

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION**

PATRICK L. MCCRORY, et al.,  
Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,  
Defendants.

Case No. 5:16-cv-238-BO

PHIL BERGER, et al.,  
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
JUSTICE, et al.,  
Defendants

Case No. 5:16-cv-240-FL

NORTH CAROLINIANS FOR PRIVACY,  
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
JUSTICE, et al.,  
Defendants

Case No. 5:16-cv-245-FL

**RESPONSE BY PLAINTIFFS PRESIDENT PRO TEMPORE PHIL BERGER  
AND SPEAKER TIM MOORE TO MOTION TO CONSOLIDATE CASES BY  
NORTH CAROLINIANS FOR PRIVACY**

Phil Berger, President pro tempore of the North Carolina Senate, and Tim Moore, Speaker of the North Carolina House of Representatives (collectively “Plaintiffs”), do not oppose the motion by North Carolinians for Privacy (“NCFP”) [Doc. 22] to consolidate this case with its action, *North Carolinians for Privacy v. U.S. Dep’t. of Justice*, No. 5:16-cv-245-FL (E.D.N.C. May 10, 2016) (“NCFP Complaint”). The NCFP action shares numerous questions of law and fact with the Plaintiffs’ declaratory judgment action and also with the declaratory action filed by Governor McCrory and Secretary Perry (which have already been consolidated, Doc. 36), and thus easily meets Rule 42’s standard for consolidation. *See* Fed. R. Civ. P. 42(a) (“If actions before the court involve a common question of law and fact, the court may ... consolidate the actions....”).

The opposition to consolidation by Defendant United States Department of Justice (“Department”) misunderstands the nature of these lawsuits in several respects. First, the Department claims that “[n]one” of NCFP’s constitutional claims—claims which include the right to privacy, parents’ right to direct the upbringing of their children, and the right to free exercise of religion—“appears in either *McCrory* or *Berger*.” Response [Doc. 38], at 4. That is mistaken. The Plaintiffs here assert many of the same constitutional claims throughout their complaint. *See* Compl. in No. 5:16-cv-240 [Doc. 1], at ¶ 2 (declaratory judgment is necessary “to vindicate the sovereign right of North Carolina’s citizens to decide how best to protect their own bodily privacy and dignity in intimate public settings”); *id.* at ¶ 62 (Department’s policy “would violate settled, legitimate expectations of privacy and safety that have long prevailed in the State”); *id.* at ¶ 83 (Department’s

interpretation of Title IX “would require States to violate persons’ constitutional rights to bodily privacy and parents’ constitutional rights to direct the education and upbringing of their children”); *id.* at ¶ 86 (“the Department’s reading of Title IX would *compel* States to violate person’s constitutional rights to bodily privacy and parents’ constitutional rights to direct the education and upbringing of their children with respect to matters of sexuality”); *id.* at ¶ 107 (HB2 “seeks to vindicate the right to sexual and reproductive privacy protected by the Fifth and Fourteenth Amendments, as well as the rights of parents to direct the upbringing of their children”).<sup>1</sup>

Second, the Department erroneously asserts that the NCFP action is “the only vehicle among these cases addressing the validity of the Department of Education’s interpretation of Title IX.” Response, at 5. That is also mistaken. Contrary to the Department’s argument, *fourteen* paragraphs of the Plaintiffs’ complaint enumerate how Title IX forecloses the Department’s policy—which is identical to the Department of Education’s interpretation of Title IX—and moreover, their complaint contains detailed assertions regarding the “determination letter” issued to UNC President Margaret Spellings alleging UNC’s violation of Title IX. *See* Compl. in 5:16-cv-240, at ¶¶ 39-43, 76-89. Moreover, Plaintiffs specifically seek a “final judgment declaring that the Act

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<sup>1</sup> The Plaintiffs do not allege violations of the Free Exercise Clause or the Religious Freedom Restoration Act, as NCFP does. NCFP makes those allegations, however, in support of its claims under Section 706 of the APA, which prohibits administrative action “contrary to constitutional right, power, privilege, or immunity.” *See* 5 U.S.C. § 706(2)(B); NCFP Compl. at ¶¶ 192-193. Plaintiffs do allege numerous violations of Section 706 of the APA, which bear similarities to the NCFP claims. *See* Compl. in No. 5:16-cv-240, at ¶¶ 75, 89, 100, 104, 111, 112(f). In any event, the presence of two additional legal claims should not obscure the fact that the NCFP action shares numerous claims of law and fact with the Plaintiffs’ action.

does not facially violate Title IX.” *Id.* at ¶ 112(b). The Department is thus mistaken that any differences in NCFP’s legal claims should foreclose consolidation.

In sum, Plaintiffs Phil Berger and Tim Moore do not oppose NCFP’s motion for consolidation.

Respectfully submitted,

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Civil Rule 83.1(d)*

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ S. Kyle Duncan  
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