

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

STEPHEN LAROQUE, et al.

Plaintiffs,

v.

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

Defendant.

Civil Action No. 10-0561 (JDB)

MEMORANDUM OPINION & ORDER

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, prohibits certain jurisdictions from implementing any change to state election practices or procedures without first obtaining either preclearance from the United States Attorney General or a declaratory judgment in federal court that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a).

In 2008, the city of Kinston, North Carolina, passed a referendum that would have amended the city charter to change local elections from partisan to nonpartisan. Compl. ¶ 2. Kinston is subject to Section 5, and therefore could not implement this change without first obtaining preclearance from the Attorney General or a declaratory judgment. See 42 U.S.C. § 1973c(a). The Attorney General, however, denied the city preclearance. Compl. ¶ 19. Instead of seeking a declaratory judgment, plaintiffs, who are primarily voters in Kinston, see Compl. ¶¶ 2-7, have filed this action challenging Section 5 as unconstitutional. Currently before the Court is

plaintiffs' application to have a three-judge court adjudicate this suit.¹

The Voting Rights Act provides that suits brought "under" Section 5 "shall be heard and determined by a court of three judges . . . and any appeal shall lie to the Supreme Court." 42 U.S.C. § 1973c(a). Besides declaratory judgment suits by jurisdictions seeking to alter their election practices, the Supreme Court has held that two implied causes of action can also be brought "under" Section 5 for purposes of section 1973c(a)'s three-judge court requirement. First, "the Attorney General may bring an injunctive action to prohibit the enforcement of a new regulation because of the State's failure to obtain approval under § 5." Allen v. State Bd. of Elections, 393 U.S. 544, 561 (1969). Second, a private citizen "may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny." Id.; see also id. at 563 ("Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges."). Suits asserting any of these three causes of action, then, are "under" Section 5 and must be heard by a three-judge court.

In this case, plaintiffs contend that challenges to Section 5's constitutionality represent a fourth kind of suit arising "under" Section 5 that must be heard by a three-judge court.² See Allen, 393 U.S. at 561 ("[S]uits involving [Section 5] may be brought in at least three ways."

¹ It is the responsibility of this judge to decide whether a three-judge court is required here. See 28 U.S.C. § 2284(b)(1).

² It is undisputed that plaintiffs' challenge does not fall within any of the three causes of action previously recognized as arising "under" Section 5. It is also undisputed that Section 4 of the Voting Rights Act, which requires a three-judge panel to hear actions by covered jurisdictions seeking to bail out from Section 5's preclearance requirement, is not applicable here. See 42 U.S.C. § 1973b(a)(5).

(emphasis added)). Hence, they have filed an application to convene a three-judge court, which the defendant has opposed. The Court declines plaintiffs' invitation to convene a three-judge court. "[C]ongressional enactments providing for the convening of three-judge courts must be strictly construed." Allen, 393 U.S. at 361 (citing Phillips v. United States, 312 U.S. 246 (1941)). And neither the language of Section 5's three-judge court provision, nor its purpose, support convening a three-judge court to adjudicate this case.

For one, this suit is not analogous to the three causes of action that the Supreme Court has previously held arise "under" Section 5. Those causes of action all seek to ensure that changes in voting procedures "neither ha[ve] the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). Because those three causes of action involve the direct application of Section 5's standards, they "may be viewed as being brought 'under' § 5." Allen, 393 U.S. at 561. Plaintiffs' challenge to the constitutionality of Section 5, on the other hand, has nothing to do with whether a specific voting practice or procedure violates Section 5. Rather, plaintiffs' suit is limited to whether Section 5 violates the Constitution's Fifth, Fourteenth, and Fifteenth Amendments. Compl. ¶¶ 33-36. The suit involves the application of provisions of the Constitution to Section 5, not the application of the provisions of Section 5 to specific state or local voting practices or procedures. It arises, therefore, under the Constitution, not Section 5. See Rome v. United States, 472 F. Supp. 221, 236 (D.D.C. 1979) (three-judge court) (expressing "doubt[s]" that a three-judge court has statutory jurisdiction to hear a constitutional challenge to Section 5).³

³ As plaintiffs note, "[i]n prior cases raising such constitutional challenges to Section 5, it has been undisputed that a three-judge court was properly convened." Pls.' App. for Three-Judge (continued...)

Moreover, the rationale underlying the use of three-judge courts in cases involving the application of Section 5's standards is absent here. In Allen, the Supreme Court observed that,

[i]n drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge. The clash between federal and state power and the potential disruption to state government are apparent. There is no less a clash and potential for disruption when the disagreement concerns whether a state enactment is subject to § 5. The result of both suits can be an injunction prohibiting the State from enforcing its election laws. Although a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains.

Allen, 393 U.S. at 562-63.

According to plaintiffs, their "constitutional challenge to coverage under Section 5 presents the precise federalism issues that were central to the Allen Court's interpretation of Section 5's three-judge-court provision." Pls.' App. at 4. Indeed, in their view, "compared to the relatively minor disputes over whether particular state laws fall within the statutory scope of Section 5, the 'clash between federal and state power and the potential disruption of state government' is far more significant and divisive where, as here, the 'disagreement . . . whether a state enactment is subject to § 5' goes to the basic constitutional validity of Section 5's coverage of any state law in any jurisdiction." Pls.' Reply in Supp. of App. ("Pls.' Reply") [Docket Entry 4] at 3 (quoting Allen, 393 U.S. at 561) (ellipses in Pls.' Reply).

³(...continued)

Court ("Pls.' App.") [Docket Entry 2], at 3 (citing Nw. Austin Municipal Utility Dist. No. 1 v. Holder, 129 S. Ct. 2504 (2009), and City of Rome v. United States, 446 U.S. 156 (1980)). In those cases, however, three-judge courts were properly convened to adjudicate statutory claims under the Voting Rights Act; the courts addressed constitutional challenges only in the alternative. See Rome, 472 F. Supp. at 236 (taking jurisdiction over constitutional claims "on a pendent jurisdiction theory"). Plaintiffs have not raised any statutory claims here.

Plaintiffs' argument is not without some merit, but the Court ultimately remains unpersuaded. In passing the Voting Rights Act, Congress was concerned that a single district court judge could issue "an injunction prohibiting the State from enforcing its election laws." Allen, 393 U.S. at 562-63. By providing for three-judge courts to adjudicate claims arising under Section 5, then, Congress diluted the power of individual federal judges to "disrupt[] . . . state election procedures." Id. at 563. But Congress's federalism concerns do not apply to this challenge to Section 5's constitutionality. If this Court were to invalidate Section 5, it would curtail federal, not state, power. And if this Court were to uphold Section 5, it would not invalidate or disrupt any state's election procedures: the application of Section 5 to Kinston's election practices is not before the Court. At most, then, a decision affirming Section 5's constitutionality would preserve the very balance between federal and state power that Congress struck through enactment of that provision. Hence, the Court concludes that the Congressional purpose behind Section 5's three-judge court requirement does not support its application in this case.⁴

Plaintiffs also state that, even if this Court is not required to convene a three-judge court, it should nonetheless voluntarily do so. In their view, this will "obviate the risk that the

⁴ Plaintiffs contend that such a result would be absurd, as it would mean that Congress "mandated three-judge-court resolution with direct appeal to the Supreme Court for every picayune challenge to the statutory scope of Section 5, but left a single district judge with the power to facially invalidate Section 5 on constitutional grounds, subject only to the normal appellate process." Pls.' Reply at 6. But as described in Allen, Congress mandated three-judge courts not because of the importance of the Voting Rights Act, or to protect generally against federal court intrusion into federal governmental action, but rather to avoid unnecessary clashes between the federal judiciary and state governments. A single federal judge's ability to declare the Voting Rights Act unconstitutional, thereby minimizing federal power in favor of the states, carries no such federalism concerns.

judgment of 'a single judge' will subsequently be held void because it 'erroneously invaded the province of a three-judge court.'" Pls.' App. at 5 (quoting Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715-16 (1962) (per curiam)). The government, for its part, disputes that this Court has the authority to convene a three-judge court voluntarily.

The Court need not resolve whether it can voluntarily assemble a three-judge court, as it declines to exercise any such authority. "Convening a three-judge court places a burden on our federal court system," Allen, 393 U.S. at 561, and the Court will not voluntarily impose that burden here. The Court is aware that an incorrect determination as to Section 5's three-judge-court requirement may subsequently invalidate a decision on the merits of plaintiffs' complaint. But district courts routinely resolve such jurisdictional questions, ever mindful that an incorrect decision on standing, mootness, or some other threshold issue may later invalidate a merits determination.

Accordingly, it is hereby **ORDERED** that [2] plaintiffs' application for a three-judge court is **DENIED**.

/s/
JOHN D. BATES
United States District Judge

Dated: May 12, 2010