

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,)	SUPPLEMENTAL 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(f) and 7.2
Defendants.)	

NOW COME defendants, by and through undersigned counsel, and hereby offer this Supplemental Memorandum of Law in support of their Motion to Dismiss. This Supplemental Brief will address those matters raised in oral argument about which the Court requested additional briefing.

ARGUMENT

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

Defendants have searched for case law – federal or state – that addresses the question of when causes of action such as those asserted in plaintiffs’ second and third claims for relief accrue. Defendants, however, have not found any cases directly addressing that question. The federal courts, of course, “borrow” analogous statutes of limitation from the states in actions brought pursuant to § 1983. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 320 (4th Cir. 2006). However, “[w]hile the time limitation itself is borrowed from state law, the federal rule fixes the time of accrual of a right of action. This federal rule establishes as the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action.” *Bireline v.*

Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977) (citations omitted). This test is substantially identical to the test employed by North Carolina courts:

Generally, a cause of action accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. . . . “As soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only aggravation of the original injury.”

Liptrap v. City of High Point, 128 N.C. App. 353, 355, 496 S.E.2d 817, 819, *disc. rev. denied*, 348 N.C. 73, 505 S.E.2d 873 (1998) (citations omitted).

Applying this straightforward standard to this case, it is clear that the basic injury of which plaintiffs complain – the wording of the ballot question submitted to the voters on Amendment One¹ – was known or should have been known when the act setting forth that language was signed into law on August 7, 2003. *See* S.L. 2003-403. At the very least, plaintiffs were charged with knowledge of the law as of that date. *Lerch Bros. v. McKinne Bros.*, 187 N.C. 419, 420, 122 S.E. 9, 10 (1924) (“*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.”). *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

¹ Again, it must be noted even though plaintiffs now argue that it is Amendment One and not S.L. 2003-403 that deprived them of the right to vote on Tax Increment Financing (“TIF” bonds), plaintiffs have challenged neither the election results regarding Amendment One nor the substance or effect of Amendment One. By their own admissions, “[p]laintiffs have brought a claim that the *process* by which Amendment One was ratified and the *method by which it was brought to a vote* . . . [s]pecifically . . . that the *method* by which the General Assembly sought to amend the North Carolina Constitution,” violated their Constitutional rights. (Pls.’ Supp. Mem. p. 3 (emphasis added.)) It was through S.L. 2003-403 alone that the General Assembly established that “process” and “method” for Amendment One.

ignorantia juris non excusat remains the general rule”). Any further harm plaintiffs may claim as a result of other factors, such as the Text of Explanations published by the North Carolina Constitutional Amendments Publication Commission, “is only aggravation of the original injury,” *Liptrap*, 128 N.C. App. at 355, 496 S.E.2d at 819, and not a separate injury without which no cause of action has yet accrued.² The Text of Explanations may have aggravated or alleviated the harm that plaintiffs claim, but the injury they have asserted – that the *method* by which the General Assembly sought to amend the North Carolina Constitution violated their constitutional rights – was set by law on August 7, 2003. Under the standard regarding the accrual of actions, then, plaintiffs’ causes of action must be considered to have accrued on August 7, 2003.³

Perhaps the reason that defendants have not found any case law directly addressing the issue of accrual of a cause of action in a case such as this one is because many courts that have been faced with similar issues have held that the statute of limitations for elections challenges or protests is the limitation period that must be applied, and have, therefore, focused on the short statute of limitations

² This is why *Lawson v. Shelby County*, 211 F.3d 331 (6th Cir. 2000), is inapposite. In *Lawson*, the plaintiffs claimed that they were denied the right to vote because they refused to disclose their social security numbers, a condition of registering to vote. The Sixth Circuit held that no cause of action accrued until plaintiffs were actually turned away at the polls and that earlier letters rejecting their registration simply served as notice of the need to provide social security numbers in order to register. In this case, while plaintiffs claim that the ratification of Amendment One has resulted in the possible loss of the need of a referendum on some bond issues, they have not challenged the substance of Amendment One, but rather have challenged the manner in which it was submitted to the voters. Their challenge concerns the form of the ballot question, and any alteration in their right to vote in some later bond referenda is, at best, only an “aggravation of the original injury.”

³ It is noteworthy that plaintiffs claim they could not have brought an action challenging the manner in which Amendment One was being submitted to the voters prior to the 2003 election on Amendment One, yet plaintiffs themselves cite cases in which plaintiffs sued before the election to have ballot summaries of proposed constitutional amendments struck from the ballot *before* the election. *See, e.g., Askew v. Firestone*, 421 So.2d 151 (Fla. 1982); *Fla. Ass’n of Realtors v. Smith*, 825 So.2d 532 (Fla. Dist. Ct. App. 1st Dist. 2002).

for such contests or protests rather than on the accrual of the cause of action to begin with. For example, in *Chandler v. City of Winchester, Kentucky*, 973 S.W.2d 78 (Ky. Ct. App. 1998), the Kentucky Court of Appeals considered a challenge involving the adoption of an amendment to the Kentucky Constitution. Part of that adopted amendment removed a portion of KY. CONST. § 157, which provided that no local government could become indebted for any purpose in an amount exceeding its income for a year without the approval of two-thirds of its voters. As he was required to do by Kentucky law, the then-sitting Attorney General prepared the ballot question highlighting and summarizing the substance of the amendment. After the amendment's ratification, the City of Winchester, again in accordance with Kentucky law, filed a "complaint for validation of a bond issue." The new Attorney General entered an appearance in the case, opposed the bond validation proceeding, and filed a motion to dismiss the proceeding on the ground that the newly-enacted constitutional amendments were void due to the alleged failure of the former Attorney General to adequately set forth the substance of the amendments. Noting the distinction between a "void" election (one in which the legal prerequisites to a valid election have not been met) and a "voidable" election (one with some latent insufficiency), the court held that the Kentucky Attorney General had alleged a latent insufficiency that could only, at most, render the election "voidable." "The attorney general's challenge to the ballot question involves an alleged latent defect which would render the election 'only voidable upon proof of underlying facts . . .'" *Id.* at 82. As a result, "the fifteen-day limitation period of KRS 120.280(1) was applicable and [] the attorney general's challenge to the election some two years later was time-barred." *Id.*⁴

⁴ This holding not only supports the proposition that challenges to ballot questions should be considered election contests or protests, but also implicitly rejects plaintiffs' argument that no cause of action could accrue until a local government attempted to issue bonds without a referendum.

A similar result was reached by the Supreme Court of Tennessee in *Dehoff v. Attorney Gen.*, 564 S.W.2d 361 (Tenn. 1978). There, the court held that a suit alleging that a referendum question reducing the term of county judges to four years was invalid because it was misleading and violated applicable Tennessee law was an election contest. “[W]e are committed to the broad proposition that insofar as an action seeks a judicial determination that an election is invalid, whatever the cause of invalidity, it is an election contest and, thus, subject to the requirements of the election code for such contests.” *Id.* at 363-364. Because this challenge was an election contest, the court held it was subject to a ten-day statute of limitations.

In *Busse v. The City of Golden*, 73 P.3d 660 (Colo. 2003), the Colorado Supreme Court considered a challenge to a ballot initiative that proposed the issuance of bonds. The plaintiffs in that case challenged one of the ballot initiatives on the grounds that it did not comply in form with Colorado law. The Colorado Supreme Court agreed with the trial court that such a challenge constituted a challenge to the form or content of the ballot and was therefore subject to a statute of limitations “which requires that the contestor file a complaint within five days after the title of the ballot issue or ballot question is set by the political subdivision.” *Id.* at 664. Because the action challenging the ballot initiative was not brought within this very short time frame, plaintiffs’ challenge was time-barred. A similar holding can be found in *Molleck v. City Council of the City of Golden, Colorado*, 884 P.2d 725 (Colo. 1994), which concluded that an action challenging an election that authorized an increased sales tax, as well as alleging the city’s failure to comply with Colorado law in adopting a fund ordinance, was an election contest subject to the 10-day period for election contests provided by the Colorado law. *See also State ex rel. Industrial Servs. Contractors, Inc. v. County Comm’n of Johnson County, Missouri*, 918 S.W.2d 252 (Mo. 1996) (holding that challenges to the wording of a proposition on a ballot are election contests subject to a statute of

limitations of thirty days after the official announcement of the election result by the appropriate election authority).

North Carolina law provides that an election protest is the proper way to challenge the “conduct” of an election, or to claim an irregularity in the election. N.C. GEN. STAT. § 163-182.9. This must be understood to include all aspects of conducting an election, including the preparation, design of the ballot and the wording of ballot questions and claims of irregularities in the wording of ballot questions. Accordingly, 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. N.C. GEN. STAT. § 163-182.5(b) (2004). Thus, this action was untimely filed and is barred.

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

Plaintiffs claim that laches cannot apply in this case because there is no showing of prejudice to defendants in the form of unavailable witnesses, lost evidence or the like. By so arguing, plaintiffs present an inappropriately restrictive view of laches.

Under the equitable doctrine of laches, the failure to exercise an enforceable right for an unreasonable amount of time may bar both equitable and legal relief. *Goshen Road Envtl. Action v. United States Dep’t. of Agric.*, 891 F. Supp. 1126, 1132 (E.D.N.C. 1995), *aff’d*, 103 F.3d 117 (4th Cir. 1996); *White v. Daniel*, 909 F.2d 99, 104-05 (4th Cir. 1990) (district court abused its discretion in failing to dismiss redistricting challenge on basis of laches), *cert. denied*, 501 U.S. 1260 (1991). *See also Marshall v. Meadows*, 921 F. Supp. 1490, 1494 (E.D. Va. 1996), *appeal dismissed*, 105 F.3d 904 (4th Cir. 1997) (dismissing challenges to open primary law on basis of laches, stating “the Fourth Circuit disdains a hypertechnical reading of the rules; laches is an appropriate issue for a

motion to dismiss in this case.”); *MacGovern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986) (dismissing challenges to apportionment plan on basis of laches).

Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant. *See Herman v. City of Chicago*, 870 F.2d 400, 401 (7th Cir. 1989). *In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously. See, e.g. Williams v. Rhodes*, 393 U.S. 23, 34-35, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968). As time passes, the state’s interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made.

Fulani v. Hogsett, 917 F.2d 1028, 1031 (7th Cir. 1990), *cert. denied*, 501 U.S. 1206 (1991) (emphasis added). Laches is proven by the combination of “(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *White*, 909 F.2d at 102 (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)). Delay and prejudice are “a complimentary ratio: the more delay demonstrated, the less prejudice need be shown.” *Marshall*, 921 F. Supp. at 1494. This equitable doctrine is supported by sound principles of judicial and public policy that operate independently of the merits of plaintiffs’ claims, recognizing that an unexcused delay in prosecuting a claim, whether through simple neglect or intentional abuse of process, can prejudice the rights not only of specific defendants but of those unnamed who would be affected by tardy adjudication of the claim. In the present case, such prejudice would reach all voting citizens of North Carolina and local governments, who have relied on the results of the referendum on Amendment One in 2004 as having settled the will of the people of North Carolina.

Plaintiffs’ failure to proceed with their claim expeditiously operates to the substantial prejudice of the State defendants and the voting public of North Carolina. To satisfy the prejudice requirement of the doctrine of laches, defendants need show only slight prejudice owing to the unreasonable length of plaintiffs’ delay in filing suit. *White*, 909 F.2d at 103; *Marshall*, 921 F. Supp. at 1494. Substantial prejudice is present here, where plaintiffs are, in effect, seeking to overturn the

results of statewide election held in 2004 on grounds that could and should have been made prior to or immediately after that election. Where, as here, plaintiffs were or should reasonably have been aware of the essential facts that form the gravamen of their complaint – the language of the ballot question on Amendment One – yet they waited to act not only until after the election but until after reliance on the ratification of Amendment One by local governments. In their complaint, plaintiffs themselves cite to five separate pending or proposed projects reliant on the bond financing mechanism provided by Amendment One. (*See* Compl. ¶¶ 36-44.) Plaintiffs’ unreasonable delay prejudices not only the named defendants but the electorate of North Carolina and local governments that have relied on Amendment One and the statutes that implement its provisions. *See Ross v. State Board of Elections*, 387 Md. 649, 876 A.2d 692 (2005) (laches barred action filed three days after the election when plaintiff adopted a “wait-and-see” attitude rather than raising issues prior to the election).

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED.

As this Court is aware, in *Burton v. Georgia*, 953 F.2d 1266 (11th Cir. 1992), the majority held “that a ballot cannot be misleading as a matter of law if it adequately identifies the particular proposed amendment to be voted on, even if the ballot language affirmatively misrepresents the effect of the proposed amendment.” *Id.* at 1272 (Johnson, concurring specially). Indeed, the Eleventh Circuit stated in *Burton*:

We are aware of no cases in which a federal court has invalidated a state election on grounds like those asserted by plaintiffs. For such extraordinary relief to be justified, it must be demonstrated that the state’s choice of ballot language so upset the evenhandedness of the referendum that it worked a “patent and fundamental unfairness” on the voters. Such an exceptional case can arise, in the context of a case such as this one, *only* when the ballot language is so misleading that voters cannot recognize the subject of the amendment at issue. In such a case, the voters would be deceived, in a concrete and fundamental way, about “what they are voting for or against.” *Burger v. Judge*, 364 F.Supp. 504, 511 n. 16 (D.Mont.1973) (upholding

state referendum on constitutional amendment against due process challenge to ballot language) (*quoting Kohler v. Tugwell*, 292 F.Supp. 978, 982 (E.D.La.1968)).

As long as citizens are afforded reasonable opportunity to examine the full text of the proposed amendment, broad-gauged unfairness is avoided if the ballot language identifies for the voter the amendment to be voted upon. Therefore, substantive due process requires no more than that the voter not be deceived about what amendment is at issue.

Id. at 1269 (footnotes omitted). The reasoning followed by the Eleventh Circuit is particularly instructive:

Plaintiffs complain that the ballot language misleads voters about the effect Amendment One will likely have on the ability of citizens to sue the state of Georgia. We cannot accept the proposition that substantive due process imposes an affirmative obligation on states to explain – some might say speculate – in ballot language the potential legal effect of proposed amendments to the state constitution. Such future effects are almost impossible to predict with accuracy, and the constitutionality of a state referendum ought not to be contingent on events that may occur long after the referendum, such as, judicial decisions construing or applying the amendment at issue.

We see no “patent and fundamental unfairness” inherent in the state’s failure, if any, to convey the legal effect of Amendment One – that is, to explain the current state of Georgia immunity law and the changes that Amendment One would likely bring about if adopted. The ballot language is intended only to identify for the voters the amendment to be passed upon; voters must inspect the text of the amendment itself to determine, for themselves, the legal effect of its passage. In this respect, the language identifying proposed constitutional amendments serves much the same role on the ballot as a candidate’s name in an election for political office. In general, voters presumably do not select officials on the basis of their names, but on the policies and programs those names represent. . . .

Were we to adopt plaintiffs’ contention, however, every amendment summary would be subject to federal court consideration of whether the change in the law implied by the ballot language is a “fair” representation of the amendment’s actual import – whatever that may be. So long as the election process is not so impaired that it is “patently and fundamentally unfair,” substantive due process is satisfied. It is not for federal courts to decide whether the state General Assembly could have selected some other language, or some other approach, that might have better informed the voters of Amendment One’s content. “It is, by now, absolutely clear that the Due Process Clause does not empower the judiciary ‘to sit as a superlegislature to weigh the wisdom of legislation.’” *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124, 98 S. Ct. 2207, 2213, 57 L. Ed.2d 91 (1978) (*quoting Ferguson v. Skrupa*, 372 U.S. 726, 731, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93

(1963)). We feel confident that a ballot form that provided, “Shall the state constitution be amended to provide as follows:” and then set out in full the text of a proposed amendment would satisfy due process, and yet even the text of the amendment itself might imply a change in the law potentially misleading to voters who are unfamiliar with the existing law being altered by the amendment.

Id. at 1270-1271 (footnotes omitted).⁵

Plaintiffs here have alleged that some voters might have been misled by the ballot question presented to the voters on Amendment One. This is a far cry from a “patent and fundamental unfairness” that deceives, in a concrete and formal way, voters as to what they are being asked to vote for or against. *Id.* at 1269. Plaintiffs’ complaint simply does not meet the standard aptly described in *Burton*, and the language of the ballot question itself refutes any suggestion that this constitutes such an “exceptional case” that the voters have been “deceived in a concrete and fundamental way.” *Id.* See also *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005), *cert. denied*, ___ U.S. ___, 164 L. Ed. 2d 519 (2006); *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 858 (9th Cir. 2002); *Cartagena v. Calderon*, 150 F. Supp. 2d 338 (D.P.R. 2001); *Citizens for Legislative Choice v. Miller*, 993 F. Supp. 1041, 1050 (E.D. Mich. 1998), *aff’d*, 144 F.3d 916 (6th Cir. 1998).

The North Carolina Supreme Court has made clear that all aspects of the manner in which a proposed constitutional amendment is put before the voters is within the control of the General Assembly.

⁵ Due to principles of federalism, a federal court must, of course, be more deferential to the manner in which a state legislature submits proposed constitutional amendments to the voters than a state court might be required to be. The understanding of this principle no doubt lies behind the concern of the *Burton* court that were it “to adopt plaintiffs’ contention . . . every amendment summary would be subject to federal court consideration of whether the change in the law implied by the ballot language is a ‘fair’ representation of the amendment’s actual import – whatever that may be,” and the court’s insistence that “[i]t is not for federal courts to decide whether the state General Assembly could have selected some other language, or some other approach, that might have better informed the voters” of a proposed amendment’s content. *Id.* at 1271.

Therefore it is that the Constitution provides not only for a three-fifths vote of each house [on submitting a proposed constitutional amendment to the people], but also that the submission should take place only “in such manner as may be prescribed by law,” and this means, no more or less, than that the Legislature may have complete control of the submission, which is not confined to the mere act of voting, but embraces all measures necessary to put in force the will of the people as expressed at the ballot box. The power given to the General Assembly to submit amendments to the people is a general and unrestricted one, in the sense that they may, without any limitation, prescribe the method by which this shall be done – in other words, the procedure throughout, and from beginning to end.

Read v. City of Durham, 173 N.C. 668, 675, 92 S.E. 712, 715 (1917).⁶ The General Assembly exercised this “general and unrestricted” power in S.L. 2003-403, when it established by law the language to be placed on the ballot for the submission of Amendment One to the people. As a matter of law, this language cannot be said to create a “patent and fundamental unfairness” that deceives voters and prevents them from understanding what they are voting on. *Burton*, 953 F.2d at 1269. For this reason, plaintiffs have failed to state a claim for which relief can be granted.

CONCLUSION

This Court has already dismissed plaintiffs’ claim under § 5 of the Voting Rights Act. 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 Session Law 2003-403, must be dismissed.

⁶ *Reade* was decided under the provisions of Art. XIII, § 2, of the 1868 Constitution, as amended, not under the current provisions of Art. XIII, § 4, of the 1971 Constitution. For purposes of the Court’s analysis in *Reade*, however, the two provisions are substantially identical.

Respectfully submitted, this the 7th day of June, 2007.

ROY COOPER
ATTORNEY GENERAL

/s/ Tiare B. Smiley
Tiare B. Smiley
Special Deputy Attorney General
State Bar No. 7719
tsmiley@ncdoj.gov

/s/Alexander McC. Peters
Alexander McC. Peters
Special Deputy Attorney General
State Bar No. 13564
apeters@ncdoj.gov

North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

CERTIFICATE OF SERVICE

I hereby certify that I have this day, June 7, 2007, electronically filed the foregoing **SUPPLEMENTAL 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:

Robert F. Orr
Pamela B. Cashwell
Jeanette Doran Brooks
225 Hillsborough Street,
Suite 245
Raleigh, NC 27603

Respectfully submitted,

/s/ Tiare B. Smiley
Tiare B. Smiley
Special Deputy Attorney General