

**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

**PLAINTIFFS' CONSENT MOTION FOR LEAVE TO FILE
FOURTH AMENDED COMPLAINT AND EXTENSION OF TIME TO
RESPOND TO FOURTH AMENDED COMPLAINT**

NOW COME Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Hunter Schafer, Angela Gilmore, and American Civil Liberties Union of North Carolina (collectively, “Plaintiffs”), by and through their attorneys, and move the Court pursuant to Rules 6(b), 15(a) & (d), and 16(b)(4) of the Federal Rules of Civil Procedure for leave to file the Fourth Amended Complaint, attached hereto as Exhibit A, and to extend until September 15, 2017, the deadline for Defendants and Intervenor-Defendants to answer, move against, or otherwise respond to Plaintiffs’ Fourth Amended Complaint. All parties have

consented to the filing of the Fourth Amended Complaint and the extension of time to respond until September 15, 2017.

In support of this motion, and pursuant to Local Rule 7.3(j)(2) & (5)-(6), Plaintiffs state as follows:

I. PROCEDURAL BACKGROUND

A. H.B. 2 Litigation

1. Plaintiffs initiated this action on March 28, 2016 with the filing of their initial Complaint (ECF No. 1).
2. Plaintiffs filed an Amended Complaint on April 21, 2016 (ECF No. 9).
3. On May 16, 2016, Plaintiffs moved for a preliminary injunction.
4. On August 15, 2016, Plaintiffs moved for leave to file their Second Amended Complaint (ECF No. 116). The Court granted the motion on September 20, 2016 (ECF No. 147), and Plaintiffs filed their Second Amended Complaint on September 21, 2016 (ECF No. 151).
5. On August 26, 2016, the Court granted in part and denied in part Plaintiffs' motion for a preliminary injunction. (ECF No. 127.)
6. On October 28, 2016, the United States Supreme Court granted certiorari in *Gloucester County School Board v. G.G.* In response, this Court on November 15, 2016, extended the trial date and discovery deadlines by ninety days and stayed the then-pending discovery and pre-trial matters.

7. On November 8, 2016, Governor Roy A. Cooper III (“Governor Cooper” or “Defendant Cooper”) was elected, defeating Governor McCrory.

8. On November 14, 2016, Plaintiffs made an oral motion for leave to file their Third Amended Complaint, which the Court granted (ECF No. 177). Plaintiffs filed their Third Amended Complaint on November 21, 2016 (ECF No. 183).

9. On December 16, 2016, this Court granted the Parties’ Joint Motion to Stay Proceedings Pending the U.S. Supreme Court Decision in *Gloucester County School Board v. G.G.*

10. On January 1, 2017, Governor Cooper took office and was automatically substituted for Defendant Governor McCrory as a party in this action.

11. On March 6, 2017, the U.S. Supreme Court vacated the United States Court of Appeals for the Fourth Circuit’s judgment in *Gloucester County School Board v. G.G.* and remanded the case to the Fourth Circuit for “further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.”

12. In light of the Supreme Court’s disposition of the *Gloucester County* case, the parties filed a Joint Status Report on March 28, 2017, addressing the expiration of this Court’s December 16, 2016 stay and outlining efforts to meet and confer about a new schedule for discovery and trial. (ECF No. 201.)

B. Repeal of H.B. 2 and Enactment of H.B. 142

13. On March 30, 2017, the General Assembly passed—and Governor Cooper signed—H.B. 142. Section 1 of H.B. 142 repealed H.B. 2. Section 2 of H.B. 142 provides that: “State agencies, boards, offices, departments, institutions, branches of government, including The University of North Carolina and the North Carolina Community College System, and political subdivisions of the State, including local boards of education, are preempted from regulation of access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with an act of the General Assembly. Section 3 of H.B. 142 provides that “No local government in this State may enact or amend an ordinance regulating private employment practices or regulating public accommodations.” Section 4 of H.B. 142 states that “Section 3 of this act expires on December 1, 2020.”

14. Subsequent to the enactment of H.B. 142, the Parties filed a Joint Status Report on April 28, 2017. (ECF No. 204.) Plaintiffs informed this Court and the Parties that they intended “to file a Fourth Amended Complaint asserting federal constitutional and statutory claims against H.B. 142, whether upon the consent of the parties or with leave of the Court.” (*Id.* at 1.) Plaintiffs also asserted that “the preliminary injunction no longer has any force or effect, even though it remains in place” and “can be lifted.” (*Id.* at 2.)

15. On May 2, 2017, the Court lifted the preliminary injunction it entered on August 26, 2016. (ECF No. 205.)

II. ARGUMENT

16. Plaintiffs' Fourth Amended Complaint is attached hereto as Exhibit A.

17. All Defendants consented to the filing of the Fourth Amended Complaint and, after meeting and conferring, Plaintiffs have agreed to extend the time for Defendants to respond to the Fourth Amended Complaint under Federal Rule of Civil Procedure 6(b).

18. Plaintiffs contend that outside events—the repeal of H.B. 2 and enactment of H.B. 142—have necessitated an amended complaint. Given the fundamental change in circumstances, the proposed Fourth Amended Complaint not only asserts claims against H.B. 142, but also adds additional plaintiffs and defendants. The proposed Fourth Amended Complaint also retains, at least conditionally, claims challenging H.B. 2.

19. Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that “The court should freely give leave [to amend the complaint] when justice so requires.” “In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’” *Foman v. Davis*, 371 U.S. 178, 182 (1962); see *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980).

20. Rule 15(d) of the Federal Rules of Civil Procedure further permits parties to supplement their pleadings to include “any transaction, occurrence, or event that

happened after the date of the pleading to be supplemented.” Supplemental pleadings “enabl[e] a court to award complete relief . . . in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted. So useful they are and of such service in the efficient administration of justice that they ought to be allowed as of course, unless some particular reason for disallowing them appears” *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28-29 (4th Cir. 1963).

21. Amended and supplemental pleadings are appropriate when a statute or ordinance is amended or repealed after being challenged by the initial pleading. *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 226-27 (1964).

22. Here, there has been no undue delay, bad faith, or dilatory motive on the part of the Parties in requesting leave to file an amended complaint and an extension of time to respond. Plaintiffs assert that events outside Plaintiffs’ control have necessitated an amended complaint and these amendments will result in no prejudice to the other parties to this proceeding, which has been stayed since before the passage of H.B. 142.

23. To the extent Rule 16(b)(4) applies—although the current scheduling order in this case does not contain a deadline for amending the pleadings—Plaintiffs assert that good cause exists for granting leave to file the Fourth Amended Complaint. Plaintiffs’ claims against H.B. 142 could not have been brought in any of the earlier versions of the complaint, because H.B. 142 was not enacted until March 30, 2017. According to Plaintiffs, the fundamental change in circumstances brought about by H.B. 142 constitutes good cause. *Cf. In re Lone Star Indus., Inc. Concrete R.R. Cross Ties Litig.*,

19 F.3d 1429, 1994 WL 118475, *11 (4th Cir. Apr. 7, 1994) (finding “good cause” exists when the evidence needed by a plaintiff to prove an to prove his or her amended claim “did not surface until after the amendment deadline”); *Forstmann v. Culp*, 114 F.R.D. 83, 86 n. 1 (M.D.N.C.1987) (“‘Good cause’ for modifying the scheduling order might exist if ... plaintiff uncovered previously unknown facts during discovery that would support an additional cause of action”). Plaintiffs contend that they have proceeded diligently, and as noted above, that the amended complaint will result in no prejudice to the other parties given the stay that has been in place.

24. Furthermore, good cause exists for an extension of time to answer, move against, or respond to the Fourth Amended Complaint due to the addition of new plaintiffs and defendants, the complexity of the new allegations and claims asserted in the Complaint, and the unavailability of several counsel during July and August 2017.

25. No Party will be prejudiced by the relief sought in this consent motion.

26. All Parties consent to the filing of this motion and the relief it seeks.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully move that the Court enter an order granting Plaintiffs leave to file the Fourth Amended Complaint and granting Defendants and Intervenor-Defendants an extension until September 15, 2017 to answer, move against, or otherwise respond to Plaintiffs’ Fourth Amended Complaint.

Respectfully submitted,

Dated: July 21, 2016

/s/ Christopher A. Brook

Christopher A. Brook (NC Bar No.
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*Appearing by special appearance
pursuant to L.R. 83.1(d).

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on July 21, 2016, I electronically filed the foregoing PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT, 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.

/s/ Christopher A. Brook
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