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



JAMES YACOVELLI, TERRY MOFFITT,
JOHN DOE NO. 1, JOHN DOE NO. 2, a
minor, by and through his parents, JOHN
and JANE DOE, SR., as next friends, and
JANE ROE,

Plaintiffs,

v.

Case No. 1:02CV596

JAMES MOESER, individually and in his
official capacity as Chancellor of the
University of North Carolina at Chapel Hill,
and CYNTHIA WOLF JOHNSON, in her
official capacity as Associate Vice
Chancellor for Student Learning for the
University of North Carolina at Chapel Hill,

Defendants.

MEMORANDUM OPINION

TILLEY, Chief Judge.

This matter is before the Court on several pending motions. Defendants filed Motions to Dismiss both the Taxpayer Plaintiffs [Doc. #10] and the Pseudonymous Plaintiffs [Doc. #8]. The Plaintiffs filed a Motion for Permission to Proceed Anonymously [Doc.#14] and a Motion for Leave to File a Second Amended Complaint [Doc. #42]. The Plaintiffs have also filed a Motion to Strike Portions of Affidavits [Doc. #25]. Finally, the Defendants have filed a Motion to Dismiss the Amended Complaint [Doc. #36] and a Motion to Stay Discovery [Doc. #34].

For the reasons set forth below, Defendants' Motion to Dismiss the Taxpayer Plaintiffs will be GRANTED. Defendants' Motion to Dismiss the Pseudonymous Plaintiffs will be DENIED. Plaintiffs' Motion to Proceed Anonymously will be GRANTED. Defendants' Motion to Dismiss the Amended Complaint will be GRANTED as to the Establishment Clause Claims and the claims for injunctive relief. Plaintiffs' Motion for Leave to File a Second Amended Complaint will be GRANTED as to the Free Exercise claims and DENIED as to the Establishment Clause claims and claims for injunctive relief. Defendants' Motion to Stay Discovery will be GRANTED. Plaintiffs' Motion to Strike will be DENIED.

I.

The facts as set forth in the Amended Complaint¹ are as follows: The University of North Carolina at Chapel Hill ("UNC") has an orientation program prior to the beginning of classes for all incoming freshman. The stated goals of the orientation program are to: (1) stimulate discussion and critical thinking around a current topic, (2) introduce the student to academic life at UNC, (3) enhance a sense of community between students, faculty and staff, and (4) provide a common experience for incoming students.²

¹Plaintiffs have filed a Motion for Leave to File a Second Amended Complaint but, because this Motion will be denied in part and because Defendants have moved to dismiss the Amended Complaint, the facts of the Amended Complaint will be used.

²These goals were listed on UNC's website along with details about the assignment. Plaintiffs attached a hard copy of UNC's web page to their Amended

UNC seeks to accomplish these goals by assigning a selected book, requesting that the students consider study questions and prepare a written response to the book, and holding a two-hour small-group discussion meeting led by volunteers. According to UNC's website, the purpose of the written requirement was to help students prepare for the discussion and to provide a sample of their analytical and writing skills for the First Year writing course.

For the 2002 orientation program, UNC selected portions of Michael Sells' Approaching the Qur'án: The Early Revelations (White Cloud Press 1999). Sells is "a ranking Islamicist"³ and professor of religion at Haverford College. UNC stated in the assignment that it chose the book because Westerners have long been puzzled about the traditions of Islam and because it thought that a book exploring Islam was highly relevant in light of the terrorist attacks of September 11, 2001. UNC eventually changed the writing assignment for the 2002 orientation in order to allow those with religious objections to the book to write a short paper explaining their objections to reading the book instead of analyzing the book itself.⁴

Complaint and specifically referenced it in the Amended Complaint. These are considered because documents that are "integral to and explicitly relied on in the complaint" may be considered in a 12(b)(6) motion if their authenticity is not in question, Phillips v. LCI Intern., Inc., 190 F.3d 609, 618 (4th Cir. 1999).

³Plaintiffs contend that this description of Sells in a book review means that Sells "sympathizes with (if not subscribes to) the religion of Islam." (Compl. ¶ 20.)

⁴ It appears that this alternative was provided in the wake of the lawsuit.

The assigned portions of the book were in two parts: pages 1-31 and 41-141.⁵ Pages 1-31 contain a discussion of the historical, cultural, and literary content of the earliest Islamic writings - Muhammad's earliest revelations contained in the first written Suras.⁶ These pages identify recurrent themes and discuss the organization of the individual Suras as compared with pre-Islamic, Arabian poetry. The unique compositional structure of the Qur'an is also discussed. Finally, sound recordings of the Suras being recited are included because the rhythmic patterns of the Arabic language are "central to the Qur'an." Sells, supra, at 22.

Sells states that "[t]he purpose of th[e] introduction is to clarify the cultural and historical matrix in which the Qur'an came to exist, the central themes and qualities of hymnic Suras, and the manner in which the Qur'an is experienced and taken to heart within Islamic societies." Id. at 4. Sells goes on to note that "[t]he purpose of this book is neither to refute nor to promote the Qur'anic message. Rather, the goal is to allow those who do not have access to the Qur'an in its recited, Arabic form to encounter one of the most influential texts in human history in a manner that is accessible." Id. at 5. Sells explains his approach as follows:

My approach to the Qur'an presumes to make no judgment on the ultimate truth of these texts, which are among the more influential in human history. It engages them with the respect for literary and

⁵Because the book is integral to and relied on in the Complaint, and neither party disputes its authenticity, the Court will consider it without converting the motion into one for summary judgment. Phillips, 190 F.3d at 618 (4th Cir. 1999).

⁶Suras are "hymnic chapters." Sells, supra, at 3.

theological depth that a translator gains through repeated efforts to recreate some sense of the original. In that spirit, this volume is meant for a varied audience: for those who have wished to know something about Islam and who have little background in its history; for those who wish to study or teach the Qur'an in a classroom setting; and for Muslims who may find this version to capture some aspects of the text in a relevant way or who wish to share an approach to the Qur'an that is accessible with non-Muslim friends. My goal is to present in English some of the texture, tone, power, and subtlety of the Arabic text that is the Qur'an."

Id. at 26.

The second part of the assignment, pages 41-141, includes a translation of several Suras and accompanying commentary. The commentary includes observations about themes in the Suras, relating them to the culture of the time and sometimes comparing them to similar or different themes in other religions. See, e.g., id. at 57-59 (comparing Sura 83 to "the gospel parables of Jesus" and the "day of reckoning"). This portion of the book is dedicated to "issues of interpretation, historical context, and key themes" of Islam as expressed in the early Suras. Id. at 21.

Plaintiffs filed the instant lawsuit alleging that UNC's orientation program violated both the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution. The Plaintiffs in this case include three pseudonymous UNC students⁷ ("Pseudonymous Plaintiffs") and two non-

⁷All three were prospective freshmen at the time this suit was instituted. One of the three was 17-years old at the time the Complaint was filed, and therefore brought suit through his parents.

student citizens (“Taxpayer Plaintiffs”). One of the Taxpayer Plaintiffs, James Yacovelli, is also an alumnus of UNC.⁸

Plaintiffs contend that Approaching the Qur’án presents a biased view of Islam as a peaceful religion and that it leaves out less flattering stories about Muhammad. Plaintiffs conclude that this positive portrayal of both Muhammad and Islam constitutes an endorsement of Islam. Furthermore, Plaintiffs contend that the inclusion of Suras and a compact disk (“CD”) containing a reading of these Suras in Arabic is impermissible. While Sells explains that listening to a reading of the text in Arabic creates a different experience than simply reading a translation, Plaintiffs argue that listening to the CD exposes students to “the spell cast by a holy man of Islam.” (Compl. ¶ 26.)

Plaintiffs also contend that, even if the students do not have to read the book, forcing students to write about and share personal religious beliefs intrudes on the Free Exercise Clause of the United States Constitution. In the Amended Complaint, Plaintiffs point to various study questions as evidence of UNC’s impermissible purpose. For example, one set of study questions asks the students, “What did you really know about the Qur’an before reading this book?” and “What ideas or impressions did you have about Muslim cultures more generally? Has reading these parts of the Qur’an affected or changed those ideas or impressions

⁸Nothing about this fact, standing alone, makes the analysis of this particular Taxpayer Plaintiff’s standing different from that of the other Taxpayer Plaintiff.

about Islam? How?” Another set of questions asks, “What are the main human and personal virtues and vices or flaws that these readings emphasize? From your perspective, how comprehensive are these lists of virtues and vices? Is there anything you would add? Or de-emphasize? Why?”

Plaintiffs sought a preliminary injunction to keep UNC from conducting its summer program. Defendants responded by moving to dismiss both sets of plaintiffs, the Taxpayer Plaintiffs and the Pseudonymous Plaintiffs. Injunctive relief was denied both by this Court and by the Fourth Circuit. Thereafter, the Defendants filed a Motion to Dismiss the Amended Complaint in its entirety. Although the program has now been completed, Plaintiffs urge this Court to enjoin UNC from organizing such a program in the future. Plaintiffs also seek nominal damages and attorneys’ fees.

II.

To date, Defendants have filed three motions to dismiss. Two of these motions are for the dismissal of particular Plaintiffs. Defendants moved to dismiss the Taxpayer Plaintiffs, James Yacovelli and Terry Moffitt, because of their alleged lack of standing to challenge the reading assignment. Defendants have also moved to dismiss the Pseudonymous Plaintiffs for failure to name themselves in the Complaint. For the reasons set forth below, Defendants’ Motion to Dismiss the Taxpayer Plaintiffs will be GRANTED. However, Defendants’ Motion to Dismiss the Pseudonymous Plaintiffs will be DENIED.

A.

Defendants first assert that The Taxpayer Plaintiffs lack standing as citizens or taxpayers to challenge the constitutionality of the reading assignment. Article III of the United States Constitution requires that only “cases” or “controversies” may be adjudicated. Allen v. Wright, 468 U.S. 737, 750-51 (1984). As part of this requirement, a plaintiff must demonstrate that he has standing to pursue the case or controversy. Id.

In order to demonstrate standing, plaintiffs need to satisfy the following three constitutional elements set forth by the Supreme Court: (1) injury in fact, (2) a causal connection between the injury and the challenged action, and (3) a likelihood that the court could redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In addition to the constitutional concerns, courts should also look to various “prudential” considerations when determining whether a plaintiff has standing. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982). However, the Plaintiffs have not met the constitutional requirements, so prudential concerns need not be addressed.

1.

The Taxpayer Plaintiffs are unable to show the first constitutional standing element, injury in fact. The Fourth Circuit has recognized that “the concept of injury for standing purposes is particularly elusive in Establishment Clause cases.”

Suhre v. Haywood County, 131 F.3d 1083, 1085 (4th Cir. 1997) (citations omitted). However, there is no “hierarchy of constitutional values” or “‘sliding scale’ of standing.” Valley Forge, 454 U.S. at 484. Therefore, a plaintiff suing for a violation of the Establishment Clause must still demonstrate some direct injury, whether it be economic or otherwise. Id.; Suhre, 131 F.3d at 1086. Specifically, to establish standing in an Establishment Clause case, the plaintiff must present more than a “mere abstract objection to unconstitutional conduct.” Suhre, 131 F.3d at 1086.

There are only two allegations in the Amended Complaint which relate to the Taxpayer Plaintiffs. First, the Complaint alleges that the State of North Carolina spends taxpayer dollars in operating UNC. (Am. Compl. ¶¶ 5, 6.) Second, the Complaint alleges that UNC, through its freshman orientation program, used taxpayer dollars to violate the First Amendment. (Am. Compl. ¶¶ 12, 49.) No further allegation of injury to the Taxpayer Plaintiffs by, or personal contact with, UNC is included in the Amended Complaint.⁹

Plaintiffs correctly point out that there is no requirement of economic injury in Establishment Clause cases. See Suhre, 131 F.3d at 1086. However, the Taxpayer Plaintiffs’ claims fail not because of a lack of economic injury, but from a lack of any demonstrable injury. Plaintiffs argue that the intangible injury they

⁹The Plaintiffs’ proposed Second Amended Complaint also fails to allege any direct injury beyond the alleged constitutional violation.

have suffered is like that of plaintiffs in the “religious display” line of cases. Courts have found standing for citizens who suffer a personal injury from unwelcome state-sponsored religious displays, such as where a plaintiff objects to the placement of a creche in front of a municipal building or to the display of the Ten Commandments in a courthouse. Id. However, plaintiffs in those cases had to show something more than a negative reaction to the “observation of conduct with which one disagrees” in order to establish citizen standing. Id.

The Taxpayer Plaintiffs claim, in their response to the Defendants’ Motion to Dismiss, that UNC’s display of the assignment and study questions on the university’s website is, in effect, an offensive state sponsored religious display. They further contend that placement of the freshman orientation information on the website subjects them to direct contact with an unwelcome religious exercise to which they strenuously object based on deeply held religious beliefs. Neither of these allegations were present in the Amended Complaint.

Even if the Amended Complaint had included allegations that the Taxpayer Plaintiffs suffered from their exposure to the website, these allegations would have been insufficient to establish injury. The Taxpayer Plaintiffs here lack the direct personal contact with the state sponsored offensive conduct that is required in the line of cases they cite. Indeed, Plaintiffs acknowledge this requirement by including in their Response Brief a quote from a constitutional law treatise explaining the requirement. L. Tribe, American Constitutional Law §§ 3-16 at 118-

119 (2d ed. 1988) (stating that taxpayer plaintiffs must show “a direct and concrete impact upon themselves”). Any exposure the Taxpayer Plaintiffs may have had to the University website could be classified as little more than “observation of conduct with which one disagrees,” which the Fourth Circuit has found insufficient for standing. Suhre, 131 F.3d at 1086.

It is also noteworthy that the website in question could not properly be deemed a religious display. The website provided a brief synopsis of Approaching the Qur’án without including any portions of either the book or the Qur’an. At most, it provided information about an orientation session that may or may not be constitutional.

In summary, even if Taxpayer Plaintiffs Yacovelli and Moffitt had alleged direct injury from exposure to UNC’s website in the pleadings, they would not prevail because they cannot present a direct injury sufficient to confer standing.

2.

In addition to the Taxpayer Plaintiffs’ argument that they have personally suffered a direct injury, they also claim that they have been injured as taxpayers. This second alleged basis for standing relies on the Supreme Court’s decision in Flast v. Cohen, 392 U.S. 83 (1968). In Flast, the Supreme Court held that taxpayers may have standing to challenge congressional action taken under the taxing and spending clause.¹⁰ Taxpayer standing is only appropriate when the

¹⁰U.S. Constitution, Art. 1, § 8, cl. 1.

congressional action in question violates constitutional provisions restricting the spending power, such as the First Amendment's Establishment Clause. Id. at 102-103.

The exception enumerated in Flast was a narrow exception to the general rule that taxpayers do not have standing solely because of their taxpayer status. 392 U.S. at 102-103; see also Doremus v. Bd. of Educ. of Borough of Hawthorne, 342 U.S. 429, 433 (1952) (finding no taxpayer standing where plaintiffs objecting to school Bible readings neither pointed to a particular appropriation, showed that the readings added to the school's operating costs, or demonstrated any direct financial injury). Plaintiffs asserting taxpayer status must allege more than a violation of the Establishment Clause. They must contend that, by use of the taxing and spending power, the government has exceeded its constitutional authority under the Establishment Clause. Flast, 392 U.S. at 102-103.

The cases the Taxpayer Plaintiffs cite are distinguishable from the instant case because those cases involve challenges to legislation governing the appropriation of tax moneys.¹¹ In the instant case, there is no congressional or state legislative exercise of the power to tax and spend. Plaintiffs do not allege

¹¹Jamestown Sch. Comm. v. Schmidt, 699 F.2d 1 n.1 (1st Cir. 1983) (noting that plaintiffs had standing under Flast to challenge a statute requiring local school committees to provide bus transportation for private school students); DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970) (challenging the validity of the Salary Supplement Act which provided state funds to teachers of non-religious subjects in private schools).

any specific appropriations measure. Instead, Plaintiffs have filed suit to challenge the use of UNC's operating funds for the purpose of conducting the freshman orientation seminars, assuming more money was spent to conduct the seminars than would have been spent in the ordinary course of running UNC. Taxpayer standing does not exist in this factual scenario.

Because Taxpayer Plaintiffs Yacovelli and Moffitt have not alleged any injury in fact, nor shown injury under Flast, they have no standing to assert claims for violation of the Establishment Clause. Accordingly, the Defendants' Motion to Dismiss the Taxpayer Plaintiffs will be GRANTED.

B.

Defendants also have moved to dismiss the Pseudonymous Plaintiffs, claiming that allowing the student plaintiffs to proceed anonymously would infringe on the public's interest in open court proceedings and would have a prejudicial effect on Defendants. Defendants further contend that the Pseudonymous Plaintiffs have offered no persuasive reason to support their desire to proceed pseudonymously. Plaintiffs both responded to the Defendants' Motion and filed their own Motion for Permission to Proceed Anonymously.

Federal Rule of Civil Procedure 10(a) requires that a complaint "include the names of all parties." Rule 10(a), however, does not act as an absolute bar to pseudonymous filings. In certain exceptional circumstances, courts have determined that plaintiffs may file suit under a pseudonym. See, e.g., James v.

Jacobson, 6 F.3d 233, 238-39 (4th Cir. 1993) (explaining the circumstances giving rise to a party's ability to proceed pseudonymously); Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (allowing minor plaintiffs to use pseudonyms in action challenging the constitutionality of school Bible readings where townspeople had stated that they needed to "beat the evil out of these people").

When determining whether a plaintiff should be permitted to proceed under a pseudonym, courts must afford appropriate weight to the presumption of openness in judicial proceedings. The public has a legitimate interest in having access to court proceedings. See Cox v. Broad. Corp. v. Cohn, 420 U.S. 469, 490-92 (1975); James, 6 F.3d at 238. Courts must balance the presumption of openness with a plaintiff's privacy rights. In James, the Fourth Circuit enumerated several factors to consider when balancing the public's interest in open judicial proceedings with the plaintiff's privacy interest. The Fourth Circuit held that district courts should consider the following when determining if a plaintiff will be granted the "rare dispensation" of proceeding anonymously:

[1] whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personally nature; [2] whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties; [3] the ages of the persons whose privacy interests are sought to be protected; [4] whether the action is against a governmental or private party; and, relatedly, [5] the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

Id. at 238.

The first factor requires the plaintiff to identify a specific sensitive and personal privacy interest. The Pseudonymous Plaintiffs contend that their deeply held religious beliefs are sufficiently personal and sensitive to satisfy this factor. Religious beliefs are "quintessentially private." Stegall, 653 F.2d at 186. In fact, the Supreme Court has said that the purpose behind the Establishment Clause is that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion'" by government. Engel v. Vitale, 370 U.S. 421, 431-32 (1962), cited in Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003). Defendants' allegations to the contrary are unpersuasive. The first factor thus weighs in the Plaintiffs' favor.

The second factor addresses the threatened consequences of the identification of plaintiffs. Here, the Pseudonymous Plaintiffs first contend that they will be harassed and socially ostracized because of their involvement in the lawsuit. Plaintiffs point to e-mails received by the Family Policy Network that refer to supporters of Plaintiffs' cause as such things as "pathetic hate mongers," "close minded and ignorant," "idiot[s]," "silly ninnies," and "outrageously out of touch." However, embarrassment and harassment are generally insufficient to demonstrate retaliatory harm. Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992); Stegall, 653 F.2d at 186 (stating that "[t]he threat of hostile public reaction, standing alone, will only with great rarity warrant public anonymity").

The Pseudonymous Plaintiffs also contend that they will be subject to physical harm in retaliation for their views if their identities are publicly revealed.

In support of this argument, Plaintiffs have identified portions of the Qur'an which state that "those who reject Islam must be killed." Plaintiffs also point to the terrorist activities of extreme fundamentalist Islamic groups, such as the bombings of the World Trade Centers and the death threats received by author Salman Rushdie.

Finally, Plaintiffs identify several allegedly threatening e-mails. The e-mails, however, do not specifically threaten physical harm to the Plaintiffs. One of the more outrageous e-mails states that "you people suck a** . Why don't you all pack yourselves into a boat, go out into the middle of the ocean, and then set it on fire." Another states, "may evolution make quick work of you and pople [sic] who think like you (and I use 'think' in the most liberal sense [sic] possible)." While unpleasant and disturbing to the persons receiving them, these e-mails do not threaten physical harm.

Unlike the situation in Stegall, in which community members stated their desire to "beat the evil" out of those who objected to religious exercises, Plaintiffs here have not pointed to any likelihood of physical harm. See Doe v. Beaumont Indep. Sch. Dist., 172 F.R.D. 215, 217 (E.D. Tex. 1997) (noting that the "it has happened before, therefore it might happen here" argument was insufficient). At most, the students here face social ostracism and harassment which may upset them and disrupt their college community life and, thereby perhaps, their education. The second factor thus tips slightly in favor of Defendants.

The third factor considers the ages of the plaintiffs who seek to protect their privacy interests. John Doe No. 1 and Jane Roe were eighteen-years old and John Doe No. 2 was seventeen-years old at the time the Complaint was filed. Because one of the Plaintiffs was a minor at the time of filing, Plaintiffs are correct in noting the importance of this factor. In cases permitting plaintiffs to proceed with pseudonyms, minors are often among the plaintiffs. See e.g., Stegall, 654 F.2d at 180. Courts have allowed minor children anonymity while simultaneously denying adults the same protection in cases involving First Amendment challenges to religious displays at school. See, e.g., Doe v. Santa Fe Indep. Sch. Dist., 933 F. Supp. 647, 651-52 (S.D. Tex. 1996) (refusing to protect the identities of adult plaintiffs “who are simply not as vulnerable as schoolchildren to social and physical intimidation or violence centered around events at public schools”).

Although “adolescents are often susceptible to pressure from their peers toward conformity, and that influence is the strongest in matters of social convention,” Lee v. Weisman, 505 U.S. 577, 593 (1992), the Pseudonymous Plaintiffs in the instant case are not primary or secondary school students. Instead, they had graduated from high school at the time of the filing of this action, and are now finishing their second year in an undergraduate academic setting in which critical thought is essential to academic pursuits. Although all of the Plaintiffs are now of the age of majority, college students may still possess the immaturity of adolescence. The third factor therefore does not strongly favor either party.

The fourth factor explores the identity of the defendant in a given case and whether the plaintiff is pursuing legal action against a governmental or private party. When a plaintiff challenges the government or government activity, courts are more like to permit plaintiffs to proceed under a pseudonym than if an individual has been accused publicly of wrongdoing. See Doe v. Harlan County Indep. Sch. Dist., 96 F. Supp. 2d 667, 671 (E.D. Ky. 2000); Doe v. N.C. Central Univ., 1999 WL 1939248 at *4 (M.D.N.C. April 15, 1999). Here, Plaintiffs are challenging the constitutionality of UNC's orientation requirements and not attacking the Chancellor per se. This factor therefore favors Plaintiffs.

The fifth factor looks at the risk of unfairness and prejudice to the other party. Defendants contend that Plaintiffs are directly attacking the Chancellor's reputation and that their identities should be disclosed in the interest of fairness. Courts have refused to grant anonymity to plaintiffs when credibility is at issue, such as in employment discrimination cases and cases involving deliberate wrongdoing. See, e.g., James v. Jacobson, 6 F.3d 233, 238-39; Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992). However, as noted above, Plaintiffs are targeting the constitutionality of a school policy and are not specifically targeting the Chancellor's personal reputation.

Further, none of the three Pseudonymous Plaintiffs has alleged that the Defendants caused them any specific or particular harm, such that the Defendants would be harmed by a failure to depose or identify the students. What is at issue

is a legal question - whether or not there has been a violation of the Establishment Clause. The credibility and factual knowledge of the anonymous students are not at issue in deciding the matter. Therefore, the fifth factor tips in favor of Plaintiffs.

The five factors enumerated in James are not exclusive. 6 F.3d 233, 238. Therefore, although not a factor enumerated in James, this Court may also consider the fact that the case has received intense media coverage. The threat of harassment and public hostility is therefore potentially more severe and harmful than that in a less publicized case.

The balance of the James factors weighs in Plaintiffs' favor. The Plaintiffs' personal religious beliefs at stake combined with the Defendants' weak showing of prejudice lean in favor of allowing pseudonyms in this case. Therefore, the Plaintiffs' Motion for Permission to Proceed Anonymously will be GRANTED and Defendants' Motion to Dismiss the Pseudonymous Plaintiffs will be DENIED.

III.

After simultaneously filing the Motion to Dismiss the Pseudonymous Plaintiffs and the Motion to Dismiss the Taxpayer Plaintiffs, but before filing their Answer, Defendants filed a Motion to Dismiss the Amended Complaint. The Motion to Dismiss the Amended Complaint contains two basic arguments: (1) that the Plaintiffs' equitable claims are moot, and (2) that the Plaintiffs' claim for nominal damages should be dismissed because of qualified immunity.

Plaintiffs contend that Defendants waived their right to file this 12(b)(6) Motion and to raise the defense of qualified immunity by filing an earlier 12(b) motion to dismiss.¹² Federal Rule 12(g) provides that a party raising any 12(b) defenses by pre-answer motion waives any 12(b) defenses that are not raised in that motion. However, a defense under 12(b)(6) for failure to state a claim is not waived if not included in the pre-answer motion. Rule 12(h)(2) provides that a 12(b)(6) motion still may be raised in any pleading, by motion for judgment on the pleadings, or at trial. Defendants have not brought their 12(b)(6) motion in a pleading or motion for judgment on the pleadings. Instead, they have filed a separate pre-answer motion.

While technically a violation of the 12(g) consolidation requirement, courts have allowed untimely 12(b)(6) motions where not imposed for the purpose of delay or harassment and where the motion would expedite disposition of the case on its merits. See e.g., Coleman v. Pension Benefit Guar. Corp., 196 F.R.D. 193, 196 (D.D.C. 2000); Mylan Labs., Inc. v. Akzo, Nev., 770 F. Supp. 1053, 1059 (D. Md. 1991); 2A James Wm. Moore et al., Moore's Federal Practice § 12.23 (3d ed. 1999); 5A Wright & Miller, Federal Practice and Procedure Civil 2d § 1392 at 762 (2d ed. 1990 & Supp. 2003) (finding that the spirit of the law is to preserve the defense, not to delimit the mechanism for asserting it).

¹²The Motion to Dismiss Pseudonymous Plaintiffs was brought pursuant to Federal Rules 12(b)(1) and (b)(2). The Motion to Dismiss Taxpayer Plaintiffs alleged that the Plaintiffs lacked standing.

Here Defendants raised their earlier motions to dismiss the two groups of Plaintiffs, one for lack of standing and one for failure to reveal their names, in response to the Plaintiffs' efforts to obtain a preliminary injunction. The Defendants waited to raise the 12(b)(6) motion on the merits until after the Fourth Circuit completed its appellate review of the denial of the preliminary injunction. Given the circumstances of this case, there is no reason to go to the time and expense of filing an answer and moving for a judgment on the pleadings when the issues can be resolved now. Therefore, the Motion to Dismiss will be considered.

A.

Defendants first move to dismiss the equitable claims against UNC because they argue that the claims have become moot. Specifically, all of the orientation activities complained of in Amended Complaint were completed in 2002. Because there is no action to enjoin, the Defendants' Motion to Dismiss will be GRANTED as to the claims for injunctive relief.

The Constitution limits this Court's jurisdiction to the adjudication of actual cases and controversies. See U.S. Const. art. III, § 2. The requirement that a case have an actual, ongoing controversy extends throughout the pendency of the action. Mellen v. Bunting, 327 F.3d 355, 363-64 (4th Cir. 2003). When the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome, the case becomes moot. Id.

When students challenge the constitutionality of school policies, their claims for declaratory and injunctive relief generally become moot when they graduate and the policies no longer govern them. See e.g., id. at 364; Bd. of Sch. Comm'rs of Indianapolis v. Jacobs, 420 U.S. 128, 129 (1975). Plaintiffs do not contend that they will be subject to a freshman orientation program again, and hence they lack a legally cognizable interest in the outcome of this decision.

An exception to the mootness doctrine exists where the harm is "capable of repetition, yet evading review." Mellen, 327 F.3d at 364. This exception applies where two requirements are met: "(1) the challenged action is too short in duration to be fully litigated before the case will become moot; and (2) there is a reasonable expectation that the complaining party will be subjected to the same action again." Id. Students who bring suit challenging school policies but graduate during the pendency of the action do not ordinarily qualify for this exception because their graduation ensures that they will never again be subject to the school's policies. Id. (listing several cases supporting this proposition).

As to the first requirement, the orientation program at issue in this case was brief in duration. The program was announced in May of 2002 and was completed in August of 2002.¹³ However, this Court need not decide whether this time is too short in duration for full litigation because Plaintiffs fail the second requirement for

¹³Plaintiff's proposed Second Amended Complaint also objects to related on- and off-campus events, all of which were completed by mid-November of 2002.

the mootness exception. The Pseudonymous Plaintiffs in this case are no longer incoming freshmen at UNC, and therefore there is no chance that they will again be subject to any freshman orientation requirements. Although Plaintiffs cite Justice Scalia's dissenting opinion in Honig v. Doe, 484 U.S. 305, 335-36 (1988), for the proposition that a risk of harm to persons other than the complaining party may suffice under extraordinary circumstances, the current state of the law is otherwise. Defendants' Motion to Dismiss will be GRANTED as to the Plaintiffs' injunctive claims.

B.

Defendants moved to dismiss the nominal damages claim against Chancellor Moeser in his individual capacity as to the Establishment Clause claims based on qualified immunity. Qualified immunity protects government officials performing discretionary functions from liability in an action under 42 U.S.C. § 1983 where the conduct of the official "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). Because this Court finds that Plaintiffs have not alleged the deprivation of a constitutional right, Defendants' Motion to Dismiss the nominal damages claim as to the Establishment Clause claim will be GRANTED.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986); Williams

v. Hansen, 326 F.3d 569, 579 (4th Cir. 2003). Essentially, qualified immunity gives a defendant “an entitlement not to stand trial or face the other burdens of litigation.” Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). A claim can be dismissed on qualified immunity grounds if the allegations of a complaint against a public official fail to state a violation of a clearly-established law. Korb v. Lehman, 919 F.2d 243, 246-47 (4th Cir. 1990). Courts evaluate qualified immunity claims by first determining whether the plaintiff’s allegations, if true, establish the deprivation of a constitutional right. Mellen v. Bunting, 327 F.3d 355, 365 (4th Cir. 2003). Only if a deprivation has been alleged need the Court address whether that violated right was a clearly established right of which a reasonable person would have known. Id.

Plaintiffs contend that UNC’s reading assignment and related discussion violate the Establishment Clause.¹⁴ The Establishment Clause has long been the subject of intense litigation. Over time, the Supreme Court “has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution’s affairs.” County of Allegheny v. A.C.L.U., 492

¹⁴ The Fourteenth Amendment extended First Amendment protections and prohibitions to the states. Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 210 (1948).

U.S. 573, 590-91 (1989). Furthermore, “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” Lee v. Weisman, 505 U.S. 577, 587 (1992). On the other hand, government action does not automatically violate the Establishment Clause simply because it confers an incidental benefit upon religion. Koenick v. Felton, 190 F.3d 259, 267 (4th Cir. 1999).

The likelihood of Plaintiffs succeeding on the merits of their Establishment Clause claim must be determined by analyzing the three prongs provided in Lemon v. Kurtzman, 403 U.S. 602 (1971).¹⁵ In Lemon, the Supreme Court stated that, to be constitutional, (1) the government activity must have a secular purpose, (2) the primary effect of the activity must neither advance nor inhibit religion, and (3) the activity must not cause the government to be excessively entangled in religion. Id. at 612-13. Government activities or statutes are rendered unconstitutional if they violate any one of the Lemon prongs. Stone v. Graham, 449 U.S. 39 (1980).

1.

The first prong of the Lemon test requires courts to determine whether the government has a secular purpose in its actions. This prong “is a fairly low hurdle.” Mellen, 327 F.3d at 372 (4th Cir. 2003). A government activity lacks a

¹⁵ Although the continued vitality of Lemon has been questioned, the Fourth Circuit continues to employ the Lemon test to evaluate alleged violations of the Establishment Clause. Mellen, 327 F.3d at 370 (4th Cir. 2003).

secular purpose only if the activity was “entirely motivated by a purpose to advance religion.” Id. (citations omitted). In making this determination, the government’s stated secular purpose is entitled to deference as long as it is sincere and not a sham. Id. The Supreme Court has looked to the history behind challenged policies as an aid in determining the sincerity of the stated secular purpose. See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000) (considering school’s history of student-led prayers in determining the purpose of student-delivered messages at school football games).

UNC has stated a secular purpose for assigning Approaching the Qur’án. The assignment as posted on UNC’s website explained that the book was selected in an effort to introduc[e] incoming students to the academic life at UNC “by stimulating discussion and critical thinking around a current topic.” The assignment explains that this book is particularly relevant in light of the terrorist events of September 11 and confusion about the Islamic faith.¹⁶

Because UNC’s stated secular purpose does not appear to be a sham, this Court will give deference to this stated secular purpose. The study of religious texts can be secular in purpose. If the religious text is presented as part of an objective secular program in which the school intends to explore the history, civilization, ethics, literary or historical aspects of the text, or if the text is used in

¹⁶Plaintiffs, on the other hand, contend that the only possible purposes of the reading assignment are to indoctrinate students with a favorable view of the Qur’an and to promote the Islamic faith.

the study of comparative religions, the use of the religious text is secular. See Stone v. Graham, 449 U.S. 39, 42; Epperson v. Ark., 393 U.S. 97, 106 (1968); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963).

The author of Approaching the Qur'án states that the book's purpose "is neither to refute nor to promote the Qur'anic message. Rather the goal is to allow those who do not have access to the Qur'an in its recited, Arabic form to encounter one of the most influential texts in human history in a manner that is accessible." Sells, supra, at 5. Sells notes that the book "presumes to make no judgment on the ultimate truth of these texts, which are among the more influential in human history. It engages them with the respect for literary and theological depth that a translator gains through repeated efforts to recreate some sense of the original. In that spirit, this volume is meant for a varied audience" Id. at 26.

Because Defendants have advanced a secular purpose for the orientation assignment and discussions and because it cannot be said that the activity was motivated wholly by religious considerations, Defendants have satisfied the first prong of the Lemon test.

2.

The second prong of the Lemon test explores whether the primary effect of the challenged government activity is to advance or endorse religion. When analyzing the second prong, "[t]he question is not the subjective intent of [the

government], but whether the objective effect of its passage is to suggest government preference for a particular religious view or for religion in general.” Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1345 (4th Cir. 1995). See also County of Allegheny v. A.C.L.U., 492 U.S. 573, 620 (explaining that constitutionality is judged according to the standard of a “reasonable observer”).

It is well established that state sponsored school prayer has the impermissible effect of advancing religion. See e.g., Mellen v. Bunting, 327 F.3d 355, 366-68 (4th Cir. 2003) (discussing Supreme Court precedent of state-sponsored school prayers before deciding that university-sponsored prayers before meals violated the Establishment Clause). Furthermore, all endorsement of religion, whether framed in terms of promotion or favoritism, is impermissible. See County of Allegheny, 492 U.S. at 592-94. At a minimum, the Establishment Clause requires that government not seem to “take a position on questions of religious belief or ‘mak[e] adherence to a religion relevant in any way to a person’s standing in the political community.’” Id. (citations omitted). Instead, government must remain neutral. “When evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether ‘the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.’” Id. at 597 (citations omitted).

The question in this case is whether the mandatory reading assignment and discussion meetings¹⁷ reasonably appear to inculcate or compel a religious exercise. Plaintiffs complain that Defendants selected Approaching the Qur'án because it presents a biased, sanitized version of Islam. Because the Plaintiffs allege that the selected book is not objective, they contend that it cannot be part of a secular educational program and that UNC's purpose must be to promote Islam. (Compl. ¶¶ 45-46.) Defendants concede that an act of religious worship such as a school prayer would violate the Establishment Clause but maintain that the orientation program did not involve the promotion of any religious activity.

The allegations of the Amended Complaint do not demonstrate that the assigned reading promotes or advances Islam. Instead, Approaching the Qur'án undertakes an analysis of the history, culture, and debate surrounding early Suras, as discussed above. The book simply explains certain religious tenets of Islam and discusses the ambiguities involved in some situations as well as the long-standing cultural issues involved in Islam. Although the book does not include any passages addressing an obligation to kill non-believers, a fact which Plaintiffs point to in finding the book to be pro-Islam, the aim of the book does not pretend to be an exhaustive review of Islam. The book instead acts as an anthropological, literary and historical review of one of the world's most widespread and controversial

¹⁷Defendants contend that the orientation is not mandatory and that students do not receive a grade for participation or even attendance.

religions. Reading and discussing the book is not properly deemed a religious practice.

Approaching the Qur'án simply cannot be compared to religious practices which have been deemed violative of the Establishment Clause, such as posting the Ten Commandments, reading the Lord's Prayer or reciting prayers in school. The book does include Suras, which are similar to Christian Psalms. However, by his own words, the author endeavors only to explain Islam and not to endorse it. Furthermore, listening to Islamic prayers in an effort to understand the artistic nature of the readings and its connection to a historical religious text does not have the primary effect of advancing religion. The fact that few students are likely to have understood the Arabic readings lends support to the position that the purpose of the CD was to aid academic discussion and not to promote the religion of Islam. A reasonable observer would not believe that the orientation program was an attempt to promote the Islamic faith.

Plaintiffs' coercion claims also must fail. Plaintiffs stress that the student-plaintiffs will be coerced by the orientation program and made to feel like outsiders if they do not participate, a situation rendered impermissible in Doe v. Santa Fe Indep. Sch. Dist., 530 U.S. 290 (2000). However, the facts presented do not support such an argument. The Supreme Court has recently noted that when a school is not advancing religion, the coercion or impressionability of students is not relevant to the Establishment Clause analysis. Good News Club v. Milford Cent.

Sch., 533 U.S. 98, 116 (2001) (discussing the impropriety of excluding only religious groups from the use of school facilities after hours).

UNC's orientation program does not require participation in a religious activity. The assignment is not to participate in prayer or any other act of worship. Instead, the orientation program is an exercise in literary, artistic, and cultural understanding. The orientation program therefore satisfies the second prong of the Lemon test, regardless of whether attendance was mandatory.

3.

The third prong of the Lemon test prohibits excessive entanglement between government and religion. Lemon, 403 U.S. at 613. In analyzing this third prong, courts have examined "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." Id. at 615. The entanglement analysis is one of both "kind and degree." Koenick v. Felton, 190 F.3d 259, 268 (4th Cir. 1999). In the instant case, Plaintiffs contend that UNC is excessively entangled in religion because it assigned a religious book, required students to write an essay on religious themes, and asked students to think about and share their private feelings about religion. Defendants, however, insist that the only effect of the program is to improve the incoming students' analytical and writing skills.

Although Defendants clearly use a book exploring Islam as the basis for an analytical skill-building exercise, it is not clear that UNC is excessively entangled with Islam. The only institution benefitted by the orientation program was UNC. Although it is possible that exposure to Islam may have led some students to learn more about the religion and eventually practice it, this benefit is indirect at best. No improper relationship was created between UNC and members of the Islamic faith. The contested portion of the program occurred for only two hours and did not involve the use of religious leaders.

Most importantly, the activities engaged in at the orientation session did not advance or promote religion and thus there can be no excessive entanglement with a religious activity. The Supreme Court has made a distinction between “the discourse of the scholar's study or the seminar room” or the “merely descriptive examination of religious doctrine” and “the evangelist's mission station.”

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 868 (1995) (noting that an article discussing how Christ alone provides spiritual fulfillment fell in the latter category). UNC’s orientation program involved the examination of both period writing, comparisons to earlier Arabic thought, and imagery as they relate to religious doctrine. It was scholarly discourse, not a proselytizing mission.

The Supreme Court has long recognized the need for academic freedom in universities. Perhaps the Supreme Court said it best nearly 50 years ago in the context of freedom of association:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (addressing the situation where a professor was asked to disclose the content of his lectures in order to determine whether he had been engaged in subversive activities).

In short, UNC's orientation program passes the Lemon test. Because there has been no violation of the Establishment Clause, Defendant Moeser is entitled to qualified immunity as to the Establishment Clause claims.

V.

Plaintiffs have filed a Motion for Leave to File a Second Amended Complaint in order to add further factual allegations against UNC. The Plaintiffs' Motion will be GRANTED IN PART and DENIED IN PART.

Federal Rule of Civil Procedure 15(a) permits a party to amend its pleading once as a matter of course, and again by leave of court or written consent of the adverse party. The rule provides that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Fourth Circuit has explained that leave should be denied only when "the amendment would be prejudicial to the opposing party, [when] there has been bad faith on the part of the moving party, or [when] the

amendment would be futile." IGEN Int'l, Inc. v. Roche Diagnostics GmbH, 335 F.3d 303, 311 (4th Cir. 2003) (citations omitted). A proposed amendment would be futile if the claim would not survive a motion to dismiss. See Burns v. AAF-McQuay, Inc., 166 F.3d 292, 294-95 (4th Cir.1999).

1.

Plaintiffs wish to expand their factual allegations against UNC to include the "Related Events" listed on UNC's website¹⁸ as supplemental activities for anyone interested in participating. The events were not limited to students, but are open to the public. The events include such things as art exhibits at the Ackland Art Museum, a music performance at Duke University, a film entitled "Islam in America" followed by a faculty-led discussion, and panel discussions on topics from the book by both student leaders and various campus ministers. In addition, the Muslim Students Association sponsored an event entitled "Islamic Awareness Week" during which students present various Islamic topics such as "Women in Islam" at a student gathering place on campus known as "The Pit."

For the reasons stated above, any claim for injunctive relief based on these new factual allegations would be moot. Further, any claim for nominal damages as to the Establishment Clause claim would not survive a 12(b)(6) motion to dismiss

¹⁸The list of events could be reached by clicking on the link to "Related Resources" on the orientation assignment webpage, and then clicking on the link to "Related Events." These events were posted online and available to Plaintiffs at or before the time of the filing of Plaintiff's Amended Complaint, but were not mailed to students until after the Amended Complaint was filed.

because offering students and the public the option to attend various campus and community events relating to the art and culture of Islam are not clear violations of the Establishment Clause. As such, the Chancellor would be entitled to qualified immunity on the Establishment Clause claims even under the proposed amendments.

The Plaintiffs also contend that UNC made the orientation mandatory, despite the Defendants' representations to this Court that participation in the orientation program was optional. However, as discussed earlier, the issue of whether the program was mandatory is not relevant to an Establishment Clause claim because there was no impermissible religious endorsement involved in UNC's orientation program.

Because the proposed Second Amended Complaint would not survive a 12(b)(6) motion to dismiss as to the Establishment Clause claims and the claims for injunctive relief, the Plaintiffs' Motion for Leave to File a Second Amended Complaint will be DENIED as to those claims.

2.

Although the Defendants' Motion to Dismiss purported to dismiss all of Plaintiffs' claims, the Defendants did not include any arguments in their Motion addressing Plaintiffs' Free Exercise claim. This omission is understandable considering that the Free Exercise claims have not been addressed by either party since Defendants' Response to Plaintiff's Motion for Preliminary Injunction.

Accordingly, the Defendants reasonably believed that the Plaintiffs were no longer pursuing that claim. Nonetheless, the Free Exercise Claim remains.

The Plaintiffs' Motion for Leave to File a Second Amended Complaint will be GRANTED as it relates to the Pseudonymous Plaintiffs' Free Exercise claims.

Should the Defendants wish to amend their 12(b)(6) Motion to include arguments relating to the Free Exercise claims in Plaintiffs' Second Amended Complaint, they will have twenty (20) days from the filing of this opinion to do so. If Defendants do so file, Plaintiffs will have an additional ten (10) days in which to respond.

VI.

Defendants have also filed a Motion to Stay Discovery. Discovery shall be stayed pending a resolution of the Free Exercise Claim.

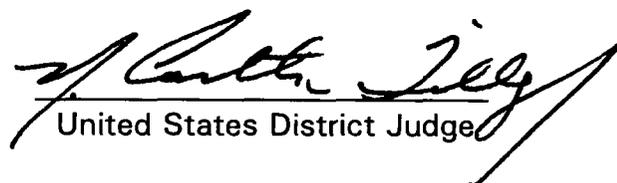
VII.

Finally, Plaintiffs have filed a Motion to Strike portions of several affidavits provided to this Court by Defendants during the preliminary injunction hearing. Plaintiffs argue that the portions in question violate the Federal Rules of Evidence because they constitute hearsay, lay witness opinions, extraneous matters, and incorrect statements. Plaintiffs' Motion will be DENIED. To the extent that the affidavits contain any inadmissible evidence, those portions of the affidavits will not be considered.

VIII.

For the reasons set forth above, Defendants' Motion to Dismiss the Taxpayer Plaintiffs [Doc. #10] will be GRANTED. Defendants' Motion to Dismiss the Pseudonymous Plaintiffs [Doc. #8] will be DENIED. Plaintiffs' Motion to Proceed Anonymously [Doc. #14] will be GRANTED. Defendants' Motion to Dismiss the Amended Complaint [Doc. #36] will be GRANTED as to the Establishment Clause Claims and the claims for injunctive relief. Plaintiffs' Motion for Leave to File a Second Amended Complaint [Doc. #42] will be GRANTED as to the Free Exercise claims and DENIED as to the Establishment Clause claims and claims for injunctive relief. Defendants' Motion to Stay Discovery [Doc. # 34] will be GRANTED. Plaintiffs' Motion to Strike [Doc. #25] will be DENIED.

This the 20th day of May, 2004.


United States District Judge