

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

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

RICHARD L. BISHOP, et al.,)	
)	
Plaintiffs,)	PLAINTIFFS' SUPPLEMENTAL
)	MEMORANDUM IN OPPOSITION TO
v.)	DEFENDANTS' MOTION TO DISMISS
)	
GARY O. BARTLETT, et al.)	Fed. R. Civ. Pro. 12(b)(1) and (6)
)	Local Rules 7.1(e) and 7.2
<u>Defendants.</u>)	

Now come Plaintiffs, by and through undersigned counsel, and hereby offer this Supplemental Memorandum of Law in opposition to Defendants' Motion to Dismiss as ordered by the Court on May 17, 2007.

PRELIMINARY STATEMENT

Plaintiffs, Richard L. Bishop, Jack L. Moore, Michael A. Joyce, and Christopher R. Donahoe, brought this action pursuant to Section 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973(c), and pursuant to 42 U.S.C. § 1983, requesting this Court to order declaratory and equitable relief in the form of an injunction prohibiting the Defendants or others acting in concert with them from enforcing, administering or implementing SECTION 23 of North Carolina's HB 1293/SB 725, titled "AN ACT TO AMEND THE NORTH CAROLINA CONSTITUTION TO PERMIT CITIES AND COUNTIES TO INCUR OBLIGATIONS TO FINANCE THE PUBLIC PORTION OF CERTAIN ECONOMIC DEVELOPMENT PROJECTS" ("Amendment One"), now Article V, § 14 of the North Carolina Constitution, and

finding null, void and unenforceable the same and all election results related thereto on the grounds that same are violative of the North Carolina and United States Constitutions and have not been properly precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973, *et seq.*

NATURE OF THE CASE

The Nature of the Case is largely as set forth in plaintiff's Memorandum of Law in opposition to defendants' Motion to Dismiss, filed on January 8, 2007, and incorporated herein by reference as though fully set forth. The Court heard argument on the Motion to Dismiss on May 17, 2007. At that time, the Court dismissed Count One (alleging a violation of the Voting Rights Act) for mootness and ordered the parties to provide supplemental memoranda of law on issues relating to the statute of limitations, standing, laches, and failure to state a claim upon which relief may be granted.

STATEMENT OF THE FACTS

The Statement of Facts is as set forth in plaintiffs Memorandum of Law in opposition to defendants' Motion to Dismiss, filed on January 8, 2007, and incorporated herein by references as though fully set forth.

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 and must draw all reasonable inferences in favor of the plaintiffs. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) ("At this stage of the litigation, we must accept petitioner's allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.")(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

II. The Statute of Limitations Does Not Bar Relief on Counts Two or Three

Plaintiffs have brought a claim that the process by which Amendment One was ratified and the method by which it was brought to a vote violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the State Constitution. Specifically, Plaintiffs allege that the method by which the General Assembly sought to amend the North Carolina Constitution violates their Due Process rights in that: 1) the language of the actual amendment was inadequately made available to the qualified voters of the State; 2) the actual amendment to the North Carolina Constitution was not submitted to the qualified voters of the State; 3) only an abbreviated summary with potentially misleading language was instead submitted to the qualified voters of the State; and 4) the language of the ballot question was insufficient to adequately apprise voters that, if passed, the amendment would deprive them of their constitutionally given right to approve or disapprove the issuance of the bonds authorized by HB 1293/SB 725.

A. The Applicable Statute of Limitations is Three Years. N.C.Gen. Stat. § 1-52(2).

Defendants have correctly pointed out that § 1983 does not contain a statute of limitations and further that the Supreme Court and the Fourth Circuit have directed the use of analogous state statutes of limitation for § 1983 actions. See Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987); Thorn v. Jefferson–Pilot Ins. Co., 445 F.3d 311, 320 (4th Cir. 2006).

As Plaintiffs argued in their previous filed Memorandum of Law and at the hearing on the Motion to Dismiss, the correct statute of limitations is found at N.C. Gen. Stat. § 1-52(2), which provides a three year statute of limitations “[u]pon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it.” The Fourth Circuit has held that claims under § 1983 arising in North Carolina have a three year statute of

limitations. See generally Bireline v. Seagondollar, 567 F.2d 260 (4th Cir. 1977), overruled on other grounds 947 F.2d 1158 (Plaintiff brought §1983 claim alleging termination based upon sex discrimination).

B. The Cause of Action Did Not Accrue Until Plaintiffs Had Standing to Bring a Claim

Plaintiffs assume for purposes of this argument that the principle statute of limitations question for the Court at this point is: when did the statute of limitations begin to run? The Fourth Circuit has explained that although the length of the statute of limitations for a § 1983 claim is borrowed from state law, accrual is set by federal law. Bireline v. Seagondollar, 567 F.2d 260 (4th Cir. 1977), supra; Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975).

The cause of action accrues when a plaintiff has been injured and has a right to maintain an action. See generally Horne v. Firemen’s Retirement System of St. Louis, 69 F.3d 233, 236 (8th Cir. 1995) (“A cause of action accrues when a suit may be maintained thereon.”)(citing Black’s Law Dictionary 21 (6th ed. 1990)). Thus, a plaintiff must not only know the facts giving rise to his cause of action but he must in fact have a cause of action. An essential component of having a cause of action is having *standing* to bring a cause of action, for unless a plaintiff has standing, his suit may not be maintained.

The threshold requirement of standing imposed by Article III of the Constitution is that those who seek to invoke the power of federal courts must allege an actual case or controversy. In City of Los Angeles v. Lyons, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983), the Supreme Court stated that to satisfy the threshold “case or controversy” requirement of Article III, “[t]he plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or

threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’ ”

Accord, Meis v. Gunter, 906 F.2d 364, 367 (8th Cir.1990), cert. denied, 498 U.S. 1028, 111 S.Ct. 682, 112 L.Ed.2d 673 (1991). See also Flast v. Cohen, 392 U.S. 83, 94-101, 88 S.Ct. 1942, 1949-1953, 20 L.Ed.2d 947 (1968); Jenkins v. McKeithen, 395 U.S. 411, 421-425, 89 S.Ct. 1843, 1848-1851, 23 L.Ed.2d 404 (1969) (opinion of Marshall, J.).

Plaintiffs in the federal courts “must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.” Linda R.S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). There must be a “personal stake in the outcome” such as to “assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

Standing principles remain even where the issues and claims are statutory, rather than wholly constitutional. Cf. United States v. SCRAP, 412 U.S. 669, 687, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973). Abstract injury is not enough. It must be alleged that the plaintiff “has sustained or is immediately in danger of sustaining some direct injury” as the result of the challenged statute or official conduct. Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. Golden v. Zwickler, 394 U.S. 103, 109-110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941); United Public Workers v. Mitchell, 330 U.S. 75, 89-91, 67 S.Ct. 556, 564-565, 91 L.Ed. 754 (1947).

The cause of action accrues and the statute of limitations commences “when the plaintiff

possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action.” Nasim v. Warden, Md. House of Corr., 64 F.3d 951, 955 (4th Cir. 1995) (en banc).

Plaintiffs did not have standing until they were injured or in immediate danger of being injured. Plaintiffs submit four possible dates could be used to determine when plaintiffs could have filed this action and so could be used to measure the point at which the proverbial clock started ticking for purposes of the statute of limitations. These are: 1) the date the Text of Explanations was adopted; 2) the date of the election; 3) the effective date of Amendment One; or 4) the date a TIF proposal began proceeding without a referendum. The oldest of these events, the adoption of the Text of Explanations, was two years and two months before the filing of this lawsuit; the oldest of these events, the TIF proposal, was approximately 7-8 months before the filing of this lawsuit. Accordingly, regardless of which one of these dates the Court concludes created an injury sufficient to establish standing, Plaintiffs commenced this action within three years of the accrual of their cause of action.

Defendants argued at the hearing on the Motion to Dismiss that plaintiffs’ cause of action accrued when the legislation requiring Amendment One be submitted to voters was signed into law. See Compl. Ex. A (HB 1293/SB 725). That legislation became law on August 7, 2003, three years and three months before plaintiffs filed this suit. That argument cannot withstand scrutiny.

Plaintiffs could not have filed this action at that time for several reasons. First, many of the events complained of did not occur until September 2004 or later, specifically, the adoption of a misleading amendment summary (Compl. ¶¶ 22-24), the limited publicity of the amendment itself (Compl. ¶ 29), the limited publicity of the amendment summary (Compl. ¶ 25), the

omission of the amendment itself or the summary from the ballot (Compl. ¶¶ 26-27), the misleading campaign by nonparties in support of the amendment (Compl. ¶ 28), and the failure to preclear *prior* to the election the amendment as required by Section 5 of the Voting Rights Act (Compl. ¶¶32-35). Contrary to defendants’ assertion, plaintiffs have complained of these wrongs, as indicated by the preceding cites to the complaint, and have alleged that they have been deprived of the right to vote as a result of *all of these* facts. Indeed, Plaintiffs requested “declaratory and injunctive relief preventing the Defendants and those acting in concert with them from authorizing the incurrence of public debt on the basis of Amendment One, or otherwise enforcing, administering or implementing HB 1293-SB 725.” (Compl. ¶ 68) That is to say, plaintiffs requested relief from the incurrence of public debt absent voter approval.

Second, passage of HB 1293/SB 725 had no legal significance other than to require that Amendment One be submitted to the voters and to detail the substance of the amendment.¹ The legislation itself did not “change the law” so to speak. Rather, it provided for and required a chance for the law to change. A lawsuit at that time would have been based on conjecture and hypothesis, the very thing the Supreme Court has held is insufficient to establish standing. See Golden v. Zwickler, 394 U.S. 103, 109-110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969).

A lawsuit prior to the effective date of a change in the law would have been premature. In an analogous situation, the First Circuit considered a second challenge to a campaign finance statute after the first lawsuit was dismissed because it was filed before the effective date of the statute. Daggett v. Com’n on Governmental Ethics and Election Practices, 172 F.3d 104 (1st Cir. 1999).

There the court distinguished the circumstances of the first lawsuit from those of the second

¹ HB 1293/SB 725 included a statutory scheme for the use and issuance of TIF bonds should the amendment pass.

lawsuit, saying:

In 1997, after adoption of the statute, it was promptly challenged in lawsuits in the district court. They were dismissed as premature, since the statute only became effective on January 1, 1999, and will apply for the first time in the November 2000 elections.

Id. at 108.

The same reasoning which called for dismissal of the first lawsuit in Daggett would have called for a dismissal of this case had it been filed before the effective date of the constitutional amendment in January 2005. Plaintiffs' Complaint is, at its core, that they have lost their right to vote on TIF bonds. The law which has deprived them of that constitutional right is not HB 1293/SB 725; rather, it is Amendment One itself. Amendment One did not take effect until January 2005. Had plaintiffs filed this lawsuit before the effective date of Amendment One, the lawsuit would have been premature, and accordingly, subject to dismissal on that basis.

Amendment One does not preclude a local government from presenting a TIF bond issue to voters in a referendum, see HB 1293/SB 725 attached as Exhibit A to the Complaint, and for that reason, Plaintiffs were not "injured" until they were deprived, or were in immediate danger of being deprived, of the opportunity to vote on a TIF project. Plaintiffs alleged in their Complaint that several TIF projects were in various stages of development (Compl. ¶¶36-38, 40-43) and further that no vote has been held or is scheduled to be held on those projects. (Compl. ¶¶ 39, 44). Plaintiffs also alleged that "without federal court action, the Plaintiffs' federal rights will be without recourse; Plaintiff has no other remedy at law." (Compl. ¶ 67).

Plaintiffs maintain that their right to maintain the instant action did not accrue until their potential opportunity to vote on one or more tax incremental financing ("TIF") projects was denied. Until a TIF project had been proposed to a local government, and that local government

began to move forward with the TIF proposal, none of the Plaintiffs had been denied an opportunity to vote on a TIF bond issuance or was in clear danger of being denied an opportunity to vote. Accordingly, no Plaintiff was injured until a TIF project was formally initiated. Ergo, no Plaintiff had a right to bring an action until a TIF project was proposed.

Moreover, until local governments began to use the financing mechanisms authorized by HB 1293/SB 725 and it became clear no referenda would be held on such bond initiatives, a lawsuit challenging the validity of Amendment One would not have been ripe. Any lawsuit challenging the validity of a bond initiative authorized without voter approval would have amounted to an effort to obtain an advisory opinion—something undeniably beyond the province of the courts. Thus, not only did Plaintiffs not have the right to file the action until at the earliest the spring of 2006, when the first TIF project began, but also this Court would not have had the jurisdiction to hear such an action.

Even if the Court concludes that the right to bring these claims accrued when Amendment One appeared on the ballot, the statute of limitations defense is still unavailable to Defendants. Amendment One appeared on the November 2004 ballot. This action was filed On November 6, 2006, only two years after the election—well within the three year statute of limitations.

In short, the applicable statute of limitations is three years. The time for filing this action did not accrue until, at the earliest, the date the Text of Explanations was adopted on September 1, 2004, or the date of the election on Amendment One on November 2, 2004.² Because the

² Plaintiffs previously argued that the cause of action did not accrue until one or more plaintiffs were denied or were immediately in danger of being denied the right to vote on a TIF project. Plaintiffs have not abandoned this position, but do not reargue it. Plaintiffs rely on their previous arguments on that position and incorporate them by reference herein, but for the convenience of

cause of action did not accrue until September 1, 2004, the statute of limitations will not run until that date this year. Plaintiffs filed this lawsuit in November 2006, only two years after the election and little more than two years after the date the Text of Explanation was adopted. Even if accrual began when Amendment One appeared on the 2004 ballot, the statute did not run prior to the filing of this action in November 2006, only two years after the election. Survival of a motion to dismiss on statute of limitations grounds requires only that the allegations be consistent with a claim that is not time-barred. Harris v. City of New York, 186 F.3d 243 (2d Cir. 1999). Accordingly, Defendants are not entitled to dismissal on the basis of statute of limitations.

III. The Doctrine of Laches Does Not Bar Relief on Counts Two and Three

Defendants also assert the doctrine of laches as a defense to Counts Two and Three of the Complaint. The doctrine of laches has two elements: first, a lack of diligence; and second, prejudice to the defendants. A lack of diligence exists where the plaintiffs delayed “inexcusably or unreasonably in filing suit.” National Wildlife Federation v. Burford, 835 F.2d 305, 318 (D.C. Cir. 1987). See also Boone v. Mechanical Specialties Co., 609 F.2d 956, 958 (9th Cir. 1979); Giddens v. Isbrandtsen Co., 355 F.2d 125, 128 (4th Cir. 1966). Prejudice to the defendants “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.” White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990). The burden to prove prejudice is on the defendant. Giddens, 355 F.2d at 128.

A. The Applicability of the Defense of Laches cannot be Determined at this Stage of the Proceedings

The issue of laches, when raised in a motion to dismiss, is generally premature because

the Court will not repeat those arguments in this Memorandum.

the findings of fact, essential to the elements of unreasonable delay and prejudice, usually are not properly made until at least the summary judgment phase. Because laches is an affirmative defense and both the length of the delay and the existence of prejudice to the defendant are questions of fact, ruling on the merits of a claim of laches raised by a motion to dismiss is inappropriate. Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers, 521 F.Supp. 614 (D.C.Mass. 1981). Although some case law suggests laches may theoretically be raised by preliminary objection, a court should not find it to bar a claim at that point where the issue is free from doubt on the claim of laches. Indeed, laches is typically resolved on summary judgment, the point at which the facts necessary for determining laches may properly be made, the burden of proof of an issue is allocated correctly, and all pertinent factors are considered. A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020, 1039, C.A.Fed. (Cal.),1992).

Laches is an affirmative defense and cannot be set up for summary disposition by a motion to dismiss. (See Topping v. Fry, 147 F.2d 715 (7th Cir. 1945) (“The pertinency of the defense of laches was not apparent on the face of the complaint in this case.”)). Consequently, if a defense of laches is raised, a full hearing of testimony of both sides is required. Rivers v. Black and White Cars, Inc., 1990 WL 303324 (E.D.Va.).

The allegations of the complaint here do not support the findings necessary for a dismissal on grounds of laches. Defendants have not pointed to any allegations which support a finding of either unreasonable delay in the filing of this lawsuit or prejudice to the Defendants, much less findings for both elements of laches. Accordingly, the Court should deny Defendants’ motion to dismiss on the grounds Plaintiff’s claims are barred by laches.

B. Defendants have failed to Prove the Elements of Laches

In their original Memorandum of Law in support of the Motion to Dismiss, Defendants argue Plaintiffs “cannot reasonably claim that they did not discover the wrongs they allege prior to the 2004 referendum.” (Def. Memo. p. 11). This argument misses the point of the laches doctrine. The Ninth Circuit has explained:

The [laches] doctrine bars an action where a party’s unexcused or unreasonable delay has prejudiced his adversary. The bare fact of delay creates a rebuttable presumption of prejudice. It protects against difficulties caused by the unreasonable delay in bringing an action, not against problems created by the pendency of a lawsuit after it is filed.

Boone v. Mechanical Specialties Co., 609 F.2d 956, 958 (9th Cir. 1979) (internal citations and quotations omitted).

The laches analysis does not focus on what facts plaintiffs knew or when plaintiffs learned them. Nor is the focus on the inconvenience caused by litigation. Rather, the focus is on the delay, if any, *in filing the action*. As explained above, Plaintiffs could not have filed this action until they were injured or in immediate danger of suffering an injury because until that time, no plaintiff would have had standing. Plaintiffs set forth above various events which arguably could have given rise to standing to bring this cause of action. Again, Plaintiffs maintain that they did not have standing until a local government began to move forward with a TIF project without plans for a vote. However, should the Court conclude that that is not the genesis of their standing, Plaintiffs submit that the earliest conceivable time at which they would have had standing was September 2, 2004, when the Text of Explanations was adopted. Relying on that benchmark, the delay Defendants claim occurred is a mere fourteen months prior to the filing of the Complaint—a far cry from the multi-year delays which tend to typify laches.

Additionally, Defendants have failed to prove prejudice. They rely on plaintiffs' allegations that local governments have been considering TIF projects as a basis for their otherwise bald assertion of prejudice. However, that reliance is misplaced for two reasons: 1) those allegations only underscore Plaintiffs' position that the claims in this case have only just become ripe; and more importantly 2) prejudice in the context of laches refers to difficulties in defending against a lawsuit.

In Giddens v. Isbrandt Co., Inc., 355 F.2d 125 (4th Cir. 1966), the Fourth Circuit set out the two elements of laches and explained:

Laches is sustainable only on proof of both of two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *The latter contemplates the dispersal and inaccessibility of witnesses, the dimming of recollections and other disadvantages incident to the lapse of time.*

Id. at 127. (internal citations omitted)(emphasis added).

Defendants point to no harm caused to the Defendants themselves which has resulted from the delay they claim establishes a laches defense. They make no claim that their ability to defend the suit is impaired by the alleged delay nor that the delay has caused them financial or other detriment. Even assuming *arguendo* that Defendants could prove prejudice, doing so would require consideration of facts not alleged in the Complaint. This stage in the proceedings is not the appropriate phase for such matters, as discussed above. See also Twigg v. Hospital Dist of Hardee Co., Fl., 731 F.Supp. 469, 471-72 (M.D.Fl.a. 1990) (“As Plaintiffs point out, the motion contains facts not raised by the pleadings, consideration of which the Court is denied on a motion to dismiss. Finding that the doctrines of laches, estoppel and waiver are affirmative defenses to be raised and proven by a defendant, the Court finds no merit to the motion to

dismiss.”); Wilson v. Illinois Cent. R. Co., 147 F.Supp. 513, (N.D.Ill. 1957)(denying as premature motion to dismiss raising allegations not averred in complaint).

Defendants have failed to establish the first and second elements of laches and are, accordingly, not entitled to a dismissal on that basis.

IV. Plaintiffs have Stated a Claim upon Which Relief May Be Granted as to Each Count of the Complaint

Finally, Defendants assert Plaintiffs have failed to state a claim upon which relief may be granted. At this stage in the proceedings, the Court must accept as true all well-pleaded factual allegations in the complaint and must draw all reasonable inferences in favor of the Plaintiffs. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A complaint may be dismissed for failure to state a claim upon which relief may be granted “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In support of their request for dismissal on that basis, Defendants argue that Plaintiffs’ 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.” (Def. Memo p. 14). However, Defendants’ argument neglects to address Plaintiffs’ full contention, i.e. that the entire amendment process, together with the circumstances of the election, combined to deprive plaintiffs of their constitutionally guaranteed right to vote to approve or disapprove TIF bonds.

A. The Ballot Question and Text of Explanation were Legally Insufficient as they Failed to Inform Voters They were being asked to give up a Constitutional Right

As the Supreme Court of Arkansas explained when holding invalid a proposed ballot, a person voting on a constitutional amendment “is simply making a choice between the retention of the existing law and the substitution of something new” and so the purpose of the ballot title is

“to provide information concerning the choice he is called to make.” Christian Civic Action Committee v. McCuen, 884 S.W.2d 605, 607-08 (Ark. 1994). The court framed its inquiry in this way: “the central question to be resolved is whether, in the voting booth, the voter is able to reach an intelligent and informed decision for or against the proposal and to understand the consequences of his or her vote based on the ballot title itself.” Id at 608. Thus, the question is not simply whether a voter can understand what he or she is voting on, but also whether he can understand the “consequences of his or her vote” in light of the ballot. See also Wadhams v. Board of County Com'rs of Sarasota County, 567 So.2d 414 (Fla.,1990) (striking amendment because “[b]y failing to contain an *explanatory statement* of the amendment, however, the ballot failed to inform the public that there was presently no restriction on meetings and that the *chief purpose* of the amendment was to curtail the Charter Review Board's right to meet.) (emphasis in original); Kane v. Kulongoski, 872 P.2d 981 (Or. 1994) (holding insufficient a ballot summary which did not include a “major effect” of a proposed amendment and rewriting summary to include that effect).

In a case eerily on point with the instant case, the language of an amendment was sustained though the summary was held insufficient to apprise voters of the amendment. Kimmelman v. Burgio, 497 A.2d 890 (N.J. Super. A.D. 1985). There, the court first considered a challenge to the wording of an amendment and found the amendment itself was not improper. But, the court went on to address a challenge to the summary of the amendment provided to voters. The court stated:

The difficulty with the statement [summary] is that while it appears to indicate the amendment involves only a routine housekeeping matter, somehow furthering a power the Legislature already has, its real purpose is an attempt to limit the application of the separation of powers and presentment clauses of the constitution, fundamental clauses of great importance. Thus the amendment may

reasonably said to be intended to alter the basic relationship between the executive and legislative branches of government. While the voters may be privileged to this, the Legislature must take reasonable steps to insure that the voters recognize what they have been asked to do.

Id. at 895-96 (internal citations omitted)(emphasis added)

The Kimmelman court recognized that government has not only a duty not to mislead voters but also an affirmative duty to take steps to clarify for voters the substance of a proposed amendment. In reaching its decision to court framed its consideration of the summary in the context of the “fundamental clauses of great importance” which were the subject of the amendment. The state constitutional provisions changed by Amendment One are no less important or fundamental than those at issue in Kimmelman. The right to vote is perhaps as fundamental a right in a republican government as any right could ever be. It is through a person’s vote that he exercises his greatest, most direct voice in government. This is especially true in bond referenda which require the approval of voters and operate as a manner of direct democracy.

Some twenty years before Amendment One, the State attempted to eliminate the right of voters to approve or disapprove TIF bonds. Another attempt was made ten years later. Both those attempts made it clear to voters what the purpose of the then-proposed amendment was—the elimination of voters’ constitutional right to vote on TIF bonds. And, those attempts failed. In 1982, North Carolina voters were asked to vote for or against a “constitutional amendment permitting the General Assembly to enact general laws permitting issuance of tax increment bonds, without voter approval.” N.C. Sess. Laws 1981-1247 § 2. (A copy of which is attached hereto as Exhibit A). In 1994, the ballot question was slightly less clear, though it still

adequately informed voters of the major purpose of the proposed amendment. The 1994 ballot asked voters to vote for or against a

constitutional amendment permitting the General Assembly to enact general laws permitting issuance of bonds without a referendum to finance public projects associated with private industrial and commercial economic development projects, with the bonds to be secured in whole or in part by the additional revenues from taxes levied on the incremental value of the property in the territorial area.

N.C. Sess. Laws 1993-497, § 27 (attached hereto as Exhibit B).

In 1982 and 1994, proposed amendments substantially similar to Amendment One were put to voters. In both cases the ballot question clearly communicated to voters in an upfront and concise manner that they were being asked to allow authorization of bonds without voter approval. Only in 2004, when the major effect of the amendment was buried two-thirds of the way through a ballot question which ran 22 lines and began with the words “constitutional amendment to promote local economic and community development projects” did voters agree to the amendment.

B. The Entire Amendment Process was Misleading to Voters.

The thrust of Plaintiffs’ case is that the entire amendment process, including the Text of Explanation, the ballot question, the lack of ample circulation of the summary and the ballot question, and the advertising campaign, was insufficient and misleading in that it did not make clear to voters that they were being asked to give up an existing right to vote. Plaintiffs have alleged, as more fully set out below, deficiencies with the entire amendment process and with publicity surrounding it. All of those circumstances and events, as pleaded, should be considered by the Court in deciding Defendants’ motion to Dismiss.

Another case raising similar claims will inform the scope of the Court's analysis here by the way in which the facts of that case contrast sharply with the facts here. In Burger v. Judge, 364 F.Supp. 504 (D.C.Mont. 1973), the court considered a lawsuit challenging the adoption of the Montana state constitution. Determining whether voters were misled, the court considered: (1) the official ballot; (2) the official publication mailed to all voters; (3) a newspaper supplement, 195,000 copies of which were distributed to 13 newspapers; (4) an analysis prepared by the constitutional convention, and (5) related session laws.

At the outset, it should be noted that review of ballot measures and election processes are incredibly fact specific and so do not lend themselves to the kinds of analytical framework often available for other types of legal challenges. As one court put it: "Because of the relative uniqueness of each case and the necessarily subjective nature of any synopsis of a given statute or constitutional amendment, it is difficult to establish firm criteria" for judicial review. State ex rel. Bailey v. Celebrezze, 426 N.E.2d 493, 495 (Ohio 1981).

In Burton v. State of Georgia, 953 F.2d 1266 (11th Cir. 1992), the Eleventh Circuit considered a challenge to the constitutionality of ballot language selected by Georgia's legislature for a proposed amendment to Georgia Constitution. The court articulated a general reluctance to intervene in a state election. The Burton court nevertheless went on to articulate the general Due Process standard for an election and when federal court review may be appropriate, explaining:

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.

Id. at 1269 (internal citations and quotations omitted).

Although the Burton upheld the amendment there at issue, that case is important here for two reasons. First, Burton specifies that a ballot may not obfuscate an amendment so that voters cannot recognize the subject matter. Second, Burton leaves open the door for plaintiffs to seek federal court redress in extraordinary cases. See also Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (“[D]ue process is implicated where the entire election process including as part thereof the state's administrative and judicial corrective process fails on its face to afford fundamental fairness. . . . In cases falling within such confines, we think a federal judge need not be timid, but may and should do what common sense and justice require.”).

Two cases from Florida best articulate the principles of fairness applicable to the amendment process and the requirement that voters not be misled. By the standards of each, the process by which Amendment One was adopted fails to satisfy basic principles of Due Process. The first of this is Askew v. Firestone, 421 So.2d 151 (Fla. 1982). In Askew, the plaintiffs appealed a trial court order validating the caption and summary of a proposed constitutional amendment scheduled to appear on the November 1982 general election ballot. The proposed amendment at issue was to remove the absolute two-year ban on lobbying by former legislators and elected officers before their former governmental bodies or agencies, as set forth in the Florida Constitution. Under the proposed amendment, the two-year ban would apply only if an affected person failed to make financial disclosure. The proposed summary of the amendment for the ballot stated that the amendment “ ‘[p]rohibits former legislators and statewide elected officers from representing other persons or entities for compensation before any state government body for a period of 2 years following vacation of office, unless they file full and

public disclosure of their financial interests.’ ” Id. at 153. The court articulated the requirements for a ballot question thusly:

The constitution and the statute require that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his voteAll that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide*What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.*

Id. at 155 (quoting Hill v. Milander, 72 So.2d 796, 798 (Fla. 1954) (emphasis in original)).

Ultimately, the Court held that the joint resolution proposing the amendment was invalid and must be stricken from the ballot because the summary was “misleading to the public concerning material changes to an existing constitutional provision.” Id. at 156. The problem with the summary was that it failed to inform the public that there was presently a *total* ban on lobbying before one's agency for two years, regardless of financial disclosure. Stated alternatively, the summary did not adequately reflect the chief purpose of the joint resolution, which was to remove the two-year absolute ban on certain lobbying activities.

A second Florida case will also inform the Court’s consideration. In Fla. Ass’n of Realtors v. Smith, 825 So.2d 532 (Fla. 1st DCA 2002), the court considered a lawsuit to have a ballot summary of a constitutional amendment struck from the ballot. Quoting at length from Askew, the court concluded that the “threshold deficiency in the ballot summary is that it does not clearly and unambiguously advise the reader” of the substance of the proposed amendment. Id. at 537 (emphasis added). In the end, the court struck the ballot question “[b]ecause this deficiency conceals what appears to be the most significant component of the proposed amendment[.]” Id. at 538. See also Am Jur. 2d Elections § 295 (“The ballot title and summary for a proposed constitutional amendment must state in clear and unambiguous language the chief

purpose of the measure, so as to give the voter fair notice of the decision he or she must make”).

Just like the ballot question in Fla. Ass’n of Realtors, the ballot question in this case did not clearly and unambiguously inform the voter of the most significant component of Amendment One—the abnegation of the people’s right to vote on certain types of bonds. And, just like the ballot in Wadhams, no reference was made to existing constitutional provisions. In fact, the word “vote” appeared no where in the ballot question. (See Compl. ¶ 19, Compl. Ex. A).

Voters here had little more helpful information to go on than the ballot question. As alleged in the Complaint, voters were called upon to cast their votes on Amendment One in a practical vacuum. Amendment One was not circulated to the public. Rather, it was available to the public only as it was published with the session laws of the General Assembly’s 2003 term. (Compl. ¶ 29). The Text of Explanations was adopted only 62 days before the election and was available to the public only via a single distribution to each county board of election and on the State’s website. (Compl. ¶¶ 24, 25) Neither the text of the amendment nor the Text of Explanations was printed on the ballot. (Compl. ¶¶ 20, 26). Moreover, the ballot question which did appear on the ballot did not reference provisions of the constitution which guaranteed the right to vote on the incurrence of public debt and did not inform voters that they were being asked to give up their right to vote on such matters. (Compl. ¶¶ 19, 21)

Plaintiffs also alleged in the Complaint that the text of the amendment and the summary were only minimally available to the public. (Compl. ¶¶ 21, 25, 26, 27, 29) This is in stark contrast to several cases, including some cited by Defendants’ in their initial Memorandum of Law, which noted the widespread circulation of amendments and other materials related to a ballot measure. For example, in Hardy v. Hannah, 849 S.W.2d 355 (Tex. App. Austin 1993), voters filed election contest, seeking to invalidate a constitutional amendment approved by

voters to authorize the issuance of general obligation bonds to fund construction of criminal punishment facilities. The court held the ballot sufficiently informed voters of the content of the amendment and relied in part on the publicity surrounding the amendment:

In Hill, we pointed to the widespread publicity that accompanied the constitutional amendment which abolished the poll tax in Texas. Publicity is required in every attempt to amend the Constitution. Tex. Const. art. XVII, § 1; *see also* Tex.Elec.Code Ann. § 274.021-.023 (West 1986). If this publicity occurs, the voters have been sufficiently informed about the content of the amendments proposed on the ballot.

849 S.W.2d at 358-59 (emphasis added)(internal citations omitted).

Even more on point on questions of both publicity and wording of a ballot question is Kohler v. Tugwell, 292 F.Supp. 978 (E.D.La.1968), *aff'd*, 393 U.S. 531, 89 S.Ct. 879, 21 L.Ed.2d 755 (1969), where plaintiffs sought an injunction prohibiting any action under a state constitutional amendment on the ground that the designation of the amendment as it appeared on the ballot misled voters. The plaintiffs there contended that the language in the ballot's description of an amendment led voters to believe that previously suspended tolls would be reimposed on an existing bridge as soon as the constitutional amendment became effective, when in fact the amendment contained no requirement that tolls be reimposed. Plaintiffs argued that voters were misled, in that the ballot description would lead the average voter to read the ballot question to mean tolls would be reimposed as soon as this amendment becomes effective. The defendants, however, read the ballot designation as saying that the amendment was “to provide for reimposing reasonable tolls” when additional bridges are built. Upholding the amendment, the court relied heavily on the statewide publication in newspapers of the amendment and the availability of the full amendment. Although the Kohler court upheld the amendment, the court stated voters might have believed they were voting on a different reading of the amendment had

they not had the ready opportunity to read the amendment. Because the amendment was so widely circulated, the court did not consider the amendment summary alone.

The issue before us is not a proposition for grammarians. If the average voter had to decide what he was voting on from the ballot alone, he might well have read it as the plaintiffs do. But he did not have to decide from this summary. He could look at the amendment itself.

Id. at 981. Implicit in that statement is the suggestion that a different conclusion might have been reached had voters had to rely on the ballot.

Plaintiffs acknowledge, as they did in the Complaint, that the phrase “which financing is not subject to a referendum” appears in the ballot question. This single phrase does not mitigate the confusion created by the amendment summary or the ballot question for several reasons. First, the average voter may not immediately associate the term “referendum” with “vote,” particularly where the term “vote,” or a derivation thereof, appears nowhere else in the ballot question. Second, that phrase is buried two-thirds of the way through a ballot question which stretched 22 lines and was at the bottom of an already lengthy presidential election year ballot. Third, as alleged in the Complaint, voters had been inundated by a campaign in support of Amendment One, which described the amendment as a means to increase jobs and was silent as to the right to vote. (Compl. ¶ 28). This campaign only exacerbated the confusion inherent in the ballot language which was also unclear on the point that voters were being asked to give up their right to vote. Although Defendants are not directly responsible for the actions of Amendment One supporters, the campaign is nonetheless relevant to the Court’s determination. See Riddle v. Cumberland Co., et al., 104 S.E 662, 666 (N.C. 1920) (“We have seen that the wording of a ballot is to be read and considered in the light of all the facts and circumstances connected with

the election”) Finally, and most paramount, the ballot question makes no reference whatsoever to Article V, § 4, which codified that right of the people to vote on bond initiatives. This cross-reference to §4 is so significant that the text of the Amendment One begins: “Notwithstanding Section 4 of this Article” Thus, the average voter—who probably is unaware of all the matters on which he has the right to vote—had no cause to even consider that he was being asked to give up his right to vote.

CONCLUSION

Plaintiffs' claims have been filed within the time allowed by the applicable statute of limitations, and are not barred by laches. The Court should exercise supplemental jurisdiction over Plaintiffs' state law claims. Plaintiffs have stated a claim upon which relief may be granted. For the reasons stated above, the Court should deny Defendants' Motion to Dismiss.

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

/s/ Jeanette Doran Brooks
Jeanette Doran Brooks (N.C. Bar No. 29127)
brooks@ncicl.org
NORTH CAROLINA INSTITUTE FOR
CONSTITUTIONAL LAW

225 Hillsborough Street, Suite 245
Raleigh, NC 27603
Telephone: (919) 838-5313
Facsimile: (919) 838-5316

/s/Robert F. Orr
Robert F. Orr (N.C. Bar No. 6798)
lorr2@nc.rr.com
3525 Carlton Square PL
Raleigh, NC 27612
Telephone: (919) 785-1705

Counsel for Richard L. Bishop, Jack L. Moore,
Michael A. Joyce, and Christopher R. Donahoe

CERTIFICATE OF SERVICE

I hereby certify that I have this day, June 7, 2007, electronically filed the foregoing PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO 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:

Tiara B. Smiley
Special Deputy Attorney General
tsmiley@ncdoj.gov

Alexander McC. Peters
Special Deputy Attorney General
apeters@ncdoj.gov

North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 761-6763
Counsel for Defendants

This the 7th day of June, 2007.

/s/ Jeanette Doran Brooks
Jeanette Doran Brooks (N.C. Bar No. 29127)
brooks@ncicl.org

NORTH CAROLINA INSTITUTE FOR
CONSTITUTIONAL LAW
225 Hillsborough Street, Suite 245
Raleigh, North Carolina 27603
Telephone: (919) 838-5313
Facsimile: (919) 838-5316