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

NO. 5:06-CV-462-FL

RICHARD L. BISHOP; JACK L. MOORE; MICHAEL A. JOYCE; and CHRISTOPHER R. DONAHOE, Plaintiffs, v. GARY O. BARTLETT, Executive Director of the North Carolina State Board of Elections, in his official capacity; LARRY LEAKE, ROBERT CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, and CHARLES WINFREE, Members of the State Board of Elections, in their official capacities; MICHAEL F. EASLEY, Governor of the State of North Carolina, in his official capacity; ROY COOPER, Attorney General of the State of North Carolina, in his official capacity; BEVERLY PERDUE, Lieutenant Governor of the State of North Carolina, in her official capacity; JAMES BLACK, Speaker of the North Carolina House of Representatives, in his official capacity; ELAINE MARSHALL, Secretary of State of the State of North Carolina, in her official capacity; JANET PRUITT, Principal Clerk of the North Carolina Senate, in her official capacity; and DENISE WEEKS, Principal Clerk of the North Carolina House of Representatives, in her official capacity, Defendants.	ORDER

This matter comes before the court on defendants' motion to dismiss (DE # 30), filed December 19, 2006. The motion has been fully briefed and is ripe for ruling. For the reasons that follow, defendants' motion to dismiss is granted.

BACKGROUND

Plaintiffs, residents of North Carolina, challenge the method by which the North Carolina Constitution was amended, by popular vote, in the November 2004 elections. Specifically, plaintiffs allege defendants violated section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, *et seq.*; the Due Process Clause of the Fourteenth Amendment; its corollary in Article 1, Section 19 of the North Carolina Constitution; and 42 U.S.C. § 1983; by placing on the ballot allegedly misleading language regarding Amendment One, which authorized municipalities to issue bonds without voter approval in certain circumstances.

Upon a three-fifths vote of each house of the North Carolina General Assembly, a proposed amendment to the state constitution is put to the voters, "at the time and in the manner provided by the General Assembly." N.C. Const., Art. XIII, Sec. 4. The voters ratify the proposal if a majority of votes cast are in its favor. Id. In 2003, the General Assembly embarked on a plan to propose, in this manner, an amendment to the state constitution: Amendment One, so named because it was the first of two amendments to appear on the November 2004 ballot.

On July 19, 2003, the General Assembly passed, and on August 7, 2003, the governor signed, what became Session Law 2003-403 (hereinafter "S.L. 2003-403"), 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." The legislation proposed amending the state constitution by adding a new Section 14 to Article V, entitled "Project development financing," which would read:

> 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 improvements 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 of the territorial area and the issuing unit. This method is conclusive. When a territorial area is defined pursuant to this section, the county shall determine the current assessed value of taxable real and personal property in the territorial area. 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 territorial area at the time the taxes are levied over the assessed value of taxable real and personal property in the territorial area at the time the territorial area was defined may be set aside. The instruments of indebtedness authorized by this section shall be secured by these set-aside proceeds. The General Assembly may authorize a county, city, or town issuing these instruments of indebtedness to pledge, 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 the set-aside proceeds authorized by this section and the revenues authorized in the preceding sentence, these instruments of indebtedness may be issued without approval by referendum. The county, city, or town may not pledge as security for these instruments of indebtedness any property tax revenues other than the set-aside proceeds authorized in this section, or in any other manner pledge its full faith and credit as security for these instruments of indebtedness unless a vote of the people is held as required by and in compliance with the requirements of Section 4 of this Article.
>
> 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 territorial area at a minimum value if agreed to by the owner of the property, which agreed minimum value shall be binding on the current owner and any future owners as long as the defined territorial area is in effect.

S.L. 2003-403, § 1. Briefly, Amendment One would permit municipalities to create development financing districts, and issue bonds to raise revenue for public improvements (roads, sewers, etc.) associated with private development projects in the defined districts. The additional property tax

revenue generated by the improved property within the district would be used to repay the bonds. This method of financing differs greatly from that otherwise permitted by the state constitution, where except in limited circumstances a majority of voters in a municipality must approve the issuance of bonds. See N.C. Const., Art. V, Sec. 4(2).[1] Thus, Amendment One would permit municipalities to issue bonds without voter approval, where previously such approval was required.

S.L. 2003-403 placed Amendment One on the November 2004 ballot. See S.L. 2003-403, § 24. On the same ballot appeared candidates for President, the United States House of Representatives and Senate, Governor, Lieutenant Governor, the General Assembly, and numerous other state and local offices and judgeships. (See Compl., Ex. B, ballot for Wake County, North Carolina; Compl., Ex. C, ballot for Halifax County, North Carolina.) However, the actual text of the proposed amendment did not appear on the ballot. Instead, S.L. 2003-403 provided, "[t]he question to be used in the voting systems and ballots shall be:"

> [ ] 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 value within the development district and is not secured by a pledge of the local government's faith and credit or general taxing authority, which financing is not subject to a

[1] Article V, Section 4(2) of the state constitution provides, in relevant part, "[t]he 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 unforseen 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."

> 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.

S.L. 2003-403, § 24. Plaintiffs allege this text was misleading, because it did not alert voters that by approving Amendment One, they surrendered their right under the state constitution to vote on municipalities' issuance of bonds.

Sixty two (62) days before the election, the Constitutional Amendments Publication Commission, comprised of several state officials, promulgated a summary of Amendment One, and transmitted this summary to county boards of elections, and made the material available to the public on the state's website.[2] See N.C. Gen. Stat. § 147-54.10 (requiring such action not later than sixty (60) days before an election).[3] State officials requested and received preclearance, on March 17, 2004, of the date of the general election, including the referendum on Amendment One. (See Compl., Ex. D; Def. Mem. at 6 n.3.) This request for preclearance did not address the substance of Amendment One, only whether "the proposed election date will have an adverse effect upon

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[2] This summary, or "Text of Explanations," provides, "[t]he 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., ¶ 24.)

[3] N.C. Gen. Stat. § 147-54.10 reads, in full, "[a]t least 60 days before an election in which a proposed amendment to the Constitution, or a revised or new Constitution, is to be voted on, the Commission shall prepare an explanation of the amendment, revision, or new Constitution in simple and commonly used language. The summary prepared by the Commission shall be printed by the Secretary of State, in a quantity determined by the Secretary of State. A copy shall be sent along with a news release to each county board of elections, and a copy shall be available to any registered voter or representative of the print or broadcast media making request to the Secretary of State. The Secretary of State may make copies available in such additional manner as he may determine."

members of racial or language minority groups." (Compl., Ex. D at 2.) On November 2, 2004, a majority of voters approved Amendment One.[4] It became effective November 23, 2004, when the Board of Elections certified the vote.

Although several municipalities began to plan projects utilizing the funding process authorized by Amendment One, it was not until February 28, 2006, that a project reached fruition. On that date, the city council of Roanoke Rapids, Halifax County, North Carolina, adopted a resolution establishing a development financing district and requesting the state approve the issuance of almost thirteen million dollars in bonds. The state Local Government Commission has or is expected to soon give final approval to the bond package, at which time the bonds will issue without voter approval. Plaintiffs also allege projects under consideration in several other counties will utilize the Amendment One method of issuing bonds.

On November 6, 2006, plaintiffs filed the four-count complaint in this lawsuit. Count one alleges defendants failed to receive preclearance of S.L. 2003-403 and Amendment One, pursuant to section 5. Count two alleges a violation of the Due Process Clause of the Fourteenth Amendment, by placing on the ballot the language prescribed by S.L. 2003-403, § 24. According to the complaint, the federal and/or state constitutions might require the full text of a proposed amendment appear on the ballot, and even if not, that the language used was "potentially misleading" (Compl., ¶ 59) and "insufficient to adequately appraise voters that, if passed, the amendment would deprive them of their constitutionally given right to approve or disapprove the issuance of" bonds (id., ¶ 60). Count three alleges maladministration of an election, in violation of 42 U.S.C. § 1983, by the failure to seek

[4] There were 1,504,383 (51.2%) votes cast in favor of Amendment One, and 1,429,185 (48.8%) votes cast against it.

and receive pre-election preclearance of Amendment One, the promulgation of a misleading summary, and the placement of the allegedly misleading or insufficient language on the ballot. Count four alleges a violation of Article I, Section 19 of the North Carolina Constitution, again through the placement of allegedly "misleading and insufficient" language on the ballot. (Id., ¶ 73.) Plaintiffs pray for a declaratory judgment that Amendment One is null, void, and unenforceable, and an injunction prohibiting the enforcing, administering, or implementing of S.L. 2003-403.

In lieu of answering the complaint, defendants filed the instant motion to dismiss. Defendants also requested preclearance of Amendment One from the Attorney General of the United States, by letter sent November 29, 2006. Defendants requested expedited consideration of the preclearance request, and on Decembe r 21, 2006, two days after filing the instant motion, Amendment One was precleared by notice that "[t]he Attorney General does not interpose any objection to the specified change." (Letter from John Tanner, Chief, Voting Rights Section of the United States Department of Justice, dated December 21, 2006, attached to DE # 32.)

The court conducted a hearing on the instant motion on May 17, 2007. At that time, the parties agreed, preclearance of Amendment One having been obtained, that count one of the complaint should be dismissed as moot.[5] Accordingly, the court dismissed count one without

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[5] According to plaintiffs' memorandum in opposition to the instant motion, "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." (Pl.'s Mem. at 10.) The Supreme Court has held, "[o]nce a covered jurisdiction has complied with . . . preclearance requirements, section 5 provides no further remedy." Lopez v. Monterey County, 519 U.S. 9, 23 (1996). Count three also raises preclearance issues, because according to plaintiffs the failure to secure pre-election preclearance is part of the maladministration of election. However, preclearance is only necessary prior to implementation of a voting change. See Lopez v. Monterey County, 525 U.S. 266, 279 (1999) ("Preclearance is required before actually *administering* a change.") (emphasis added). In fact, the Attorney General is not required to decide whether a voting change is entitled to preclearance prior to a referendum:

> [t]he Attorney General will not consider on the merits . . . [a]ny proposal for a change affecting voting submitted prior to final enactment or administrative

(continued...)

objection from plaintiffs. The court also ordered further briefing on the other arguments raised in the motion to dismiss, which it has received and reviewed.

DISCUSSION

A. Standard of Review

Defendants move for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Dismissal under Rule 12(b)(1) is appropriate "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999) (quoting Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)). The court may consider evidence outside the pleadings for purposes of this analysis. Id.

B. Nature of challenge

To properly analyze the issues raised in the instant motion, it is first necessary to understand the nature of the claims in this case. On count two, the Due Process Clause violation, plaintiffs allege, "the language of the actual amendment was available to voters only by accessing the state's website," and "[t]hus, the language of the actual amendment was inadequately made available to the qualified voters of the state" (Compl., ¶ 58); that "[t]he actual amendment to the North Carolina Constitution was not submitted to the qualified voters of the State but instead an abbreviated

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[5](...continued)

> decision . . . . However, with respect to a change for which approval by referendum . . . 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 C.F.R. § 51.22 (2007) (emphasis added). Plaintiffs show no authority requiring pre-election preclearance, and, indeed, no similar case where a court favored the "sum is greater than the parts" approach incorporated into plaintiff's maladministration claim.

summary with potentially misleading language was in fact submitted to the qualified voters of the State" (id., ¶ 59); and that "[t]he language of the ballot question that was submitted to the qualified voters of the state was misleading and insufficient to adequately apprise voters that, if passed, the amendment would deprive them of the [right to vote on bond issues]" (id., ¶ 60). Similarly, on the maladministration of election claim under section 1983, plaintiffs allege that "[t]he summary of the amendment appearing on the ballots in the 2004 general election was confusing and misleading" (id., ¶ 65), and that "[t]he actions of the Defendants in failing to preclear HB 1293/SB 725 and to provide a clear summary of the proposed amendment is a deprivation of [due process]" (id., ¶ 66).

Plaintiffs also argue that the state failed to meet its obligations to publicize the proposed amendment. As discussed below, whether a proposed constitutional amendment was generally available to members of the public may be one factor to consider.

The issue in this case is therefore whether the ballot language was unconstitutionally misleading under the Due Process Clause of the Fourteenth Amendment and section 1983. The leading case, Burton v. State of Georgia, 953 F.2d 1266 (11th Cir. 1992), discusses at length the standards to apply for a substantive due process analysis.[6] See National Audubon Society, Inc. v. Davis, 307 F.3d 835, 858 (9th Cir. 2002) (adopting test from Burton, in challenge to language for California ballot initiative); Cartagena v. Calderon, 150 F. Supp. 2d 338, 344 (D.P.R. 2001); Citizens for Legislative Choice v. Miller, 993 F. Supp. 1041, 1050-51 (E.D. Mich. 1998), *aff'd*, 144 F.3d 916 (6th Cir. 1998); see also Caruso v. Yamhill County ex rel. County Commissioner, 422 F.3d 848, 863

[6] Both sides devote considerable briefing to various state law standards for ballot language, see, e.g., 26 Am. Jur. 2d *Elections* § 295 (2007) (collecting cases), but these cases have little relevance to an analysis of Amendment One's constitutionality under the Due Process Clause and section 1983. For instance, these cases often rely on state constitutional provisions or statutes which set standards for ballot language. See, e.g., Askew v. Firestone, 421 So. 2d 151, 154-55 (Fla. 1982) (noting a relevant Florida statute required "the ballot title and summary for a proposed constitutional amendment [to] state in clear and unambiguous language the chief purpose of the measure").

(9th Cir. 2005) (citing Burton and National Audubon with approval in challenge to Oregon ballot), *cert. denied*, Caruso v. Oregon, ___ U.S. ___, 126 S.Ct. 1786 (2006).

In Burton, several citizens of Georgia challenged the ratification of a state constitutional amendment regarding sovereign immunity, alleging the ballot language was misleading in that it suggested the proposed amendment would broaden the grounds for suing state officials, when the amendment allegedly made such suits more difficult. See id. at 1267. In this circumstance, the challenge was not to a systematic attempt to deny or dilute voting rights, "but only dilution of [Georgia citizens'] right to vote on this one occasion." Id. at 1268. In affirming the district court's denial of relief, the Eleventh Circuit articulated the limited nature of federal review of state elections and resulting standard of law, and then applied that standard to the ballot language at issue, finding it not misleading.

First, the court recognized the Constitution protects qualified citizens' right to vote in state elections, but cautioned that "[p]rinciples of federalism limit the power of federal courts to intervene in state elections." Id. at 1268. Caution in this area is warranted, for "[i]f every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute." Id. (quoting Bell v. Southwell, 376 F.2d 659, 662 (5th Cir. 1967)). Most irregularities are properly addressed by state courts, state elections officials, or the state political process, which "affords another avenue for redress of grievances, as voters may demonstrate at the polls their displeasure with those officials responsible for election irregularities, and citizens may lobby for changes in the election process itself." Id. Thus, "[o]nly in extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation." Id. (quoting Curry v. Baker, 802 F.2d 1302, 1314 (11th Cir. 1986)).

Applying these principles of federalism, the court stated the general legal test that the plaintiffs "may prevail only 'if the election process itself reaches the point of *patent and fundamental unfairness*.'" Id. at 1269 (quoting Curry, 802 F.2d at 1315) (emphasis in original). Specifically,

> [f]or 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. (internal citations and quotations omitted). The ballot language must "identif[y] for the voter the amendment to be voted on." Id. Thus, "[a]s long as citizens are afforded reasonable opportunity to examine the full text of the proposed amendment . . . substantive due process requires no more than that the voter not be deceived about what amendment is at issue." Id.; see also Hutchinson v. Miller, 797 F.2d 1279 (4th Cir. 1986) (discussing, at length, the reasons for federal courts' caution towards entertaining suits challenging state elections, and citing the "patent and fundamental unfairness" standard); Hendon v. N.C. State Board of Elections, 710 F.2d 177 (4th Cir. 1983) (holding failure to comply with terms of state ballot laws does not usually violate the Constitution, and finding certain ballot counting practices unconstitutional, but declining to order recount of prior election because of general rule that denies relief with respect to past elections).

The critical issue, therefore, is not whether the ballot language reveals the entire legal substance of the amendment, but rather whether it distinguishes the proposal from any other on the ballot. "In this respect, the language identifying proposed constitutional amendments serves much the same role on the ballot as a candidate's name in an election for political office," because voters

select a candidate based not on the names, but rather "on the policies and programs those names represent." Burton at 1270-71. Therefore,

> [w]hen the ballot language purports to identify the proposed amendment by briefly summarizing its text, then substantive due process is satisfied – and the election is not "patently and fundamentally unfair" – so long as the summary does not so plainly mislead voters about the text of the amendment that "they do not know what they are voting for or against"; that is, they do not know which or what amendment is before them.

Id. at 1270. The court described this analysis as a "deferential due process test." Id.

Next, the Eleventh Circuit examined the actual ballot language, and found that it passed constitutional muster. The court noted the ballot language tracked the actual text of the proposed amendment, and was not deceptive when it concluded that the amendment "provides how public officers and employees may and may not be held liable in court." Id. (quoting the ballot language at issue). The ballot language itself need not discuss *how* the amendment "provides" for suit against public officials, because substantive due process does not "impose[] an affirmative obligation on states to explain – some might say speculate – in ballot language the potential legal effect of proposed amendments." Id.

Thus, returning to federalism concerns that motivated this deferential test, "[i]t is not for federal courts to decide whether the state General Assembly could have selected some other language, or some other approach, that might have better informed the voters of [the proposed amendment's] content." Id. at 1271; c.f. Hutchinson, 797 F.2d at 1284 ("Had the framers wished the federal judiciary to umpire election contests, they could have so provided. Instead, they reposed primary trust in popular representatives and in political correctives.").

C. Standing

Defendants argue this action is barred by the statute of limitations, that equitable relief is barred by laches, and that plaintiffs have failed to state a claim upon which relief can be granted. Before considering these alleged deficiencies of the complaint, the court must assure itself that plaintiffs have standing to prosecute this action. See Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006) If plaintiffs lack standing, the court lacks jurisdiction to hear this action, and defendants are entitled to dismissal under Fed. R. Civ. P. 12(b)(1). The concern for standing is particularly important in a challenge to state election results, because "the resolution of particular electoral disputes has been primarily committed to others in our system," namely Congress and the states. Hutchinson, 797 F.2d at 1284. Furthermore, federal courts are wary to intervene in such disputes "because of the constitutional recognition that 'states are primarily responsible for their own elections.'" Id. (quoting Welch v. McKenzie, 765 F.2d 1311, 1317 (5th Cir. 1985)).

To establish standing, a plaintiff must show (1) that he suffered an "injury in fact," or the invasion of a legal interest, which is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the conduct of the defendant; and (3) that it is likely the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); see also Miller, 462 F.3d at 316. Plaintiffs, by attempting to invoke the court's jurisdiction, bear the burden of establishing standing. Miller, 462 F.3d at 316.

The district court that first heard Burton briefly considered the requirements for standing to challenge allegedly misleading ballot language. In the memorandum opinion explaining its decision, the court wrote,

> [i]n actions involving elections of a candidate, supporters of the

> losing candidate whose votes were properly counted generally do not have a right to contest an election although the candidate himself might. See Curry v. Baker, 802 F.2d [1302, 1312 n.6 (11th Cir. 1986)]. The court assumes that the same holds true when the result of a referendum is challenged. Since there is no candidate in a referendum, only those voters who are "injured" by the state's action in conducting the election have standing to challenge the result. Id., at 1313. Failing to obtain the election outcome desired is not sufficient injury. Further, there is an important distinction between plaintiffs' "plain, direct and adequate interest in maintaining the effectiveness of their votes" and every citizen's interest in requiring the government to be administered according to the law. Baker v. Carr, 369 U.S. 186, 208 (1962), cited in Curry v. Baker, 802 F.2d at [1312 n.6].

Burton v. State of Georgia, Case No. 1:90-CV-2402-JOF, Mem. Op. at 12 n.6 (N.D. Ga. Mar. 29, 1991), *aff'd*, 953 F.2d 1266 (11th Cir. 1992). The plaintiff voters in Burton brought a pre-election challenge to the proposed ballot language, but the merits of the claim were determined at a post-election evidentiary hearing. The district court acknowledged "a strong argument for dismissal of the case on grounds that plaintiffs, who do not allege that they were misled by the ballot language, do not have standing to bring this action." Id. at 11. However, "[t]he court did not reach the standing issue because [the] defendants waived this objection in order to proceed with the hearing." Id. at 12. The facts of the instant case present a similar standing issue, but the parties devoted little briefing to the question.

The four plaintiffs in this case are all citizens of North Carolina and voted in the 2004 general election. The critical flaw in the complaint is the lack of any allegation that any plaintiff was actually misled by the ballot language. Instead, the complaint alleges generally that the ballot

language was "misleading" or "potentially misleading."[7] (See Compl., ¶¶ 59, 60, 65.) Unless they were actually misled, plaintiffs do not present a concrete and particularized injury. Instead, the only injury was the presentation of allegedly misleading language, which plaintiffs shared with every voter in the 2004 general election in North Carolina. See Moultrie v. South Carolina Election Comm'n, Case No. 3:06-CV-3073-CMC, 2007 WL 445383, *5 (D.S.C. Feb. 6, 2007) (holding the plaintiffs did not present a concrete and particularized injury, where "[t]he resulting injury is, therefore, primarily one which would be shared equally by every citizen of the state as all citizens have an equal interest in the full enforcement of statues [sic] governing the political process"); see also Curry, 802 F.2d at 1312-13 (noting "serious doubt" whether voters whose votes were counted had standing to contest election, but declining to rule on issue where a third defendant, who was a candidate in the election, "clearly has standing"). Voters can have standing, for example, where their preferred candidate is denied a place on the ballot. See Backus v. Spears, 677 F.2d 397, 399 (4th Cir. 1982) (holding voters who signed nominating petition had standing to challenge the refusal to place candidate's name on ballot, despite voters' right to nonetheless write-in their preferred vote).

The same analysis applies to plaintiffs' allegation that the Text of Explanations propounded by the Constitutional Amendments Publication Commission was misleading. There is no allegation that any plaintiff was actually mislead by the summary, or even that any plaintiff read the summary.

Similarly, while plaintiffs generally complain the full text of Amendment One was

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[7] For example, "[t]he actual amendment to the North Carolina Constitution was not submitted to the qualified voters of the State but instead an abbreviated summary with potentially misleading language was in fact submitted to the qualified voters of the State." (Compl., ¶ 59.) Also, "[t]he language of the ballot question that was submitted to the qualified voters of the State was misleading and 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." (Id., ¶ 60.) Also, "[t]he summary of the amendment appearing on the ballots in the 2004 general election was confusing and misleading, and reached the point of patent and fundamental unfairness and a violation of the federal right of due process." (Id., ¶ 65.)

unavailable to voters, there is no such allegation tied specifically to any individual plaintiff. For instance, the complaint recognizes the requirement in N.C. Gen. Stat. § 147-54.10 that, "a copy [of the full text of a proposed constitutional amendment] shall be available to any registered voter or representative of the print or broadcast media making request to the Secretary of State." There is no allegation that any plaintiff, much less any voter, requested the full text from the Secretary of State and was denied. Instead, the complaint alleges: "[u]pon information and belief, the language of the actual amendment was available to voters only by accessing the state's website. Thus, the language of the actual amendment was inadequately made available to the qualified voters of the state." (Compl., ¶ 58.) There is no allegation that plaintiffs did not possess a copy of the full text, or could not possess a copy of the full text. In short, again, as it relates to plaintiffs, there is no allegation of concrete and particularized injury. Instead, plaintiffs attempt to bear the cross for a harm that may have affected all voters in the general election.

Plaintiffs allege they were injured by the actual or potential development projects that have or will be financed with the Amendment One financing method, specifically the issuance of bonds without a referendum. At the time of filing, no such bonds had been issued, and only one project, affecting one plaintiff, had neared a critical point.[8] However, plaintiffs' claims are aimed at the conduct of the 2004 election, and not the substance of the financing scheme enacted by Amendment One and the other provisions of S.L. 2003-403. The allegations in count two and count three relate exclusively to the allegedly misleading ballot language and other conduct factoring into plaintiffs' claim of "maladministration of an election." Thus the supposed injury arising from the actual use

[8] The court does not reach the issue of whether any particular plaintiff lacks standing because the pertinent development project has not sufficiently materialized, despite the lack of any evidence of the status of development projects other than the Roanoke Rapids project.

of the Amendment One mechanism is totally unrelated to this legal challenge, which must be cast in the Burton framework. C.f. Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (*per curiam*) ("[T]he proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful" (emphasis added).); Hileman v. Maze, 367 F.3d 694, 697 (7th Cir. 2004) (examining the plaintiff's allegations to determine when the alleged injury accrued, where the plaintiff made allegations as a "spurned candidate," but argued for a later accrual date as if she complained "as a voter whose franchise was diluted").

Plaintiffs are forthright about their case when they argue, in supplemental briefing, that,

> [t]he 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.

(Pl.'s Supp. Mem. at 17.) In this posture, the allegations present a general grievance, and in these circumstances, "the political process, rather than the judicial process, may provide the more appropriate remedy." Federal Election Comm'n v. Akins, 524 U.S. 11, 23 (1998) (holding the respondents had standing to challenge decision of Federal Election Commission, because of statutory right to bring such action). If voters were duped out of their right to vote on bond issues, the political remedy is clear: amendment of the North Carolina Constitution to restore the lost right.

Plaintiffs unintentionally point out another remedy: they aver that Amendment One does not *require* municipalities to issue the bonds without a vote.[9] Accordingly, citizens have recourse at the

[9] According to plaintiffs, because Amendment One does not foreclose the use of referenda, they suffered no injury until a municipality actually sought approval of a bond issue with a referenda, because only then was it clear that their previous constitutional right to vote on bond issues was lost.

local level, to persuade local officials to continue the previously-required procedure of a public vote on bond issues. But it is not for the court to delve any further into consideration of the vagaries of potential non-judicial remedies.

Counts two and three must be dismissed because plaintiffs lack standing.

D. Supplemental Jurisdiction

In count four, plaintiffs attempt to state a claim under the North Carolina Constitution. It is not entirely clear whether the state constitution requires the full text of a state constitutional amendment appear on the ballot, or what standard applies in evaluating whether ballot language is misleading. See Reade v. City of Durham, 92 S.E. 712, 715 (N.C. 1917) (suggesting full text of proposed amendment need not appear on ballot).

As noted above, the court has found plaintiffs' section 5 claim moot, and dismissed their federal constitutional claims for lack of standing. The court declines to exercise supplemental jurisdiction over the state constitutional claim, because "the claim raises a novel or complex issue of state law" and "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. §§ 1367(c)(1) and (3). In making this determination, the court has considered "convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy." Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995). In particular, the court notes that this proceeding has terminated at an early stage, before any discovery or even the filing of an answer. Additionally, the court recognizes the limited role of the federal judiciary in matters of state elections, as expressed in Burton and Hutchinson. North Carolina's administrative, judicial, and political processes provide a better forum for plaintiffs to seek vindication of their state constitutional claim.

CONCLUSION

After careful consideration, for the reasons discussed herein, counts two and three are hereby DISMISSED pursuant to Fed. R. Civ. P. 12(b)(1) because plaintiffs lack standing, and the court declines to exercise supplemental jurisdiction over count four. Accordingly, defendants' motion to dismiss (DE # 30) is GRANTED. The Clerk is directed to close this case.

SO ORDERED, this the 17th day of August, 2007.

LOUISE W. FLANAGAN
Chief United States District Judge