IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:10-CV-00561-JDB

STEPHEN LAROQUE, ANTHONY CUOMO, JOHN NIX, KLAY NORTHROP, LEE RAYNOR, and KINSTON CITIZENS FOR NON-PARTISAN VOTING, *Plaintiff*s, *v.* ERIC HOLDER, JR. ATTORNEY GENERAL OF THE UNITED STATES, *Defendant.* *and* JOSEPH M. TYSON, et al., *Defendant-Intervenors.*	Civil Action No.: 1:10-CV-561-JDB

DEFENDANT-INTERVENORS BRIEF REGARDING KINSTON ELECTION RESULTS AND MOOTNESS

I. Introduction

Defendant-Intervenors Joseph M. Tyson, et al. file this brief in response to this Court's Minute Order dated December 7, 2011 and in response to the Plaintiffs' Brief Regarding Suggestion of Mootness, filed December 9, 2011, (ECF No. 67). Defendant-Intervenors' position on standing with regard to Count I of the Complaint is that the D.C. Circuit Court of Appeals opinion made Nix's standing dependent only on whether he was a candidate for the Kinston City Council, and his victory or defeat as a candidate would not affect that standing. *See*

Laroque v. Holder, 650 F.3d 777, 787 (D.C. Cir. 2011). However, Nix's evidence on whether he intends to continue as a candidate at this stage of the proceedings should include competent evidence sufficient to survive a summary judgment motion. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889 (1990).

With regard to Count II of the Complaint, Defendant-Intervenors' position is that no plaintiff in this action can demonstrate standing to bring that claim because 1) the Section 5 objection to the City of Kinston's proposed change to a non-partisan method of election was not based on either of the amendments to Section 5 of the Voting Rights Act made in the 2006 reauthorization, and 2) even if unconstitutional, the amendments are severable and the non-retrogression principle of Section 5 as modified by the decisions in *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003), would still mandate an objection to the use of a non-partisan method of election where, as in the City of Kinston, that change would "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). Having failed to demonstrate causation and redressability, the Plaintiffs do not have standing to bring Count II. The outcome of Nix's candidacy does not impact his standing to bring this claim.

II. Statement of Case

This is a facial challenge to Section 5 of the Voting Rights Act of 1965, seeking declaratory and injunctive relief on two grounds: that the 2006 reauthorization of Section 5 exceeded Congress' powers under the 14th and 15th Amendments of the United States Constitution, and that two amendments to the Section 5 standard of review included in that reauthorization constitute an unconstitutional scheme of racial discrimination against white

voters that violates the equal protection component of the Due Process Clause of the Fifth Amendment. This Court dismissed both counts for lack of standing and a cause of action. Concluding that Plaintiff Nix, a candidate for public office, has standing and a cause of action to pursue the first claim, the D.C. Court of Appeals remanded for further proceedings, including consideration of the complex questions related to plaintiffs' standing to raise the equal protection claim in Count II of the Complaint. *Laroque v. Holder,* 650 F.3d at 796.

On remand the Defendant-Intervenors renewed their motion to dismiss Count II for lack of standing and also filed a motion for summary judgment on both Counts. The Plaintiffs and Defendants have cross-motions for summary judgment on both Counts pending. On October 26, 2011, a motions hearing was held. On December 7, on its own motion, the Court ordered the Plaintiffs to "file a brief, along with any necessary factual material, on (1) whether candidate John Nix won or lost the November 2011 city council election in Kinston, and (2) whether either Count I or Count II is now moot." Plaintiffs' response to this Order was filed on December 9, 2011.

III. Statement of Facts

According to the 2010 Census, the population of the City of Kinston is 21,677, of whom 14,749 (68%) are African-American and 6,211 (28.7%) are white. *See* U.S. Census Bureau, 2010 Census Redistricting Data (Public Law 94-171), Summary File, Tables P1, P2, P3, P4, H1, (attached hereto as Exhibit 1). In 2010, African-Americans in the City of Kinston were 65.1% of the voting age population. *Id.* Although in the majority numerically, African-American voters are routinely in the minority in voter turnout in municipal elections. *See* Letter from Loretta King, Acting Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to James P. Cauley, III, Kinston City Attorney, (Aug. 17, 2009) at pg. 1, (Ex. E to Pls.' Mot. for

Summ. J. filed Aug. 18, 2010, ECF No. 23-6.) (hereinafter "DOJ Objection Letter"). African-American voters have had limited success in electing their candidates of choice to the City Council. *Id.* at pg. 3. The city of Kinston is divided between the predominantly African-American east side and the predominantly white west side. *See* Decl. of Joseph M. Tyson, Sr., 2, Dec. 15, 2010, ECF No. 54-3; Decl. of Linda Joyce Lanier, 2, Dec. 15, 2010, ECF No. 54-8; and Decl. of George Graham, 2, Dec. 15, 2010, ECF No. 54-4. Voting is polarized along racial lines. *See* Decl. of Courtney M. Patterson, 2, Dec.15, 2010, ECF No. 54-6; Decl. William A. Cooke, 2, Dec. 15, 2010, ECF No. 54-7. Local elections are characterized by appeals to race, as recently as the 2010 election. *See* Decl. of Julian Pridgen, 2, Dec. 15, 2010, ECF No. 54-5; Patterson Decl. 2, ECF No. 54-6.

In the 2011 municipal elections, three city council seats were up for election. Lenoir County Board of Elections, November 8, 2011, Municipal Elections, Official Results, ECF No. 67-1. Two of the six candidates ran as unaffiliated candidates. *Id.,* John C. Nix was the fourth highest vote getter and therefore was not elected. *Id.,* The votes for unaffiliated candidates together would have been sufficient to defeat two of the three successful candidates, both African-American. *Id.* The five-member Kinston City Council is currently composed of two African-Americans and three whites. *See* Second Decl. of Courtney M. Patterson, 2, December 12, 2011, (attached hereto as Exhibit 2). After the newly elected members take their seats, the Board will have three African-Americans and two whites. *Id.* Since the white candidate in the 2011 election was the top vote getter, if Plaintiff Nix had won, he would have defeated one of the African-American candidates. His election would have meant that a racially divided town with a nearly 70% African-American population would continue to be governed by a city council that is majority-white.

IV. Argument

A. FOLLOWING THE COURT OF APPEALS' HOLDING, PLAINTIFF NIX HAS STANDING TO BRING COUNT I

The Court of Appeals in this case held that Plaintiff Nix, as a candidate for the Kinston City Council, sufficiently alleged that the inability to run in a non-partisan election system created a concrete and particularized injury to two legally cognizable interests: first, he is injured because the partisan regime makes the process of getting on the general election ballot more costly and time-consuming for him, and second, he is injured because the partisan elections system provides a competitive advantage to Democratic opponents. *Laroque,* 650 F.3d at 786. The Court went on to explain that its holding in *Shays v. FEC,* 414 F.3d 76 (D.C. Cir. 2005), "means that Nix has no obligation to demonstrate definitively that he has less chance of victory under the partisan than the nonpartisan system." *Id.,* at 785. Since, according to the Court, the injury he suffers flows from having to participate in the allegedly unfair system, whether he wins or not, he has standing to bring Count I of the complaint. Thus, the fact that he did not win election is irrelevant to his standing to bring Count I.

However, the 2011 municipal election results do legitimately raise a question about whether Plaintiff Nix continues to meet his burden to demonstrate his intention to be a candidate. While he does not need to demonstrate that his campaign to run again in 2013 is "well under way", *Laroque,* 650 F.3d at 787, he does need to introduce competent evidence appropriate for this stage of the litigation. *See Lujan v. National Wildlife Federation,* 497 U.S. at 883-889. *See also, Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 114-115, and n. 31 (1979) (holding that factual allegations necessary for standing must be proven at trial). As the Supreme Court has explained:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra, at 889*. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," *Fed. Rule Civ. Proc. 56(e)*, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Here, at the summary judgment stage, Plaintiff Nix should provide this court with admissible evidence, not hearsay from an internet posting. The authority relied upon by Plaintiffs for the proposition that a public newspaper statement is a sufficiently reliable indicator of candidate status, *Davis v. FEC,* 554 U.S. 724 (2008) was at a different procedural posture, namely already at the Supreme Court, when the candidate made his announcement that he was running again. *Id.,* 544 U.S. at 735. *See* Pls.' Br. Regarding Suggestion of Mootness at 2 (ECF No. 67). The Plaintiffs should provide competent evidence appropriate for this stage of the litigation.

B. THE PLAINTIFFS DO NOT HAVE STANDING TO BRING COUNT II OF THEIR COMPLAINT

Whether John Nix runs for the Kinston City Council is not relevant to the standing inquiry for Count II of the Complaint. This count alleges that the amendments to the Section 5 preclearance standard, intended to restore the Section 5 retrogression standard to what it had been for many years prior to the *Bossier Parish* and *Georgia v. Ashcroft* Supreme Court interpretations of legislative intent, create a racially discriminatory statute that, on its face, discriminates against white voters. The Court of Appeals explained that for this Count, one question is whether the Plaintiffs have "met the requirement that litigants claiming injury from a racial classification establish that they "personally [have been] denied equal treatment by the

challenged discriminatory conduct." *Laroque*, 650 F.3d at 795. As white voters living in a jurisdiction covered by Section 5 of the Voting Rights Act, they meet that standard. *See, e.g.*, Decl. of Stephen Laroque, 1, Aug. 16, 2010, ECF No. 23-11.

John Nix's status as a candidate and his loss in the 2011 municipal election is irrelevant to his standing to bring Count II. The Plaintiffs, however, fail to meet the causation and redressability requirements for standing on this Count. The objection to Kinston's non-partisan election scheme was based on the retrogressive impact it would have on African-American voters. The *Bossier Parish* decision, which only concerned whether the intent prong of the Section 5 was limited to an intent to retrogress or included any discriminatory intent, *see Bossier Parish*, 528 U.S. at 328, is not relevant to this objection because it was not based on intent. The text of the objection letter explicitly says: "while the motivating factor for this change may be partisan, the effect will be strictly racial." DOJ Objection Letter, 2, ECF No. 23-6.

The *Georgia v. Ashcroft* decision dealt with whether it would be retrogressive for a redistricting plan to substitute "influence districts" for "ability to elect" districts in a redistricting plan. *See Georgia v. Ashcroft*, 539 U.S. at 481-82. Prior to the *Georgia v. Ashcroft* decision, the Department of Justice had always said that yes, such a change has a retrogressive effect. *See* H. R. Rep. No. 109-478, at 68-72 (2006). In 2006 Congress agreed that such a change is retrogressive and re-wrote the Section 5 standard to make that clear. *Id.* Elections for members of the Kinston City Council are at-large elections. They do not use a single-member district system. Second Decl. of Courtney M Patterson, 2, Dec. 12, 2011, (attached hereto as Exhibit 2). The *Georgia v. Ashcroft* amendment to Section 5 does not impact how that submission was evaluated, and the outcome, a conclusion that the proposed change to non-partisan elections would be retrogressive, would be the same even without the 2006 Amendments. Thus, these

plaintiffs cannot show that their injury was caused by the 2006 Amendments to Section 5 and they cannot demonstrate that absent those amendments, Kinston would be using a non-partisan election method.

V. Conclusion

Defendant-Intervenors respectfully submit that Plaintiff Nix's loss in the 2011 municipal elections is irrelevant to standing on both Counts of the Complaint in this action. Law of the case establishes that Nix has standing to bring Count I, but he has failed to put forward evidence of his future candidacy in an appropriate form. None of the plaintiffs have standing to bring Count II of the complaint, because the Department of Justice's objection to the proposed change to non-partisan elections was not governed by either of the two amendments in the 2006 reauthorization of Section 5.

This 13th day of December, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, December 13, 2011, 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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