

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ROBYN KRAVITZ, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, *et al.*,

Defendants.

No. 8:18-cv-01041-GJH

Hon. George J. Hazel
United States District Judge

**MEMORANDUM OF LAW
IN OPPOSITION TO
PLAINTIFFS' MOTION FOR LEAVE
TO AMEND COMPLAINT**

In this case challenging the inclusion of a citizenship question on the 2020 census, Plaintiffs seek to amend their complaint for the third time over a month after the close of discovery and just weeks before trial to add an equal protection claim. They acknowledge that their proposed new claim is not based on any newly discovered facts or evidence. Mot. at 2, ECF No. 71-1.¹ They also acknowledge that they began contemplating adding the claim at least three months ago. Mot. at 2, ECF No. 71-1. And they acknowledge that the reason they waited until now to add the claim was to see how this Court ruled on the government's motion to dismiss a virtually identical equal protection claim in the related census case, *La Unión del Pueblo Entero v. Ross*, No. 18-cv-1570. Mot. at 2, ECF No. 71-1.

Plaintiffs' belated attempt to add a new equal protection claim should be denied. Leave to amend a complaint is properly denied when the plaintiff has acted with a dilatory motive. *Foman v. Davis*, 371 U.S. 178, 182 (1962); accord *Sandcrest Outpatient Servs., P.A. v. Cumberland Cty. Hosp. Sys., Inc.*,

¹ For the Court's convenience, citations to docket entries and legal authorities in the PDF version of this brief are linked to the cited authorities in ECF and Westlaw, respectively.

853 F.2d 1139, 1148–49 (4th Cir. 1988) (leave to amend was properly denied because “the proposed amendment appears to have been an after-thought by [plaintiff], possibly prompted only by the concern that it would lose on [a] summary judgment motion”). Here, Plaintiffs acknowledge that they deliberately waited at least three months to add the claim so they could get a preview of the Court’s views on the viability of a nearly identical claim in *LUPE*. Now that the Court has allowed the *LUPE* equal protection claim to proceed, Plaintiffs seek to add their own equal protection claim in what they know to be a receptive forum. Had the Court dismissed the *LUPE* equal protection claim, Plaintiffs ostensibly would not have added the claim here and instead would have brought it in another district that had not ruled against a similar claim (to the extent that doing so would not be barred by claim-splitting rules). The Court should not countenance this kind of “heads I win, tails try again elsewhere” tactic.

The impropriety of Plaintiffs’ attempt to add a new claim is further shown by the lack of any newly discovered facts or evidence. Leave to amend is properly denied when the proposed new claim is not based on any new facts or evidence — as Plaintiffs acknowledge is the case here. *See First Nat’l Bank of Louisville v. Master Auto Serv. Corp.*, 693 F.2d 308, 314 (4th Cir. 1982) (leave to amend sought 19 days before trial was properly denied because plaintiff “had not obtained any information that it previously had not known of or had access to”).

Finally, Plaintiffs’ attempt to add the equal protection claim should also be denied as futile. Leave to amend is properly denied when the proposed new claim could not survive a dispositive motion. *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 902 n.6 (4th Cir. 2003) (“Because [Defendant] is entitled to summary judgment on Plaintiffs’ claims and because the claims of the putative class are identical to those of Plaintiffs, their motion to amend was futile.”); *Shafer v. Preston Mem’l Hosp. Corp.*, 107 F.3d 274, 276, 282 (4th Cir. 1997) (leave to amend was properly denied because “‘there is no question’ that the [defendant] would be entitled to summary judgment on the amended Complaint”), *abrogated on other grounds by Baird ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999). Here, Plaintiffs

acknowledge that their proposed equal protection claim is identical in substance to the equal protection claim in *LUPE*. Mot. at 2, ECF No. 71-1. The government has moved for summary judgment on the equal protection claim in *LUPE*. *See* Mot. for Summ. J. at 21–24, ECF No. 82-1, *La Unión del Pueblo Entero v. Ross*, No. 18-cv-1570. The flaws in the *LUPE* equal protection claim identified in the government’s summary judgment motion are thus equally fatal to Plaintiffs’ proposed equal protection claim here.

Plaintiffs’ motion for leave to amend the complaint should therefore be denied.

Dated: December 17, 2018

Respectfully submitted,

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