UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; AND BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants, and NORTH CAROLINIANS FOR PRIVACY, an unincorporated nonprofit association, Proposed Defendant-Intervenor.	Case No. 1:16-CV-00425-TDS-JEP

NORTH CAROLINIANS FOR PRIVACY'S MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24 and Local Rule 7.3, Proposed Defendant-Intervenor North Carolinians for Privacy, on behalf of itself and its members, moves to intervene in the above-captioned case. For the reasons stated in accompanying Brief, North Carolinians for Privacy respectfully requests that this Court issue an order granting it intervention of right under Federal Rule of Civil Procedure 24(a)(2), or alternatively, granting it permissive intervention under Federal Rule of Civil Procedure 24(b)(1). As required by Federal Rule of Civil Procedure 24(c), North Carolinians for Privacy is contemporaneously filing a responsive pleading in the form of an Answer and Counterclaims.

Before filing, counsel for Proposed Intervenor conferred with counsel for Plaintiff and Defendants. Defendants the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety indicated that they do not oppose this motion. The University of North Carolina Defendants take no position on this motion. And Plaintiff United States of America states that "[w]ithout seeing the motion and the proposed answer, the United States cannot consent to this motion and reserves the right to oppose it."

Respectfully submitted this 28th day of June, 2016.

/s/ James A. Campbell /s/ Deborah J. Dewart

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2016, I electronically filed the foregoing Motion to Intervene with the Clerk of Court by using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

Date: June 28, 2016

/s/ James A. Campbell
James A. Campbell

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ANSWER AND COUNTERCLAIMS OF PROPOSED DEFENDANT-INTERVENOR NORTH CAROLINIANS FOR PRIVACY

Proposed Defendant-Intervenor North Carolinians for Privacy answers the Complaint (Dkt. 1), filed by the United States of America ("Plaintiff"), and asserts counterclaims as follows:

ANSWER

1. Proposed Defendant-Intervenor North Carolinians for Privacy admits the allegations contained in Paragraph 1 only to the extent that the Complaint filed by Plaintiff challenges the North Carolina Public Facilities Privacy and Security Act, popularly known as H.B. 2, which speaks for itself. To the extent not admitted, the allegations in Paragraph 1 are denied.

2. Proposed Defendant-Intervenor North Carolinians for Privacy admits that H.B. 2 was enacted by the North Carolina General Assembly, and that it became effective on March 23, 2016. All the remaining allegations in Paragraph 2 are denied.

3. The allegations in Paragraph 3 state legal conclusions to which no response is necessary. To the extent that a response is required, Proposed Defendant-Intervenor North Carolinians for Privacy admits that this Court has jurisdiction to hear Plaintiff's claims, although Proposed Defendant-Intervenor North Carolinians for Privacy denies that Plaintiff's claims have any merit or that Plaintiff is entitled to any of the relief it seeks.

4. The allegations in Paragraph 4 state legal conclusions to which no response is necessary. To the extent that a response is required, Proposed Defendant-Intervenor North Carolinians for Privacy admits that venue is proper in this Court. To the extent that a response is required and an allegation is not admitted, the allegation is denied.

5. The allegations in Paragraph 5 state legal conclusions to which no response is necessary. To the extent that a response is required, Proposed Defendant-Intervenor North Carolinians for Privacy denies that this Court has jurisdiction to enter the requested relief because Plaintiff's claims are without merit. Proposed Defendant-Intervenor North Carolinians for Privacy nevertheless admits that this Court has the authority to enter a declaratory judgment or an injunction when federal law is actually violated, which is not true here. To the extent that a response is required and an allegation is not admitted, the allegation is denied.

6. The allegations in Paragraph 6 state legal conclusions to which no response is necessary. To the extent that a response is required, Proposed Defendant-Intervenor North Carolinians for Privacy admits only that the State of North Carolina may, under some circumstances, be deemed a "person" within the meaning of 42 U.S.C. § 2000e(a) and an "employer" within the meaning of 42 U.S.C. § 2000e(b). To the extent that a response is required and an allegation is not admitted, the allegation is denied.

7. Proposed Defendant-Intervenor North Carolinians for Privacy admits the allegations in Paragraph 7.

8. Proposed Defendant-Intervenor North Carolinians for Privacy admits that Defendant North Carolina Department of Public Safety is an agency of the State of North Carolina. Proposed Defendant-Intervenor North Carolinians for Privacy denies the remaining allegations in Paragraph 8 for lack of knowledge.

9. Proposed Defendant-Intervenor North Carolinians for Privacy denies for lack of knowledge the allegations in Paragraph 9.

10. The allegations in Paragraph 10 state legal conclusions to which no response is necessary. To the extent that a response is required, Proposed Defendant-Intervenor North Carolinians for Privacy admits only that the Board of Governors of the University of North Carolina is responsible for the general control, supervision, and governance of the University of North Carolina. To the extent that a response is required and an allegation is not admitted, the allegation is denied.

11. Proposed Defendant-Intervenor North Carolinians for Privacy admits that the North Carolina legislature convened a special session on or about March 23, 2016.

Proposed Defendant-Intervenor North Carolinians for Privacy denies the remaining allegations in Paragraph 10 for lack of knowledge.

12. The text of H.B. 2 speaks for itself, and no response is required. To the extent a response is required, Proposed Defendant-Intervenor North Carolinians for Privacy admits that Plaintiff has accurately quoted the language of H.B. 2. All allegations in Paragraph 12 not expressly admitted are denied.

13. Proposed Defendant-Intervenor North Carolinians for Privacy admits that Ordinance 7056 (the "Charlotte Ordinance") was passed by the City Council of Charlotte, North Carolina. Proposed Defendant-Intervenor North Carolinians for Privacy further admits that the Charlotte Ordinance required places of public accommodation to allow biological males who profess a female identity to use locker rooms and restrooms with women and girls, and vice versa. Proposed Defendant-Intervenor North Carolinians for Privacy denies for lack of information the allegation regarding the motivation for H.B. 2. Proposed Defendant-Intervenor North Carolinians for Privacy denies the remaining allegations in Paragraph 13.

14. Proposed Defendant-Intervenor North Carolinians for Privacy admits that Governor McCrory and some members of the North Carolina legislature made public statements about H.B.2. Proposed Defendant-Intervenor North Carolinians for Privacy denies the remaining allegations in Paragraph 14 for lack of knowledge. All allegations in Paragraph 14 not expressly admitted are denied.

15. Proposed Defendant-Intervenor North Carolinians for Privacy denies all allegations in Paragraph 15 for lack of knowledge.

16. Proposed Defendant-Intervenor North Carolinians for Privacy denies all allegations in Paragraph 16 for lack of knowledge.

17. Proposed Defendant-Intervenor North Carolinians for Privacy admits the allegations in Paragraph 17.

18. Proposed Defendant-Intervenor North Carolinians for Privacy denies all allegations in Paragraph 18 for lack of knowledge.

19. Proposed Defendant-Intervenor North Carolinians for Privacy denies all allegations in Paragraph 19 for lack of knowledge.

20. Proposed Defendant-Intervenor North Carolinians for Privacy denies all allegations in Paragraph 20 for lack of knowledge.

21. Proposed Defendant-Intervenor North Carolinians for Privacy admits that the Department of Justice is a federal agency. Proposed Defendant-Intervenor North Carolinians for Privacy denies all remaining allegations in Paragraph 21 for lack of knowledge. All allegations in Paragraph 21 not expressly admitted are denied.

22. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations contained in Paragraph 22 for lack of knowledge.

23. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 23 for lack of knowledge.

24. Proposed Defendant-Intervenor North Carolinians for Privacy admits that Governor McCrory issued Executive Order 93 on April 12, 2016. Proposed Defendant-Intervenor North Carolinians for Privacy further admits that the quote of Executive Order 93 is accurate. All allegations in Paragraph 24 not expressly admitted are denied.

25. The allegations in Paragraph 25 state legal conclusions to which no response is necessary. To the extent that a response is required, Proposed Defendant-Intervenor North Carolinians for Privacy admits that Title IX applies to the University of North Carolina System, and thus the University of North Carolina System is subject to the requirements of Title IX. Proposed Defendant-Intervenor North Carolinians for Privacy further admits that Title IX applies to issues of access to the University of North Carolina System's restrooms and changing facilities. Proposed Defendant-Intervenor North Carolinians for Privacy denies the remaining allegations in Paragraph 25.

26. The allegations in Paragraph 26 state legal conclusions to which no response is necessary. To the extent that a response is required, Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 26.

27. The allegations in Paragraph 27 state legal conclusions to which no response is necessary. To the extent that a response is required, Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 27.

28. Proposed Defendant-Intervenor North Carolinians for Privacy admits that the United States Department of Justice sent the letters described in Paragraph 28, and that they contained the threat also described in Paragraph 28. Proposed Defendant-Intervenor North Carolinians for Privacy denies that federal law requires that those whose subjective gender identity is incongruent with their biological sex must be given the right of entry to and use of locker rooms and restrooms designated for the opposite sex. Proposed Defendant-Intervenor North Carolinians for Privacy also denies that any of the

provisions of H.B. 2 are irreconcilable with federal law. All allegations in Paragraph 28 not expressly admitted are denied.

29. Proposed Defendant-Intervenor North Carolinians for Privacy states that the State of North Carolina's enforcement of H.B. 2 is fully compliant with federal law. Accordingly, Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 29.

30. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 30 for lack of knowledge.

31. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 31

32. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 32.

33. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 33.

34. Proposed Defendant-Intervenor North Carolinians for Privacy admits that the term "transgender" is frequently used to describe someone who experiences gender dysphoria, whether diagnosed or not, and identifies as a member of the opposite sex. Proposed Defendant-Intervenor North Carolinians for Privacy denies all remaining allegations in Paragraph 34.

35. The allegations in Paragraph 35 purport to describe the experience of every person with gender dysphoria. Proposed Defendant-Intervenor North Carolinians for Privacy denies that those generalized allegations can possibly speak for everyone who

experiences gender dysphoria. Proposed Defendant-Intervenor North Carolinians for Privacy therefore denies the allegations in Paragraph 35.

36. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 36.

37. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 37.

38. The allegations in Paragraph 38 state legal conclusions to which no response is necessary. To the extent that a response is necessary, Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 38 for lack of knowledge.

39. The allegations in Paragraph 39 state legal conclusions to which no response is necessary. To the extent that a response is necessary, Proposed Defendant-Intervenor North Carolinians for Privacy admits that N.C. Gen. Stat. § 130A-118(b)(4) establishes legal procedures and requirements for individuals to change their sex designation on their birth certificate. The text of the statute speaks for itself. All allegations in Paragraph 39 not expressly admitted are denied.

40. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 40 for lack of knowledge.

41. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 41 for lack of knowledge.

42. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 42 for lack of knowledge.

43. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 43.

44. Proposed Defendant-Intervenor North Carolinians for Privacy states that H.B. 2 allows the use of changing facilities and restrooms in government buildings consistent with one's biological sex, and prohibits individuals from using changing facilities and restrooms in government buildings that are designated for the opposite biological sex. All allegations in Paragraph 44 that are not expressly admitted are denied.

45. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 45.

46. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 46 for lack of knowledge. To the extent that this paragraph alleges that the State of North Carolina or any of its agencies is legally liable for any alleged injury described in this paragraph, Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegation.

47. Proposed Defendant-Intervenor North Carolinians for Privacy states that H.B. 2 allows the use of changing facilities and restrooms in government buildings consistent with one's biological sex, and prohibits individuals from using changing facilities and restrooms in government buildings that are designated for the opposite biological sex. All allegations in Paragraph 47 that are not expressly admitted are denied.

48. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 48.

49. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 49 for lack of knowledge. To the extent that this paragraph alleges that the State of North Carolina or any of its agencies is legally liable for any alleged injury described in this paragraph, Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegation.

50. Proposed Defendant-Intervenor North Carolinians for Privacy states that H.B. 2 allows the use of changing facilities and restrooms in government buildings consistent with one's biological sex, and prohibits individuals from using changing facilities and restrooms in government buildings that are designated for the opposite biological sex. All allegations in Paragraph 50 that are not expressly admitted are denied.

51. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 51.

52. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 52 for lack of knowledge. To the extent that this paragraph alleges that the State of North Carolina or any of its agencies is legally liable for any alleged injury described in Paragraph 52, Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegation.

53. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 53.

54. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 54.

55. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 55.

56. Proposed Defendant-Intervenor North Carolinians for Privacy denies the allegations in Paragraph 56.

57. Proposed Defendant-Intervenor North Carolinians for Privacy denies that Plaintiff is entitled to any of the requests in its Prayer for Relief.

58. Each and every allegation of Plaintiff's Complaint not elsewhere responded to is hereby expressly denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Department of Education's and Department of Justice's redefinition of "sex" in Title IX to mean or include "gender identity," their promulgation and enforcement of that new legislative rule, and their threats to revoke federal funding from educational institutions that do not obey the new legislative rule (referred to as the "Agency Action") violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 et seq., because that Agency Action is in excess of statutory jurisdiction, authority, or limitations.

Second Affirmative Defense

The Agency Action violates the APA because it is arbitrary, capricious, an abuse of discretion, or not in accordance with law.

Third Affirmative Defense

The Agency Action violates the APA because it is contrary to constitutional right, power, privilege, or immunity.

Fourth Affirmative Defense

The Agency Action violates the APA because it is without observance of procedure required by law.

Fifth Affirmative Defense

Plaintiff's actions in ordering the State of North Carolina to allow people who profess a gender identity inconsistent with their biological sex to access government-owned changing facilities, locker rooms, and restrooms designated for the opposite sex violate the constitutional right to bodily privacy protected under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

Sixth Affirmative Defense

Plaintiff's actions in ordering the State of North Carolina to allow people who profess a gender identity inconsistent with their biological sex to access government-owned changing facilities, locker rooms, and restrooms designated for the opposite sex violate the Spending Clause in Article 1, Section 8 of the United States Constitution.

Seventh Affirmative Defense

Plaintiff's actions in ordering the State of North Carolina to allow people who profess a gender identity inconsistent with their biological sex to access government-owned changing facilities, locker rooms, and restrooms designated for the opposite sex violate the constitutional right of parents to direct the education and upbringing of their children protected under the Fifth and Fourteenth Amendments to the United States Constitution.

Eighth Affirmative Defense

Plaintiff's actions in ordering the State of North Carolina to allow people who profess a gender identity inconsistent with their biological sex to access government-owned changing facilities, locker rooms, and restrooms designated for the opposite sex violate the free exercise of religion protected under the First and Fourteenth Amendments to the United States Constitution.

Ninth Affirmative Defense

Plaintiff's actions in ordering the State of North Carolina to allow people who profess a gender identity inconsistent with their biological sex to access government-owned changing facilities, locker rooms, and restrooms designated for the opposite sex violate the free exercise of religion protected under the federal Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb et seq.

Tenth Affirmative Defense

Title IX permits educational institutions to maintain sex-specific changing facilities, locker rooms, and restrooms based on biological sex.

Eleventh Affirmative Defense

The Violence Against Women Act (VAWA) permits educational institutions to maintain sex-specific changing facilities, locker rooms and restrooms based on biological sex.

COUNTERCLAIMS AGAINST PLAINTIFF

Jurisdiction and Venue

1. This action arises under 28 U.S.C.A. §§ 2201-02 (the "Declaratory Judgments Act"), 5 U.S.C. §§ 500 et seq. (the APA), and 20 U.S.C. §§ 1681 et. seq. (Title IX).

2. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1361, and 1367.

3. The Court has jurisdiction to issue the requested declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.

4. The Court has jurisdiction to award the requested injunctive relief under 5 U.S.C. §§ 702 and 703, 20 U.S.C. § 1683, and Federal Rule of Civil Procedure 65.

5. North Carolinians for Privacy has no adequate remedy at law.

6. The Court has jurisdiction to award reasonable attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412.

7. Venue lies in this district pursuant to 28 U.S.C. § 1391(b) and (e) because a substantial part of the events or omissions giving rise to North Carolinians for Privacy's claims occurred in this district.

Factual Allegations Relevant to Counterclaims

8. North Carolinians for Privacy is an unincorporated non-profit association organized under N.C. Gen. Stat. Ann. § 59B-1 through B-15, and headquartered in Raleigh, North Carolina.

9. North Carolinians for Privacy's members are all United States citizens and residents of the State of North Carolina.

10. Some of North Carolinians for Privacy's members reside in the federal district for the Middle District of North Carolina.

11. Some of its members are students within the University of North Carolina System (the "University Students"), or will be matriculating next school year as freshmen to colleges within the University System.

12. Some of its members are students in North Carolina elementary schools, middle schools, or high schools that receive federal funding (the "Minor Students").

13. Some of its members are parents of Minor Students (the "Parents").

14. Some of its members are victims of sexual assault by a member of the opposite sex.

15. North Carolinians for Privacy's members are directly impacted by the Department of Justice's actions, which threaten to revoke federal funding to North Carolina's public schools, including schools attended by members of North Carolinians for Privacy, if the State and University System do not allow biological males the right of entry and use of changing facilities, locker rooms, and restrooms designated for females, and vice versa.

16. The term "sex" as used in Title IX and its implementing regulations means male and female, under the traditional binary conception of sex consistent with one's birth or biological sex.

17. Title IX states that "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes[,]" 20 U.S.C. § 1686, which indicates that Congress intended that Title IX would respect student privacy rights.

18. Title IX's accompanying regulations confirm that schools "may provide separate toilet, locker room, and shower facilities on the basis of sex, [so long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

19. Preventing the mixing of biological boys and girls in intimate environments like restrooms, locker rooms, and showers is the very reason that Congress allowed for single-sex living facilities, and that Title IX regulations allow for single-sex changing areas and restrooms.

20. The Department of Education and the Department of Justice have promulgated a new legislative rule decreeing that "sex" in Title IX means, or includes, gender identity, and no longer means only biological sex.

21. This new rule was not published for notice and comment.

22. This new rule was not signed by the President of the United States.

23. The Department of Education and the Department of Justice have both enforced this new rule against educational institutions, requiring them to allow students to use facilities designated for the opposite sex or face the risk of revocation of federal funds.

24. On May 4, 2016, the Department of Justice notified the State of North Carolina and also the President of the University of North Carolina System that, if educational institutions continued to enforce the requirements of H.B. 2, they would risk the revocation of their federal funding.

25. On May 13, 2016, the Department of Justice and Department of Education issued a joint "Dear Colleague" letter to all the Nation's educational institutions, including those in North Carolina, in which the Departments again announced the new legislative rule, and also announced that educational institutions receiving federal funds must obey the new legislative rule or risk the revocation of their federal funding.

26. The Department of Justice also notified the President of the University of North Carolina System, in a letter dated May 4, 2016, that the federal Violence Against Women Act ("VAWA") prohibits schools of the University of North Carolina System from enforcing H.B. 2.

27. VAWA requires that no one, based on gender identity, "be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any program or activity funded in whole or in part with funds made available under the [VAWA]*." 42 U.S.C.A. § 13925(13)(A) (emphasis added).

28. VAWA funding does not specifically include policies or programs regulating access to changing facilities, locker rooms, and restrooms.

29. VAWA has an express carve-out for "sex segregation" and "sex-specific programming" that "is necessary to the essential operation of a program." 42 U.S.C.A. § 13925(13)(B).

30. VAWA does not prohibit any school, including the schools attended by North Carolinians for Privacy's members, from maintaining sex-specific changing facilities, locker rooms, and restrooms.

31. The Department of Justice's threatened enforcement action, which has already commenced with the filing of this lawsuit, and which includes an imminent threat to revoke the University System's $1.4 billion in federal funding, places the University Students at immediate risk of suffering the loss of educational opportunity as a result of decreased funding to the University System.

32. Some of the University Students receive federal financial aid.

33. Federal financial assistance under Title IX includes federal grants, loans, scholarships, and wages that are "authorized or extended under a law administered by the Federal agency that awards such assistance." 65 Fed. Reg. 52858.

34. If the University System's eligibility for federal funding is revoked, the University Students will no longer be eligible for federal financial assistance.

35. If that happens, the University Students expenditures related to their college education would increase dramatically, forcing them to pay far more to attend a college within the System, transfer to a school outside the System, or drop out of school altogether.

36. But if the University System capitulates to the Department of Justice's threat or if the Department of Justice prevails in this lawsuit, the University Students will suffer the loss of their constitutional right to privacy, because they will be compelled by

the government to use changing facilities, locker rooms, and restrooms with members of the opposite sex.

37. The Minor Students' schools are also at risk of losing federal funding, if they do not immediately allow biological males who profess a female identity to access changing facilities, locker rooms, and restrooms designated for girls, and vice versa.

38. If the Minor Students' schools lose their federal funds, the Minor Students will suffer the harm of fewer, or inferior, educational programs and activities.

39. Additionally, if the Minor Students' schools capitulate to the Department of Justice's threat or if the Department of Justice prevails in this lawsuit, the Minor Students will suffer the loss of their constitutional right to privacy, because they will be compelled by the government to use changing facilities, locker rooms, and restrooms with members of the opposite sex.

40. If that happens, each of the Parents' right to direct the education and upbringing of their children—including their right to control whether their children will be exposed to people of the opposite sex in intimate, vulnerable settings like showers, locker rooms, and restrooms—will be violated because their minor children will be compelled by the government to use changing facilities, locker rooms, and restrooms with members of the opposite sex.

41. The female University Students, Minor Students, and victims of sexual assault experience the added worry, anxiety, stress, and fear caused by the knowledge that allowing biological males the right of entry and use of changing facilities, locker

rooms, and restrooms designated for females so long as those males profess a female identity creates a higher risk of sexual assault.

42. Currently, if someone sees a male student enter the female students' private facilities, he or she can notify security.

43. But if the Department of Justice succeeds in this lawsuit, or if the Department of Education and the Department of Justice are able to continue enforcing their new legislative rule, no one will be able to stop any biological male who professes a female identity from entering female changing facilities, locker rooms, and restrooms in government buildings throughout North Carolina.

44. Significantly, the Department of Education's and the Department of Justice's new legislative rule does not include a "gender expression" component, but only a "gender identity" component.

45. As a result, under the Department of Education's and the Department of Justice's new legislative rule, biological males need not present as females, but rather must only say that they subjectively perceive themselves to be female (a claim no one can independently verify) in order to obtain access to changing facilities, locker rooms, and restrooms designated for women and girls.

46. Some of the University Students and Minor Students object to using changing facilities, locker rooms, and restrooms with members of the opposite sex because of their sincerely held religious beliefs regarding modesty and nudity.

47. Some of the Parents object to the Minor Students using changing facilities, locker rooms, and restrooms with members of the opposite sex because of their sincerely held religious beliefs regarding modesty and nudity.

48. If the Department of Justice prevails in this case, the University Students will either (1) suffer the loss of their constitutionally guaranteed right to bodily privacy, or (2) suffer the loss of educational opportunities and their ability to access federal financial assistance.

49. If the Department of Justice prevails in this case, the Minor Students will either (1) suffer the loss of their constitutionally guaranteed right to bodily privacy, or (2) suffer the loss of educational opportunities.

50. If the Department of Justice prevails in this case, the Parents will either (1) suffer the loss of their constitutionally guaranteed right to direct the education and upbringing of their minor children, or (2) suffer the loss of educational opportunities for their children.

51. The University Students, Minor Students, and their Parents should not be forced to suffer any of these results, because providing single-sex changing facilities, locker rooms, and restrooms based on biological sex does not violate Title IX or VAWA.

52. To preserve the legal rights of the University Students, Minor Students, and Parents, North Carolinians for Privacy needs a declaration and injunction from this Court.

Count I
The Administrative Procedure Act

53. Proposed Defendant-Intervenor North Carolinians for Privacy realleges all matters set forth in all proceeding paragraphs and incorporates them by reference herein.

54. The Department of Education's and Department of Justice's redefinition of "sex" in Title IX to mean or include gender identity, and its promulgation and enforcement of that new legislative rule, complete with the threat to revoke federal funding from educational institutions that do not obey the new legislative rule (together, the "Agency Action"), violates the Administrative Procedure Act because it is in excess of statutory jurisdiction, authority, or limitations.

55. The Department of Education's and Department of Justice's redefinition of "sex" in Title IX to mean or include "gender identity," their promulgation and enforcement of that new legislative rule, and their threats to revoke federal funding from educational institutions that do not obey the new legislative rule (referred to as the "Agency Action") violates the APA, 5 U.S.C. §§ 500 et seq, in four separate ways.

56. First, the Agency Action violates the APA because it is in excess of statutory jurisdiction, authority, or limitations.

57. Neither the Department of Education nor the Department of Justice has authority to redefine the term "sex" in Title IX to mean or include "gender identity."

58. Second, the Agency Action violates the APA because it is arbitrary, capricious, an abuse of discretion, or not in accordance with law.

59. Neither the Department of Education nor the Department of Justice gave a legally sufficient explanation for their redefinition of "sex" in Title IX to mean or include gender identity.

60. The Agency Action is contrary to RFRA, 42 U.S.C. §§ 2000bb et seq., because it substantially burdens the free exercise rights of students whose sincerely held religious beliefs concerning modesty prohibits them from changing their clothing or using the restroom in the presence of the opposite sex.

61. Third, the Agency Action is contrary to constitutional right, power, privilege, or immunity.

62. The Agency Action violates the fundamental constitutional right to bodily privacy protected under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, which includes the right to be free from state-compelled risk of exposure of one's fully or partially unclothed body to the opposite sex.

63. The Agency Action violates the fundamental right of parents to direct the education and upbringing of their children protected under the Fifth and Fourteenth Amendments to the United States Constitution because it decrees that their children must risk being exposed to opposite-sex nudity and that their children must risk the exposure of their fully or partially unclothed bodies to the opposite sex.

64. The Agency Action violates the free exercise rights of some of North Carolinians for Privacy's members protected under the First and Fourteenth Amendments to the United States Constitution because it requires them to risk sharing changing areas,

locker rooms, and restrooms with the opposite biological sex in violation of their sincerely held religious beliefs.

65. The Agency Action burdens the free exercise of religion, is not generally applicable toward religion, is not neutral toward religion, does not further a compelling government interest, and is not narrowly tailored to further a compelling government interest.

66. The Agency Action violates the Spending Clause.

67. The Agency Action imposes a new condition on federal funding that conflicts with the clear and unambiguous conditions that Congress imposed when it enacted Title IX.

68. The Agency Action coerces and commandeers educational institutions to implement the Department of Education's and Department of Justice's gender-identity policies.

69. The Department of Education and Department of Justice threaten to revoke all (not merely part) of the educational funding that the federal government provides the University of North Carolina System and the State of North Carolina's schools.

70. The amount of federal funding that the Department of Education and Department of Justice threaten to revoke is a substantial portion of these educational institutions' budgets.

71. Fourth, the Agency Action is without observance of the procedure required by law.

72. The Agency Action constitutes a legislative rule.

73. The Agency Action did not comply with the APA's notice-and-comment requirements.

74. For these reasons, North Carolinians for Privacy is entitled to a declaration that the Agency Action violates the APA.

Count II
Title IX

75. Proposed Defendant-Intervenor North Carolinians for Privacy realleges all matters set forth in all proceeding paragraphs and incorporates them by reference herein.

76. Title IX provides that "[n]o person in the United States shall, *on the basis of sex,* be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added).

77. The text of Title IX includes terminology, such as "both sexes," "one sex," and "the other sex," which indicates that "sex" in Title IX refers to the binary concept of biological sex.

78. Title IX's implementing regulations, found at 34 C.F.R. Part 106, contain many similar, "one sex . . . the other sex" statements, which indicate that "sex" in the implementing regulations refers to the binary concept of biological sex.

79. Title IX's implementing regulations explicitly allow educational institutions to maintain sex-specific changing facilities, locker rooms, and restrooms based on biological sex.

80. The Department of Justice and the Department of Education each have decreed that Title IX prohibits educational institutions from maintaining sex-specific changing facilities, locker rooms, and restrooms based on biological sex.

81. These directives are wrong as a matter of law.

82. Alternatively, if Title IX prohibits biological sex-specific locker rooms and restrooms based on biological sex, Title IX violates the Constitution as explained in Count I.

83. Proposed Defendant-Intervenor North Carolinians for Privacy is entitled to a declaration to that effect.

Count III
VAWA

84. Proposed Defendant-Intervenor North Carolinians for Privacy realleges all matters set forth in all proceeding paragraphs and incorporates them by reference herein.

85. VAWA's anti-discrimination provisions apply to "any program or activity funded in whole or in part with funds made available under the [VAWA]." 42 U.S.C.A. § 13925(13)(A).

86. VAWA funding does not specifically include policies or programs regulating access to changing facilities, locker rooms, and restrooms.

87. VAWA has an express carve-out for "sex segregation" and "sex-specific programming" that "is necessary to the essential operation of a program." 42 U.S.C.A. § 13925(13)(B).

88. Because of constitutional privacy concerns, Title IX hostile environment concerns, and safety concerns, separation by biological sex is "necessary to the essential operation" of schools' changing facilities, locker rooms, and restrooms.

89. Additionally, the practice of maintaining restrooms and locker rooms separated by biological sex does not discriminate based on gender identity.

90. The Department of Justice has determined that VAWA prohibits educational institutions from maintaining sex-specific changing facilities, locker rooms, and restrooms based on biological sex.

91. This determination is wrong as a matter of law.

92. Alternatively, if VAWA prohibits biological sex-specific locker rooms and restrooms based on biological sex, Title IX violates the Constitution as explained in Count I.

93. Proposed Defendant-Intervenor North Carolinians for Privacy is entitled to a declaration to that effect.

PRAYER FOR RELIEF

WHEREFORE, Proposed Defendant-Intervenor North Carolinians for Privacy requests that this Court:

a) Dismiss the United States of America's claims;

b) Enter a final judgment in favor of Proposed Defendant-Intervenor North Carolinians for Privacy declaring that the Department of Justice and Department of Education have violated the Administrative Procedure Act by promulgating and

enforcing their new legislative rule decreeing that "sex" in Title IX means, or includes, gender identity, and enjoining those Departments from continuing to enforce that rule;

c) Enter a final judgment in favor of Proposed Defendant-Intervenor North Carolinians for Privacy declaring that Title IX does not prohibit schools in North Carolina from maintaining sex-specific changing facilities, locker rooms, and restrooms based on biological sex, and enjoining the Department of Justice and Department of Education from continuing to threaten enforcement of Title IX against schools in North Carolina that maintain sex-specific changing facilities, locker rooms, and restrooms based on biological sex;

d) Enter a final judgment in favor of Proposed Defendant-Intervenor North Carolinians for Privacy declaring that VAWA does not prohibit schools in North Carolina from maintaining sex-specific changing facilities, locker rooms, and restrooms based on biological sex, and enjoining the Department of Justice and Department of Education from continuing to threaten enforcement of VAWA against schools in North Carolina that maintain sex-specific changing facilities, locker rooms, and restrooms based on biological sex;

e) Enter a preliminary and permanent injunction restraining the Department of Justice, Department of Education, their officers, agents, employees, and all other persons acting in concert with them from taking any action contrary to the above-listed declarations, including the threatened revocation of federal funding made available to the University of North Carolina System and the State of North Carolina's schools;

f) Retain jurisdiction of this matter for the purpose of enforcing any orders issued;

g) Award North Carolinians for Privacy its attorney fees and costs;

h) Enter the requested injunctive relief without a condition of bond or other security being required of North Carolinians for Privacy; and

i) Grant such other and further relief as the Court deems equitable and just in the circumstances.

Respectfully submitted this 28th day of June, 2016.

/s/ James A. Campbell

/s/ Deborah J. Dewart

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*Appearing by special appearance pursuant to L.R. 83.1(d)

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2016, I electronically filed the foregoing Answer and Counterclaims with the Clerk of Court by using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

Date: June 28, 2016

/s/ James A. Campbell
James A. Campbell

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; AND BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants, and NORTH CAROLINIANS FOR PRIVACY, an unincorporated nonprofit association, Proposed Defendant-Intervenor.	Case No. 1:16-CV-00425-TDS-JEP

ORDER

Having reviewed the motion to intervene and supporting documents, it is hereby ORDERED that North Carolinians for Privacy is permitted to intervene as defendant in this case pursuant to Federal Rule of Civil Procedure 24.

_____
Hon. Thomas D. Schroeder
United States District Judge

Dated: _____ ___, 2016