IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

Civil Action No. 5:06-CV-00462-FL

RICHARD L. BISHOP, et al.,	)	
	)	
Plaintiffs,	)	**MEMORANDUM IN SUPPORT**
	)	**OF DEFENDANTS'**
v.	)	**MOTION TO DISMISS**
	)	
GARY O. BARTLETT, et al,	)	**FED. R. CIV. P. 12(b)(1) and (6)**
	)	**Local Rules 7.1(d) and 7.2**
Defendants.	)	

NOW COME defendants, by and through the undersigned counsel, and hereby offer this Memorandum of Law in support of their Motion to Dismiss.

NATURE OF THE CASE

Plaintiffs have brought this action pursuant to § 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973c, and pursuant to 42 U.S.C. § 1983. Plaintiffs allege that their due process rights under both the Fourteenth Amendment to the United States Constitution and Article I, § 19, of the North Carolina Constitution were infringed by the method in which a constitutional amendment was placed before the voters in 2004. Specifically, plaintiffs complain that the language placed on the ballot for the referendum may have misled some voters who might not have understood that with ratification, local governments could in limited circumstances issue bonds for economic development without a vote of the people.

Noticeably absent from plaintiffs' complaint is any allegation that any voter was in fact misled by the language placed on the ballot. Also absent is any explanation for why plaintiffs have waited until two years after that election to bring this action, when all the facts alleged in the complaint were matters of public record and were well-known prior to the 2004 General Election.

STATEMENT OF THE FACTS

North Carolina Session Law 2003-403 (hereafter "S.L. 2003-403"), signed into law in August 2003, provided for the submission of Section 1 of Senate Bill 725 to a vote of the people in the November 2, 2004, statewide general election. S.L. 2003-403, § 24. This proposed constitutional amendment was commonly known as "Amendment One" because it was the first of two amendments on the 2004 ballot. Amendment One amended Article V of the North Carolina Constitution by adding a new § 14, entitled "Project Development Financing," and authorized the General Assembly to enact laws creating a method for local units of government to borrow money to finance public improvements associated with private development projects by the creation of development financing districts. So long as no revenues other than the set-aside proceeds from the finance districts are pledged by a local government, the instruments of indebtedness authorized by the provision may be issued without approval through a referendum. S.L. 2003-403, § 1. The session law also sets out the statutory provisions governing the implementation of the financing method authorized by Amendment One. S.L. 2003-403, §§ 2 through 21. Finally, it set forth the question to be placed on the ballot with regard to Amendment One. S.L. 2003-403, § 24. (A copy of the session law is included as Attachment 1.)

The North Carolina Constitutional Amendments Publication Commission (composed of Secretary of State Elaine F. Marshall, Chair, Attorney General Roy Cooper and George Hall, Legislative Services Officer, in their official capacities) is created by N.C. GEN. STAT. § 147-54.8. Pursuant to N.C. GEN. STAT. § 147-54.10,

> [a]t least 60 days before an election in which a proposed amendment to the Constitution, or a revised or new Constitution, is to be voted on, the Commission shall prepare an explanation of the amendment, revision, or new Constitution in simple and commonly used language.

> The summary prepared by the Commission shall be printed by the Secretary of State, in a quantity determined by the Secretary of State. A copy shall be sent along with a news release to each county board of elections, and a copy shall be available to any registered voter or representative of the print or broadcast media making request to the Secretary of State. The Secretary of State may make copies available in such additional manner as he may determine.

More than sixty days prior to the November 2, 2004, General Election (Compl. ¶ 24), the Commission adopted the following summary of Amendment One:

> The amendment would grant North Carolina local governments authority to issue bonds to pay for public improvements associated with private development projects within a defined development district created by the local government. The bonds could be used for public improvements such as streets, water and sewer service, redevelopment, land development for industrial or commercial purposes, airports, museums or parking facilities. Upon passage of this amendment, no additional voter referendum would be necessary to issue these bonds. The bonds would be repaid with the additional property tax revenues that would result from the enhanced property values on the improved property in those development districts. To ensure enough property tax revenues are generated to repay the bonds, the amendment allows the property owners within the development district to agree to a minimum value at which their property will be assessed for tax purposes. If a majority of voters approves this amendment, it becomes effective immediately upon the certification of its passage.

As required by N.C. GEN. STAT. § 147-54.10, the summary was distributed to all county boards of elections and was also made available to news media and the electorate at the Secretary of State's website. (Compl. ¶ 25.)

Amendment One was ratified by the voters of North Carolina by a vote of 1,504,383 (51.2%) for the amendment and 1,429,185 (48.8%) against the amendment. (Compl. ¶30.) On or about November 23, 2004, the North Carolina State Board of Elections, as required by N.C. GEN. STAT. § 163-182.15(b) and (c), certified to the North Carolina Secretary of State that Amendment One had been ratified by the voters of North Carolina. (Compl. ¶ 31.) In the two years between the time that Amendment One was ratified by the voters of North Carolina and this action was initiated, local

governments have begun the process of issuing bonds in accordance with the authority granted them by Amendment One and by the S.L. 2003-403. (Compl. ¶¶ 36-43.)

ARGUMENT

I. STANDARD FOR CONSIDERATION OF A MOTION TO DISMISS.

In considering a motion to dismiss, the court must accept as true all well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). The court may dismiss a complaint for failure to state a claim under FED. R. CIV. P. 12(b)(6) if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Although all reasonable inferences are to be drawn in favor of the plaintiff, the complaint must set forth factual allegations sufficient to establish the elements that are crucial to recovery under the plaintiff's claims, and legal conclusions without factual support are not sufficient. *See, e.g., Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985). With regard to FED. R. CIV. P. 12(b)(1), the federal courts are courts of limited, not general, jurisdiction, and it is the duty of the federal courts to determine, *sua sponte* if necessary, whether jurisdiction exists and to dismiss an action if it does not. *Cooper v. Productive Transp. Servs.*, 147 F.3d 347, 352 (4th Cir. 1998). *See also* FED. R. CIV. P. 12(h)(3).

II. PLAINTIFFS' FIRST CAUSE OF ACTION, AS WELL AS A PORTION OF THEIR THIRD CAUSE OF ACTION, HAVE BEEN MOOTED BY THE STATE'S REQUEST FOR PRECLEARANCE OF NORTH CAROLINA SESSION LAWS 2003-403.

Plaintiffs brought this action seeking to enjoin the implementation of North Carolina Session Laws 2003-403, which submitted to the voters of North Carolina a proposed amendment to the North Carolina Constitution, Amendment One, and which enacted various laws to implement the provisions of the amendment, contingent upon the amendment's ratification. Plaintiffs claim that

implementation of the act must be enjoined until that act and the now-ratified constitutional amendment that it proposed have been precleared by the United States Department of Justice pursuant to § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.[1] Although it is not clear that S.L. 2003-403 constitutes a change in voting requirements or procedure requiring preclearance under § 5, the North Carolina Secretary of State, who by state law bears responsibility for submitting constitutional amendments for preclearance, *see* N.C. GEN. STAT. § 120-30.9D, submitted S.L. 2003-403 to the United States Department of Justice on November 29, 2006, in order to remove any potential § 5 issue. (*See* Cover Letter and Submission Information, attached as Attachment 2.) Expedited consideration was requested, and defendants see no reason why S.L. 2003-403 should not be precleared.[2] Clearly, the ratification of Amendment One and the statutes that implement that constitutional amendment lack discriminatory purpose or effect on the rights of minority voters and will have no retrogressive effect with regard to those voters. Plaintiffs have not alleged any factual or legal suggestion otherwise.

Plaintiffs' first claim for relief is predicated entirely on § 5 of the Voting Rights Act. Because North Carolina has complied with the requirements of § 5 and has submitted for preclearance the changes in voting procedure in question, plaintiffs' claim is moot, or will be moot once preclearance is obtained. "Once a covered jurisdiction has complied with these preclearance

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[1] Forty of North Carolina's one hundred counties are currently subject to § 5's preclearance requirements. Those counties are Anson, Beaufort, Bertie, Bladen, Camden, Caswell, Chowan, Cleveland, Craven, Cumberland, Edgecombe, Franklin, Gaston, Gates, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Jackson, Lee, Lenoir, Martin, Nash, Northampton, Onslow, Pasquotank, Perquimans, Person, Pitt, Robeson, Rockingham, Scotland, Union, Vance, Washington, Wayne, and Wilson. 28 C.F.R. § 51.4 and pt. 51 App. at 96-97(2002)(App. 1-3).

[2] Even if review is not expedited by the United States Department of Justice, preclearance should be accomplished within sixty (60) days of the submission. *See* 28 C.F.R. Part 51.9. Defendants will, of course, notify the Court and the parties when the Department of Justice responds to the preclearance request.

requirements, § 5 provides no further remedy." *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996). Plaintiffs' first claim for relief, then, must be dismissed, as should plaintiffs' third claim for relief, to the extent that it alleges failure to obtain preclearance as a basis for plaintiffs' "maladministration of an election" claim.[3]

III. PLAINTIFFS' FEDERAL DUE PROCESS CHALLENGES IN THEIR SECOND AND THIRD CLAIMS FOR RELIEF ARE BARRED BY THE STATUTE OF LIMITATIONS.

The only remaining federal claim that plaintiffs bring is a claim that the process by which Amendment One was submitted to the electorate and ratified violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Invoking 42 U.S.C. § 1983, plaintiffs allege that the language appearing on the ballot for the referendum on Amendment One was not the actual language of the proposed amendment but rather a "summary with potentially misleading language." (Compl. ¶ 59.) They further allege that the ballot language, when coupled with what plaintiffs allege was insufficient access to the actual language of the proposed amendment, "reached the point of patent and fundamental unfairness and a violation of the federal right of due process." (Compl. ¶ 65.) Notably, plaintiffs do not allege any constitutional infirmity with regard to Amendment One itself or to the other implementing provisions of S.L. 2003-403; rather, they challenge only the electoral procedure by which Amendment One was proposed and ratified. Plaintiffs' claims are barred by the statute of limitations.

Noting that § 1983 and the statutes related to it do not contain a statute of limitations, the United States Court of Appeals for the Fourth Circuit has stated:

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[3] The date of holding the referendum on Amendment One was in fact submitted for preclearance by the North Carolina State Board of Elections prior to the November 2004 election. (Compl. ¶ 34 and Ex. D.) The Department of Justice granted preclearance on March 17, 2004. *See* Attachment 2, Submission Information, section (k).

> While Congress has not enacted a specific statute of limitations for §§ 1981 and 1982, we interpret these federal statutes to "borrow" the statute of limitations and equitable tolling rules applicable to the state cause of action that is most analogous to §§ 1981 and 1982. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987) ("Because § 1981, like [§ 1982 and 42 U.S.C. § 1983], does not contain a statute of limitations, federal courts should select the most appropriate or analogous state statute of limitations.")

Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 320 (4th Cir. 2006). While often the state cause of action most appropriate or analogous to a § 1983 claim is a state's personal injury statute, *see Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187 (4th Cir. 1999), that is not the case here.[4] The gravamen of plaintiffs' claims is that the electoral process was flawed in such a way as to infringe upon due process rights. Thus, the state cause of action "most analogous" to plaintiffs' claims is an "elections protest" under N.C. GEN. STAT. Chapter 163, Article 15A.

Pursuant to N.C. GEN. STAT. § 163-182.9(a), "[a] protest concerning the conduct of an election may be filed with the county board of elections by any registered voter who was eligible to vote in the election or by any person who was a candidate for nomination or election in the election."[5] At the time of the 2004 General Election, North Carolina law further provided:

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[4] Even if North Carolina's personal injury statute of limitations were deemed to apply, this action is barred. All of plaintiffs' claims stem from the enactment of S.L. 2003-403, which the Governor signed into law on August 7, 2003. (Compl., Ex. A.) The statute of limitations on personal injuries in North Carolina is three years. N.C. GEN. STAT. § 1-52(16). Inasmuch as this case was filed on November 6, 2006, more than three years had in fact passed between the time that plaintiffs' cause of action accrued and this action was filed.

[5] Pursuant to N.C. GEN. STAT. § 163-182.12, as in effect at the time of the 2004 General Election, "The State Board of Elections may consider protests that were not filed in compliance with G.S. 163-182.9, may initiate and consider complaints on its own motion, may intervene and take jurisdiction over protests pending before a county board, and may take any other action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election." This section has since been amended. *See* North Carolina Session Laws 2005-428, § 17, eff. Jan. 1, 2006.

c. If the protest concerns an irregularity other than vote counting or result tabulation, the protest shall be filed no later than 6:00 P.M. on the second day after the county board has completed its canvass and declared the results.

d. If the protest concerns an irregularity on a matter other than vote counting or result tabulation and the protest is filed before election day, the protest proceedings shall be stayed, unless a party defending against the protest moves otherwise, until after election day if any one of the following conditions exists:

1. The ballot has been printed.
2. The voter registration deadline for that election has passed.
3. Any of the proceedings will occur within 30 days before election day.

N.C. GEN. STAT. § 163-182.9(4).[6] In the 2004 General Election, county boards of elections were required to meet to complete the canvass of votes cast at 11:00 A.M. on the seventh day after the election. *See* N.C. GEN. STAT. § 163-182.5(b) (2004).[7] Thus, in 2004, North Carolina law required that anyone desiring to protest the results of the referendum on Amendment One do so no later than 6:00 P.M. on the ninth day following the election. Otherwise, the right to protest an election irregularity would be lost.

Plaintiffs did not protest the language placed on the ballot for the referendum on Amendment One in the fifteen months between the 2003 enactment of S.L. 2003-403 and the 2004 referendum, neither did they protest any other aspect of the election process with regard to that referendum within the time allowed by statute. Accordingly, the referendum results were canvassed and certified by county boards of elections in accordance with N.C. GEN. STAT. § 163-182.5(b); the canvass was in turn completed by the State Board three weeks following the election and the results of the referendum were certified to the Secretary of State. *See* N.C. GEN. STAT. §§ 163-182.5(c), -182.15(b)

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[6] N.C. GEN. STAT. § 163-182.9(4)(c) was slightly amended following the 2004 General Election. *See* North Carolina Session Law 2005-428, § 4, eff. Jan. 1, 2006.

[7] This section too has since been amended, so that the canvass now occurs on the tenth day following the election. *See* North Carolina Session Law 2005-428, § 11(a), eff. Jan. 1, 2006.

and (c). Plaintiffs waited for two years to challenge this long-completed referendum process, raising challenges that they should have presented as an election protest in 2003 or 2004.

The public interest inherent in the short time allowed by statutes for filing post-election protests is readily apparent. Statutes of limitations exist to give all parties assurance of finality.

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

United States v. Kubrick, 444 U.S. 111, 117 (1979) . Perhaps nowhere is this need for finality and for avoiding "stale" claims more important than in the case of elections. The public has a significant interest in achieving swift finality in election matters. It is for this reason that

> [c]ourts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible. They have reasoned that failure to require pre-election adjudication would "permit, if not encourage, parties who could raise a claim 'to lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973).

Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177, 182 (4th Cir. 1983) (explaining why, even when constitutional infirmities are found in an election statutes and regulations, election results will not be overturned where the challenge could have been brought prior to the election.)

Had plaintiffs properly protested the referendum on Amendment One and obtained a stay of certification, certification of the results of that referendum would have been delayed until the protest was resolved. *See* N.C. GEN. STAT. § 163-182.15(b). This is important because the issuance of the certificate established *prima facie* the results of the election. In the context of election to public office, the North Carolina Supreme Court has stated:

> The certificate of election issued to the successful candidate is an official document having legal import and effect. It is authorized and required by statute and it proves

> *prima facie* the pertinent facts stated therein. *Roberts v. Calvert*, 98 N.C. 580, 4 S.E. 127. The declaration of election as contained in the certificate conclusively settles *prima facie* the right of the person so ascertained and declared to be elected to be inducted into, and exercise the duties of the office. *Gatling v. Boone*, 98 N.C. 573, 3 S.E. 392; *Cozart v. Fleming*, 123 N.C. 547, 31 S.E. 822; *Harkrader v. Lawrence*, 190 N.C. 441, 130 S.E. 35; *Lyon v. Commissioners*, 120 N.C. 237, 26 S.E. 929; *Rhodes v. Love*, 153 N.C. 468, 69 S.E. 436. "The law contemplates and intends generally that the result of an election as determined by the proper election officials shall stand and be effective until it shall be regularly contested and reversed or adjudged to be void by a tribunal having jurisdiction for that purpose." *S. v. Cooper*, 101 N.C. 684, 8 S.E. 134; *Bynum v. Comrs.*, 101 N.C. 412; *S. v. Jackson*, 183 N.C. 695, 110 S.E. 593; *Jones v. Flynt*, 159 N.C. 87, 74 S.E. 817.

Cohoon v. Swain, 216 N.C. 317, 319, 5 S.E.2d 1, 3 (1939). *See also In re Election Protest of Fletcher*, 625 S.E.2d 564; 2006 N.C. App. LEXIS 294 (2006) (holding a protest to be moot where certification had issued). The result should be similar for certification of a referendum – as with certification of election to office, certification of referendum results should prove *prima facie* that the results are as stated in the certificate, so that the public can be assured of finality with regard to the referendum.

North Carolina plainly required plaintiffs to protest the manner in which Amendment One was presented to the electorate prior to 6:00 P.M. on the ninth day following the election or to lose the right to bring their challenge. As a result, plaintiffs' claims under § 1983, brought two years after the referendum was held, are barred by the statute of limitations. These claims must therefore be dismissed pursuant to Rules 12(b)(1) and (6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

IV. PLAINTIFFS' FEDERAL DUE PROCESS CHALLENGES IN THEIR SECOND AND THIRD CLAIMS FOR RELIEF ARE BARRED BY LACHES.

Even if the Court were to determine that plaintiffs' claims are not barred by the statute of limitations (whether it be the statute of limitations for an election protest or the more general three-year statute of limitations for personal injury suits), plaintiffs' claims are barred by laches. All of the

facts alleged giving rise to plaintiffs' claims were known or reasonably could have been known to plaintiffs prior to the 2004 referendum on Amendment One. Rather than bringing their claims in a timely manner, plaintiffs have sat on their rights and waited until local governments have acted in reliance on the provisions of S.L. 2003-403. The Court should not countenance plaintiffs' lack of diligence in pressing their claims, which has resulted in prejudice to the people of North Carolina.

> The first element of laches – lack of diligence – exists where "the plaintiff delayed inexcusably or unreasonably in filing suit." *National Wildlife Federation*, 835 F.2d at 318. *See also Giddens v. Isbrandtsen Co.*, 355 F.2d 125, 128 (4th Cir. 1966) (where "inexcusable or inadequately excused delay"); *Baylor University Medical Center v. Heckler*, 758 F.2d 1052, 1057 (5th Cir. 1985) (where "delay is not excusable"). An inexcusable or unreasonable delay may occur only after the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action. *See Ward v. Ackroyd*, 344 F. Supp. 1202, 1212 (D. Md. 1972); *Knox v. Milwaukee County Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984). The defendant may show lack of diligence either by proof that the action was not commenced within the period provided by the applicable statute of limitations or by facts otherwise indicating a lack of vigilance. *Giddens*, 355 F.2d at 128.
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> The second element – prejudice to the defendant – is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct. *Gull Airborne Instruments, Inc. v. Weinberger*, 224 U.S. App. D.C. 272, 694 F.2d 838, 844 (D.C. Cir. 1982). However, the defendant "is aided by the inference of prejudice warranted by the plaintiff's delay. The plaintiff is then to be heard to excuse his apparent laggardness and to prove facts manifesting an absence of actual prejudice." *Giddens*, 355 F.2d at 128. Clearly the greater the delay, the less the prejudice required to show laches, and vice versa. But the defendant is ultimately required to prove prejudice (given the defendant's burden to plead and prove laches under Fed. R. Civ. P. 8(c)) and "may either rest on the inference alone or introduce additional evidence." *Id.*

White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991).

Plaintiffs cannot reasonably claim that they did not discover the wrongs they allege prior to the 2004 referendum. The provisions of Amendment One, as well as the language to be placed on the ballot, were contained in S.L. 2003-403, which plaintiffs are presumed to have known.

> *Ignorantia facti excusat, ignorantia juris non excusat*. Ignorance of a material fact may excuse a party, but ignorance of the law does not excuse him from the legal consequences of his conduct. In *Skinner v. Terry*, 107 N.C. 103, 12 S.E. 118, the Court, holding that the words "mistake, inadvertence, surprise, and excusable neglect" signify some fact of which the complaining party should have had knowledge and do not include mistakes of law, used this language: "It [the statute] does not imply that the Court may grant a new trial or set aside a judgment for errors of law or upon the ground that the party was ignorant of the law or of his rights and of the methods and means whereby he might assert or enforce them."

Lerch Bros. v. McKinne Bros., 187 N.C. 419, 420, 122 S.E. 9, 10 (1924). *See also Cheek v. United States*, 498 U.S. 192, 199 (1991) ("Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law."); *State v. Bryant*, 359 N.C. 554, 568, 614 S.E.2d 479, 488 (2005) ("it is clear that the legal maxim *ignorantia juris non excusat* remains the general rule"). Thus, plaintiffs are charged with knowledge over a year prior to the referendum of the language of Amendment One as well as the language that would be placed on the ballot in the referendum. They had an obligation to raise any challenge to the ballot or to the election process prior to certification of the referendum results. *Cf. Thirty Voters v. Doi*, 61 Haw. 179, 181, 599 P.2d 286, 288 (1979) ("The general rule is that if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward.").

Moreover, as plaintiffs themselves allege, local governments have already begun to take action based on the ratification of Amendment One and the provisions of S.L. 2003-403. These local governments have done so based on the fact that the results of the 2004 referendum on Amendment One were not challenged at the time of the referendum and were certified two years ago to the Secretary of State as a valid amendment to the North Carolina Constitution. There is undeniable prejudice if plaintiffs are allowed to come into court challenging S.L. 2003-403 at this late date. Accordingly, this action is barred by laches.

V. THIS COURT SHOULD DECLINE TO EXERCISE ITS SUPPLEMENTAL JURISDICTION OVER PLAINTIFFS' STATE LAW CLAIMS.

Plaintiffs also allege that the electoral process for ratification of Amendment One and resulting implementation of the statutory amendments contained in S.L. 2003-403 violated their rights under Article I, § 19, of the North Carolina Constitution. Because all claims arising under federal law in this action must be dismissed, this Court should decline to exercise supplemental jurisdiction over plaintiffs' pure state law claims.

28 U.S.C. § 1367(a) provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

"The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Here, the Court should indeed decline to consider plaintiffs' state law claims.

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (footnote omitted). *See also Barragan v. St. Catherine Hosp.*, 339 F. Supp. 2d 1141, 1144 (D. Kan. 2004) ("Under § 1367(c), when all federal claims have been dismissed from a case, supplemental state claims will ordinarily be dismissed without prejudice. . . . Discretion to try state law claims in the absence of any federal claims should only be exercised in those cases in which judicial economy, convenience, and fairness would be served by retaining jurisdiction."). For this reason, plaintiffs' state law claims should be dismissed.

VI. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR RELIEF WITH REGARD TO ALL OF THEIR CLAIMS.

Even if the Court determines that plaintiffs' claims, other than those claims based in § 5 of the Voting Rights Act, are not barred by the statute of limitations or by laches, the Court should nonetheless determine that plaintiffs have failed to state a claim for which relief can be granted. All of plaintiffs' remaining claims are grounded in their fundamental allegations that the full text of Amendment One did not appear on the ballot in 2004 and that the language that did appear on the ballot could have misled some voters.[8] It is the manner in which Amendment One was put to the voters – the language of the question placed on the ballot – that plaintiffs allege deprived them of rights under the United States and North Carolina constitutions. The law, however, will not support plaintiffs' claims.

The North Carolina Constitution provides two ways in which it can be amended: by convention of the people or by legislative initiative. Amendment One was proposed on legislative initiative.

> A proposal of a new or revised Constitution or an amendment or amendments to this Constitution may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection. The proposal shall be submitted at the time *and in the manner prescribed by the General Assembly*. If a majority of the votes cast thereon are in favor of the proposed new or revised Constitution or constitutional amendment or amendments, it or they shall become effective January first next after ratification by the voters unless a different effective date is prescribed in the act submitting the proposal or proposals to the qualified voters.

N.C. CONST. art. XIII, § 4 (emphasis added). In S.L. 2003-403, § 24, the General Assembly did in fact prescribe the manner for submitting Amendment One to the voters:

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[8] Notably, plaintiffs never allege that any of them actually were misled by the language that appeared on the ballot.

> The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at the statewide general election in November 2004, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:
>
> "[ ] FOR [ ] AGAINST
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> Constitutional amendment to promote local economic and community development projects by (i) permitting the General Assembly to enact general laws giving counties, cities, and towns the power to finance public improvements associated with qualified private economic and community improvements within development districts, as long as the financing is secured by the additional tax revenues resulting from the enhanced property value within the development district and is not secured by a pledge of the local government's faith and credit or general taxing authority, *which financing is not subject to a referendum*; and (ii) permitting the owners of property in the development district to agree to a minimum tax value for their property, which is binding on future owners as long as the development district is in existence."

(Emphasis added.) Despite the fact that the ballot question specifically says "which financing is not subject to a referendum," plaintiffs allege that the question did not give notice that voters would not have the right to vote on the financing schemes contemplated by Amendment One. They argue in essence that the full text of Amendment One should have been placed on the ballot.[9]

> Constitutional and statutory provisions customarily require that a description of a proposed law or measure be printed upon the ballot, and any such requirement is mandatory. As a general rule, however, it is not essential to print the full text of

[9] It is debatable whether the actual language of Amendment One, now Article V, § 14, is significantly or substantively different from or clearer than the language of the ballot question. While the ballot question says, "which financing is not subject to a referendum," Amendment One states: "As long as no revenues are pledged other than the set-aside proceeds authorized by this section and the revenues authorized in the preceding sentence, these instruments of indebtedness may be issued without approval by referendum. The county, city, or town may not pledge as security for these instruments of indebtedness any property tax revenues other than the set-aside proceeds authorized in this section, or in any other manner pledge its full faith and credit as security for these instruments of indebtedness unless a vote of the people is held as required by and in compliance with the requirements of Section 4 of this Article."

> the proposed law or amendment on the ballot; it is sufficient if enough is printed to identify the matter and show its character and purpose.

26 Am. Jur. 2d Elections § 295. *See also Fla. Ass'n of Realtors v. Smith*, 825 So. 2d 532, 536, (Fla. 1st DCA 2002) ("A court may declare a ballot summary invalid only if it appears that the summary is clearly and conclusively defective."); *Smith v. Calhoun Community Unit School Dist.*, 16 Ill. 2d 328, 335, 157 N.E.2d 59, 63 (1959) ("The substance of a public measure is adequately set forth if the ballot gives a fair portrayal of the chief features of the proposition in words of plain meaning, so that it can be understood by persons entitled to vote. In our view, this does not require that the complete proposition be set forth in the official ballot . . . .") (citations omitted). Indeed, as the Supreme Court of South Carolina has stated:

> The Courts are slow to strike down either the legislative proceedings or the election incident to the adoption of a constitutional amendment, and will indulge every reasonable presumption in favor of their validity. As was said in *State ex rel. Corry v. Cooney*, 70 Mont. 355, 225 P. 1007, 1009: "The question is not whether it is possible to condemn the amendment, but whether it is possible to uphold it, and we shall not condemn it unless in our judgment its nullity is manifest beyond a reasonable doubt".
>
> It is not necessary that the question on the ballot include the full text of the proposed amendment; it is sufficient that it describe the amendment plainly, fairly, and in such words that the average voter may understand its character and purpose.
>
> . . . .
>
> The question is sufficiently propounded to the voters by printing on the ballot the title of the proposing resolution, if such title fairly shows the purpose of the amendment. *Fleming v. Royall*, 145 S.C. 438, 143 S.E. 162.
>
> And where the ballot is challenged because of the form of the question proposed, rather than its substance, evidence that the voters were in fact misled may be required to overcome the presumption to which we have referred.[10]

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[10] As noted *supra*, n.8, plaintiffs do not allege that any of them were, in fact, misled by the ballot language. Indeed, they do not allege that *anyone* was in fact, misled by the ballot language, but merely suggest that voters could have been misled.

Ex parte Tipton, 229 S.C. 471, 476-77, 93 S.E.2d 640, 643 (1956).

This well-established principle that the full text of a proposed constitutional amendment need not be printed on the ballot is grounded, at least in part, in the presumption already noted *supra*: people are presumed to know the law.

> Voters are presumed to be familiar with the content of the actual proposed amendment summarized on a ballot. A ballot adequately describes a proposed amendment if it gives fair notice to the voter of average intelligence by directing him to the amendment so that he can discern its identity and distinguish it from other propositions on the ballot. The ballot language must show the character and purpose of the amendment, but it need not show all the relevant details. Exactitude is not required, since it would often be impracticable to print an entire amendment on the ballot.

Hardy v. Hannah, 849 S.W.2d 355, 358 (Tex. App. Austin1992).

Plaintiffs' allegations are inadequate to overcome the presumption that voters are familiar with the law and that ballot language is sufficient if it "describe the amendment plainly, fairly, and in such words that the average voter may understand its character and purpose." *Ex parte Tipton*, 229 S.C. at 476, 93 S.E.2d at 643. Moreover, it is clear that Amendment One was proposed to the people of North Carolina in a manner fully consistent with Article XIII, § 4, of the North Carolina Constitution. Accordingly, plaintiffs have failed to state a claim for which relief can be granted with regard to their claims under the United States and North Carolina constitutions.

CONCLUSION

Plaintiffs' claim under § 5 of the Voting Rights Act is moot inasmuch as S.L. 2003-403 has now been submitted to the United States Attorney General for preclearance. The Court lacks subject matter jurisdiction over plaintiffs' remaining claims under the United States and North Carolina constitutions because those claims are barred by the statute of limitations and by laches. Moreover, plaintiffs have failed to state claims upon which relief can be granted in that their claims are barred and are not supported by the law. For these reasons, this action, brought more than three years after

the enactment of S.L. 2003-403 and two years after the certification of the ratification of Amendment One, must be dismissed.

Respectfully submitted, this the 19th day of December, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day, December 19, 2006, electronically filed the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS 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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