IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION No. 1:15-CV-559

THE CITY OF GREENSBORO, LEWIS A. BRANDON III, JOYCE JOHNSON, NELSON JOHNSON, RICHARD ALAN KORITZ, SANDRA SELF KORITZ, CHARLI MAE SYKES, AND MAURICE WARREN II Plaintiffs, v. THE GUILFORD COUNTY BOARD OF ELECTIONS, Defendant, MELVIN ALSTON, JEAN BROWN, HURLEY DERRICKSON, STEPHEN GOLIMOWSKI, WAYNE GOODSON, JIM KEE, EARL JONES, SHARON KASICA, and WILLIAM CLARK PORTER, Defendant-Intervenors.	**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

I. NATURE OF THE MATTER BEFORE THE COURT

In this lawsuit, Plaintiffs The City of Greensboro ("the City") and Lewis A. Brandon III, Joyce Johnson, Reverend Nelson Johnson, Richard Alan Koritz, Sandra Self Koritz, Charli Mae Sykes, and Maurice Warren II (collectively, "Individual Plaintiffs") challenge the constitutionality of Session Law 2015-138, House Bill 263, entitled "An Act to Modify the Form of Government in the City of Trinity and to Clarify the Form of Government, Method of Election, and Determination of Election Results in the City of Greensboro," as amended (hereinafter "the Greensboro Act" or "the Act"). Although the Act, which substantially alters the structure of the City's government and the form of City elections, is constitutionally problematic for a number of reasons, the instant motion is addressed to a provision of the Act that withdraws from the City of Greensboro and its citizens—alone among North Carolina municipalities—the statutory right to control the structure of their municipal government in the future by means of petitions for initiative and referendum.

Because the Act singularly targets the City and the Individual Plaintiffs to deprive them of the right to govern themselves locally, it is invalid under the Equal Protection Clause of the United States Constitution and Article I, Section 19 of the North Carolina Constitution as a matter of law. As this Court reasoned in enjoining the Act in July 2015, the Act "deprives Greensboro voters, alone among municipal voters in the State, of the right to change the City's municipal government by referendum and otherwise treats the City of Greensboro and its voters differently from all other municipalities and municipal voters, without a rational basis." *City of Greensboro v. Guilford Cnty. Bd. of Elections*,

2015 U.S. Dist. LEXIS 95972 (M.D.N.C. July 23, 2015) (Doc. 35 at 2) ("Injunction Order"). Because there can be no material dispute about the language or operative effect of the Act, this Court's reasoning compels partial judgment on the pleadings in favor of Plaintiffs on Count I of the Amended Complaint as a matter of law.

II. FACTUAL ALLEGATIONS

A. The North Carolina General Statutes confer on municipalities and their citizens the right to control the structure of their municipal governments.

The North Carolina General Statutes grant every city, town, and village in North Carolina, and the citizens of every municipality, the right to control the structure of their municipal governments. Section 160A-101 empowers each municipality to adopt or alter its name; the style of the municipal corporation and its governing board; the number, terms of office, and mode of election of members of the council; the method of conducting municipal elections; the method of selecting the mayor; and the form (mayor-council or council-manager) of municipal government. *See* N.C. Gen. Stat. § 160A-101; Am. Compl. (Doc. 65) ¶¶ 35-36. The city council is authorized to adopt any of the options identified in Section 160A-101 by means of an ordinance amending the city's charter and is permitted (but not required) to condition adoption of such an ordinance on approval by the people. *See* N.C. Gen. Stat. § 160A-102; Am. Compl. ¶ 37.

The authority to alter the structure of municipal government is not, however, placed exclusively in the hands of the city council. The General Statutes emphatically preserve the rights of initiative and referendum by the people themselves, empowering them to correct legislative action with which they do not agree. If the city council does not make

an amendment to the city's charter contingent on approval of the citizens as provided in Section 160A-102, the citizens themselves are empowered to introduce a referendum petition that compels submission of the amendment to a majority vote:

> An ordinance adopted under G.S. 160A-102 that is not made effective upon approval by a vote of the people **shall be subject to a referendum petition**. Upon receipt of a referendum petition . . . , the council **shall submit** an ordinance adopted under G.S. 160A-102 to a vote of the people.

N.C. Gen. Stat. § 160A-103 (emphasis added); Am. Compl. ¶ 38. The General Statutes, then, effectively grant all North Carolina municipal citizens the right, exercised through a referendum petition, to veto any change to the structure of their municipal government. *Id.*

The General Statutes also authorize municipal citizens themselves to initiate a change to the form of their municipal government:

> The people may **initiate a referendum** on proposed charter amendments. . . . Upon receipt of a valid initiative petition, the council **shall call a special election** on the question of adopting the charter amendments proposed therein, and shall give public notice thereof . . . .

N.C. Gen. Stat. § 160A-104 (emphasis added); Am. Compl. ¶ 39. Together, Sections 160A-103 and 160A-104 enable citizens of every North Carolina municipality to control and change the structure of their municipal governments.

B. The Greensboro Act withdraws the rights of initiative and referendum from Greensboro and its citizens alone.

1. The original Greensboro Act.

In July 2015, the General Assembly enacted the Greensboro Act, which made several unconstitutional changes to the City's form of government and the structure of its

municipal elections. The Act purported to restructure Greensboro's municipal government by (among other things) decreeing the form of municipal government, limiting the Mayor's vote and veto on City Council matters, extending the terms of the Mayor and Council members from two to four years, altering the structure of the 2015 City Council election from the primary/general election format the City has followed for more than four decades to a new general/runoff election format, and defining eight new single-member districts from which the City Council would be elected (several of which will unfairly dilute the votes of Greensboro voters whose new districts are more populous than those of other Greensboro voters or assign voters to districts on the basis of race).[1] Am. Compl. ¶ 42; Injunction Order at 6. Although they illustrate the heavy hand the General Assembly has taken to limit Greensboro's powers of self-government, those specific features are not the subject of the instant motion.

Plaintiffs instead seek partial judgment on the pleadings with respect to the provisions of the Act that withdraw from Greensboro citizens alone the right to petition and initiate a referendum to amend the City's Charter to change the form of municipal government:

> Notwithstanding Part 4 of Article 5 of Chapter 160A of the General Statutes . . . **the City of Greensboro** shall not alter or amend the form of government for the City. Upon the return of the 2020 federal decennial census the North Carolina General Assembly shall revise the districts set out in this action, if needed. The City of Greensboro

[1] The redistricting plan is the subject of the Equal Protection claims raised by the Individual Plaintiffs in the Second and Third Causes of Action. (Doc. 65, ¶¶ 84-97). In the present motion, the Citizen Plaintiffs do not seek judgment on the pleadings as to those claims.

> may submit proposed changes to the districts set out in this section to the North Carolina General Assembly.

Session Law 2015-138, § 2.(b) (emphasis added); Am. Compl. ¶ 43. That provision effectively eliminated Greensboro voters' ability to undo the changes the General Assembly has decreed to the structure of their local government. In the context of the existing general law applicable to all other North Carolina municipalities, it eliminated the rights of the City and its citizens to exercise their rights of self-governance available to all other North Carolina citizens. And if any doubt remained that the General Assembly intended to single out the City and its citizens for withdrawal of those powers of self-government, the Act specifies in Section 2(g) that it "applies only to the City of Greensboro." "Under the Act, Greensboro voters, unlike all other municipal voters in the State, will elect their council members under a system that was never subject to the possibility of review by referendum, and they will be unable to change that system going forward." Injunction Order at 11.

Because the Act withdrew the statutory authority of the City and its citizens to choose, change, and control their form of local government—a right available to citizens of every other North Carolina municipality—Plaintiffs challenged that withdrawal on constitutional grounds. At the same time, they moved for injunctive relief to prevent the Act from going into effect prior to the then-fast-approaching Greensboro municipal elections. (Docs. 3, 7). In an order dated July 23, 2015, this Court preliminarily enjoined the Act, finding that the Act "treats the City of Greensboro and its voters differently from all other municipalities and municipal voters, without a rational basis" and that "[t]he

plaintiffs would suffer irreparable harm should the 2015 election go forward under the new law." Injunction Order at 2.

2. The September 2015 Amendment to the Greensboro Act.

In September 2015, just weeks after this Court preliminarily enjoined the Act, the North Carolina General Assembly amended the Act to alter the duration of the withdrawal of initiative and referendum rights from the citizens of Greensboro. The amended Act would effectively restore to Greensboro citizens their rights of self-government via petitions for initiative and referendum, but only after the return of the 2020 Census. N.C. Sess. Laws 2015-264, § 85.5.[2] As a result, the City's form of government would be unilaterally set by the General Assembly for the next five years—without the opportunity for citizen input—and elections in 2017 and perhaps 2021 would be affected by the Act.

III. LEGAL STANDARD

Rule 12(c) permits any party to move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). The pleadings in this case have closed: Plaintiffs filed their Amended Complaint on February 13, 2016 (Doc. 65), Intervenor-Defendants answered that Complaint on March 3, 2016 (Doc. 69), and the Guilford County Board of Elections filed its answer on March 10, 2016 (Doc. 70).

[2] It appears that the 2020 census data will be "returned" or made publicly available, at least in significant part, in the second quarter 2021. That determination extrapolates from return dates of information gathered in the last decennial census in 2010. *See http://www.census.gov/population/www/cen2010/glance/*.

Motions for judgment on the pleadings "are 'designed to dispose of cases when the material facts are not in dispute and the court can judge the case on its merits by considering the pleadings.'" *Disability Rights North Carolina v. Moses H. Cone Mem. Hosp. Operating Corp.*, No. 1:11CV812, 2013 U.S. Dist. LEXIS 129367, at *5 (M.D.N.C. Sept. 11, 2013) (quoting *Preston v. Leake*, 629 F. Supp. 2d 517, 521 (E.D.N.C. 2009)). "As it does when reviewing a Rule 12(b)(6) motion, the court assumes the facts alleged by the non-moving party as true and draws all reasonable factual inferences in its favor." *The Lofts at Albert Hall Condominium Ass'n, Inc. v. Vintage Oaks II*, No. 1:12-CV-906, 2014 U.S. Dist. LEXIS 113485, at *7 (M.D.N.C. Aug. 15, 2014) (citing *Burbach Broad. Co. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002)).

Here, as in *The Lofts at Albert Hall*, "[t]he material facts are not in dispute." 2014 U.S. Dist. LEXIS 113485, at *2. Instead, the City's and Individual Plaintiffs' claim directed to the constitutionality of the Greensboro Act's withdrawal of initiative and referendum rights raises a pure question of law suitable for disposition on the pleadings.

IV. ARGUMENT

A. Plaintiffs' Equal Protection claim raises a pure question of law that is suitable for disposition on the pleadings.

Plaintiffs' first cause of action asserts that the Greensboro Act violates the Equal Protection Clauses of the U.S. and North Carolina Constitutions because it withdraws from the citizens of Greensboro, alone among the hundreds of North Carolina municipalities, the right to control their local governments by means of petitions for initiative and referendum. That claim raises a pure question of law, the determination of which does not

require this Court to resolve any disputed factual issues. Indeed, Defendant and Intervenor-Defendants do not dispute the essential facts regarding the passage, wording, and effect of the Act. *See* Intervenor-Defendants' Answer to Amended Complaint (Doc. 69) ¶¶ 1, 18-34, 42-43, 77-79 (answering that Sections 160A-103 and -104 and Session Law 2015-138 "speak for themselves"); Guilford County Board of Elections Answer to Amended Complaint (Doc. 50, 70) (*Id.*) (admitting certain allegations and responding to certain allegations that the Defendant has insufficient knowledge upon which to base an admission or denial). No discovery or further factual development on the language, history, or effect of the Act is necessary or practicable. The First Cause of Action is ripe for this Court's determination as a matter of law. The Court can and should resolve that claim based on the plain language and operative effect of the relevant provision of the Greensboro Act in light of long-settled equal protection jurisprudence. *Cf. Disability Rights North Carolina*, 2013 U.S. Dist. LEXIS 129367, at *5, *10 (granting motion for judgment on the pleadings as to plaintiff's claims for injunctive and declaratory relief where defendant did not "argue that any material fact is in dispute" and plaintiff "demonstrated that it is entitled" to the relief it sought).

B. Because the Act withdraws the rights of initiative and referendum from Greensboro voters alone without any rational basis for doing so, it violates the Equal Protection Clause.

1. <u>The statutory rights of initiative and referendum are essential components of the right of self-government.</u>

Sections 160A-103 and 160A-104 grant all North Carolina citizens the right to institute an initiative or a referendum to control or change the structure of their municipal

government. *See* pp. 3-5, *supra*. The Greensboro Act withdraws those rights from Greensboro citizens alone among all North Carolina municipalities. As this Court indicated in its July 2015 Memorandum Opinion and Order, that targeted withdrawal, entirely lacking in basis, rational or otherwise, violates the Equal Protection Clauses of the United States and North Carolina Constitutions. *See* Injunction Order at 10-17. The Court's analysis confirms that judgment on the pleadings in favor of Plaintiffs is appropriate.

The statutory rights of initiative and referendum are essential components of the right to self-government. Just last Term, the United States Supreme Court described the essential role played by those rights in facilitating "[d]irect lawmaking by the people":

> The two main "agencies of direct legislation" are the initiative and the referendum. . . . The initiative operates entirely outside the States' representative assemblies; it allows "voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls." D. Magleby, Direct Legislation 1 (1984). While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows "voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls." *Ibid.* "The initiative [thus] corrects sins of omission" by representative bodies, while the "referendum corrects sins of commission." Johnson, Direct Legislation as an Ally of Representative Government, in IRR 139, 142.

Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652, 2659-60 (2015) (citation omitted). Given that essential function, the Court declared, "the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power." *Id*. at 2674; *see also id*. at 2672 (describing initiative and referendum as "the people's legislative prerogatives"); *id*. at 2669 (observing

that, by the early twentieth century, "several States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, through the processes of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislation by the electorate)").

To be sure, "there is no fundamental right to initiate legislation as there is a fundamental right to vote." *Kendall v. Balcerzak*, 650 F.3d 515, 522 (4th Cir. 2011); *see also, e.g.*, *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210-11 (10th Cir. 2002) (noting that "nothing in the language of the Constitution commands direct democracy"; instead, "initiatives are state-created rights and are therefore not guaranteed by the U.S. Constitution" (citing cases)). If, however, "a state chooses to confer the right of referendum to its citizens, it is obligated to do so in a manner consistent with the Constitution," including the Equal Protection Clause. *Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d Cir. 2009). *See also, e.g.*, *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution.") (citing cases); *Wright v. State of North Carolina*, 787 F.3d 256, 2015 U.S. App. LEXIS 8731, at *27-28 (4th Cir. May 27, 2015) (citing *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762-63 (2009), for the proposition that "[t]he right to vote on equal terms in representative elections—a one person, one vote standard—is a fundamental right" under the North Carolina Constitution); *Martin v. Preston*, 325 N.C. 438, 454, 385 S.E.2d 473, 481 (1989)

("[T]he right to vote per se is not a fundamental right under our [N.C.] Constitution; instead once the right is conferred, the equal right to vote is a fundamental right." (emphasis added)).

North Carolina has chosen to confer initiative and referendum rights broadly, by statute, on citizens of every North Carolina municipality. The Greensboro Act withdraws that right from the citizens of a single municipality among hundreds. That targeted legislative withdrawal is not "consistent with the Constitution," *Molinari*, 564 F.3d at 597, and cannot survive Equal Protection scrutiny.

2. The targeted withdrawal of initiative and referendum rights from Greensboro citizens alone lacks any rational basis.

As a general rule, legislative classification that does not involve a fundamental right or a suspect class is unconstitutional unless it is rationally related to the achievement of a legitimate government interest. *See, e.g., Turner v. Fouche*, 396 U.S. 346, 362 (1980); Injunction Order at 11. That "standard of review, although deferential, 'is not a toothless one.'" *Lyng v. Int'l Union*, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) (quoting *Mathews v. De Castro*, 429 U. S. 181, 185 (1976)).

> The rational basis test contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals. In an alternative formulation, the Court has explained that these limitations amount to a prescription that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *see Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Lyng, 485 U.S. at 375 (Marshall, J., dissenting). *See also, e.g.*, *Richardson v. North Carolina Dep't of Correction*, 345 N.C. 128, 135, 478 S.E.2d 501, 506 (1996) (statutory classification survives equal protection scrutiny under Article I, Section 19 of the North Carolina Constitution only if "it bears some rational relationship to a conceivable legitimate interest of government") (citation and internal quotation marks omitted).

The Greensboro Act must be measured against that standard. As this Court correctly reasoned, "[b]ecause the Act withdraws the statutory right to petition for a referendum from voters in the City of Greensboro, alone among North Carolina municipalities, it cannot survive constitutional scrutiny unless there is a rational basis for distinguishing between Greensboro voters and voters in every other North Carolina municipality." Injunction Order at 11-12. *See also, e.g.*, *Taxpayers United for Assessment Cuts*, 994 F.2d at 297 (state procedures for reviewing the validity of initiative petitions "pass muster if they are reasonably related to a legitimate government interest"); *Kelly v. Macon-Bibb Cnty. Bd. of Elections*, 608 F. Supp. 1036, 1039 (M.D. Ga. 1985) (approving state referendum procedure as "reasonably related to a permissible state interest").

The decision of the Tenth Circuit Court of Appeals in *Save Palisade Fruitlands* illustrates the appropriate analysis. There, the appellate court applied rational basis scrutiny to an equal protection challenge to a Colorado statutory scheme that "grant[ed] the power to initiate legislation to the electors of home rule counties but not to those of statutory counties," finding that the statutory distinction implicated neither a suspect class nor a fundamental right. 279 F.3d at 1207, 1210-13. The distinction drawn by the Colorado

statute passed muster under rational basis review because the Court was able to identify legitimate government purposes served by the line drawn by the statute:

> [H]ome rule counties have a broader range of powers than statutory counties. Moreover, home rule counties were created in order to give citizens of unincorporated areas a greater degree of autonomy in local affairs than they previously enjoyed. Both of these ends - facilitating a broader degree of powers and enhancing local autonomy - are legitimate government purposes. Granting the power of initiative to home rule counties and not statutory counties could advance both of these ends, and is therefore rationally related to either purpose.

Id. at 1214. The Tenth Circuit noted that it was being asked "to compare apples and oranges when comparing home rule and statutory counties." *Id.* at 1213. With respect to North Carolina municipal powers of initiative and referendum, the comparison is apples to apples.

As this Court observed in the Injunction Order, in *Save Palisades Fruitlands*, "all counties could obtain the status that would allow for referendum rights by going through procedural requirements indicating voter support." Injunction Order at 14 (citing 279 F.3d at 1208). As the Court noted, "[t]hat is not the case here, where the Act itself prohibits the City of Greensboro and its voters from exercising the statutory rights given to all other municipalities and municipal voters in the State and provides no mechanism for restoring those rights." Injunction Order at 14.

Measured against the rational basis standard, the targeted withdrawal of the initiative and referendum rights from Greensboro citizens alone violates the Equal Protection Clause, as this Court indicated at the preliminary injunction stage. Put plainly, no interest of the State, rational or otherwise, is served by withdrawing the right of self-

government by means of initiative and referendum from Greensboro residents alone among all citizens of North Carolina. No such interest is apparent on the face of the original Act or the amended legislation, both of which are "silent as to the General Assembly's motivation or purpose" and neither of which "put forth any reasons for treating Greensboro and its voters differently from all other municipalities and municipal voters in the State." Injunction Order at 12. And unlike *Save Palisades*, where the longstanding dichotomy of statutory and home rule counties underpinned the court's finding of rational bases for treating some counties differently than others vis-à-vis the right of initiative, no such longstanding categorical distinction exists here. Rather, the City and its citizens have been singled out, without any constitutional, statutory, or rational basis for doing so.

Neither the County Board of Elections nor the Intervenor-Defendants have pointed to any legitimate government interest that could reasonably be served by telling Greensboro citizens alone that they no longer have the right to control or alter the structure of their local government—while citizens of every other city, town, and village across the State retain that right.[3] Under the Act, "all persons similarly situated" are, quite plainly, not "treated alike." *Lyng*, 485 U.S. at 375 (citations and internal quotation marks omitted). And no party has pointed to any rational explanation for the difference.

[3] In its Injunction Order, this Court correctly observed that the Greensboro Act neither "facilitat[es] a broader degree of powers [by counties] and enhance[es] local autonomy"—the interests found to support the statute challenged in *Save Palisades Fruitlands*—nor enables "experiment[ation] with different election formats." Injunction Order at 14-15.

In short, the singling out of Greensboro citizens for revocation of the statutory rights of initiative and referendum is plain on the face of the Act, but no reasonable explanation for the distinction it draws is apparent, suggested, or even conceivable. The absence of any rational explanation for the distinction drawn by the Act is fatal. *Cf. Cipriano v. Houma*, 395 U.S. 701, 706 (1969) (per curiam) (invalidating state statute that gave right to vote in special election called to approve issuance of utility revenue bonds only to property owners because the statute "excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as those who are permitted to vote"); *Taxpayers United for Assessment Cuts*, 994 F.2d at 297 (approving state procedure that did "nothing more than impose non-discriminatory, content-neutral restrictions on the plaintiff's ability to use the initiative procedure that serve Michigan's interest in maintaining the integrity of its initiative process" but noting that constitutional analysis "would be different if [plaintiffs] alleged they were being treated differently than other groups seeking to initiate legislation").

3. The 2015 amendments to the Act do not cure the constitutional defect.

Just weeks after this Court preliminarily enjoined the Act, the North Carolina General Assembly amended the Act to alter the duration of the withdrawal of powers of self-government from the citizens of Greensboro. The amended Act effectively restores the rights of Greensboro citizens to petition for initiative and referendum, but only after the return of the 2020 Census. N.C. Sess. Laws 2015-264, § 85.5.

The temporally limited—but still significant—withdrawal of the initiative and referendum rights effectuated by the September amendment to the Act does not alter the analysis. According to the amended Act, Greensboro citizens (only, among citizens of all North Carolina municipalities) may not exercise the rights of initiative and referendum available to every other municipal citizen in North Carolina for at least five or six years, until after the "return" of the 2020 Census. That impairment of rights will affect at least one municipal election cycle in 2017, in which city council members will stand for reelection to the newly established four-year terms.[4] *See* Injunction Order at 5 (noting that Greensboro "[e]lections are held in odd-numbered years"). Depending on when the 2020 census results are returned, the 2021 elections could also be impacted.[5]

In other contexts, federal courts have recognized that nonpermanent (but nonetheless significant) deprivations of constitutional rights do not escape constitutional scrutiny. *See, e.g.*, *Gross v. Carter*, 265 F. Supp. 2d 995, 1001 (W.D. Ark. 2003) (observing that the U.S. Supreme Court has held that "even temporary, non-final deprivations of property are deprivations within the contemplation of the Fourteenth

[4] The September amendments took effect on October 1, 2015. A then-pending referendum on whether to extend city council member terms from two to four years was presented to Greensboro citizens in the November 2015 election. *See* Am. Compl. ¶ 41. The referendum passed; accordingly, beginning with the Greensboro City Council elections in 2017, council candidates will be elected to four-year terms. *See* Greensboro, N.C., Charter, Ch. III, Subchapter A, Sec. 3.01 (as amended by Ord. No. 15-0151).

[5] *See supra* note 2 (noting that the 2020 census data, if it follows the 2010 census data return patterns, will be released in the second quarter of 2011).

Amendment" (citing *Sniadach v. Family Financial Corp.*, 395 U.S. 337 (1969), and *Bell v. Burson*, 402 U.S. 535 (1971))). *Cf., e.g.*, *Antonio v. Kirkpatrick*, 453 F. Supp. 1161, 1179 (W.D. Mo. 1978) (concluding, in response to equal protection challenge raised by would-be candidate, that ten-year durational residency requirement would not survive even rational basis scrutiny, as "it has neither logic, reason, nor experience to support it"); *Brill v. Carter*, 455 F. Supp. 172, 174-75 (D. Md. 1978) (applying strict scrutiny to strike down four-year residency requirement for candidates for county council because requirement "entirely prevents a new resident from running for office for a substantial period of time, thereby infringing not only upon that right [to vital government benefits and privileges in the States to which they migrate] but also upon the right to travel" (emphasis added)). Indeed, the wealth of cases addressing challenges to durational residency requirements (i.e., where a newly arrived state resident lacks the same rights as an established resident until some period of residency, usually a year, is met by the new resident), show that equal protection analysis is properly applied to "short term" constitutional violations, even when the guarantee of equal protection is only violated (or allegedly violated) for less than a year. *See, e.g.*, *Haw. Boating Asso. v. Water Transp. Facilities Div., Dep't of Transp.*, 651 F.2d 661, 664-65 (9th Cir. 1981) (applying rational basis standard to challenge to one-year residency requirement to be eligible for preferential rates for boat mooring rights); *Starns v. Malkerson*, 326 F. Supp. 234, 238 (D. Minn. 1970) ("[W]e find the one-year durational residence requirement challenged here . . . should be tested under the traditional equal protection standards."); *Draper v. Phelps*, 351 F. Supp. 677, 681, 685 (W.D. Okla. 1972)

(applying compelling interest test to six-month residency requirement for candidates seeking election to state legislature).

Withdrawal of the initiative and referendum rights from Greensboro citizens alone, while for a significant but non-permanent period, is still "entirely lacking in basis." There remains no justification for singling out Greensboro from among all North Carolina municipalities otherwise entitled to invoke Sections 160A-103 and -104 to alter the form or structure of their local government. As this Court reasoned at the preliminary injunction stage, "[w]hile the General Assembly has from time to time redistricted and reapportioned other cities and boards, nothing before the Court indicates that the General Assembly has ever before prohibited a municipality's voters from participating in the referendum rights given in N.C. Gen. Stat. § 160A-103 and 160A-104 or that it has ever before completely removed city governance choices from a city council." Injunction Order at 7. That statement holds equally true for prohibitions that withdraw the right of self-governance for a defined period of time. The September 2015 amendments to the Greensboro Act, then, do not save the facially unconstitutional withdrawal of initiative and referendum rights from Greensboro citizens.

This Court's analysis of the harm imposed on Greensboro citizens by the Act remains fully applicable notwithstanding the September 2015 amendments:

> [The amended Act] deprives Greensboro voters of the right to vote on the way they select City Council members by depriving them of referendum rights available to every other voter in every municipality in the State. . . . Unlike voters of every other municipality in the State, Greensboro voters will elect their city council members [in 2017] under a new system established by the

> General Assembly that was adopted without notice to local voters and without giving voters the right to disapprove that system by referendum. . . . [T]he plaintiffs will have been deprived of their equal protection rights during the 201[7] election cycle. That is not a deprivation that can be remedied. Moreover, all Greensboro citizens will have been governed, at least for a time, by a City Council that was elected in violation of equal protection requirements and by the only City Council in the State that was elected through a system and process established without local participation or oversight. That, too, is a wrong that cannot be remedied.

Injunction Order at 15-17.

* * *

The Greensboro Act, on its face and with decided emphasis, singles out the City of Greensboro for revocation of the rights of initiative and referendum—and, with them, the right of Greensboro citizens to control and alter the form of their municipal government. Those rights remain available, by statute, to every other North Carolina citizen. Because neither the language of the Act nor its legislative history offers any explanation, "rational" or otherwise, for that targeted withdrawal, because the County Board and Intervenor-Defendants have offered none, and because no legitimate government interest could conceivably be furthered by that targeted withdrawal, this Court should find the Act, as amended, unconstitutional under the Equal Protection Clause of the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant partial judgment on the pleadings as to Plaintiffs' First Cause of Action. Fed. R. Civ. P. 12(c).

Respectfully submitted this the 21st day of October, 2016.

/s/ Jim W. Phillips
Jim W. Phillips, Jr.
N.C. State Bar No. 12516
jphillips@brookspierce.com
Julia C. Ambrose
N.C. State Bar No. 37534
jambrose@brookspierce.com

/s/ Bryan Starrett
Bryan Starrett
N.C. State Bar No. 40100
bstarrett@brookspierce.com
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Post Office Box 26000
Greensboro, NC 27420-6000
Telephone: 336/373-8850
Attorneys for the City of Greensboro

/s/ Anita S. Earls
Anita S. Earls
N.C. State Bar No. 15597
anita@southerncoalition.org
Allison J. Riggs
N.C. State Bar No. 40028
allison@southerncoalition.org
Emily E. Seawell
N.C. State Bar No. 50207
emily@southerncoalition.org
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380, ext. 115
Facsimile: 919-323-3942
Attorneys for Plaintiffs Lewis A. Brandon III, Joyce Johnson, Nelson Johnson, Richard Alan Koritz, Sandra Self Koritz, Charli Mae Sykes, and Maurice Warren II

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served copies of the foregoing notice on all parties who have entered an electronic appearance in this action through the ECF filing system.

This the 21st day of October, 2016.

/s/ Bryan Starrett
Bryan Starrett