

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

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs,

v.

ROY A. COOPER, III, *et al.*,

Defendants,

and

PHIL BERGER, *et al.*,

Intervenor-Defendants.

No. 1:16-cv-00236-TDS-JEP

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE
DECLARATION OF ERICKA MYERS**

Neither Intervenor nor UNC oppose Plaintiffs' request for leave to file the Declaration of Ericka Myers, and therefore the Court should grant Plaintiffs' motion for leave to file. *See* UNC Response at 1, ECF No. 240; Intervenor Response at 1, ECF No. 241. But both claim either: (1) that the Court should not consider the declaration when ruling on the pending motions to dismiss, or (2) that the declaration does not support Plaintiffs' standing. For the following reasons, the Court should consider the declaration—which contains further evidence of Plaintiffs' standing, in addition to the evidence and allegations already set forth in Plaintiffs' Fourth Amended Complaint and Opposition to the pending motions to dismiss. *See* Pls.' Opp'n to Motions to Dismiss

(“Pls.’ Opp’n”) at 8-19, ECF No. 233. To the extent the Court declines to grant leave to file or to consider the declaration, however, Plaintiffs would promptly move for leave to file a Fifth Amended Complaint.

UNC contends that the Court cannot consider the declaration and that, regardless, it has no bearing on Plaintiffs’ standing against UNC.

First, UNC claims that Rule 8(a) bars consideration of the declaration. But as Plaintiffs explained, much of Ms. Myers’ declaration provides additional evidence to support the harms already detailed in the Complaint. *See, e.g.*, Fourth Amended Complaint (“FAC”) ¶¶ 67, 70, 75, 76-80, ECF No. 210. And, regardless, the Supreme Court has directly explained that when a motion to dismiss raises standing, “it is within the trial court’s power to allow” a plaintiff “to supply, by amendment to the complaint *or by affidavits*, further particularized allegations of fact deemed supportive of plaintiff’s standing.” *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (emphasis added). The Fourth Circuit and this Court have accepted affidavits or declarations outside the pleadings that provide additional factual information when offered by Plaintiffs to support standing. *See, e.g., White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460-62 (4th Cir. 2005) (considering association president’s affidavit); *Nat’l Alliance for Accessibility, Inc. v. Rite Aid of N.C., Inc.*, No. 10-932, 2011 WL 4499294, at *5 n.5 (M.D.N.C. Sept. 27, 2011) (considering post-complaint affidavit providing specificity concerning return trips to North Carolina property—and likelihood of future harm—where Defendants argued plaintiff’s intent as stated in the complaint was insufficiently concrete). In particular, this Court has accepted post-complaint declarations of organizational plaintiffs’ members that

“support its allegations and provide additional detail.” *Action NC v. Strach*, 216 F. Supp. 3d 597, 617-18 & n.6 (M.D.N.C. 2016).

To argue otherwise, UNC attempts to rely on the Fourth Circuit’s distinction between facial and factual challenges. But the Fourth Circuit has made that distinction when barring *defendants* from offering additional matters outside the pleadings and where defendants raised only a facial challenge to jurisdiction (and therefore did not challenge the factual veracity of the pleadings’ allegations). The doctrine is designed to avoid improperly accelerating the court’s determination of disputed issues of fact, and ensuring that the plaintiff receives the appropriate “procedural protection” at the motion to dismiss stage: namely that the facts alleged “are taken as true.” See *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009); see also *Wikimedia Found. v. NSA*, 857 F.3d 193, 212-13 (4th Cir. 2017) (declining to consider government’s evidence, including two declarations). Application of the doctrine turns on the source of the defendant’s attack on jurisdiction. *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981) (explaining that the question asks whether the matter outside the complaint is the “*basis of*” the defendant’s jurisdictional “attack” (emphasis added)); *Thigpen v. United States*, 800 F.2d 393, 401 n.15 (4th Cir. 1986) (citing *Williamson*). But as noted, when *plaintiffs* seek to respond to a standing challenge using a declaration, the Fourth Circuit and this Court have accepted that additional evidence—in effect, construing them as allegations incorporated in the complaint. See *White Tail*, 413 F.3d at 460-62; *Action NC*, 216 F. Supp. 3d at 617-18. UNC misleadingly quotes portions of *Wikimedia* to imply that a court may *only* look beyond the complaint on a factual challenge. 857 F.3d at 208.

Moreover, even if the distinction applies to a plaintiff's use of evidence outside the pleading in the face of a standing challenge, both UNC and Intervenor appear to raise factual challenges to at least Plaintiffs' allegations that H.B. 142 is vague and could be used by officials to bar individuals from public facilities, causing plausible fear and uncertainty. UNC contends that "Plaintiffs face no significant uncertainty about the meaning of HB 142" because the Attorney General has the power to interpret state statutes. UNC Br. at 7, ECF No. 223. And Intervenor characterize Plaintiffs' claim that enjoining HB 142 would prevent officials from claiming that transgender individuals are barred from public facilities as "untrue" because, Intervenor claim, "HB 142 neither enacts nor overrules any particular access policy." Intervenor Reply at 4, ECF No. 234. But the complaint alleges that H.B. 142 was intended to leave H.B. 2 in place and that many legislators described it as having that effect. *See, e.g.*, FAC ¶¶ 246, 277, 303. And Ms. Myers' declaration demonstrates that government officials *are* using H.B. 142 as a justification to bar transgender individuals from public restrooms consistent with their gender identity, and that, absent a judicial order, Plaintiffs' fear is significant and reasonable.

Second, UNC wrongly suggests the declaration is immaterial because it recounts "in part" events that occurred after filing of the complaint. UNC Response at 3. Ms. Myers' declaration states that in August 2017 she met with officials at her daughter's school and in *that month* the principal informed her that "H.B. 142 permits schools to take [the] position" that it is illegal in North Carolina for Ms. Myers' daughter to use the girls' restroom. Myers Decl. ¶ 9. On its face, the declaration shows that Ms. Myers, a

member of the ACLU, and her daughter—individuals on whose behalf Plaintiff the ACLU of North Carolina sued, FAC ¶ 26—were suffering an injury as of September 7, 2017, when the Fourth Amended Complaint was filed. That the declaration details continuing injuries following from that action does not undermine this fact. *See Kenny v. Wilson*, No. 17-1367, --- F.3d ----, 2018 WL 1321983, at *4 (4th Cir. Mar. 15, 2018) (explaining that where plaintiffs seek declaratory and injunctive relief they must, in fact, “establish an ongoing or future injury in fact”).

Finally, although Ms. Myers’ declaration may not have a direct bearing on Plaintiffs’ standing with respect to UNC itself, the fact that one school district has interpreted H.B. 142 as permitting that district to bar transgender individuals from using restrooms consistent with their gender identity simply highlights that, as Plaintiffs point out, UNC has itself chosen its own limiting construction of H.B. 142 by continuing to regulate restrooms in certain respects—like posting male and female signs on campus restrooms. *See* Pls.’ Opp’n at 14.

For their part, Intervenors do not claim that the declaration cannot be considered; they simply argue that, even taken as true, the declaration fails to support Plaintiffs’ standing. *See* Intervenors Response at 1-3 & n.2. Indeed, in arguing only that the declaration does not show causation and redressability, Intervenors implicitly concede that the harms alleged in the declaration demonstrate an injury-in-fact. *Id.* at 3. Neither of Intervenors’ causation and redressability arguments hold water.

First, Intervenors incorrectly claim that the declaration alleges harms that are caused only by parties not before the court. That is simply incorrect. As Plaintiffs

explained in their opposition to the motions to dismiss, Plaintiffs' inability to access government restrooms is a direct result of H.B. 142, itself. Pls.' Opp'n at 13-14. An order invalidating H.B. 142 would remove the state law that the New Hanover County School District claims justifies its bar on transgender individuals using the restroom consistent with their gender identity. Indeed, Intervenor's claims that Defendants are not "legally responsible for the alleged New Hanover policy," and citation to local school boards' authority, Intervenor's Response at 3, are inconsistent with their repeated claim in their Motion to Dismiss that H.B. 142 is simply a preemption measure that *prevents* localities from regulating bathroom access at all, Intervenor's Br. at 5, ECF No. 225.

Intervenor's cannot have it both ways. Because H.B. 142 preempts these types of regulations, under Intervenor's arguments, the local school board cannot deviate from H.B. 142 at all and cannot issue bathroom access regulations that contradict H.B. 142. Any general responsibility for school governance North Carolina law may place in local school boards is therefore irrelevant. H.B. 142 expressly locks in uncertainty and ambiguity about restroom access and obstructs local officials from providing any clarity. In this case, the school board interpreted H.B. 142 as an invitation to, in effect, maintain H.B. 2's bar on transgender individuals using government restrooms consistent with their gender identity. Ms. Myers' declaration shows that some school districts expressly read the law consistent with Intervenor's and other legislators' statements that the law has the effect of maintaining H.B. 2's restroom prohibitions. *See, e.g.*, FAC ¶ 246. An order invalidating H.B. 142 would prevent officials from claiming that under state law, transgender individuals are barred from public facilities, and indeed would restore their

ability to clarify that transgender people may use restrooms corresponding to their gender identity.

Second, Intervenors claim that H.B. 142 is not traceable to the school district's decision because the statute enacts no access standards and makes no demands on private conduct. For the same reasons as expressed in Plaintiffs' opposition to the motions to dismiss, this argument inappropriately asks this Court to determine the merits of Plaintiffs' vagueness challenge. At the motion to dismiss stage, the Court must presume Plaintiffs will prevail on the merits of their claims. *See White Tail*, 413 F.3d at 460-61. Indeed, Intervenors' contention that school officials "may have *mistakenly* identified H.B. 142 as a basis for their restroom policy" directly exhibits the type of vagueness inherent in and intended by H.B. 142. Intervenors Response at 4; *see* Pls.' Opp'n at 27.¹ Plaintiffs' injuries are traceable to H.B. 142's vagueness and would be remedied by an order striking down the law.

* * *

¹ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940 (1982) is of no help to Intervenors. There, the Court refused to attribute to the state the action of *private individuals* who had invoked a state statute to justify attaching certain property. In particular because the Petitioner himself claimed the private individuals' decision was "unlawful under state law," the Court concluded that action could not be ascribed to a state rule or decision. *Id.* Here, however, Plaintiffs are directly challenging a state law, have sued state actors charged with enforcing and implementing that law, and the New Hanover County School District is directly regulated by that state law.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant leave to file the Declaration of Ericka Myers, and consider that declaration when ruling on the pending motions to dismiss. If this Court declines to consider the declaration, however, Plaintiffs will promptly move for leave to file a Fifth Amended Complaint.

Dated: March 23, 2018

Respectfully submitted,

/s/ Christopher A. Brook

Christopher A. Brook (NC Bar No. 33838)

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CERTIFICATE OF WORD COUNT

This brief complies with Local Rule 7.3(d) because, excluding the parts of the brief exempted by Rule 7.3(d) (cover page, caption, signature lines, and certificates of counsel), this brief contains 1,868 words.

Dated: March 23, 2018

/s/ Christopher A. Brook

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CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on March 23, 2018, I electronically filed the foregoing REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE DECLARATION OF ERICKA MYERS using the CM/ECF system, and have verified that such filing was sent electronically using the CM/ECF system to all parties who have appeared with an email address of record.

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