IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
5:13-cv-00607-BO

CALLA WRIGHT, *et al.*,	)
	)
	)
Plaintiffs,	)
	)
vs.	)
	)
THE STATE OF NORTH CAROLINA, and THE WAKE COUNTY BOARD OF ELECTIONS	)
	)
Defendants.	)
	)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiffs respectfully submit the following memorandum in support of their Motion for Leave to File an Amended Complaint.

STATEMENT OF THE CASE

Plaintiffs commenced this action on August 22, 2013 on behalf of individual plaintiffs and associations of voters seeking to preserve their constitutional rights pursuant to 42 U.S.C. § 1983. Plaintiffs seek to enjoin implementation of Session Law 2013-110, which includes a new redistricting plan for the Wake County School Board, passed and ratified June 13, 2013, because it violates the Equal Protection principles of the United States and North Carolina Constitutions.

On November 4, 2014, Defendants filed their Answer (Docket Entry, hereinafter "D.E." #30) and two Motions to Dismiss (D.E. #27; D.E. #29). The Motion to Dismiss filed by the State of North Carolina seeks to dismiss the State as a Defendant based on sovereign immunity. (D.E.

29 ¶ 1) Plaintiffs now seek to add Governor Pat McCrory, Senate President Pro Tem Phil Berger and House Speaker Thom Tillis as Defendants in their official capacities to obtain injunctive and equitable relief concerning Session Law 2013-110.

STATEMENT OF RELEVANT FACTS

Plaintiffs seek to enjoin the further use and implementation of Session Law 2013-110 which redistricted the Wake County School Board a mere two years after new districts were implemented. Senator Berger and Representative Tillis presided over the North Carolina Senate and North Carolina House, respectively, when S.B. 325 was enacted on June 13, 2003. As chief executor of the laws of North Carolina, Gov. McCrory oversees the implementation of Sessionn Law 2013-110. Plaintiffs allege that the population deviations in the Session Law 2013-110 plan violate the established equal protection principles of one-person, one vote in the federal and state constitution. If elections proceed under Session Law 2013-110, the rights of Plaintiffs and voters across Wake County will be irreparably harmed. For this reason, Plaintiffs seek prospective, equitable relief and seek to add the three state officials as Defendants in this action.

ARGUMENT

I. LEAVE TO AMEND COMPLAINTS SHOULD BE FREELY GRANTED BARRING BAD FAITH, PREDJUDICE TO THE DEFENDANTS OR FUTILITY.

Under Rule 15(a) of the Federal Rules of Civil Procedure, "a party may amend the party's pleadings only by leave of court or by written consent of the parties; and leave to amend a complaint shall be freely given when justice so requires." The Fourth Circuit has consistently held that prejudice, bad faith or futility are the only grounds for denying a motion to amend a complaint. *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (en banc); *Davis v. North Carolina*, 180 F. Supp. 2d 774, 776 (E.D.N.C. 2001). In *Edwards v. City of Goldsboro*, 178 F.3d

231, 242 (4th Cir. 1999), the Fourth Circuit commented on the Rule's directive that leave to amend be freely granted when justice requires it:

> The Supreme Court has declared that "this mandate is to be heeded." . . . The law is well settled "that leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." . . . Delay alone is an insufficient reason to deny leave to amend. . . . Rather, the delay must be accompanied by prejudice, bad faith, or futility.

Edwards at 242 (citations omitted; emphasis in original).

Federal courts have long recognized that justice and judicial efficiency encourage liberal amendment of the pleadings. "If the underlying facts and circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* Further, a formal defect in a plaintiff's complaint should have the opportunity to be cured so the Court can address substantive claims. *Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999) ("The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that [the] plaintiff be given every opportunity to cure a formal defect in his pleading." (quoting 5A Charles Allen Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (2d ed. 1990))). This Court has previously allowed plaintiffs to cure a "fatal defect" related to sovereign immunity by adding state officials as Defendants. *Davis v. North Carolina*, 180 F. Supp. 2d at 776, fn. 1.

Plaintiffs have moved expeditiously to amend their complaint and have acted in good faith, filing their first complaint in August of 2013 although the plans will not go into effect until 2016. As allowing addition of Defendants at this time would maximize judicial efficiency,

without prejudice to the current Defendants, the motion to amend the complaint should be allowed.

II. PLAINTIFFS ARE ENTITLED TO AMEND THEIR COMPLAINT

A. Plaintiffs have Not Acted in Bad Faith in Seeking to Amend their Complaint.

Plaintiffs named the State of North Carolina as a Defendant to reduce the complexity of the litigation and limit the number of defendants burdened by litigation. The State of North Carolina may waive immunity to suit in federal court by consent. *Lapides v. Board of Regents of the Univ. System of Georgia*, 535 U.S. 613, 619 (2002) (A state's voluntary appearance in federal court waives sovereign immunity to claims where a state has consented to suit in its own courts for such claims).

However, as the State has now moved to dismiss based on Eleventh Amendment immunity, Plaintiffs move to add additional state officials in their official capacity as defendants under the *Ex Parte Young* doctrine. *See*, *Davis v. North Carolina*, 180 F. Supp. 2d at 776, fn. 1 (allowing state officials as defendants and citing *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)). Plaintiffs also seek to remove the State of North Carolina from the suit because it claims immunity under the Eleventh Amendment.

B. Amending the Complaint to Add State Officials will not Prejudice Defendants.

As Plaintiffs seek to add the Governor and the legislators in their official capacities, they will be represented by the Attorney General, who already serves as counsel in this litigation, and has been notified since August of the claims against S.B. 325. Further, no sovereign immunity exception is claimed by the Wake County Board of Elections, which qualifies as a person for purposes of § 1983 litigation. *Monell v. Department of Social Services* 436 U.S. 658, 690 (1978) ("Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory,

or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.") The Wake County Board of Elections can be sued in its own capacity as a defendant because "there is no need to bring official-capacity actions against local government officials, for under *Monell*, supra, local government units can be sued directly for damages and injunctive or declaratory relief." *Ky. v. Graham*, 473 U.S. 159, 167 (1985).

Defendants have also noted that, should the case continue on its merits, "the Attorney General of North Carolina intends to move to intervene in this action pursuant to 28 U.S.C. § 2403(b), N.C. GEN. STAT. § 114-2 and Rule 24(a) of the Federal Rules of Civil Procedure." [D.E. 28, p. 17, fn. 6]. Thus, it appears counsel for the State intends to remain active in this litigation if the State should be removed as a Defendant. Allowing Plaintiffs to file an amended complaint rather than leaving Plaintiffs no recourse but to file a new, separate action against the Wake County Board of Elections and Governor McCrory, Senator Berger and Representative Tillis, all in their official capacities, would be an efficient use of the Court's and the parties' resources.

C. Adding State Officials McCrory, Berger And Tillis as Defendants is not Futile

Plaintiffs moved to amend promptly to add officials McCrory, Berger and Tillis as Defendants in this action. As the State has moved to dismiss based on Eleventh Amendment immunity, naming state officials as Defendants will allow the case to proceed. Although in a 42 U.S.C. § 1983 claim a state is not a person for purposes of litigation under § 1983, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64–67 (1989), courts have consistently permitted the suit against state actors as a way of enjoining the state from unconstitutional action. *Ex parte Young*, 209 U.S. 123, 159-160 (1908). Individuals may sue state officials in their official

capacities to avoid Eleventh Amendment challenges under the legal fiction that state actors lose their shield of immunity when their actions are unconstitutional. In *Ex parte Young*, the Court observed that "it is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment." *Id.* at 159-160. The Court held that a state agent who violates federal law "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.*, at 160. By acting outside the law, the actor loses the protection of sovereign immunity. *Id.*

The *Ex parte Young* state official exception has been applied specifically to §1983 claims. *Hafer v. Melo*, 502 U.S. 21, 31 (1991**).** As noted in *Will v. Mich. Dep't of State Police* "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.*, 491 U.S. 58, 71 (1989) (internal citations omitted). In *Davis v. North Carolina*, the court allowed plaintiffs who had named the State of North Carolina and the Board of Governors of the University of North Carolina as defendants in a 42 U.S.C. § 1983 claim to add numerous state officials as defendants after the State moved to dismiss plaintiffs' based on immunity under the Eleventh Amendment. *Davis*, 180 F. Supp. 2d at 776.

For the purposes of obtaining injunctive relief, Plaintiffs now seek injunctive relief from Gov. McCrory, as chief executor of state laws, and Sen. Berger and Rep. Tillis, as leaders of the General Assembly which passed the law, to enjoin the implementation and continued abridgement of Plaintiffs' constitutional rights under Session Law 2013-110.

CONCLUSION

As the Plaintiffs are not acting in bad faith, the proposed amendments cause no prejudice to the Defendant, and the amendments are not futile, Plaintiffs respectfully request this Court grant their motion for leave to file their amended complaint.

Respectfully submitted this the 19th day of November, 2013.

/s/ Anita S. Earls_____
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CALLA WRIGHT, et al *Plaintiffs,* *vs.* THE STATE OF NORTH CAROLINA, and THE WAKE COUNTY BOARD OF ELECTIONS *Defendants.*	)	CERTIFICATE OF SERVICE

I hereby certify that on November 19th , 2013, I electronically filed the foregoing PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE AMEND COMPLAINT, and, I hereby further certify that pursuant to Local Civil Rule 5.1(b) counsel for all other parties are being served as registered users of CM/ECF as provided for in Local Civil Rule 5.1(e).

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This the 19th day of November 2013.

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