SCHEDULED FOR ORAL ARGUMENT FEBRUARY 27, 2012
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5349

STEPHEN LAROQUE, *et al.*,

Plaintiffs-Appellants

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION TO DISMISS

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Contrary to appellants' contentions, events unrelated to this litigation led the Department of Justice (DOJ) to reconsider the Section 5 objection to Kinston's proposed change to nonpartisan elections, and the decision to withdraw the objection was made on the merits. See AG Motion to Dismiss 2-4; Berman Dec. ¶¶ 3-6. The Department's reconsideration of the objection was triggered by its review of a submission of a proposed change to nonpartisan elections for the Lenoir County Board of Education (Board). The timing of the DOJ's consideration of the Board's submission was, in significant part, outside of DOJ's control. Indeed, it was the act of one of the plaintiffs that set in motion the events leading to the withdrawal of the Kinston objection. Lenoir County Board of Education Submission 3. In particular, DOJ did not control when the state legislation affecting the Board was enacted (July 28, 2011), when the Board submitted the legislation to DOJ for review (September 7, 2011), or when the Board responded to DOJ's request for additional information that was not included in the original submission (December 12, 2011). The Department issued its decision on the Board's submission on February 10, 2012, 60 days after receipt of its response to the request for additional information. Both the reconsideration notice and the withdrawal letter provided detailed explanations for these actions.

The "voluntary cessation" exception to the mootness doctrine is not applicable here, because "(1) 'there is no reasonable expectation that the alleged

violation will recur,' and (2) 'interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.'" *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (citations omitted).

1. Because the withdrawal of the Kinston objection is valid, Section 5 will not prevent Nix from running in a nonpartisan election in 2013. Appellants' claim for an injunction barring the Attorney General from enforcing Section 5 against Kinston's change to nonpartisan elections is now moot. As to this claim, appellants "ha[ve] obtained everything that [they] could recover." *Better Gov't Ass'n* v. *Department of State*, 780 F.2d 86, 91 (D.C. Cir. 1986) (citation omitted).

The Department's regulations authorize reconsideration and withdrawal of an objection, on DOJ's initiative. 28 C.F.R. 51.46. That provision has been part of the regulations since their adoption in 1971, 36 Fed. Reg. 18,186, 18,190 (Sept. 10, 1971), and has been used previously, Berman Dec. ¶ 11. The regulations are entitled to substantial deference. *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 281-282 (1999). To be sure, Section 5 does not expressly authorize withdrawal of objections; nor does it forbid such withdrawals. Indeed, the statute specifies *no* procedures to be employed in the preclearance process. *Georgia* v. *United States*, 411 U.S. 526, 536 (1973). Thus, lack of a statutory provision authorizing withdrawal does not preclude that authority any more than it precludes DOJ's

authority to request more information to assess a submitted change – an authority provided in the regulations and upheld in *Georgia* as a "reasonable" means of providing "objective ground rules" that are consistent with the statute. *Ibid.*

The regulatory provisions authorizing DOJ to withdraw objections upon a change in operative facts or discovery of an error are reasonable and consistent with Section 5. Under appellants' construction, DOJ would be unable to correct errors in preclearance decisions or take account of changes in law or facts without asking the jurisdiction to resubmit the proposed change, even though requiring such a resubmission would serve no purpose. Permitting reconsideration and withdrawal at DOJ's initiative, on the other hand, avoids such unnecessary hurdles and allows for reconsideration even where the jurisdiction may not request it.

2. Any possible injury appellants may suffer as a result of potential future voting changes that may or may not be enacted and may or may not draw objections is too speculative to give them a "personal stake in the outcome" of this lawsuit. *Lewis* v. *Continental Bank Corp*., 494 U.S. 472, 478 (1990) (citation omitted). In *Better Government*, after plaintiffs challenged the validity of guidelines regarding fee waivers under the Freedom of Information Act, the defendant agencies belatedly granted the waivers, thereby mooting plaintiffs' claims as to those specific requests. 780 F.2d at 91 & n.20. This Court ruled that plaintiffs' facial challenge to the guidelines was *not* moot, but only after finding

not only that the agencies would continue to rely on the disputed guidelines, but also that the plaintiffs, who were "frequent FOIA requesters," had "alleged a continuing injury due to this practice." *Id.* at 91; see also *Payne Enters., Inc.* v. *United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (finding, in ripeness analysis, that plaintiff "relie[d] 'heavily and frequently on FOIA' to conduct work that is 'essential to the performance of certain of [its] primary institutional activities'") (citation omitted). *Legal Assistance for Vietnamese Asylum Seekers* v. *Department of State*, 74 F.3d 1308 (D.C. Cir. 1996), is not to the contrary. *LAVAS* held that government action that mooted a plaintiff's individual claim did not moot a challenge to an underlying policy where the allegedly unlawful behavior would "quite probably recur in the case of" one of the plaintiffs. *Id.* at 1311-1312; cf. *Dynalantic Corp.* v. *Department of Defense*, 115 F.3d 1012, 1015-1018 (D.C. Cir. 1997) (although plaintiff's challenge to the application of a race-conscious contracting program might be moot, challenge to the program itself was not moot where plaintiff had standing to assert such a challenge).

Here, in contrast, appellants are not likely to suffer a "continuing injury" traceable to Section 5. *Better Gov't*, 780 F.2d at 91. Appellants' contentions that Nix will be injured in unspecified ways if DOJ objects to voting changes that have not even been enacted yet are too speculative to warrant adjudication of the grave constitutional challenges they assert. AG Motion 7-8. See *Golden* v. *Zwickler*,

394 U.S. 103, 110 (1969) ("The power of courts * * * to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough.") (citation omitted).

3. Appellants' contention that declaratory relief in this case *might* entitle Nix to seek a new election from the State Election Board – which is not a party to this action – is also too speculative to warrant continued litigation. Indeed, it is doubtful that North Carolina law would authorize a new election even if appellants prevail in this case. While state law authorizes the State Board of Elections to order new elections under certain circumstances, N.C.G.S. 163-182.13(a)(4), "[t]here is no statutory authority vesting the State Board with the power to revoke a certificate of election" for the purpose of ordering a new election "once [the certificate] has already been issued" and the winners have taken office. *In re Caldwell Cnty. Election Protests of Hutchings*, 600 S.E.2d 901 (Table), 2004 WL 1610347, at *3 (N.C. Ct. App. 2004) (citation omitted). Further, even if appellants were to prevail in this case, it is unlikely that they would obtain a final decision sufficiently in advance of the scheduled 2013 elections to warrant the extraordinary remedy of a new election. This court should dismiss this appeal, vacate the judgment below, and remand with instructions to dismiss the complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2012, the foregoing REPLY IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION TO DISMISS was filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

J. Gerald Herbert
The Campaign Legal Center
215 E. St. N.E.
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Michael E. Rosman
Center For Individual Rights
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Washington, D.C. 20036

I further certify that I will cause four paper copies of the foregoing REPLY to be hand delivered to the Clerk of the Court by 4:00 p.m. on February 22, 2012.

s/ Linda F. Thome
LINDA F. THOME
Attorney

ATTACHMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN LAROQUE, et al., Plaintiffs-Appellants v. ERIC H. HOLDER, JR., in his official capacity as Attorney General Of The United States, Defendant-Appellees	)	No. 11-5349

DECLARATION OF ROBERT S. BERMAN

I, Robert S. Berman, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am an attorney who currently serves as a Deputy Chief in the Voting Section of the Civil Rights Division of the United States Department of Justice. I have supervisory responsibility for the administrative review of voting changes submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. I have been employed as an attorney in the Department of Justice for 33 years with over 20 years of service in the Voting Section.

2. I have personal knowledge of the information contained in this declaration based upon my review of relevant records maintained by the Department of Justice, as well as my professional experience with, and personal knowledge of, Department of Justice policies and procedures.

3. In February 2009, the City of Kinston, North Carolina (in Lenoir County) submitted to the Attorney General for Section 5 review a proposed change from partisan to nonpartisan elections for municipal offices that had been adopted by the City's electorate by referendum

in November 2008. On August 17, 2009, the Attorney General interposed an objection to the proposed change.

4. On January 30, 2012, the Attorney General gave notice that he intended to reconsider the August 17, 2009, objection in Kinston. In his January 30 letter, the Attorney General advised that he intended to decide whether to continue or withdraw that objection by February 10, 2012, at the same time as the Attorney General made a determination on a submission under Section 5 from the Lenoir County Board of Education of a proposed change from partisan to nonpartisan elections. On February 10, 2012, the Attorney General withdrew the objection to the change to nonpartisan elections in Kinston and notified the Lenoir County Board of Education that he did not object to the board's proposed change.

5. As stated in the Department's January 30, 2012, letter, the Department's reconsideration of the objection under Section 5 of the Voting Rights Act to Kinston's proposed change to nonpartisan elections was triggered by the Department's review of a submission under Section 5 of a proposed change to nonpartisan elections for the Lenoir County Board of Education. The timing of the Department's consideration of the submission of the change to nonpartisan elections for the Lenoir County Board of Education under Section 5 was something that was, in significant part, outside of the Department's control. The state legislative act that changed the Lenoir County Board of Education to non-partisan elections was sponsored by one of the plaintiffs in this case, Rep. Stephen LaRoque. Lenoir County Board of Education Submission at 3 ("Although the Board is responsible for submitting the local legislation for preclearance, the change was not initiated by the Lenoir County Board of Education and, thus, the Board is not in the best position to explain the reasons for the change. State Representative Stephen LaRoque was the sponsor of this local legislation

affecting the Lenoir County Board of Education.") In particular, the Department did not control: when the state legislation affecting the board of education was enacted (July 28, 2011), when the legislation was submitted by the board of education to the Department for review under Section 5 (September 7, 2011), or when the board of education responded to the Department's written request for needed additional information that was not included in the original submission (December 12, 2011). The Department issued its determination on the Lenoir County Board of Education submission on February 10, 2012, which is sixty days after the Department received the board of education's initial response to the Department's written request for additional information. The board of education did not request expedited consideration on this submission.

6. It is uncommon that the Department would receive two Section 5 submissions within two years of an identical type of change (from partisan to nonpartisan elections) from two government bodies located within the same county. That new submission provided the occasion to consider information about voting patterns in the City of Kinston that was not available at the time of the earlier submission. As of January 30, 2012, the Department had available to it considerable information that it did not have at the time of August 17, 2009, decision to object to the Kinston submission. This included the information and analysis of the proposed change to nonpartisan elections for the Lenoir County Board of Education, which includes both at-large positions and single-member districts that cover the City of Kinston. This also included the results of the 2010 Census for the City of Kinston, which showed that the black share of the total population had grown to 68percent, and the black share of the voting age population had grown to 65 percent, over the last decade (previously the Department had only estimated data available). This also included data from two

additional municipal elections in Kinston, including actual data on voter turnout by race, showing that black voters comprised 53 percent of the turnout in the 2011 municipal election (previously the Department had only estimates of turnout by race from earlier municipal elections), as well as the results of those recent elections, showing that black voters had elected candidates of choice to a majority of the seats on the city council in the November 2011 election.

7. The Department's Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R 51.46(b), provide that it will afford the public and jurisdictions an opportunity to comment when the Department reconsiders an objection at its own instance. When the Department's analysis of the Lenoir County Board of Education submission had advanced to the point that it appeared that there may have been a substantial change in fact with regard to the Kinston objection, the Department gave public notice of the reconsideration on January 30, and advised that the Department intended to make a decision on reconsideration of the Kinston objection on February 10, 2012, at the same time as it made its decision on the Lenoir County Board of Education submission. Necessarily, this constrained the time available for comment to only about 11 days, which is a relatively short period of time.

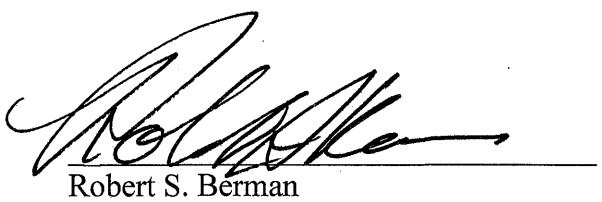
8. The Attorney General has a long-standing policy of providing information to covered jurisdictions concerning the administrative review process by publishing the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 in the Code of Federal Regulations. 28 C.F.R. Part 51 (July 1, 2011). These procedures were first promulgated in 1971, 36 Fed. Reg. 18186 (Sept. 10, 1971), and are revised when necessary. See, *e.g.*, 75 Fed. Reg. 33205 (June 11, 2010); 76 Fed. Reg. 21239 (Apr. 15, 2011).

9. The Attorney General's Procedures for the Administration of Section 5 have provided that he may reconsider and withdraw an objection, both at the request of the jurisdiction and at his own instance, since these procedures were first adopted as a final rule in 1971. 36 Fed. Reg. 18186, 18190 (Sept. 10, 1971). The original 28 C.F.R. 51.25, as adopted in 1971, provided that "[w]here there has been a substantial change in fact or law, the Attorney General may, if he deems it appropriate, withdraw an objection on his own motion..." The Attorney General's Section 5 Procedures continue to provide for the Attorney General to reconsider objections at his own instance in 28 C.F.R. 51.46 (July 1, 2011).
10. A review of the Department's submission tracking and processing system indicates some 163 submission files involving instances in which the Department has withdrawn an objection that it previously interposed under Section 5.
11. There are other recent instances where the Department has reconsidered and withdrawn objections interposed under Section 5 of the Voting Rights Act at the Department's own instance, without a request for reconsideration from the jurisdiction. For example, on June 28, 2005, the Department withdrew an objection to an annexation to the City of Grenada, Mississippi after giving notice of reconsideration at the Department's own instance. The objection was interposed on August 17, 1998. The Department also gave notice of reconsideration of a November 30, 1981, objection to state redistricting procedures in North Carolina, in part based on the Department's own instance, and in part based on a request for reconsideration by a state court, and withdrew that objection on July 12, 2002.
12. There are also a number of examples where the Department has administratively precleared voting changes under Section 5 of the Voting Rights Act in the midst of litigation. See, e.g., *Commissioners Court of Medina County* v. *United States*, 683 F.2d 435, 440-441 (D.C. Cir.

1982) (county commission redistricting plan); *Georgia* v. *Holder*, 748 F. Supp. 2d 16 (D.D.C. 2010) (state voter registration verification procedures).

13. Congress allowed the Department 60 days to review administrative submissions under Section 5 of the Voting Rights Act. In general, administrative submissions received by the Department under Section 5 undergo a number of levels of review from the time they are received until the time they are decided and that decision is communicated by letter to the covered jurisdictions. Submissions are initially received by mail, express delivery, fax, or internet system. Once received, submissions are then logged into the tracking system, the submission documents are scanned into the tracking system, and a file is created for the submission that includes the relevant documents. The file is then analyzed by line level Department staff who prepare a written analysis and recommendation and draft letter, which is reviewed by Department attorneys. Where necessary, additional expert analysis is undertaken of geographic, census, and electoral data. At the end of the process, a final letter is prepared, reviewed, signed, and transmitted to the jurisdiction. The submission is reviewed by a number of Department staff throughout the process. The levels of review that any particular submission undergoes are dependent upon the nature of the submission in question. Final decisions regarding whether to object to a submission or to withdraw an objection, and final decisions regarding statewide redistricting plans, are committed to the Assistant Attorney General for Civil Rights.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 22, 2012.



Robert S. Berman

E-Submission No: 3428

Submission Number: 2011 3476

Name: Deborah R. Stagner **Title:** Attorney
Address: 209 Fayetteville Street
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Authority: Lenoir County Board of Education **Other:**

County: LENOIR **State:** NC

Jurisdiction: CENTRAL LENOIR WATER AND SEWER DISTRICT

Attached Files Below:

\\crt-nwb-img01\evs_files$\3428\Exhibit A (R0700798).PDF
\\crt-nwb-img01\evs_files$\3428\Exhibit B (R0700799).PDF
\\crt-nwb-img01\evs_files$\3428\Exhibit C (R0700800).PDF
\\crt-nwb-img01\evs_files$\3428\Exhibit D (R0700801).PDF
\\crt-nwb-img01\evs_files$\3428\Exhibit E (R0700802).PDF
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Changes Description

A copy of any ordinance, enactment, order, or regulation embodying a change affecting voting.

Section a:) Enclosed as Exhibit A is a copy of Session Law 2011-407. The legislation is an omnibus local bill, with various sections applying to various jurisdictions across the State. This submission concerns only sections 2(a) and 2(b) of the act, which are applicable to the Lenoir County Board of Education.

A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed.

Section b:) The current election method for the Board of Education is set forth in the 1991 Merger Plan enclosed as Exhibit B. The Merger Plan submission was numbered 91-4517 and was precleared by letter dated February 7, 1992, which is enclosed as Exhibit C.

A clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

Section c:) The Lenoir County Board of Education currently consists of seven board members elected on a partisan basis. Five board members are

Changes Description

elected from single-member districts and two are elected at-large. On July 28, 2011, the North Carolina General Assembly enacted a local act, Session Law 2011-407, sec. 2, to change the method of election for the Board from partisan to nonpartisan. The local act also provides that elections will be conducted on a nonpartisan plurality basis, with the results determined in accordance with N.C. Gen. Stat. § 163-292. This is a change from the current partisan primary method of election, conducted pursuant to N.C. Gen. Stat. § 163-111.
The act does not alter the total number of board members (7), nor the length of their terms (4 years), nor the time of elections. The act also does not alter the district boundaries - five school board members will continue to be elected from the same districts used by the Lenoir County commissioners and two members will continue to be elected at-large.

Identification of the person or body responsible for making the change and the mode of decision (e.g. act of state legislature, ordinance of city council, administrative decision by the registrar).

Section d:) The change from partisan to nonpartisan elections is pursuant to a legislative enactment of the North Carolina General Assembly. The local act, S.L. 2011-407, was ratified on July 28, 2011.

A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

Section e:) The change is a legislative enactment of the North Carolina General Assembly authorized by the State constitution. The change is a local bill (by definition, one that affects fewer than 15 counties) and, after passage in both houses of the General Assembly, is not subject to veto. N.C. Const. Art. II.

A statement that the change has not yet been enforced or administrated, or an explanation of why such a statement cannot be made.

Section f:) The change has not been implemented. Pursuant to S.L. 2011-407, sec. 2(b), the change to nonpartisan elections is effective January 1, 2012, and applies to elections occurring on or after that date if the United States District Court for the Eastern District of North Carolina has approved modification of the consent order entered in Lossie Holmes et al. v. Lenoir County Board of Education et al., 86-120-CIV-4. A copy of the consent order is enclosed as Exhibit D. If the consent order is not modified until after January 1, 2012, nonpartisan elections will not be

Changes Description

used until after January 1, 2013.
The change is also subject to preclearance.

Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

Section g:) The change will affect the entire county.

A statement of the reasons for the change.

Section h:) Although the Board is responsible for submitting the local legislation for preclearance, the change was not initiated by the Lenoir County Board of Education and, thus, the Board is not in the best position to explain the reasons for the change. State Representative Stephen LaRoque was the sponsor of this local legislation affecting the Lenoir County Board of Education. A copy of the minutes of the August 1, 2011, Lenoir County Board of Education meeting at which Representative Stephen LaRoque addressed the Board regarding this change is enclosed as Exhibit E. The Board of Education adopted a Resolution of support for the change, which is also enclosed as Exhibit F.
It should be noted that nonpartisan elections are the norm for local boards of education in the State of North Carolina. N.C. Gen. Stat. § 115C-37 is the state law of general applicability, and section (a) of this statute provides that "county boards of election shall be elected on a nonpartisan basis." Local modifications do exist as a result of local acts. However, of the 115 local school districts state-wide, only 15 elect their members on a partisan basis.

A statement of the anticipated effect of the change on members of racial or language minority groups. In addition, per 51.28 h, include the names, addresses, daytime telephone numbers, and organizational affiliation, if any of racial and language minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who have been active in the political process.

Section i:) As stated above, the change to the election method was not initiated by the Board, and the Board has no information to suggest the change will have an impact on minority groups in Lenoir County. Because both the Board of County Commissioners and the Board of Education have

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Changes Description

historically utilized partisan elections to elect members of the respective boards, there are no records of voting in county-wide nonpartisan elections in Lenoir County upon which to specifically evaluate the effect of nonpartisan elections.
However, the current method of electing 5 of 7 members from single-member districts has resulted in minority representation on the Board of Education. Minority candidates have also been elected to the Board of County Commissioners, which uses the same election method. Currently, there is one African-American member of the Board of Education, Garland Nobles, and there are two African-American county commissioners, Jackie Brown and Chairman George W. Graham. Under the proposed change, five members of the Board of Education will continue to be elected from single-member districts, and therefore, it can be anticipated that minority voters will continue to have the opportunity to elect candidates of their choice in the two majority-minority districts.

A statement identifying any past or pending litigation concerning the change or related voting practice.

Section j:) As noted above, the Lenoir County Board of Education, pre-merger, was a party to a 1988 consent order in the matter of Lossie Holmes et al. v. Lenoir County Board of Education et al., 86-120-CIV-4, in the U.S. District Court for the Eastern District of North Carolina. The local act, S.L. 2011-407 recognizes implementation of the change requires modification of the consent order. The Board of Education anticipates making relevant filings in the matter of Lossie Holmes et al. v. Lenoir County Board of Education et al., to seek modification of the consent order as provided by S.L. 2011-407.

Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in ?51.28 and is most likely to be needed with respect to redistrictings, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in ?51.37.

Section l:) 28 CFR § 51.28 (g)
This submission is a public record under state law and a copy will be available for inspection and copying at the office of the Superintendent for the Lenoir County Public Schools.