

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,)	REPLY 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 the undersigned counsel, and hereby offer this Reply Memorandum of Law in support of their Motion to Dismiss. This Reply Brief will be limited to matters raised in Plaintiffs’ Memorandum requiring particular response. Other matters can be addressed in oral argument.

NATURE OF THE CASE

The Nature of the Case is as set forth in defendants’ Memorandum of Law in support of their Motion to Dismiss, filed on December 19, 2006, and incorporated herein by reference as though fully set forth.

STATEMENT OF THE FACTS

The Statement of the Facts is as set forth in defendants’ Memorandum of Law in support of their Motion to Dismiss, filed on December 19, 2006, and incorporated herein by reference as though fully set forth.

ARGUMENT

I. AMENDMENT ONE HAS BEEN PRECLEARED, AND ANY CHALLENGE UNDER § 5 OF THE VOTING RIGHTS ACT IS MOOT.

On December 21, 2006, the United States Department of Justice precleared N.C. Sess. Law 2003-403 (“Amendment One”) pursuant to § 5 of the Voting Rights Act. *See* Def’s Dec. 21, 2006, Notice of Filing (Docket No. 32). This action by the United States Department of Justice renders any § 5 challenge to Amendment One moot. “Once a covered jurisdiction has complied with these preclearance requirements, § 5 provides no further remedy.” *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996). Plaintiffs appear to concede as much with regard to Count One of their Complaint. (Pls’ Mem. p. 10) Nevertheless, plaintiffs argue that the preclearance of Amendment One does not moot that portion of the “maladministration of an election” claim contained in Count Three that is based on § 5. Plaintiffs argue that part of the alleged “maladministration” occurred through the failure to receive preclearance *prior to* the 2004 referendum on Amendment One, so that at the time the referendum was held, § 5 had been violated. This argument cannot withstand scrutiny.

Initially, it is noted that nowhere in Count Three of plaintiffs’ complaint do they allege that failure to receive preclearance of the substance of the amendment *prior to* the 2004 referendum violated § 5; rather, they simply allege that Amendment One had not been precleared. They admitted in their complaint that the conduct of the referendum itself on November 2, 2004, was submitted and received § 5 preclearance prior to the election. (Compl. ¶ 34) Hence, plaintiffs’ argument is substantively faulty because until Amendment One had been ratified by the electorate, it was not the law of North Carolina and was not required to be precleared.

The Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision or (b) any proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance. However, with respect to a change for which approval by referendum, a State or Federal court or a

Federal agency is required, the Attorney General *may* make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

28 CFR 51.22 (2007) (emphasis added). *Cf. McCain v. Lybrand*, 465 U.S. 236, 256 (1984) (“a submission must include the date of final adoption of the change affecting voting, [28 C.F.R.] 51.10(a)(2)”). Thus, while it might have been possible to submit Amendment One to the United States Department of Justice prior to the 2004 referendum, North Carolina was not required by § 5 to do so. Federal law simply requires preclearance prior to *implementation* of Amendment One. That preclearance has now been received, mooting *any* claim under § 5. *Lopez*, 519 U.S. at 23.

Finally, plaintiffs appear to suggest in their Statement of the Facts that the United States Department of Justice has only “purported” to preclear Amendment One, because the letter from USDOJ “continued by specifically stating that failure to object does not bar litigation to enjoin enforcement of the change.”¹ (Pls’ Mem. p. 7) Plaintiffs misconstrue the import of this standard language, contained in all preclearance letters.

In light of the potential severity of the § 5 remedy, the statutory language, and the legislative history, we think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be “no dragging out” of the extraordinary federal remedy beyond the period specified in the statute. *Switchmen v. National Mediation Board*, 320 U.S., at 305. Since judicial review of the Attorney General’s actions would unavoidably extend this period, it is necessarily precluded.

Our conclusions in this respect are reinforced by the fact that the Attorney General’s failure to object is not conclusive with respect to the constitutionality of

¹ The preclearance letter included this sentence: “However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin enforcement of the change.”

the submitted state legislation. The statute expressly provides that neither “an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General’s failure to object . . . shall bar a subsequent action to enjoin enforcement” of the newly enacted legislation or voting regulation. *Cf. Dunlop v. Bachowski*, 421 U.S. 560, 569-570 (1975). It is true that it was the perceived inadequacy of private suits under the Fifteenth Amendment that prompted Congress to pass the Voting Rights Act. *Allen v. State Bd. of Elections*, 393 U.S., at 556 n. 21; *South Carolina v. Katzenbach*, 383 U.S., at 309. But it does not follow that Congress did not intend to preclude judicial review of Attorney General actions under § 5. The initial alternative requirement of submission to the Attorney General substantially reduces the likelihood that a discriminatory enactment will escape detection by federal authorities. Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation. But it cannot be questioned in a suit seeking judicial review of the Attorney General’s exercise of discretion under § 5, or his failure to object within the statutory period.

Morris v. Gressette, 432 U.S. 491, 504-505 (1977) (footnotes omitted). In other words, the preclearance letter makes clear that preclearance only precludes any further ability to challenge an enactment under § 5 of the Voting Rights Act; it does not preclude challenges alleging a discriminatory purpose or effect under § 2 or under the due process or equal protection clauses of the Fourteenth Amendment to the United States Constitution. It is clear, then, that plaintiffs’ claims under § 5 are moot. Plaintiffs have not alleged any facts suggesting a discriminatory purpose or effect, and have made no such claims under § 2 of the Voting Rights Act or the Fourteenth Amendment to the United States Constitution. The language contained in the preclearance letter indicating such actions are not precluded is irrelevant to this action.

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

Plaintiffs argue that the appropriate statute of limitations to be applied in this action is the three-year statute of limitations contained in N.C. GEN. STAT. § 1-52(2). Further, plaintiffs argue that any cause of action did not accrue, and therefore the statute of limitations did not begin to run, “until their potential opportunity to vote on TIF projects was denied.” (Pls’ Mem. p. 13) This

argument however is at odds with the basis of plaintiffs' allegations and claims for relief – that the *method* by which Amendment One was ratified was faulty. Under plaintiffs' argument, if no local government availed itself of the provisions of Amendment One for 30 years after its ratification, then no cause of action to challenge the method by which it was ratified would accrue until 30 years after ratification. Such a result is absurd. Because plaintiffs claim that their injury arises from the way in which Amendment One was presented to the voters for ratification, then their cause of action necessarily accrued when decisions about the referendum were made and became public knowledge.

All of plaintiffs' claims stem from the enactment of Session Law 2003-403. (Compl. Ex. A) Indeed, plaintiffs admit that their claims “are grounded in their fundamental allegation that the full text of Amendment One did not appear on the ballot in 2004 and that the language that did appear could have misled some voters.” (Pls' Mem. p. 18 (quoting Defs' Mem., p. 14)) Session Law 2003-403, which the Governor signed into law on August 7, 2003, contained not only the text of the proposed constitutional amendment but also the text of the language to be placed on the referendum ballot. Thus, both the text of Amendment One and the ballot language that voters would see at the 2004 referendum were set by law on August 7, 2003. As defendants have already noted and as the law has long provided, plaintiffs were charged with knowledge of the law. *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 *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.

Defendants maintain that the plaintiffs' challenge should have been brought as an election protest. *See* Def's Mem., Arg. III (incorporated herein by reference as though fully set forth). Nevertheless, even if the three-year statute of limitations is applied, the cause of action accrued and the statute of limitations began to run on August 7, 2003. Inasmuch as this case was filed on November 6, 2006, more than three years passed between the time that plaintiffs' cause of action accrued and this action was filed, and plaintiffs' claims should be dismissed.

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

Plaintiffs contend that the doctrine of laches should not be applied in this case because they could not have brought any cause of action until they were denied the right to vote on the issuance of bonds. As already shown *supra*, this is a specious argument. Plaintiffs' cause of action does not challenge the substance of Amendment One but only the manner in which Amendment One was placed before the voters in the 2004 referendum. The manner in which that referendum was to be conducted was established on August 7, 2003, when the Governor signed Session Law 2003-403 into law.² At the latest, it was known at the time the 2004 referendum occurred. Yet plaintiffs sat on their rights and did nothing while Amendment One was ratified, certified and relied upon by local governments.

² Notably, no plaintiffs allege that they themselves were misled by the ballot language. As this action is not, despite plaintiffs' claims to the contrary, a class action, *see* Arg. V, *infra*, plaintiffs must at the least allege that, despite their presumed knowledge of Amendment One, they were in fact misled by the language placed on the ballot. Absent such allegations, plaintiffs have failed to state a claim for relief in addition to having raised claims that are barred by laches.

It is disingenuous for plaintiffs to claim that the State of North Carolina is not prejudiced in this lawsuit. Amendment One was ratified by the voters, certified by the Secretary of State and became part of the North Carolina Constitution. Plaintiffs themselves have provided the Court a list of local governments that have relied on the provisions of this economic development tool. (Compl. ¶¶ 36 – 43) Yet plaintiffs come now at this late date to challenge not the substance of Amendment One, but the method by which it was submitted to the voters – a method that was established by law fifteen months prior to the referendum and over three years prior to the initiation of this lawsuit. As defendants have previously noted, the courts have declared that, as a matter of public policy, disputes about an election should be resolved as quickly as possible so that election results are settled. 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 election statutes and regulations, election results will not be overturned where the challenge could have been brought prior to the election). In this case, because the substance of the provision affects substantial financial investments, there is also an economic need for finality. Plaintiffs make no claim against the development tool itself, but instead raise claims that could and properly should have been raised prior to the 2004 referendum. This untimely attempt to seek to undo ballot results unquestionably prejudices the people of North Carolina.

IV. PLAINTIFFS OFFER NO LAW SUPPORTING THEIR CLAIM THAT THE BALLOT LANGUAGE WAS INSUFFICIENT.

Plaintiffs' claims turn on their allegation that the ballot language used in the referendum on Amendment One was insufficient to apprise voters as to exactly on what they were voting. Defendants have cited the Court relevant case law regarding the standard applied for judging the sufficiency of language that places a constitutional amendment on the ballot for a vote by the people. *See, e.g., Fla. Ass'n of Realtors v. Smith*, 825 So. 2d 532, 536 (Fla. Dist. Ct. App. 1st Dist. 2002); *Hardy v. Hannah*, 849 S.W.2d 355, 358 (Tex. App. Austin 1992); *Smith v. Calhoun Community Unit School Dist.*, 16 Ill. 2d 328, 335, 157 N.E.2d 59, 63 (1959); *Ex parte Tipton*, 229 S.C. 471, 476-77, 93 S.E.2d 640, 643 (1956). *See also* 26 AM. JUR. 2d *Elections* § 295. Defendants have also shown the Court that the language appearing on the ballot in the 2004 referendum complied with the standards described in this case law. *See* Def's Mem., Arg. VI (incorporated by reference as though fully set forth).

In response, plaintiffs offer no case law and no judicial standard by which a court may measure the "sufficiency" of a referendum ballot's language. Plaintiffs are asking this Court to nullify a vote of the people based on no more than plaintiffs' anemic claim that some voters, although not them, might have been confused and may not have understood that a "referendum" is a vote of the people. This is not sufficient to state a claim under the federal or state constitutions and the merits of their claims, if reached, should be summarily dismissed.

V. THIS ACTION IS NOT A CLASS ACTION.

Both in the Preliminary Statement of their Complaint and in the Preliminary Statement of their Memorandum in Opposition, plaintiffs claim to bring this action "for themselves and representing a class of registered voters in North Carolina as described hereinafter." Neither the Complaint nor the Memorandum, however, contains any further description of a class, except to

make reference to “other voters similarly situated.” (Compl. ¶¶ 39, 54, 62; Pls’ Mem., p. 1) Plaintiffs’ Complaint is insufficient to support a class action.

Rule 23(a) sets forth the “mandatory requirements” that must be satisfied for the maintenance by a plaintiff of a class action; and, while suits involving racial discrimination lend themselves generally to class treatment, a plaintiff does not satisfy the burden that is his in order to qualify as a proper representative to maintain such an action merely because of his or her race or because he designates his action as a class action. . . . To satisfy the requirements of Rule 23, there must be a class of individuals raising the same claims or defenses too numerous for joinder and the plaintiff must be a representative of that class with a claim ‘typical of the claims or defenses of the class’ both “at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, * * *.” As stated, the burden of establishing these requirements rests on the plaintiff.

Doctor v. Seaboard C. L. R. Co., 540 F.2d 699, 706-707 (4th Cir. 1976) (footnotes omitted).

Plaintiffs’ Complaint contains no allegations describing the purported class or alleging that “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a). A class action can be maintained “only” if these criteria are shown. *Id.*³ Thus, plaintiffs’ Complaint must be viewed only as regards the named plaintiffs and not as a hypothetical class of potentially confused voters. Plaintiffs have failed to bring this action as a class action.

CONCLUSION

Plaintiffs’ claim under § 5 of the Voting Rights Act is moot inasmuch as Session Law 2003-403 has now been precleared by the United States Attorney General. The Court lacks subject matter jurisdiction over plaintiffs’ remaining claims under the United States and North Carolina

³ That this is not a “class” action is further demonstrated by plaintiffs’ failure to file a motion for class certification and to seek certification as soon as practicable after commencement of the action as required by FED. R. CIV. P. 23(c)(1)(A).

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, and two years after the certification of the ratification of Amendment One, must be dismissed.

Respectfully submitted, this the 25th day of January, 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, January 25, 2007, electronically filed the foregoing **REPLY 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