UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

PATRICK L. MCCRORY, in his official capacity as Governor of the State of North Carolina, and FRANK PERRY, in his official capacity as Secretary, North Carolina Department of Public Safety,	)	
Plaintiffs,	)	Case No. 5:16-cv-238-BO
vs.	)	
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, LORETTA E. LYNCH, in her official capacity as United States Attorney General, and VANITA GUPTA, in her official capacity as Principal Deputy Assistant Attorney General,	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs do not dispute that their claims in this case are identical to the counterclaims and defenses they are pursuing in the Middle District of North Carolina in *United States v. North Carolina*, 16-cv-425, and *Carcaño v. McCrory*, 16-cv-236. Plaintiffs also do not dispute that pursuing their claims in this case risks inconsistent judgments and needlessly duplicates judicial and litigant efforts. And they provide no practical justification for litigating these same claims simultaneously in different districts. Instead, in their Response in Opposition, Plaintiffs lean heavily on the order of filings. But that is not important in this context (and certainly not dispositive), and more to the point, it still fails to identify what useful purpose this lawsuit will serve. Plaintiffs also argue that the Court's denial of their earlier transfer motion somehow also resolved Defendants' future Declaratory Judgment Act ("DJA") defense, even though the two

analyses diverge. In any case, circumstances have changed dramatically since then. Accordingly, because Plaintiffs fail to identify any legitimate basis for continuing to pursue these claims, this Court should exercise its discretion under the Declaratory Judgment Act and dismiss the Complaint.

I. Plaintiffs Do Not Contest Most of the Declaratory Judgment Discretionary Factors

Defendants' Motion to Dismiss raised one defense: that the Fourth Circuit's DJA discretionary factors require dismissal. *See* MTD, ECF No. 48-1, at 7-14. Specifically, as explained in the Motion, this lawsuit (1) has no ongoing uncertainty to resolve, because all of its claims are raised in the parallel enforcement action, (2) has no clarifying purpose, for the same reason, (3) needlessly risks inconsistent judgments, (4) needlessly duplicates judicial and litigant efforts, because it involves the same issues and the same parties as the enforcement action, (5) threatens piecemeal resolution of the underlying controversy, which involves additional claims, issues, and parties not before this Court, and (6) has made less progress toward trial than the Middle District actions.

In their Opposition, Plaintiffs do not contest most of these factors. They identify no uncertainty that the enforcement action will not resolve. They point to no legal rights that this lawsuit is necessary to clarify. They say nothing about the obvious risk of inconsistent judgments. They do not seek to justify the resources wasted by litigating the exact same issues twice in different courts. And they do not dispute that this action threatens piecemeal resolution of the underlying controversy.[1] Any one of these factors alone would be sufficient to dismiss this lawsuit. Taken together, the case for dismissal is overwhelming.

[1] The Middle District lawsuits involve additional claims (Title IX) and additional parties (University of North Carolina, UNC Board of Governors, the North Carolina legislature, private plaintiffs) not present in the instant lawsuit. Plaintiffs point out that "any judicial ruling on the merits [in the Middle District]

The only DJA discretionary factor Plaintiffs explicitly contest is procedural fencing. Opp. 5-9. The United States' letters to Plaintiffs made it clear that the United States intended to seek judicial relief, regardless of the precise date of filing.[2] That is all courts have required to find procedural fencing. *See* MTD 11-13. Plaintiffs' requested "extension" only bolsters that argument. Opp. 9.[3] But procedural fencing is just one factor, whose existence is by no means necessary for dismissal. Even if Plaintiffs did not engage in procedural fencing—that is, even if it was not clear to Plaintiffs that the United States intended to file an enforcement action, and even if it was pure coincidence that Plaintiffs, after requesting an extension, filed this lawsuit on the same day the United States had requested compliance—dismissal would still be required by the non-existence of any affirmative factors (resolving uncertainty and clarifying legal relations), and by the existence of at least four negative factors (inconsistent judgments, duplicative efforts, piecemeal resolution, and relative progress toward trial). A declaratory action can be dismissed

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would have the same result as a similar such ruling from this Court." Opp. 8 n.2. That is true: the Middle District cases will resolve all the issues presented in this case. But the converse is not true: this case cannot resolve all the issues presented in the Middle District cases, because this case involves fewer parties and fewer claims.

[2] *See, e.g.*, Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., to Patrick L. McCrory, Governor, at 2, May 4, 2016 ("When the Attorney General of the United States has a reasonable basis to believe that a state or person has engaged in a pattern or practice of discrimination in violation of Title VII, she may apply to the appropriate court for an order that will ensure compliance with Title VII. . . . Please advise the Department, therefore, no later than close of business on May 9, 2016 whether you will remedy these violations of Title VII . . . .") (underline in original). The United States sent letters with equivalent language to all defendants in its enforcement action.

[3] Plaintiffs argue that the United States' decision to file in the Middle District could equally be viewed as illegitimate forum shopping. Opp. 6-7. But it is a basic principle of federal adjudication that the party seeking a coercive remedy (injunctive or monetary)—not the party seeking a declaration to preempt a coercive remedy—has the choice of forum. *See, e.g.*, *Morgan Drexen*, 785 F.3d at 697 (noting that the coercive plaintiff (in that case, a government agency enforcing a federal statute) has the "traditional choice of forum and timing"); *J.B. Hunt Transport, Inc. v. Innis*, 985 F.2d 553 (Table), at *2 (4th Cir. 1993) (same); *Gribin*, 793 F. Supp. at 234 (dismissing declaratory action in line with "a plethora of cases from other circuits [which] buttress the notion that the Declaratory Judgment Act should not be used to deprive the plaintiff of his traditional choice of forum and timing") (quotes omitted); *Taylor*, 118 F.R.D. at 430 ("[T]he person who may be entitled to coercive relief has traditional interests in choice of forum, timing, and avoiding a race to the courthouse.").

based on even just one discretionary factor. *See, e.g.*, *Pitrolo v. Cty. of Buncombe*, 589 Fed. App'x 619, 629-30 (4th Cir. 2014) (affirming refusal to entertain declaratory action for the sole reason that it would serve no clarifying purpose).[4]

Plaintiffs also argue that "the alleged progress in the Middle District is, in truth, illusory." Opp. 10. That is plainly false. As of today, the following actions have occurred in the Middle District: All defendants in the United States' enforcement action have filed answers (except one, which filed a motion to dismiss), private plaintiffs have filed a motion for preliminary injunction which is fully briefed, the Court has set oral argument on that motion for August 1, 2016, the United States has filed a preliminary injunction motion which the parties have proposed to finish briefing by September 16, 2016, the Court has set a trial date for November 14, 2016 on all claims and counterclaims raised by both private and governmental parties, and all parties have submitted expedited discovery plans under Federal Rule of Civil Procedure 26(f), which the Court has now cemented in an Order.[5] *See* Order, Case 1:16-cv-425-TDS-JEP, Dkt. No. 93, at 3-4, July 14, 2016; *id.*, Dkt. No. 104 (Joint Rule 26(f) report); *id.*, Dkt. No. 108 (Order adopting discovery schedule); *id.*, Dkt. No. 112 (proposed schedule for United States' preliminary

[4] Plaintiffs' only attempt to explain why this lawsuit is consistent with the DJA's purposes is to cite one out-of-circuit district court decision, which distinguished between declaratory relief with prospective versus retrospective effect. *See* Opp. 8 (citing *Adirondack Cookie Co., Inc. v. Monaco Baking Co.*, 871 F. Supp. 2d 86, 94 (N.D.N.Y. 2012). But the cited passage only says that retrospective declaratory suits (asserting non-liability for past actions) are *never* permissible, not that prospective declaratory relief (non-liability for future actions) are *always* permissible—a result that would nullify all the other well-established DJA factors. *See id.* at 94 ("There is no basis for declaratory relief where only past acts are involved.") (quotes omitted). Far from holding that a duplicative and piecemeal declaratory action could proceed alongside a pending enforcement action, the court in *Adirondack Cookie* agreed that "the anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure." *Id.* at 94 (quotes omitted).

[5] Given these many actions taken by the plaintiffs, defendants, and judge in the Middle District, it is unclear why Plaintiffs think that the progress there stems only from the United States' "own unilateral decisions." Opp. 10 (italics omitted). Regardless, the United States can hardly be faulted for taking the 60 days for response provided by the federal rules. *See* Opp. 10 (citing Fed. R. Civ. P. 12(a)(2)). Plaintiffs have never moved for any expedition.

injunction motion). Thus, the four Middle District actions will likely reach some preliminary resolution in a matter of weeks, and a final resolution—as to all parties and claims in the underlying dispute over H.B. 2's legality—in a matter of months. No equivalent actions have occurred in the present case.

II. The DJA Discretionary Factors Supersede the First-to-File Rule

One consideration is notably absent from the DJA factors the Fourth Circuit has instructed district courts to consider: whether the declaratory action was filed first. Plaintiffs' reliance on the order of filings is therefore misplaced. *See* Opp. 7-8.[6] The Supreme Court and the Fourth Circuit have both made clear that the DJA factors supersede the first-to-file rule. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 280 (1995) (affirming district court's refusal to entertain first-filed declaratory action because the later-filed coercive action "encompassed the same coverage issues raised in the declaratory judgment action"); *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 258 (4th Cir. 1996) ("[A]lthough the federal action was filed first, we decline to place undue significance on the race to the courthouse door, particularly in this instance where [the declaratory judgment plaintiff] had constructive notice of the [declaratory judgment defendant's] intent to sue . . . ."); *Allied-General Nuclear Svcs. v. Commonwealth Edison Co.*, 675 F.2d 610, 611 (4th Cir. 1982) (upholding dismissal of first-filed declaratory suit because the "suit was anticipatory of the action at law"); Wright & Miller, Federal Practice & Procedure, § 2758 (2016) ("*Wilton* thus makes clear that the real question for the court is not which action was commenced first but which will most fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict.").

[6] In any event, Plaintiffs do not dispute that the first-filed lawsuit challenging H.B. 2 was *Carcaño v. McCrory*, which was filed in the Middle District on March 28, 2016—over a month before Plaintiffs filed the instant lawsuit.

The very existence of the discretionary factors necessarily assumes that the first-filed rule does not require a court to retain a first-filed declaratory suit. If it were otherwise, then no other factor would matter—a court would simply retain a first-filed declaratory action and dismiss a second-filed one. No court has ever suggested such a thing. To the contrary, courts routinely dismiss first-filed declaratory actions after the underlying coercive action is promptly filed. *See, e.g.*, Wright & Miller, Federal Practice & Procedure, § 2758 n.23 (collecting numerous cases); *State Farm Fire & Cas. Co. v. Taylor*, 118 F.R.D. 426, 429-30 (M.D.N.C. 1988). The reason is clear: Once the coercive action is filed, the pro-DJA factors disappear (especially when the coercive action has advanced further toward final resolution), and a number of anti-DJA factors arise. The courts of appeals have agreed that such a situation merits dismissal. *See, e.g.*, *Morgan Drexen, Inc. v. Consumer Fin. Protection Bureau*, 785 F.3d 684, 697 (D.C. Cir. 2015); *AmSouth Bank v. Dale*, 386 F.3d 763, 786 (6th Cir. 2004); *Tempco Elec. Heater Corp. v. Omega Engineering, Inc.*, 819 F.2d 746, 749-50 (7th Cir. 1987); *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 (5th Cir. 1983).

Because the first-filed rule has no application in this context, Defendants need not rely on any "special circumstances" outside of the DJA discretionary factors. Opp. 7; *see Wilton*, 515 U.S. at 286 (holding that "exceptional circumstances" are not required to dismiss a first-filed declaratory action). Even where the first-filed rule does apply, Plaintiffs concede that the "balance of convenience" might overcome it. *Id.* (quoting *Ellicott Machine Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178, 180 n.2 (4th Cir. 1974)). Here, the Middle District actions are the more convenient venue for resolving the underlying controversy because all parties and claims are present there, and so all claims and defenses will be resolved there in one fell swoop.

If Plaintiffs really think it would be more convenient to simultaneously litigate a subset of those same issues a second time in this Court, they have yet to say so.

Finally, because the Fourth Circuit's DJA discretionary factors supersede the first-filed rule, the United States was under no obligation to file its enforcement action as counterclaims to Plaintiffs' declaratory action. *See* Opp. 6-8. Courts have consistently held that the subject of a government enforcement action cannot use declaratory claims to force the government to file its case as counterclaims. *E.g.*, *Audubon Life Ins. Co. v. FTC*, 543 F. Supp. 1362, 1370-71 (M.D. La. 1982) ("To grant the request of [declaratory judgment] plaintiffs in this regard would only serve to encourage more of these scattered preemptive attacks."); *FTC v. Carter*, 464 F. Supp. 633, 639 (D.D.C. 1979); *In re Corporate Patterns Report Litigation*, 432 F. Supp. 274, 284 (D.D.C. 1977); *A.O. Smith v. FTC*, 417 F. Supp. 1068 (D. Delaware 1976). The same is true in suits between private parties, because "it defies logic to suggest that a complaint seeking declaratory relief that the defendant does not have certain claims would force that defendant to plead mirror image claims as compulsory counterclaims." *In re Denton Ct. Elec. Co-op, Inc.*, 2003 WL 22846354, *2-3 (N.D. Tex. Apr. 8, 2003); *see also Franklin v. Diamond Offshore Mgmt. Co.*, 1994 WL 144288 (E.D. La. Apr. 18, 1994) ("That [the declaratory judgment plaintiff] won the race to the courthouse by several days does not entitle it to gain precedence in time and forum, forcing [the coercive plaintiff] to litigate his [] claim as a compulsory counterclaim in the forum of [the declaration judgment plaintiff's] choice. To so conclude would encourage the race to the courthouse.").[7]

[7] In their Opposition, Plaintiffs state that they "also seek injunctive relief." Opp. 2. But their Complaint requests no such relief. It is titled "Complaint for Declaratory Judgment." Compl. at 1, ECF No. 1. And while an introductory sentence states that Plaintiffs "seek declaratory and injunctive relief," *id.*, the Complaint's counts are declaratory only, *see id.* at 8 ("Count One: Declaration"); *id.* ("Count Two: Declaration"), and its prayer for relief seeks only declaratory relief. *Id.* at 9 (seeking "Declaratory Relief" only). The Complaint contains no explanation of what kind of injunction Plaintiffs might seek, what

At any rate, the United States had a perfectly good reason to file in the Middle District: A lawsuit challenging the validity of H.B. 2 had already been filed there over a month earlier, and it made no sense to litigate that question in separate districts. Subsequent developments in those two lawsuits confirm why this choice made sense: The United States will now be participating in the argument of the first lawsuit's preliminary injunction, and the two cases will then be tried together. *See* Order, Case 1:16-cv-425-TDS-JEP, Dkt. No. 93, at 3-4, July 14, 2016.

III. This Court Has Not Already Decided Defendants' Discretionary Factors Defense

Unable to seriously contest that the Fourth Circuit's discretionary factors counsel in favor of dismissal, Plaintiffs argue that this Court implicitly ruled on those factors in its decision denying transfer. *See* Opp. 4-5 (citing Order, June 7, 2016, ECF No. 34). But the DJA factors were not even nominally presented by Plaintiffs' Motion to Transfer, ECF No. 9, and the Court's Order did not mention them. Moreover, the transfer and DJA-factor analyses are different. The first-filed rule is often dispositive in the transfer context—as the Court recognized, *see* ECF No. 34, at 2—but not in the DJA context. Plaintiffs also quote the Order's explanation that venue was proper in the Eastern District, Opp. 4, but Defendants have not challenged venue. The Order simply did not resolve any issues that were not before the Court.

Furthermore, to the extent that the transfer and DJA-factor analyses share concerns about duplicative litigation and inconsistent judgments, *see* MTD 9 n.5, circumstances have changed considerably since the Court denied Plaintiffs' transfer motion. At the time, it was possible that all three Eastern District actions would be consolidated in this Court, and that one or both of the Middle District actions would be transferred here as well. Those possibilities no longer exist.

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actions it might prohibit, or what sources of law might support it. In fact, after its first sentence, the Complaint never again uses the word "injunction" or any variant.

Since then, all four other cases (*Carcaño*, *United States*, *Berger*, and *North Carolinians for Privacy*) have been assigned to the same judge in the Middle District, who has already set schedules for preliminary injunction and trial on the merits. All four cases have been consolidated for discovery, and three have been consolidated for trial. Order, Case 1:16-cv-425-TDS-JEP, Dkt. No. 108. Plaintiffs in this case have since raised all of their claims in this lawsuit as defenses and counterclaims in the Middle District actions. No party—including Plaintiffs—has moved to transfer any of those cases to this District. Thus, while at the time of the Court's June 7 Order, the risks of duplicative litigation and inconsistent judgments may have counseled against transfer, at this point, those risks require dismissal.

* * *

This Court should not allow Plaintiffs to litigate their defenses and counterclaims twice.[8] The efficiency of federal adjudication would be deeply compromised if every time parties knew they would soon be sued, they could file and maintain a separate declaratory suit for non-liability. *See* Compl. at 9 (asking for declarations that Plaintiffs "are not violating Title VII or VAWA" and "do not have to incur damages"). The burden on the federal courts would proliferate. The potential for inconsistent judgments would abound. Instead of one lawsuit to settle each controversy, there would be two, and perhaps more, if there were multiple defendants. This is exactly what the DJA discretionary factors exist to prevent.

Entertaining this lawsuit would also create a series of perverse incentives for litigants. If a party can maintain its declaratory suit even after the coercive suit is promptly filed, that party

[8] Relatedly, the plaintiffs in *Berger v. United States*, 16-cv-844, who are intervenor-defendants in the United States' enforcement action, have agreed to voluntarily dismiss their declaratory judgment lawsuit in light of their counterclaims. *See* Joint Notice, *United States v. North Carolina*, 16-cv-425, Dkt. No. 106, at 2-3 ("The plaintiffs in *Berger v. United States Department of Justice, et al.*, No. 1:16CV844, agree to voluntarily dismiss their complaint, in view of the fact that, as intervenor-defendants, they are pursuing the same claims and relief via counter-claims in *United States of America v. North Carolina, et al.*, No. 1:16CV425).

will have an incentive to rush into court to gain an advantage in forum and timing. Even more problematic, this would reduce incentives for pre-litigation negotiations. If informing a potential defendant about the possibility of judicial enforcement allows that defendant to dictate the terms of the litigation, plaintiffs will not reach out to try and resolve disputes out of court. "Such an environment would discourage the *prelitigation* settlement of disputes and thus *prejudice* judicial economy." *Taylor*, 118 F.R.D. at 431 (italics in original). The Complaint should be dismissed.

Respectfully submitted,

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