IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Rev. Dr. Thomas A. Summers, Rev. Dr. Robert M. Knight, Rabbi Sanford T. Marcus, Rev. Dr. Neal Jones, Hindu American Foundation, and American-Arab Anti-Discrimination Committee, Plaintiffs, vs. Marcia S. Adams, in her official capacity as the Director of the South Carolina Department of Motor Vehicles, and Jon Ozmint, in his official capacity as the Director of the Department of Corrections of South Carolina, Defendants.	Civil Action No. 3:08-cv-02265-CMC DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Defendants Marcia S. Adams, in her official capacity as the Director of the South Carolina Department of Motor Vehicles, and Jon Ozmint, in his official capacity as the Director of the Department of Corrections of South Carolina, come before the Court and respectfully submit this Memorandum in Opposition to Plaintiffs' Second Motion for Leave to File a Second Amended Complaint. As explained below, Plaintiffs' Motion should be denied, as their proposed amendments are both unduly prejudicial and futile.

BACKGROUND

This Motion marks the fourth time Plaintiffs have attempted to change the composition of this case. It seems that every time Plaintiffs discover a defect in their case, they seek to alter the playing field by amending their complaint. The only facts relevant to their constitutional claims,

however, have remained static since June 5, 2008, when the statute authorizing the creation of the "I Believe" license plate became law. Defendants should not be forced to defend against ever-changing causes of action, especially when the latest proposed installment of the complaint seeks to find Defendants liable in their individual, rather than official, capacities for implementing a statute that they had no role in creating. Additionally, Plaintiffs' proposed amendments would be futile, as Defendants are immune from being sued for the alleged constitutional violations in their private capacity. For these reasons, which are discussed more fully below, Plaintiffs' Motion should be denied.

STANDARD OF REVIEW

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend its pleading once as a matter of course under certain conditions, but all other amendments must be made with opposing counsel's consent or through leave of the Court. While the Court should allow an amendment "when justice so requires," *id.*, Rule 15 does not give a litigant unlimited opportunities to modify its pleadings. The Fourth Circuit has explained that an amendment should be denied when it is requested in "bad faith," when it would be "unduly prejudicial" to the adverse party, or when it would be "futil[e]." *See, e.g.*, *Antonio v. Moore*, 174 F. App'x 131, 137 (4th Cir. 2006) (quoting *United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000)).

ARGUMENTS AND AUTHORITIES

I. ALLOWING PLAINTIFFS TO CONTINUOUSLY AMEND THEIR COMPLAINT WOULD BE UNDULY PREJUDICIAL TO DEFENDANTS.

As noted above, this is Plaintiffs' fourth attempt to materially alter this case. Each amendment has been in response to a clear defect in Plaintiffs' case. For instance, Plaintiffs initially pled three causes of action here: an alleged violation of the federal constitution's Free Speech Clause, an alleged violation of the federal constitution's Establishment Clause, and an

alleged violation of the state constitution's Religious Freedom Clause. Compl. ¶¶ 40–51 (Dkt. No. 1). These claims were brought against Defendants in their official capacities. *Id.* ¶¶ 14–15. Apparently recognizing that their state-law claim was barred by the Eleventh Amendment, Plaintiffs filed an amended complaint withdrawing their alleged violation of the South Carolina Constitution shortly after this case began with Defendants' consent. *See* First Am. Compl. ¶¶ 45–52 (Dkt. No. 9) (pleading only claims under the federal constitution).

Later, the day before a preliminary injunction hearing, Plaintiffs moved to file a second amended complaint in order to overcome Defendants' arguments that Plaintiffs did not have standing to prosecute a claim based on the Free Speech Clause. *See* Mem. of P. & A. in Supp. of Pls.' [First] Mot. for Leave to File Second Am. Compl. at 1–2 (Dkt. No. 50-3) (explaining that Plaintiffs wished to further amend their complaint in order to "conform[]" their pleadings in response to Defendants' lack-of-standing arguments). The Court rightly declined to consider Plaintiffs' proposed amendments during the hearing and subsequently held that it was "unlikely" and "doubtful" that Plaintiffs had standing to bring a cause of action under the Free Speech Clause. Am. Mem. Op. on Pls.' Mot. for Prelim. Inj. at 16 (Dkt. No. 59). In light of this ruling, Plaintiffs dismissed their Free Speech claim, which mooted their first motion to file a second amended complaint. *See* Stipulation of Voluntary Dismissal of Plaintiffs' Free Speech Claim at 1–2 (Dkt. No. 63).

Now, Plaintiffs seek to file their fourth different complaint and, for the first time, assert liability against Defendants individually. *See* Mem. of P. & A. in Supp. of Pls.' [Second] Mot. for Leave to File Second Am. Compl. at 3 (Dkt. No. 65-3) ("In light of the addition of the claim for nominal damages, the Second Amended Complaint also makes clear that Defendants are sued in both their individual and official capacities."). The facts supporting their claimed violation of

the Establishment Clause, however, have remained static since the statute authorizing the creation of the "I Believe" license plate became law in July 2008: the challenged statute has not been superseded by a new law, no additional statutes impacting this case have been passed, no new license plates with a special relevancy here have come into being, and the applicable Department of Motor Vehicles regulations have been unchanged since the inception of this case.

Despite this case's unchanged factual background, Plaintiffs are attempting to make Defendants hit a moving target by constantly revising their claims. Courts are clear, however, that a motion to amend under Rule 15 is properly denied when a plaintiff has already had an opportunity to crystallize her claims but failed to do so in earlier pleadings. *See, e.g.*, *Sauer v. Xerox Corp.*, 173 F.R.D. 78, 79–80 (W.D.N.Y. 1997) (explaining that the plaintiff had already amended his complaint three times previously and holding that his "failure to adequately plead his claims despite sufficient opportunity to do so is, by itself, a sufficient basis for denying leave to amend" (citing *Foman v. Davis*, 371 U.S. 178 (1962))); *Kline v. Nationsbank of Va., N.A.*, 886 F. Supp. 1285, 1289 (E.D. Va. 1995) (refusing to allow a plaintiff to amend her complaint with respect to a claim for punitive damages in part because she had already amended the complaint once before and failed at that time to include her additional allegations). Because the factual predicate to Plaintiffs' claims has not changed since this case's inception, it would be unduly prejudicial to force Defendants to change their defense strategy yet again to accommodate Plaintiffs' new theory of liability. Plaintiffs' Motion should be denied accordingly.

II. BECAUSE DEFENDANTS ARE IMMUNE FROM SUIT AGAINST THEM INDIVIDUALLY, PLAINTIFFS' PROPOSED AMENDMENTS ARE FUTILE.

Even if the Court finds that Defendants will not be unduly prejudiced if Plaintiffs amend their complaint to assert new liability based on events that have not changed since the outset of this case, Plaintiffs' Motion should be denied because the proposed amendments would be futile.

The proposed amendments are designed to "make[] clear that Defendants are sued in both their individual and official capacities." Mem. of P. & A. in Supp. of Pls.' [Second] Mot. for Leave to File Second Am. Compl. at 3 (Dkt. No. 65-3). But Defendants, who are not members of the General Assembly and who have only limited roles in implementing the challenged "I Believe" statute, are immune from being sued in their individual capacities for any alleged violation of the Establishment Clause.

The doctrine of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court recently reiterated that qualified immunity is designed to protect government officials "when they perform their duties reasonably," regardless of whether they commit a mistake of fact, mistake of law, or both in the performance of their duties. *Pearson v. Callahan*, No. 07-751, 555 U.S. ___, 2009 U.S. LEXIS 591, at *14 (Jan. 21, 2009).

When assessing the applicability of qualified immunity, courts are to look to the "objective reasonableness of an official's conduct, as measured by reference to clearly established law," rather than a plaintiff's subjective beliefs and arguments. *Harlow*, 457 U.S. at 818–19. As this Court has recognized:

> In determining whether the right violated was clearly established, the court defines the right "in light of the specific context of the case, not as a broad general proposition. If the right was not clearly established in the 'specific context of the case'—that is, if it was not 'clear to a reasonable officer' that the conduct in which he allegedly engaged 'was unlawful in the situation he confronted'—then the law affords immunity from suit."

Yarborough v. Montgomery, 554 F. Supp. 2d 611, 620 (D.S.C. 2008) (quoting *Parrish v. Cleveland*, 372 F.3d 294, 301–02 (4th Cir. 2004)). In *Yarborough*, this Court further indicated

that the absence of an on-point, adverse decision from the Fourth Circuit or Supreme Court precludes a finding that a right was "clearly established" for purposes of the qualified immunity analysis. *See id.* (holding that the defendant was "entitled to qualified immunity" because "[t]here is no case law in the Fourth Circuit or the Supreme Court which would establish [the constitutional rights asserted by the plaintiff] under facts similar to those of this case").

Here, there can be no doubt that the doctrine of qualified immunity would protect Defendants from an Establishment Clause claim against them individually. Because Establishment Clause jurisprudence is particularly unsettled, the Fourth Circuit has liberally applied qualified immunity to challenges brought under this constitutional provision. *See, e.g.*, *Mellen v. Bunting*, 327 F.3d 355, 376 (4th Cir. 2004) (applying qualified immunity to government official who required prayer during meals at a public college despite case law from the Supreme Court prohibiting prayer in a series of other public-school settings). Moreover, Plaintiffs' putative right to be free from viewing a license plate with a perceived religious message on it is hardly "clearly established"; as the Court's earlier opinion granting Plaintiffs' motion for a preliminary injunction noted, no court has ever addressed the constitutionality of such license plates. *See* Am. Mem. Op. on Pls.' Mot. for Prelim. Inj. at 23–28 (Dkt. No. 59) (observing that "[n]either party has directed the court to any case addressing the constitutionality of legislatively-authorized (or administratively-approved) religious license plates" and not citing any such cases in the remainder of the opinion). In fact, courts that have addressed the constitutionality of certain specialty plates are split on whether the messages contained on them are attributable to the government, *see, e.g.*, *ACLU v. Bredesen*, 441 F.3d 370, 376 (6th Cir. 2006); the private motorist, *see, e.g.*, *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002); or both, *see, e.g.*, *Planned*

Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) (Michael, J., concurring in the judgment).

In light of the uncertain state of the law with respect to both the Establishment Clause and specialty license plates, under no circumstances could Defendants be held liable for acting "unreasonably" in making the "I Believe" license plate publicly available, as directed by the General Assembly. Plaintiffs' proposed amendments to their pleadings, therefore, would be futile. The Court should deny Plaintiffs' Motion as a result. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) (holding that a district court properly denied a motion to amend a complaint because the proposed amendments would not have stated a claim for relief); *Wilson Group, Inc. v. Quorum Health Res., Inc.*, 880 F. Supp. 416, 429 (D.S.C. 1995) (denying motion to amend pleadings because proposed amendment would have been futile under controlling law).

CONCLUSION

For the reasons stated above, the Court should deny Plaintiffs' Second Motion for Leave to File a Second Amended Complaint.

SIGNATURE PAGE ATTACHED

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