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,	)	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
	)	
v.	)	
	)	
GARY O. BARTLETT, et al.	)	**Fed. R. Civ. Pro. 12(b)(1) and (6)**
	)	**Local Rules 7.1(e) and 7.2**
Defendants.	)	

Now come Plaintiffs, by and through undersigned counsel, and hereby offer this Memorandum of Law in opposition to Defendants' Motion to Dismiss.

PRELIMINARY STATEMENT

Plaintiffs, Richard L. Bishop, Jack L. Moore, Michael A. Joyce, and Christopher R. Donahoe, for themselves and representing a class of registered voters in North Carolina as described hereinafter, 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

Plaintiffs filed this action on November 6, 2006. On December 19, 2006, Defendants filed a motion to dismiss on the grounds that Count One (alleging a Voting Rights Act violation) and a portion of Count Three are moot, that Counts Two and Three are barred by the Statute of Limitations, that Counts Two and Three are barred by laches, that the Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims, specifically Count Four, and that all counts fail to state a claim upon which relief can be granted.

STATEMENT OF THE FACTS

(Amendment Process and Ballot Language)

HB 1293/SB 725 was passed by the General Assembly of North Carolina on third reading on July 19, 2003 and signed by the Governor on August 7, 2003, a copy of which is attached as Exhibit A to the Complaint and incorporated by reference. (Compl. ¶ 13, Compl. Ex. A) Section 1 of that act set forth the specific language of the amendment to the North Carolina Constitution and is hereinafter referred to as "Amendment One":

> Notwithstanding Section 4 of this Article, the General Assembly may enact general laws authorizing any county, city, or town to define territorial areas in the county, city, or town, and borrow money to be used to finance public activities associated with private development projects within the territorial areas, as provided in this section. The General Assembly shall set forth by statute the method for determining the size for the territorial area and the issuing unit. This method is conclusive. When a territorial area is defined pursuant to this section, the current assessed value of taxable real and personal property

> in the area shall be determined. Thereafter, property in the territorial area continues to be subject to taxation to the same extent and in like manner as property not in the territorial area, but the net proceeds of taxes levied on the excess, if any, of the assessed value of taxable real and personal property in the area at the time the area was defined may be set aside. The instruments of indebtedness shall be secured by these set-aside proceeds. The General Assembly may authorize a county, city, or town issuing these instruments of indebtedness to add, as additional security, revenues available to the issuing unit from sources other than the issuing unit's exercise of its taxing power. As long as no revenues are pledged other than set-aside proceeds and the revenues authorized in the preceding sentence, these instruments of indebtedness may be issued without approval by referendum. The county, city, or town may not pledge any property tax revenues other than set-aside proceeds authorized in this section, or in any other manner pledge its full faith and credit unless a vote of the people is held as required by and in compliance with the requirements of Section 4 of this Article. Notwithstanding the provisions of Section 2 of this Article, the General Assembly may enact general laws authorizing a county, city, or town that has defined a territorial area pursuant to this section to assess property within the area at a minimum value if agreed to by the owner of the property.

(Compl. ¶ 18)

Pursuant to HB 1293/SB 725, Section 24, the North Carolina State Board of Elections was required to submit the following question to the voters:

> [ ] For [ ] Against
> Constitutional amendment to promote local economic and community development projects by (i) permitting the General Assembly to enact general laws giving counties, cities, and towns the power to finance public improvements associated with qualified private economic and community improvements within development districts, as long as the financing is secured by the additional tax revenues resulting from the enhanced property valued within the development district and is not secured by a pledge of the local government's faith and credit

> or general taxing authority, which financing is not subject to a referendum; and (ii) permitting the owners of property in the development district to agree to a minimum tax value for their property, which is binding on future owners as long as the development district is in existence.

(Compl. ¶ 19)

The actual language placed on the official state ballot and submitted to the voters of North Carolina on November 2, 2004, was not the actual and complete language of the proposed constitutional amendment. (Compl. ¶ 20) The language which did appear on the ballot did not reference Article V, § 4 of the North Carolina State Constitution. (Compl. ¶ 21)

Just 62 days before the general election, on September 1, 2004, the State, through the Amendment Publications Commission, pursuant to N.C. Gen. Stat. § 147-54.10, adopted the following "Text of Explanations" relating to the proposed Amendment One:

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

immediately upon certification of its passage.

(Compl. ¶¶ 22-24)

As alleged in the Complaint, a copy of the above cited "Text of Explanations" was distributed to each county board of elections on a single occasion and to the press, and was available on the State's website, but was not otherwise distributed to the public. (Compl. ¶ 25) However, the text of Amendment One itself was *not* circulated to the public and was available to the public only as it was published with the session laws of the General Assembly's 2003 term. (Compl. ¶¶ 26, 28, see also Compl. Ex. B and Ex. C)

Neither the "Text of Explanations" nor the full text of Amendment One appeared on the general election ballot on November 2, 2004. (Compl. ¶¶ 20-21, 27)

Plaintiffs alleged in the Complaint that proponents of Amendment One, including a coalition known as North Carolinians for Jobs and Progress, encouraged voters to approve the amendment and, in the weeks prior to the election, ran advertisements in various media encouraging voters to approve the amendment on the grounds that Amendment One would help create jobs and foster economic development. These advertisements did not indicate that Amendment One, if passed, would abolish the voters' constitutional right to vote to approve or disapprove certain types of local government bond financing mechanisms. (Compl. ¶ 28)

On November 2, 2004, the voters of North Carolina answered the question relating to Amendment One as follows: 1,504,383 (51.2%) for; 1,429,185 (48.8%) against. (Compl. ¶ 30) Thereafter, on or about November 23, 2004, the North Carolina State Board of Elections certified the votes cast on Amendment One. (Compl. ¶ 31)

Article V, Section 4, of the North Carolina Constitution, prior to the election of November 2, 2004, stated, in pertinent part:

> (2) Authorized purposes; two-thirds limitation. The General Assembly shall have no power to authorize any county, city or town, special district, or other unit of local government to contract debts secured by a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon, except for the following purposes:
>
> (a) to fund or refund a valid existing debt;
>
> (b) to supply an unforeseen deficiency in the revenue;
>
> (c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;
>
> (d) to suppress riots or insurrections;
>
> (e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
>
> (f) for purposes authorized by general laws uniformly applicable throughout the State, to the extent of two-thirds of the amount by which the unit's outstanding indebtedness shall have been reduced during the next preceding fiscal year.

(Compl. ¶ 16)

Thus, prior to November 2, 2004, North Carolina voters had a right to vote to approve or disapprove bonds to be issued by local governments except in certain, enumerated circumstances.

Plaintiffs alleged that they and all other North Carolina citizens have been deprived of their constitutional right under Article V, § 4 of the North Carolina Constitution to approve or disapprove certain types of local government bond financing mechanisms. (Compl. ¶ 32) They further alleged that as citizens and residents of their respective counties, Plaintiffs and all other voters could be adversely affected by the incurrence of local debt pursuant to HB 1293/SB 725 and deprived of their constitutionally protected right to vote to approve or disapprove the bonds.

(Compl. ¶ 33)

(Preclearance and the Voting Rights Act)

On or about January 20, 2004, Defendant Bartlett on behalf of the State of North Carolina submitted a letter to the United States Attorney General regarding the proposed amendment. Plaintiffs alleged that the State's preclearance submission failed to clearly describe changes in state law with respect to the right of voters to vote on the incurrence of local government debt, and that abolishing the right to vote on certain types of bonds, when such practice was previously required by the North Carolina Constitution, is a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," which requires preclearance by the Attorney General under Section 5 of the Voting Rights Act of 1965, as amended. (Compl. ¶¶ 34-35)

On November 29, 2006, more than two years *after* the election, the State submitted a preclearance letter to the United States Attorney General. In its letter, the State referenced the instant action as a basis for its request that the Justice Department expedite its so-called "preclearance" request. (See Def. Motion to Dismiss, Attachment 2)

On December 21, 2006, the United States Justice Department issued a letter purporting to "preclear" Amendment One. In its letter, the United States Justice Department acknowledged receipt of submissions by Defendants through December 14, 2006. The letter stated that the Attorney General does not object to the voting changes of Amendment One, but continued by specifically stating that failure to object does not bar litigation to enjoin enforcement of the change. (See Def. Notice of Filing, Letter from John Tanner, Chief Voting Rights Section, United States Dept. of Justice, dated December 21, 2006, filed December 21, 2006)

(Utilization of the Types of Local Government Bond Financing Mechanisms

Provided For In The Legislation Accompanying Amendment One)

To date, only one city or county has received State approval to issue the type of bonds, specifically tax increment financing ("TIF") bonds, described in HB 1293/SB 725. Several other local governments are proceeding with plans to use TIF bonds. In the Complaint, Plaintiffs made the following allegations relevant to the TIF project approved by the State as of the date of the filing of this lawsuit:

- On February 28, 2006, the City of Roanoke Rapids, North Carolina, by and through its City Council adopted a resolution establishing a development financing district to be known as "Carolina Crossroads Music and Entertainment District" ("Carolina Crossroads District") and requested approval of the Local Government Commission ("LGC") of the State Treasury Department to issue approximately $12,885,000 in bonds to fund the purchase of an entertainment project within the Carolina Crossroads District ("Roanoke Rapids Project"). (Compl. ¶ 36, Compl. Ex. E)
- On March 7, 2006, the LGC approved the use of TIF bonds for the Roanoke Rapids Project, and on June 28, 2006, $3.75 million anticipation notes were issued in relation to the Roanoke Rapids Project. (Compl. ¶ 37, Compl. Ex. G)
- The LGC is expected to give final approval of interest rates for bonds for the Roanoke Rapids Project in March or April of 2007 and the bonds will issue on or before May 15, 2007. (Compl. ¶ 38)
- No vote by the people has been held, or is scheduled to be held, to permit voters to approve or disapprove the issuance of bonds to finance the Roanoke Rapids Project. Consequently, Plaintiff Moore and others similarly situated have been

deprived of their right to vote on the issuance of local government debt instruments as required by Article V, § 4 of the North Carolina Constitution, prior to the adoption of Amendment One. (Compl. ¶ 39)

In the Complaint, Plaintiffs alleged that the following TIF projects have been proposed in the following cities and/or counties:

- Raleigh, North Carolina, a city within Wake County, for the financing of a development and parking facility in the so-called "North Hills" area of Raleigh, North Carolina ("North Hills Project") (Compl. ¶ 40);
- Charlotte, North Carolina, a city within Mecklenburg County, for a development and parking facility at or near Tyron Street in the so-called "Uptown" area of Charlotte, North Carolina. ("Tryon Street Project") (Compl. ¶ 41);
- Chapel Hill, North Carolina, a city within Orange County, for a development and parking facility at or near Franklin Street at Chapel Hill, North Carolina. ("Chapel Hill Project") (Compl. ¶ 42); and
- Kannapolis, North Carolina, a city within Cabarrus County, for a research facility or other development, known as the North Carolina Research Campus. ("N.C. Research Campus Project") (Compl. ¶ 43).

Plaintiffs further alleged, upon information and belief, that no vote will be submitted to the voters of the respective government units referenced in the list above to approve or disapprove any tax increment financing bonds proposed pursuant to Article V, §4. (Compl. ¶ 44)

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. Defendants Obtained *Post Hoc* Preclearance of Amendment One

Plaintiffs acknowledge Defendants obtained preclearance from the Attorney General of the United States and, to that extent, may have rendered Count One of the Complaint moot. However, that *post hoc* preclearance does not impair Plaintiffs' right to prosecute Count Three which alleges maladministration of an election.

In Count Three, Plaintiffs alleged, *inter alia*, that Defendants violated Plaintiffs' and others' right to vote by failing to preclear Amendment One *prior* to the election and further by failing to provide a clear summary of the proposed changes embodied in Amendment One. (Compl. ¶ 66) The thrust of this count is that Defendants improperly conducted the November 2004 election. The allegations relating to preclearance, like the allegations relating to the ballot language, are but one means by which Plaintiffs allege Defendants improperly did so. Thus, even if Defendants' *post hoc* preclearance now satisfies Section 5 of the Voting Rights Act, Defendants nevertheless maladministered the election because at the time the election was held, Defendants violated the mandate of Section 5.

Finally, even assuming *arguendo* that Plaintiffs may not prosecute Count Three on the basis of the failure to preclear, they may still prosecute that count on the grounds that the ballot language was unclear, confusing, and misleading.

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

In addition to their Voting Rights Act claim, pursuant to 42 U.S.C. § 1983, 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.

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 anaologous 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). Defendants argue that although § 1983 claims general rely on personal injury statute of limitations, the North Carolina statute of limitations most analogous to Plaintiffs claims is an "elections protest" pursuant to North Carolina General Statutes Chapter 163, Article 15A. Pursuant to the statutes in effect at the time of the 2004 election, such protests must have been made within two days following the canvass of votes which must have been completed by 11:00

a.m. on the seventh day following the election. N.C. Gen. Stat. § 163-182.9(4) (2004); N.C.Gen. Stat. § 163-182.5(b) (2004). Thus, in 2004, an election protest must have been filed within nine days of the election.

Defendants argument regarding the applicable statute of limitation misses the mark. 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).

Despite Defendants' suggestions, the three year statute of limitations is not limited to personal injury suits. Rather, N.C. Gen. Stat § 1-52(2) has been used in a variety of federal claims. Not only in sex discrimination claims like Bireline, but also in Fourteenth Amendment claims, Feilder v. Moore, 423 F.Supp. 62 (D.C.N.C. 1976), §§ 1981 and 1983 claims, Kestler v. North Carolina Local Government Employyes Retirement System, 808 F.Supp. 1220 (W.D.N.C. 1992), rev'd on other grounds, 48 F.3d 8000 (Fed. Cir. 1995), Lugo v. City of Charlotte, 577 F.Supp. 988 (D.C.N.C. 1984), Lily v. Harris-Teeter Supermarket, 545 F.Supp. 686 (D.C.N.C. 1982), aff'd 720 F.2d 326, Lattimore v. Loews Theaters, inc. 410 F.Supp. 1397 (D.C.N.C. 1975), Pittman v. Anacodia Wire & Cable Co., 408 F.Supp. 286 (D.C.N.C. 1974), and employment discrimination claims, see Chisholm v. U.S. Postal Service, 516 F. Supp. 810 (D.C.N.C. 1980). Use of the three year statute of limitations is bolstered by the Fourth Circuit's conclusion that in enacting N.C. Gen. Stat.§ 1-52, the North Carolina legislature sought to create a statute which was as broad as possible. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir.

1984).

The real statute of limitations question, then, is: when did time begin to run? Generally speaking, the time begins to run when the right to bring an action accrues. Williams v. GMC, 393 F.Supp. 387 (M.D.N.C. 1975), aff'd, 538 F.2d 327 (4th Cir. 1976). The Fourth Circuit has explained that although the length of the statute of limitations 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. 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). 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. In a typical controversy regarding accrual, the debate is about when a plaintiff had sufficient facts to be on inquiry notice of a cause of action. Here, on the other hand, the question is not when the Plaintiffs had sufficient facts, rather the question is when did the Plaintiffs have a cause of action.

Plaintiffs' maintain that their right to maintain the instant action did not accrue until their potential opportunity to vote on 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 a 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 did not accrue until TIF project planning began in 2006. 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. Accordingly, Defendants are not entitled to dismissal on the basis of statute of limitations.

IV. 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 Federalation 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.

In their memorandum of law, 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 is a red herring. The focus of a laches analysis is not what did the Plaintiffs know and when did they know it. The focus is on the delay, if any, *in filing the action*. As explained above, Plaintiffs could not have filed this action until a TIF project had been proposed to a local government and that local government began to move forward with the TIF proposal. Until that occurrence, none of the Plaintiffs had been denied an opportunity to vote on a TIF bond issuance. Until those things happened, Plaintiffs would not have had standing and the case would not have been justiciable. This case is not about the use of TIF bonds or the creation of TIF districts; it is about the constitutional right of citizens to vote to approve or disapprove bonds. Therefore, until the right to vote had been denied, no cause of action existed and no plaintiff could have filed an action.

The first TIF project started pursuant to HB1293/SB 725 was not proposed until March 2006, merely seven months before the instant action was commenced. Other projects noted in the statement of facts above were proposed through the summer and fall of 2006. As those projects were proposed, Plaintiffs and their counsel needed time to conduct legal research and prepare pleadings. A timeframe of six to seven months is hardly "inexcusable" or "unreasonable" in light of the complexities of constitutional challenges, voting rights and bond initiatives. To the

contrary, less time would have almost certainly resulted in slipshod research and sloppy pleadings, precisely the sort of irresponsible lawyering attorneys should avoid.

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, those allegations only underscore Plaintiffs' position that the claims in this case have only just become ripe. 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. Thus, Defendants have failed to establish the first and second elements of laches and are, accordingly, not entitled to a dismissal on that basis.

V. The Court Should Exercise Supplemental Jurisdiction over Plaintiffs' State Law Claims

Defendants assert that the Court should decline to exercise supplemental jurisdiction over the state law claims because Plaintiffs' federal law claims should be dismissed. See 28 U.S.C.§ 1367(c)(3) (granting courts discretion to dismiss state claims where it has dismissed "all claims over which it has original jurisdiction"). For the reasons argued above, Plaintiffs' claims are not barred by mootness, the statute of limitations or laches, and for the reasons argued below, all of Plaintiffs' counts state a claim upon which relief may be granted. Accordingly, Defendants are not entitled to a dismissal of the federal claims. While hearing Plaintiffs' federal law claims, judicial economy, convenience to the parties and general fairness dictate that this Court should exercise supplemental jurisdiction to hear the related state claim, as authorized by 28 U.S.C. § 1367(a).

The doctrine of "pendent" jurisdiction (a precursor to the modern "supplemental"

jurisdiction) which had perhaps its best known and most generous interpretation in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), recognizes that in our federal system a plaintiff who has a federal claim against a defendant will often find that the same wrongful conduct that grounded the federal claim has given rise to a claim under state law as well. More to the point here is that the doctrine of pendent jurisdiction permits the plaintiff to bring both claims in the federal court. The "pendent" jurisdiction doctrine permits a federal court to entertain a state claim of which it would otherwise lack subject matter jurisdiction when it is joined with a related federal claim, the two arising out of the same event or connected series of events. The rationale for the existence of pendent or supplemental jurisdictional is precisely the rationale which supports the use of such jurisdiction here.

Fundamentally, this case involves due process questions relating to voting. Those questions involve the Due Process Clause of the Fourteenth Amendment of the United States Constitution (a clear basis for federal jurisdiction) and an analogous Due Process Clause of the North Carolina Constitution. The relationship between those doctrines and naturally arising analogies between them are alone sound cause for the Court to hear state law claims in this case. Furthermore, Plaintiffs also draw the Court's attention to the practical implications of this case as further support for the exercise of supplemental jurisdiction. Amendment One purportedly authorized the issuance of TIF bonds without voter approval. These bonds are, or rather will be, sold on the national and international markets. Where, as here, a controversy strikes at the heart of national commerce, a federal court is best equipped to navigate the legal waters of such a contest.

VI. 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. 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). In that, Defendants are correct. Defendants further argue that the law does not require the full text and instead allows for a fair summary. (Def. Memo. P. 15-16) In that, Defendants may possibly be correct. Defendants point to no authority which explicitly controls that question and undersigned counsel have not found controlling authority on that point. Finally, Defendants ultimately argue that the ballot summary of Amendment One was a fair summary. (Def. Memo p. 17) In that, Defendants are dead wrong.

As Defendants themselves concede in an inconspicuously placed footnote, "[i]t is debatable whether the actual language of Amendment One, now Article V, § 14, is significantly or substantively different from or clearer than the language of the ballot question." (Def. Memo. p. 15, fn. 9). Plaintiffs welcome Defendants' recognition that the amendment itself may be "significantly or substantively different" from the ballot question. In light of such an admission, however, it is curious that Defendants would ultimately argue that the amendment summary and ballot question were plain and fair representations to the people. After all, if even attorneys for the Defendants can find debate, is it not likely that citizens of ordinary intelligence, unschooled in the law, would be confused?

Even absent Defendants' recognition of the potential discrepancy between the amendment text and the ballot question, Plaintiffs have unambiguously stated a claim upon which relief may be granted. Count Two alleges a federal due process violation in that the ballot question "was misleading and insufficient to adequately apprise voters" of the substance of

Amendment One. (Compl. ¶ 60). Count Three alleges maladministration of an election by failure to obtain preclearance before the election and for failure to provide a "clear summary of the proposed amendment." (Compl. ¶ 66). Count Four alleges a state due process violation in that "the language of the ballot question that was submitted to the qualified voters of the State was misleading and insufficient to adequately apprise voters" of the substance of Amendment One. (Compl. ¶ 73). Despite Defendants assertion to the contrary, Plaintiffs have not "argue[d] in essence that the full text of Amendment One should have been place on the ballot." (Def. Memo. P. 15). Rather, Plaintiffs have alleged two points: first, that the State Constitution may require the full text of the amendment appear on the ballot; and second, even if a summary of the amendment is constitutionally sufficient, that the ballot question and amendment summary here were confusing and misleading. Simply put, if the State chooses not to put the full text of an amendment on the ballot, then it must use a clear summary and question, one which can be understood by voters of ordinary intelligence.

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. 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 8th day of January, 2007.

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