

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs,

v.

ROY A. COOPER, III, in his official
capacity as Governor of North Carolina, *et
al.*,

Defendants.

Case No. 1:16-cv-236

**UNC DEFENDANTS' RESPONSE TO
MOTION FOR LEAVE TO FILE DECLARATION**

This response addresses the Plaintiffs' Motion for Leave to File Declaration of Erika Myers, ECF No. 236. The UNC Defendants do not oppose the filing of the declaration, but do oppose Plaintiffs' request that the Court consider this declaration when ruling on the UNC Defendants' motion to dismiss for lack of standing, ECF No. 222.

First, Plaintiffs' declaration is irrelevant because it cannot cure an inadequacy in a complaint at the motion-to-dismiss stage. Federal Rule of Civil Procedure 8(a) states that a complaint "must contain ... a short and plain statement of the grounds for the court's jurisdiction." "Thus the facts providing the court jurisdiction must be affirmatively alleged in the

complaint.” *Pinkley, Inc. v. City of Frederick*, 191 F.3d 394, 399 (4th Cir. 1999). The UNC Defendants’ motion to dismiss explains that the allegations in Plaintiffs’ complaint fail to establish standing. A declaration cannot cure that deficiency.

Plaintiffs claim that *White Tail Park, Inc. v. Stroube*, 413 F.3d 451 (4th Cir. 2005)—which says that a court “may consider evidence outside the pleadings” when ruling on a motion to dismiss for lack of subject-matter jurisdiction—allows the Court to consider their declaration here. That conflates two different types of challenges to jurisdiction. “A defendant may challenge standing at the motion-to-dismiss stage in one of two ways: facially or factually.” *Wikimedia Foundation v. NSA*, 857 F.3d 193, 208 (4th Cir. 2017). A “facial challenge ... contends that the complaint fails to allege facts upon which standing can be based,” while “a factual challenge ... contends that the jurisdictional allegations of the complaint are not true.” *Id.* A court may “look beyond the complaint” *only* “in a factual challenge.” *Id.*; *see, e.g., Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 252 F. Supp. 3d 488, 491 (D.S.C. 2017) (“A facial attack questions the sufficiency of the complaint. In this context, ... materials outside the pleadings are not considered. Alternatively, a factual attack challenges the factual allegations in the complaint upon which subject-matter jurisdiction is based. In this situation,

the court is required to consider evidence outside the pleadings as well”) (citations omitted). The UNC Defendants have raised a facial challenge; they have argued that the Complaint on its face lacks allegations establishing standing. The question before the Court is thus the adequacy of the allegations in the Complaint; extrinsic evidence is beside the point.

Second, Plaintiffs’ declaration is also immaterial because it recounts events that occurred after the filing of the complaint. The existence of standing “depends on the facts *as they exist when the complaint is filed.*” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.5 (1992) (emphasis in original); *see also United States ex rel. Beauchamp v. Academi Training Center*, 816 F.3d 37, 45 (4th Cir. 2016) (“jurisdiction depends on the state of things at the time ... the action [is] brought”). Plaintiffs filed their Fourth Amended Complaint on September 7, 2017. (ECF No. 210.) But Plaintiffs’ declaration, in part, relates events that took place *after* September 2017. *See, e.g.*, Myers Decl. ¶ 11 (“One day in October of 2017 ...”). These subsequent events cannot establish that Plaintiffs had standing when they filed their complaint.

Third, in all events, Plaintiffs’ declaration has nothing to do with the UNC Defendants. To establish standing, a plaintiff must show that the asserted injury is “fairly traceable to the challenged action *of the defendant.*”

Lujan, 504 U.S. at 560 (emphasis added)—here, the UNC Defendants. The declaration, however, does not allege any action by the UNC Defendants; it alleges, instead, action by an “elementary school in the new Hanover County School District.” Myers Decl. ¶ 3. The declaration thus cannot establish standing to sue the UNC Defendants.

Dated: March 9, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this brief complies with the word limits of Local Civil Rule 7.3(d) because, excluding the parts exempted by the rule, the brief contains 625 words.

Dated: March 9, 2018

/s/ Glen D. Nager

Glen D. Nager

Counsel for the UNC Defendants

CERTIFICATE OF SERVICE

I certify that on March 9, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered parties.

Dated: March 9, 2018

/s/ Glen D. Nager

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