate to the degree required at the summary judgment stage, that the City of Kinston would attempt to

¹ Plaintiffs incorrectly contend that successfully striking down the 2006 Amendments on enumerated powers grounds would lead to the facial invalidation of Section 5 as a whole. *See* Plaintiffs' Brief Regarding Mootness at 3. In fact, the proper judicial action would be to sever the offending portion of the statute, "while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006). *See* United States' Reply Brief at 21 n.8.

preclear the voting change and that its attempt would be successful under the pre-2006 standard, both of which are required to establish redressability.² Importantly, plaintiffs' inability to demonstrate redressability defeats all of their challenges to the Amendments grounded in the suspension of the referendum, including both their Count I enumerated powers challenge to the Amendments and the non-equal treatment portion of their Count II equal protection challenge.

Finally, plaintiffs' assertion that their referendum-related injuries would be redressed if this Court "vacated the objection letter" fails as well. In addition to the fact that, as explained above, a severed Section 5 would continue to suspend the voting change absent successful preclearance, the Attorney General's determination is not judicially reviewable. *See* United States' Opp. Brief at 30-31; United States' Reply Brief at 18-19. Vacating the objection letter is exactly the kind of judicial review the Supreme Court has prohibited. *See Morris v. Gressette*, 432 U.S. 491 (1977).

3. Plaintiffs' second type of injury—their alleged "equal treatment" injury—does not establish injury in fact. *See* United States' Reply Brief at 7-12. Plaintiffs' generalized contention that the Amendments subject them to a race-based preclearance scheme and provide electoral benefits to minority voters is insufficient "to demonstrate that [plaintiffs] personally, ha[ve] been injured by that kind of racial classification." *United States v. Hays*, 515 U.S. 737, 744 (1995). Indeed, the record contains no evidence of concrete, personal injury resulting from the 2006 Amendments on their face and no evidence of white voter preferences or frustration of those preferences. Whereas "general factual allegations of injury" of the sort plaintiffs allege

² Plaintiffs conflate causation and redressability by stating that the Amendments are "non-severable from the reauthorization of the preclearance requirement, which means that the amended standard caused the injurious suspension to exist and this Court could redress that injury by facially invalidating Section 5." Plaintiffs' Brief Regarding Mootness at 4, 6. Here, severability does not affect causation but rather affects only redressability.

may suffice at the pleading stage, they are insufficient at the summary judgment stage. *Lujan*, 504 U.S. at 561 (citing Fed. R. Civ. P. 56(e)).

Finally, plaintiffs' reliance on *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993), is inapposite. Plaintiffs in the affirmative action cases alleged they were denied an equal opportunity to compete for tangible and concrete benefits. Plaintiffs' alleged injuries here are far more speculative, yet voters' "supposed injury to their 'ability to influence the political process'" may not "rest[] on gross speculation." *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998) (quoting *Kardules v. City of Columbus*, 95 F.3d 1335, 1348-1353 (6th Cir. 1996)). In sum, plaintiffs' alleged equal treatment injuries are too generalized, speculative, and vague to confer standing to bring Count II.

CONCLUSION

Plaintiffs' claims have not been mooted by the passing of the 2011 general election in Kinston, North Carolina. Plaintiffs nonetheless lack standing to challenge the constitutionality of the 2006 Amendments.

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