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.	)	Case No. 1:16-cv-00425

UNITED STATES' MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE BY NORTH CAROLINIANS FOR PRIVACY

The United States respectfully submits the following response in opposition to the June 28, 2016, Motion to Intervene filed by North Carolinians for Privacy ("NCFP" or "Movant"). The United States respectfully requests that the Court deny the motion to intervene. First, to the extent that Movant's interest is based on its affirmative claims or counter-claims against the United States, that interest is sufficiently protected by Movant's pending affirmative litigation. Movant raises identical claims in two cases – here and in its own separate action against the United States. Movant's claims consist of significant collateral issues of law distinct from the claims and counterclaims at issue in this case and they should be decided in NCFP's existing separate action against the United States. Second, to the extent that Movant's interest is predicated on its desire to

participate in the defense of North Carolina House Bill 2 ("H.B. 2"), Movant is not entitled to intervention as of right under Rule 24(a)(2) because it has failed to establish that it has a protectable interest that would be impeded or impaired by resolution of this action, and because, even if it had such an interest, it has failed to show that Defendants would not adequately represent that interest. In addition, because Movant seeks to pursue issues that are irrelevant and collateral to this litigation, permitting its intervention under Rule 24(b) would needlessly delay resolution of this case, which has been placed on an accelerated schedule in order to enable the Court to consolidate the United States' motion for preliminary injunction with trial. Thus, the United States respectfully asks that the Court deny the motion to intervene, both as of right under Rule 24(a)(2) and permissively under Rule 24(b).

STATEMENT OF FACTS

On May 9, 2016, the United States filed a Complaint in this Court against the State of North Carolina, the Governor of North Carolina, the North Carolina Department of Public Safety ("DPS"), the University of North Carolina and its Board of Governors ("UNC") (collectively, "Defendants"). *See* Complaint, ECF No. 1. The Complaint alleges, among other things, that by complying with and implementing Part I of North Carolina Session Law 2016-3, House Bill 2 ("H.B. 2"), these government Defendants are violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"), and the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925(b)(13), ("VAWA"). Complaint, ECF No. 1, at 1-2.

H.B. 2 mandates, *inter alia*, that all "[p]ublic agencies . . . require multiple occupancy bathrooms or changing facilities . . . be designated for and only used by individuals based on their biological sex." Ex. 1 at 2. H.B. 2 defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." *Id.* at 1. On July 5, 2016, the United States filed a Motion for Preliminary Injunction, asking this Court to enjoin Defendants from complying with or implementing Section 1.3 of H.B. 2. ECF No. 73.

On June 28, 2016, NCFP moved pursuant to Federal Rule of Civil Procedure 24(a) and (b) to intervene in this case. *See* Motion to Intervene, ECF No. 58. The Movant purports to represent a group of K-12 students in North Carolina schools and their parents, as well as a group of students in the University of North Carolina University System. ECF No. 59 at 1.

Movant has also filed a separate action against the United States, which is currently pending before this Court. *See* Complaint, *North Carolinians for Privacy* v. *United States, et al.*, No. 1:16-cv-00845 (M.D.N.C.), ECF. No. 1. In Count One of its Complaint, NCFP alleges that the United States has violated the Administrative Procedures Act ("APA"), on both substantive and procedural grounds. *Id.* at ¶¶ 130-238. In its substantive APA claims, Movant argues that the United States' interpretation of the term "sex" violates the APA because it is contrary to law, including Title IX, *id.* ¶ 181, the Religious Freedom Restoration Act ("RFRA"), *id.* ¶ 182-191, the right to privacy, *id.* ¶¶ 194-201, parental rights, *id.* ¶¶ 202-212, the Free Exercise Clause, *id.* ¶¶ 214-223, and the Spending Clause, ¶¶ 224-236. Counts Two and Three of NCFP's Complaint raise

declaratory judgment claims on pure questions of law under Title IX and VAWA. *Id.* ¶¶ 249-294.

I. INTERVENTION OF RIGHT

A. Legal Standard

Under Federal Rule of Civil Procedure 24(a)(2), intervention is available as a matter of right if, by timely motion, the movant can show (1) an interest relating to the property or transaction that is the subject of the action; (2) that it is so situated that disposing of the action, as a practical matter, may impair or impede its ability to protect its interest; and (3) that its interest is not adequately represented by existing parties to the litigation. Fed. R. Civ. P. 24(a)(2); *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013); *United States v. North Carolina*, No. 13-CV-861, 2014 WL 494911, at *2 (M.D.N.C. Feb. 6, 2014) (Ex. 2). All of these criteria must be met before intervention of right is appropriate. *See Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (holding that intervention of right was properly denied because the State of Virginia's interests in the litigation were adequately represented by the plaintiffs); *see also Gould v. Alleco, Inc.*, 883 F.2d 281, 284-85 (4th Cir. 1989) (holding that potential creditors did not have an interest sufficient to justify intervention of right). In addition, "a would-be intervenor bears the burden of demonstrating to the court a right to intervene." *In re Richman*, 104 F.3d 654, 658 (4th Cir. 1997).

To meet the criteria for intervention of right, the movant must demonstrate an interest in the litigation that is "'significantly protectable.'" *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)).

"[A] general interest in the subject matter of pending litigation does not constitute a protectable interest within the meaning of Rule 24(a)(2)." *Dairy Maid Dairy, Inc. v. United States*, 147 F.R.D. 109, 111 (E.D. Va. 1993). Rather, the interest "must bear a close relationship to the dispute between the existing litigants and therefore must be direct, rather than remote or contingent." *Id.*

This standard is distinct from, but related to, the test for establishing standing pursuant to Article III of the Constitution. *See Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013) (discussing the "related standing context" in evaluating a request for intervention). To establish Article III standing, a party must demonstrate that it has (1) suffered an injury in fact; (2) which was caused by the conduct at issue; and (3) which will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Similar to the standard for a protectable interest under Rule 24(a)(2), standing doctrine requires a party to show an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id*. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations and internal quotation marks omitted)).

Even if it is able to demonstrate a sufficient interest in the litigation that may be impaired or impeded, a prospective intervenor must further show that its interest is not adequately represented by existing parties to the litigation. Further, "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the [movant] must demonstrate adversity of interest, collusion, or nonfeasance." *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). That presumption is stronger where a

government agency represents the interests of the putative intervenors; in such a situation, an "exacting showing of inadequacy" is required. *See Stuart*, 706 F.3d at 352. This Court has recently affirmed this standard, finding that "[w]hen a State statute is challenged and a proposed intervenor shares a common objective with the State to defend the validity of the statute, the proposed intervenor 'must mount a strong showing of inadequacy.'" *United States v. North Carolina*, No. 13-CV-861, 2014 WL 494911(M.D.N.C. Feb. 6, 2014) (quoting *Stuart*, 706 F.3d at 352).

As discussed further below, Movant cannot demonstrate that it has a significantly protectable interest that would be impaired by the resolution of this case or make the "strong showing of inadequacy" of representation necessary for intervention as of right in this case. *See Stuart*, 706 F.3d at 349; *id.* at 352 (finding no right to intervene for appellants who shared with defendant North Carolina the same ultimate interest in upholding the challenged statute); *Westinghouse Elec. Corp.*, 542 F.2d at 216.

B. Movant is Not Entitled to Intervention of Right

1. Movant is not so situated that disposing of this action may impair or impede its ability to protect its interest because it has a separate affirmative case against the United States.

Movant has a separate affirmative case against the United States, *North Carolinians for Privacy* v. *United States, et al.*, No. 1:16-cv-00845 (M.D.N.C.), in which it brings substantively identical claims to those which it seeks to raise in intervention here. *Compare* Complaint, No. 5:16-cv-00845 (M.D.N.C.), ECF No. 1, *with* Proposed Answer and Counterclaims, No. 1:16-cv-00425 (M.D.N.C.), ECF No. 58-1. Disposing of

this action without permitting intervention will not impede Movant's ability to protect its interests.[1]

Specifically, NCFP purports to represent students and parents of minor students in North Carolina's public schools and universities who have an interest in continued implementation of H.B. 2 in schools and universities in the State. As part of its APA claims, NCFP alleges that, should the United States prevail in enjoining implementation of H.B. 2, it would infringe on both its student and parent members' right to the free exercise of religion and unduly burden that right in violation of the Religious Freedom Restoration Act.

These grounds for an APA claim have not been raised by any of the six existing defendants and would not, therefore, be foreclosed by resolution of the issues in the other related cases pending before this court. Since NCFP has brought all of its claims against the United States in a separate lawsuit, and those claims are distinct and different from the claims at issue in this case, resolution of this case will not impact NCFP's ability to protect any asserted interests and this Court should deny intervention.

[1] While NCFP may offer to affirmatively dismiss its action in exchange for raising its claims in intervention, the United States would reject such an offer as it would allow NCFP to side-track the instant action with non-germane arguments that NCFP itself admits are ancillary. *See* Proposed Defendant-Intervenor North Carolinians for Privacy's Reply to United States' Response to Motion to Expedite the Responses to Motion to Intervene, No. 1:16-cv-00425, ECF No. 88, at 6 ("For if the court agrees with NCFP's contention that the term 'sex' in Title IX does not include 'gender identity' – an issue at the heart of the United States' Motion for a Preliminary Injunction—the court might not need to reach any of NCFP's other arguments.")

2. Movant lacks a significantly protectable interest that may be impaired or impeded by this litigation.

Neither of Movant's asserted interests in being part of the defense in this litigation amounts to a significantly protectable interest sufficient to justify intervention of right. Movant identifies two interests that it deems significantly protectable: its members' interest in federal funding to their schools and universities and its members' interest in their "constitutional right to bodily privacy." Motion to Intervene, ECF No. 59 at 11-12.

First, Movant does not provide any legal authority to support the assertion that an individual or group can have a significantly protectable interest in federal funding provided to another entity, and such claims do not withstand scrutiny because the asserted interest is too general and not the "direct and concrete interest" required by Rule 24(a)(2). *See Diamond v. Charles*, 476 U.S. 54, 75 (1986) (upholding denial of intervention because the movant taxpayer's "asserted interests in the provisions at issue . . . fall well outside the ambit of Rule 24(a)(2)."). Further, even if Movant could demonstrate that it has a significantly protectable interest with regard to the federal funding at issue here, it has failed to demonstrate that such an interest is impaired or impeded by this litigation. Here, the Department of Justice is seeking injunctive relief against Defendants and has not taken any affirmative step to revoke federal funding through this litigation. Indeed, this Court, pursuant to the joint request of the United States and Defendants, has stayed the automatic termination of federal funds under VAWA.

Second, the alleged constitutional right to bodily privacy Movant asserts does not constitute a sufficient basis for intervention of right and Movant has cited no legal

authority to suggest otherwise. In fact, in the most analogous and controlling case, the Fourth Circuit found that a transgender student's use "or for that matter any individual's appropriate use—of a restroom" will not implicate comparable interests in bodily privacy recognized in the cases cited by Movants, where constitutional abuses were at issue. *See G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F. 3d 709, 723 n.10 (4th Cir. 2016), reh'g denied (4th Cir. 2016). Indeed, by relying on cases such as *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) and *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981)—both of which were cited by the dissent and found unpersuasive by the majority in *Gloucester*—Movants argue that their interest in avoiding the mere presence of a transgender individual in a sex-segregated bathroom or changing facility is comparable to the privacy interests at issue in *Lee*, where a female prisoner had her underwear forcibly removed and her vaginal cavity searched in the presence of male guards who were restraining her, 641 F.2d at 118-19, or the interest of the students in *Brannum*, who had been *videotaped* dressing and undressing in school locker rooms, 516 F.3d at 492-93. The other cases cited by Movant to establish its "significant protectable interest" are similarly inapposite. *See Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (Fourth and Eighth Amendment case where male inmates argued that strip searches are unconstitutional because female correctional officers and visitors can observe their occurrence); *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) (Fourteenth Amendment case finding plaintiff established a right to privacy from documentation, such as photographing and videotaping, of one's unclothed or partially unclothed body); *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993)

(Fourth Amendment case regarding teacher's forcible strip search of a student); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009) (Fourth Amendment case regarding thirteen year-old girl who was searched for drugs, including exposing sensitive areas). These cases do not establish the interest in bodily privacy asserted by Movant, which is an interest in using bathrooms and facilities from which transgender individuals are excluded. That the interest asserted by Movant extends to changing facilities does not change the outcome. *See Gloucester*, 822 F. 3d at 728-29 (David, J., concurring) (finding that the concern about mitigating students' unintentional exposure of their genitals to others was largely, if not entirely, remedied by the alterations to the school's facilities). As in *Gloucester* and unlike in the cases cited by Movant, there are simple steps that can be taken to address any concern regarding unintentional exposure of one's body through alterations to locker room facilities, such as curtains, to afford more privacy to all individuals, or the provision of single-stall restrooms for anyone seeking additional privacy.

NCFP attempts to show a protectable interest by relying upon hypotheticals positing mandatory sharing of sex-segregated facilities by people of all sexes and where "male sexual predators" may enter multi-occupancy facilities for women. *See* Mot. Intervene, ECF No. 59 at 7-8. This is a mischaracterization of the issues present in this case. The United States does not seek to enjoin the use of sex-segregated facilities,[2] but rather to restore the status quo and to ensure, consistent with federal law, that all women

[2] Title IX regulations permit, but do not require federal funding recipients to have sex-segregated facilities. *See* 34 C.F.R. § 106.33 (2016).

(including transgender women) have access to women's facilities and all men (including transgender men) have access to men's facilities. In addition, Movant's generalized and speculative fear about male sexual predators entering women's bathrooms is not an interest that could be impaired or impeded by this litigation. Laws prohibiting criminal conduct will continue to apply and be enforced, just as they did prior to enactment of H.B. 2 and regardless of the outcome of this case. For this reason, and the reasons above, the type of bodily privacy that Movant has advanced is not a "significantly protectable interest" that could be impaired or impeded by the present litigation.

3. Any protectable interest Movant may have is adequately represented by existing parties.

Even if the Movant had established a protectable interest that could be impaired by disposition of this action, any such interest is adequately represented in this suit by the existing Defendants. Here, the Movant and Defendants share precisely the same objective in the defensive posture in this litigation—to uphold the challenged provisions of H.B. 2—and the Defendants in this case are all government entities and representatives.

This case involves a challenge under federal law to a North Carolina statute. The party best situated to defend the statute is the State itself. The facts of this case are analogous to those in *Stuart*, where the Fourth Circuit held that "the need for government to exercise its representative function is perhaps at its apex where, as here, a duly enacted statute faces a constitutional challenge . . . [and w]hen a statute comes under attack, it is

difficult to conceive of an entity better situated to defend it than the government." 706 F.3d at 351.

In this case, Movant has made no showing of inadequate representation. They have not established that their interests diverge from those of the existing Defendants. Defendants have vigorously opposed the United States' claims seeking to enjoin provisions of H.B. 2 that deny transgender people access to sex-segregated bathrooms and changing rooms consistent with their gender identity unless they can produce an amended birth certificate. This is exactly the same objective NCFP seeks to advance in its motion to intervene.

Rather than claiming that Governor McCrory and DPS will not, or cannot, adequately defend against the United States' suit, the Movant instead suggests that the fact that those Defendants are represented by private counsel rather than the Attorney General somehow indicates that the defense is compromised in a way that warrants Movant's presence in the case. Mot. Intervene, ECF No. 59 at 13-14. There is no legal support for the proposition that a government entity's retention of private counsel is evidence of inadequate representation, and such an assertion is hardly credible. Movant further states that the North Carolina Attorney General "has publicly attacked the Act and refused to defend it in court," *Id.* at 14,[3] but this Court has previously found that an Attorney General's failure adequately to represent a putative intervenor's interest was not

[3] The United States notes that the North Carolina Department of Justice has indeed entered an appearance in this matter. *See* Notice of Appearance by attorney Olga E. Vysotskaya De Brito on Behalf of Defendant State of North Carolina, ECF No. 21and Notice of Appearance by attorney Amar Majmundar on Behalf of Defendant State of North Carolina, ECF No. 25.

significant when there were multiple other parties with competent counsel. *See Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 706 (M.D.N.C. 2014) (allowing only limited intervention for the purpose of lodging and preserving an objection).

Movant also argues that its interests under Title IX are not adequately represented because the University of North Carolina has "made it clear that they have no intention of enforcing H.B. 2." Mot. Intervene, ECF No. 59 at 12. This argument, however, is premature. UNC, an agency of the State, has already filed a motion to dismiss in this matter. *See* UNC Defendants' Motion to Dismiss, No. 1:16-cv-00425, ECF No. 98. There is no indication that UNC will not fully and adequately defend against the United States' Title IX claim moving forward.[4] *See North Carolina*, 2014 WL 494911, at *3 (noting the difficulty in identifying divergent interests where the litigation is at an early stage and existing defendant still has the opportunity to raise defenses). The Movant has not established that its interest in this case is any different than Defendant UNC's, or for that matter the Governor's or Senator Berger's, in defending the application of H.B. 2 to the UNC system. Accordingly, the Movant has not carried its burden to "rebut the presumption that [its] interests are adequately represented by the State Defendants." *Id.* at *4.[5] Indeed, in *North Carolina*, this Court specifically emphasized that mere

[4] As the United States explained in its Memorandum in Support of its Motion for Preliminary Injunction, ECF No. 76 at 63-67, H.B. 2 applies to all of UNC's campuses, any statements by UNC that it will not effectuate or enforce H.B. 2 on its campuses are legally insufficient, and UNC has actually taken steps to enforce H.B. 2.

[5] *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), cited by Defendants, does not change this analysis. There, the Court addressed whether Rule 24 permitted intervention by a union member in an action brought by the Secretary of Labor to enforce a statutory

disagreement over litigation strategy or over the choice of legal arguments is not sufficient to rebut the presumption of adequate representation. *Id.* at *3.

Finally, Movant argues that it is "better situated" than the Defendants to speak to the privacy issues allegedly at stake in this case. Without conceding that privacy issues are at stake here or whether Movant has an interest in those alleged issues, that argument is not relevant to the "adequate representation" prong of the intervention analysis under Rule 24. The mere existence of another individual with an alleged legal interest does not mean that the named Defendants cannot adequately represent that interest, particularly where they have already asserted it. *See* Answer and Counterclaims of the State of North Carolina, the Governor of North Carolina, and DPS, ECF No. 32 at 23-26. Indeed, "not all parties with strong feelings about or an interest in a case are entitled, as a matter of law, to intervene." *Id*. Despite NCFP's alleged particularized interest, "stronger, more specific interests do not adverse interests make." *Stuart*, 706 F.3d at 353.

Movant has an identical interest to that of the Defendants: asserting the validity of H.B. 2 against the United States' challenges. *See, e.g.*, *Stuart*, 706 F.3d at 352 (finding no inadequacy of interest where the North Carolina Attorney General and the putative intervenors were "motivated by the same underlying concerns."). Movant has failed to demonstrate that they have any interest as a putative intervenor-defendant in this

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provision relating to union elections. *See id.* at 530. In holding that intervention was appropriate, the Court emphasized that the interest of the Secretary of Labor and those of a union member seeking to intervene are not identical. *Id.* at 538-39 (noting that the Secretary of Labor had a statutory obligation to "serve two distinct interests"). Here, Movant cannot show that UNC, in defending against the United States' Title IX claim, will take a position that is adverse to, or does not adequately represent, the Movant's interest.

litigation that is not adequately represented by Defendants.

II. PERMISSIVE INTERVENTION

A. Legal Standard

A movant may also seek permissive intervention pursuant to Federal Rules of Civil Procedure 24(b). A court may permit intervention upon timely motion when an applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Although permissive intervention is discretionary, a court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

B. The Court Should Not Grant Permissive Intervention

While it is true that Movant and Defendants share the same interest in upholding H.B. 2, and thus share identical interests in the defensive posture, Movant's proposed affirmative claims in intervention raise legally and factually distinct issues from those raised in the United States' case and would needlessly expand and delay timely resolution of this case. For this reason, as well as the reasons set forth above, the Court should deny Movant's request for permissive intervention.

This Court, and others, have denied permissive intervention when the addition of parties "would consume additional and unnecessary judicial resources, further complicate the discovery process, potentially unduly delay the adjudication of the case on the merits, and generate little, if any, corresponding benefit to the existing parties." *North Carolina*, 2014 WL 494911, at *5. *See also Stuart*, 706 F.3d at 349 (Fourth Circuit found no error in district court's denial of permissive intervention which would "complicate the

discovery process and consume additional resources of the court and the parties."); *Fletcher v. Lamone*, No. 11-cv-3220, 2011 WL 6097770, at *2 (D. Md. Dec. 5, 2011) (threat of undue delay justified the denial of permissive intervention where the proposed intervenors' claims were adequately represented by current parties); *Brock v. McGee Bros. Co.*, 111 F.R.D. 484, 487 (W.D.N.C. 1986) (permissive intervention denied because proposed intervenor's interest was adequately represented and intervention would "needlessly increase the cost and delay the disposition of this litigation.").

The same concerns are present here. As discussed above, Movant seeks to participate in order to, among other things, assert and litigate APA counter-claims grounded in the Free Exercise Clause and RFRA. *See* Answer and Counterclaims of Proposed Defendant-Intervenor North Carolinians for Privacy, No. 1:16-cv-00425, ECF No. 58-1 ¶¶ 60-65. Also discussed above, Movant admits that its Free Exercise and Religious Freedom arguments are ancillary to the predominant claim at issue in this matter and may be unnecessary. *See* Proposed Defendant-Intervenor North Carolinians for Privacy's Reply to United States' Response to Motion to Expedite the Responses to Motion to Intervene, No. 1:16-cv-00425, ECF No. 88 at 6. Permitting Movant to intervene and maintain these arguments would inject these new issues into the case and further complicate any trial.

NCFP will bring to the Defendants' table a fourth group of attorneys attempting to depose and later examine and cross-examine witnesses at trial and propound discovery on issues that will be more than adequately addressed by counsel for the government Defendants. And if allowed to intervene, the parties should anticipate additional

contested briefing related to the claims advanced by NCFP, requiring the Court and the parties to divide their attention between NCFP's interests and the central issues in the case. While the United States will have to address NCFP's claims in its stand-alone litigation, doing so is preferable because the existing case is on an accelerated discovery schedule necessary to accommodate the Court's decision to consolidate the United States' motion for preliminary injunction with trial. If NCFP's claims were present in this litigation, NCFP would likely seek discovery over the objections of the United States. If such discovery were permitted it could expand issues beyond what is already present in this case, making it difficult for the United States to ensure it could be ready for a trial during the timeframe currently contemplated. Because NCFP can add little or no corresponding benefit to the existing parties, the additional judicial resources that will have to be committed to manage NCFP's active participation in the case is unnecessary.

Accordingly, the Court should also deny permissive intervention.

III. CONCLUSION

For the foregoing reasons, the Court should deny Proposed Intervenor's Motion to Intervene. The United States does not object to Movant participating as *amici* in this case, should the Court deem that appropriate.

This the 18th day of July, 2016.

Respectfully submitted,

RIPLEY RAND
United States Attorney
Middle District of North Carolina
United States Department of Justice
101 South Edgeworth Street, 4th Floor
Greensboro, NC 27401
Telephone: (336) 333-5351
E-mail: ripley.rand@usdoj.gov

VANITA GUPTA
Principal Deputy Assistant Attorney General

SHAHEENA SIMONS
Chief, Educational Opportunities Section

DELORA L. KENNEBREW
Chief, Employment Section

COREY L. STOUGHTON
Senior Counsel

LORI B. KISCH
WHITNEY PELLEGRINO
Special Litigation Counsel

DWAYNE J. BENSING
TOREY B. CUMMINGS
SEAN R. KEVENEY
ALYSSA C. LAREAU
CANDYCE PHOENIX
TARYN WILGUS NULL
Trial Attorneys
United States Department of Justice
Civil Rights Division

/s/ *Torey B. Cummings*
MA Bar Number: 664549
Senior Trial Attorney
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-4092
torey.cummings@usdoj.gov

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:16-CV-00425
	)	
STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITYOF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA,	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and have verified that such filing was sent electronically using CM/ECF to the following: Karl S. Bowers, Jr., Robert C. Stephens, William Woodley Stewart, Jr., Brennan Tyler Brooks, Frank J. Gordon, Robert N. Driscoll, Amar Majmundar, Olga E. Vysotskaya De Brito, Carolyn C. Pratt, Glen D. Nager, James M. Burnham, Noel J. Francisco, Stuart K. Duncan, Gene C. Shaerr, Robert D. Potter, Jr., David A. Cortman, James A. Campbell, Jeremy D. Tedesco, Jonathan Caleb Dalton; and mailed to the following non-CM/ECF participant:

Steven-Glenn: Johnson
c/o 208 Nydegg Road
New Bern, NC 28562

Respectfully submitted,

/s/ *Torey B. Cummings*
MA Bar Number: 664549
Senior Trial Attorney
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
Telephone: (202) 514-4092
Email: Torey.Cummings@usdoj.gov

Counsel for Plaintiff

EXHIBIT 1

N.C. House Bill 2, 2d Extra Sess. (2016) (Sess. Law 2016-3), *available at* http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf.

GENERAL ASSEMBLY OF NORTH CAROLINA
SECOND EXTRA SESSION 2016

SESSION LAW 2016-3
HOUSE BILL 2

AN ACT TO PROVIDE FOR SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING FACILITIES IN SCHOOLS AND PUBLIC AGENCIES AND TO CREATE STATEWIDE CONSISTENCY IN REGULATION OF EMPLOYMENT AND PUBLIC ACCOMMODATIONS.

Whereas, the North Carolina Constitution directs the General Assembly to provide for the organization and government of all cities and counties and to give cities and counties such powers and duties as the General Assembly deems advisable in Section 1 of Article VII of the North Carolina Constitution; and

Whereas, the North Carolina Constitution reflects the importance of statewide laws related to commerce by prohibiting the General Assembly from enacting local acts regulating labor, trade, mining, or manufacturing in Section 24 of Article II of the North Carolina Constitution; and

Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State will improve intrastate commerce; and

Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State benefit the businesses, organizations, and employers seeking to do business in the State and attracts new businesses, organizations, and employers to the State; Now, therefore,

The General Assembly of North Carolina enacts:

PART I. SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING FACILITIES

SECTION 1.1. G.S. 115C-47 is amended by adding a new subdivision to read:

"(63) To Establish Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Local boards of education shall establish single-sex multiple occupancy bathroom and changing facilities as provided in G.S. 115C-521.2."

SECTION 1.2. Article 37 of Chapter 115C of the General Statutes is amended by adding a new section to read:

"**§ 115C-521.2. Single-sex multiple occupancy bathroom and changing facilities.**

(a) Definitions. – The following definitions apply in this section:

(1) Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.

(2) Multiple occupancy bathroom or changing facility. – A facility designed or designated to be used by more than one person at a time where students may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a school restroom, locker room, changing room, or shower room.

(3) Single occupancy bathroom or changing facility. – A facility designed or designated to be used by only one person at a time where students may be in various states of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.

(b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.

(c) Accommodations Permitted. – Nothing in this section shall prohibit local boards of education from providing accommodations such as single occupancy bathroom or changing facilities or controlled use of faculty facilities upon a request due to special circumstances, but in no event shall that accommodation result in the local boards of education allowing a student to use a multiple occupancy bathroom or changing facility designated under subsection (b) of this section for a sex other than the student's biological sex.

(d) Exceptions. – This section does not apply to persons entering a multiple occupancy bathroom or changing facility designated for use by the opposite sex:

(1) For custodial purposes.

(2) For maintenance or inspection purposes.

(3) To render medical assistance.

(4) To accompany a student needing assistance when the assisting individual is an employee or authorized volunteer of the local board of education or the student's parent or authorized caregiver.

(5) To receive assistance in using the facility.

(6) To accompany a person other than a student needing assistance.

(7) That has been temporarily designated for use by that person's biological sex."

SECTION 1.3. Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 81.

"Single-Sex Multiple Occupancy Bathroom and Changing Facilities.

"**§ 143-760. Single-sex multiple occupancy bathroom and changing facilities.**

(a) Definitions. – The following definitions apply in this section:

(1) Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.

(2) Executive branch agency. – Agencies, boards, offices, departments, and institutions of the executive branch, including The University of North Carolina and the North Carolina Community College System.

(3) Multiple occupancy bathroom or changing facility. – A facility designed or designated to be used by more than one person at a time where persons may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a restroom, locker room, changing room, or shower room.

(4) Public agency. – Includes any of the following:

a. Executive branch agencies.

b. All agencies, boards, offices, and departments under the direction and control of a member of the Council of State.

c. "Unit" as defined in G.S. 159-7(b)(15).

d. "Public authority" as defined in G.S. 159-7(b)(10).

e. A local board of education.

f. The judicial branch.

g. The legislative branch.

h. Any other political subdivision of the State.

(5) Single occupancy bathroom or changing facility. – A facility designed or designated to be used by only one person at a time where persons may be in various states of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.

(b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Public agencies shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.

(c) Accommodations Permitted. – Nothing in this section shall prohibit public agencies from providing accommodations such as single occupancy bathroom or changing facilities upon a person's request due to special circumstances, but in no event shall that accommodation result in the public agency allowing a person to use a multiple occupancy bathroom or changing facility designated under subsection (b) of this section for a sex other than the person's biological sex.

(d) Exceptions. – This section does not apply to persons entering a multiple occupancy bathroom or changing facility designated for use by the opposite sex:

(1) For custodial purposes.

(2) For maintenance or inspection purposes.
(3) To render medical assistance.
(4) To accompany a person needing assistance.
(4a) For a minor under the age of seven who accompanies a person caring for that minor.
(5) That has been temporarily designated for use by that person's biological sex."

PART II. STATEWIDE CONSISTENCY IN LAWS RELATED TO EMPLOYMENT AND CONTRACTING

SECTION 2.1. G.S. 95-25.1 reads as rewritten:

"**§ 95-25.1. Short title and legislative ~~purpose.~~purpose; local governments preempted.**

(a) This Article shall be known and may be cited as the "Wage and Hour Act."

(b) The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry. The General Assembly declares that the general welfare of the State requires the enactment of this law under the police power of the State.

(c) The provisions of this Article supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to compensation of employees, such as the wage levels of employees, hours of labor, payment of earned wages, benefits, leave, or well-being of minors in the workforce. This subsection shall not apply to any of the following:

(1) A local government regulating, compensating, or controlling its own employees.
(2) Economic development incentives awarded under Chapter 143B of the General Statutes.
(3) Economic development incentives awarded under Article 1 of Chapter 158 of the General Statutes.
(4) A requirement of federal community development block grants.
(5) Programs established under G.S. 153A-376 or G.S. 160A-456."

SECTION 2.2. G.S. 153A-449(a) reads as rewritten:

"(a) Authority. – A county may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the county is authorized by law to engage in. A county may not require a private contractor under this section to abide by ~~any restriction that the county could not impose on all employers in the county, such as paying minimum wage or providing paid sick leave to its employees,~~ regulations or controls on the contractor's employment practices or mandate or prohibit the provision of goods, services, or accommodations to any member of the public as a condition of bidding on a ~~contract.~~contract or a qualification-based selection, except as otherwise required or allowed by State law."

SECTION 2.3. G.S. 160A-20.1(a) reads as rewritten:

"(a) Authority. – A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in. A city may not require a private contractor under this section to abide by ~~any restriction that the city could not impose on all employers in the city, such as paying minimum wage or providing paid sick leave to its employees,~~ regulations or controls on the contractor's employment practices or mandate or prohibit the provision of goods, services, or accommodations to any member of the public as a condition of bidding on a ~~contract.~~contract or a qualification-based selection, except as otherwise required or allowed by State law."

PART III. PROTECTION OF RIGHTS IN EMPLOYMENT AND PUBLIC ACCOMMODATIONS

SECTION 3.1. G.S. 143-422.2 reads as rewritten:

"**§ 143-422.2. Legislative declaration.**

(a) It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, biological sex or handicap by employers which regularly employ 15 or more employees.

(b) It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

(c) The General Assembly declares that the regulation of discriminatory practices in employment is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to the regulation of discriminatory practices in employment, except such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law."

SECTION 3.2. G.S. 143-422.3 reads as rewritten:

"**§ 143-422.3. Investigations; conciliations.**

The Human Relations Commission in the Department of Administration shall have the authority to receive charges of discrimination from the Equal Employment Opportunity Commission pursuant to an agreement under Section 709(b) of Public Law 88-352, as amended by Public Law 92-261, and investigate and conciliate charges of discrimination. Throughout this process, the agency shall use its good offices to effect an amicable resolution of the charges of discrimination. This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."

SECTION 3.3. Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 49B.

"Equal Access to Public Accommodations.

"**§ 143-422.10. Short title.**

This Article shall be known and may be cited as the Equal Access to Public Accommodations Act.

"**§ 143-422.11. Legislative declaration.**

(a) It is the public policy of this State to protect and safeguard the right and opportunity of all individuals within the State to enjoy fully and equally the goods, services, facilities, privileges, advantages, and accommodations of places of public accommodation free of discrimination because of race, religion, color, national origin, or biological sex, provided that designating multiple or single occupancy bathrooms or changing facilities according to biological sex, as defined in G.S. 143-760(a)(1), (3), and (5), shall not be deemed to constitute discrimination.

(b) The General Assembly declares that the regulation of discriminatory practices in places of public accommodation is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement pertaining to the regulation of discriminatory practices in places of public accommodation.

"**§ 143-422.12. Places of public accommodation – defined.**

For purposes of this Article, places of public accommodation has the same meaning as defined in G.S. 168A-3(8), but shall exclude any private club or other establishment not, in fact, open to the public.

"**§ 143-422.13. Investigations; conciliations.**

The Human Relations Commission in the Department of Administration shall have the authority to receive, investigate, and conciliate complaints of discrimination in public accommodations. Throughout this process, the Human Relations Commission shall use its good offices to effect an amicable resolution of the complaints of discrimination. This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."

PART IV. SEVERABILITY

SECTION 4. If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable. If any provision of this act is temporarily or permanently restrained or enjoined by judicial order, this act shall be enforced as though such restrained or enjoined provisions had not

been adopted, provided that whenever such temporary or permanent restraining order or injunction is stayed, dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

PART V. EFFECTIVE DATE

SECTION 5. This act is effective when it becomes law and applies to any action taken on or after that date, to any ordinance, resolution, regulation, or policy adopted or amended on or after that date, and to any contract entered into on or after that date. The provisions of Sections 2.1, 2.2, 2.3, 3.1, 3.2, and 3.3 of this act supersede and preempt any ordinance, resolution, regulation, or policy adopted prior to the effective date of this act that purports to regulate a subject matter preempted by this act or that violates or is not consistent with this act, and such ordinances, resolutions, regulations, or policies shall be null and void as of the effective date of this act.

In the General Assembly read three times and ratified this the 23rd day of March, 2016.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Pat McCrory
Governor

Approved 9:57 p.m. this 23rd day of March, 2016

EXHIBIT 2

United States v. North Carolina, No. 13-CV-861, 2014 WL 494911 (M.D.N.C. Feb. 6, 2014)

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:13CV861
	)	
THE STATE OF NORTH CAROLINA, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

THOMAS D. SCHROEDER, District Judge.

This case brought by the United States Department of Justice ("United States") is one of several related cases involving challenges to recent amendments to North Carolina's election laws. Before the court is a motion by Judicial Watch, Inc. ("Judicial Watch"), and Christina Kelley Gallegos-Merrill ("Gallegos-Merrill," and collectively, the "Proposed Intervenors") to intervene as defendants pursuant to Federal Rule of Civil Procedure 24. (Doc. 26.) The Proposed Intervenors seek intervention of right pursuant to Rule 24(a) or, in the alternative, permissive intervention pursuant to Rule 24(b). The United States opposes intervention on several grounds (Doc. 38), and the Proposed Intervenors have filed a reply (Doc. 46). For the reasons set forth herein, the motion

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will be denied without prejudice to the Proposed Intervenors' right to participate as *amici curiae*.

I. BACKGROUND

On August 12, 2013, Governor Patrick L. McCrory signed into law North Carolina Session Law 2013-381, popularly known as the Voter Information Verification Act or House Bill 589 ("VIVA" or "HB 589"). (Doc. 1 ¶ 66); see 2013 N.C. Sess. Laws 381, http://www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H589v9.pdf. The law enacted several changes to the State's election laws. On the same day, two separate organizations along with several individual plaintiffs filed complaints challenging the validity of the law pursuant to the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. § 1973(a). See League of Women Voters of N.C. v. McCrory, 1:13CV660 (M.D.N.C. filed Aug. 12, 2013); N.C. State Conference of the NAACP v. McCrory, 1:13CV658 (M.D.N.C. filed Aug. 12, 2013).

On September 30, 2013, the United States filed the above-captioned case against the State of North Carolina and Kim Westbrook Strach, in her official capacity as Executive Director of the North Carolina Board of Elections (collectively the "State Defendants"). (Doc. 1.) The complaint alleges that several provisions of HB 589, including the reduction of the early voting period (id. ¶¶ 24–34), elimination of same-day

registration (id. ¶¶ 35–38), elimination of out-of-precinct provisional ballots (id. ¶¶ 39–42), and the requirement that voters present a valid photo identification in order to cast a vote (id. ¶¶ 43–50), violate Section 2 of the VRA. The United States alleges both that enforcement of the challenged provisions will have a disparate impact on African-American voters (id. ¶¶ 68–79) and that HB 589 was enacted with a discriminatory purpose (id. ¶¶ 80–92). In addition to an injunction and declaratory judgment pursuant to Section 2, the United States seeks two additional remedies. First, it seeks an order authorizing federal officials to observe elections in North Carolina pursuant to Section 3(a) of the VRA, 42 U.S.C. § 1973a(a). Second, it requests an order subjecting North Carolina to a "preclearance" requirement under Section 3(c) of the VRA, 42 U.S.C. § 1973a(c).

The Proposed Intervenors filed their motion to intervene as defendants on December 10, 2013, along with a proposed answer pursuant to Rule 24(c). (Docs. 26, 26–1.) Both Proposed Intervenors also submitted a declaration. Judicial Watch submitted the declaration of Thomas J. Fitton, the president of Judicial Watch since 1998. (Doc. 26–3 ¶ 2.) Fitton describes the organization as one that "seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law." (Id.) Judicial Watch has at least 7,260

active members in North Carolina, of whom 143 are registered voters who have actively expressed an interest in intervening in this case. (Id. ¶ 18.) Judicial Watch believes that the reforms contained in HB 589 are necessary to curb election fraud and that the United States' success in this action would "degrade the integrity and accuracy of voter rolls." (Id. ¶ 11.)

Gallegos-Merrill was a Republican candidate in District 2 for the Buncombe County (North Carolina) Board of Commission in 2012. (Doc. 26–2 ¶ 3.) She states that, under the pre-HB 589 regime, some students from Warren Wilson College ("WWC") in Asheville, North Carolina, were permitted to vote in District 2 rather than District 1 in the 2012 elections, ultimately causing her defeat. (Id. ¶¶ 11–13.) According to Gallegos-Merrill, Newsweek has declared WWC one of the most liberal colleges in the nation. (Id. ¶ 4.) The students had originally registered to vote using WWC's main address, which was located in District 1, although some dormitories on WWC's campus are located in District 2. (Id. ¶¶ 7–8.) However, following a reapportionment by the Buncombe County Board of Elections (the "Board"), some WWC students' votes were counted in District 2. (Id. ¶ 11.) Although Gallegos-Merrill was originally declared the winner, following the canvass it was determined that she had lost by 13 votes. (Id. ¶ 13.) Her appeal to the Board was denied. (Id.

¶ 15.) She plans to run again for the same office in 2014 and believes that she would suffer similar harm in the next election without the provisions of HB 589. (Id. ¶¶ 16, 19–20.)

The United States opposes intervention on several grounds: it contends that the Proposed Intervenors have not demonstrated a protectable interest that would be impaired by the action, that they have not demonstrated that the State Defendants would not adequately represent such interest in any event, and that they seek to pursue matters that are irrelevant and collateral to this litigation. (Doc. 38.) According to the Proposed Intervenors, the State Defendants do not oppose their motion. (Doc. 26 at 1.)

II. ANALYSIS

The Proposed Intervenors seek to intervene as defendants in this case pursuant to Federal Rule of Civil Procedure 24(a) and (b). Each basis will be addressed in turn.

A. Intervention of Right

"Under Rule 24(a)(2), a district court must permit intervention as a matter of right if the movant can demonstrate '(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation.'" Stuart v. Huff, 706 F.3d 345, 349 (4th Cir. 2013) (quoting Teague v.

Bakker, 931 F.2d 259, 260–61 (4th Cir. 1991)). The Proposed Intervenors and the United States devote a significant portion of the briefing on this motion to the issue of whether the Proposed Intervenors possess a sufficient protectable interest. However, the court will not reach the first two factors because it concludes that, assuming (without deciding) they have been met, the Proposed Intervenors fail to demonstrate that such interests will not be adequately represented by the State Defendants.

When a State statute is challenged and a proposed intervenor shares a common objective with the State to defend the validity of the statute, the proposed intervenor "must mount a strong showing of inadequacy" to be entitled to intervention of right. Stuart, 706 F.3d at 352. This is so because, as the Fourth Circuit has explained, "when a statute comes under attack, it is difficult to conceive of an entity better situated to defend it than the government." Id. at 351. To rebut the presumption of adequacy, the Proposed Intervenors must show either collusion between the existing parties, adversity of interests between themselves and the State Defendants, or nonfeasance on the part of the State Defendants. See id. at 350, 352–55.

The Proposed Intervenors argue that the State Defendants will not adequately represent their interests for three

principal reasons. First, the Proposed Intervenors argue that only they will insist that a causal link be shown between the challenged provisions of HB 589 and the alleged disparate impact, pointing to the fact that the State Defendants have not raised a "lack of causation" defense in their answers to the complaint. (Doc. 27 at 14–17.) Next, they claim that the State Defendants will not adequately represent their interest in making public records requests, and specifically that, "[i]f the United States becomes involved in approving North Carolina's voting laws and procedures, it will complicate the process of obtaining documents and make the State less willing to cooperate." (Id. at 17.) Finally, the Proposed Intervenors contend that the State Defendants will not adequately represent their interest in maintaining the accuracy of voter rolls. Particularly, they wish to "show that the potential for various kinds of electoral fraud is greater where registration lists are made less accurate by same-day registration during early voting, out-of-precinct voting, or the absence of photo ID." (Id. at 18 (citing Doc. 26–3 ¶¶ 11–12).)

None of these contentions is sufficient to rebut the presumption that the State Defendants will adequately represent the Proposed Intervenors' interests. First, it is undisputed that the Proposed Intervenors and the State Defendants both seek to uphold HB 589. While the Proposed Intervenors may have a

particularized interest and fervent desire to protect the statute, "stronger, more specific interests do not adverse interests make." Stuart, 706 F.3d at 353. As the Fourth Circuit explained, "would-be intervenors will nearly always have intense desires that are more particular than the state's (or else why seek party status at all). Allowing such interests to rebut the presumption of adequacy would simply open the door to a complicating host of intervening parties with hardly a corresponding benefit." Id.

Nor can the Proposed Intervenors' intention to emphasize certain legal arguments at the expense of others create adversity of interests or malfeasance. "[D]isagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy." Id. (citing Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 954 (9th Cir. 2009) ("Mere differences in litigation strategy are not enough to justify intervention as a matter of right.")). In any event, there is no evidence at this early stage of the litigation that the State Defendants will not pursue the Proposed Intervenors' chosen argument regarding causation. The fact that the State Defendants did not raise the lack-of-causation defense in their answers does not foreclose them from arguing the point in the merits briefing, particularly when a lack of causation is

generally not regarded to be an affirmative defense that must be pleaded separately. See Fed. R. Civ. P. 8(c).[1]

The Proposed Intervenors' other two interests are also sufficiently aligned with those of the State Defendants. The Proposed Intervenors allege that the State will be less willing or able to comply with its public records request should it be subject to a "preclearance" requirement. But the State has, of course, a great incentive to litigate vigorously to *avoid* being subject to such federal supervision. Similarly, the Proposed Intervenors' and the State Defendants' interests are aligned with respect to the Proposed Intervenors' desire to introduce evidence about voter fraud under the pre-HB 589 regime. Both seek to defend the statute on the ground it will reduce election fraud. Thus, there are no grounds to conclude that the interests of the State Defendants and the Proposed Intervenors are adverse to one another.

The posture of this case is remarkably similar to that of Stuart. There, the plaintiffs challenged a North Carolina law requiring certain informed consent procedures prior to the

[1] The Proposed Intervenors highlight their concern by pointing to the complaint's allegation that North Carolina Attorney General Roy Cooper openly opposed and criticized HB 589 before Governor McCrory signed it. (See Doc. 1 ¶ 67.) However, the Proposed Intervenors have not demonstrated that the Attorney General will not fulfill his obligation to aggressively defend laws duly enacted by the General Assembly. Moreover, the docket reflects that the Attorney General has retained outside co-counsel for the State Defendants and that the Governor has retained separate counsel.

performance of an abortion. Stuart, 706 F.3d at 347; see N.C. Gen. Stat. § 90–21.80, et seq. A group of pro-life physicians and others sought to intervene as defendants, seeking to uphold the statute. Stuart, 706 F.3d at 347. The Fourth Circuit affirmed the district court's denial of intervention of right on the ground that the would-be intervenors failed to rebut the presumption that the State, which defended the statute vigorously, did not adequately represent their interests. Id. at 355. The Proposed Intervenors here are in an identical position. They possess an interest in the outcome of this case, but not all parties with strong feelings about or an interest in a case are entitled, as a matter of law, to intervene. Because the Proposed Intervenors cannot rebut the presumption that their interests are adequately represented by the State Defendants, their motion for intervention of right will be denied.

B. Permissive Intervention

The Proposed Intervenors also seek permissive intervention under Rule 24(b). The court may permit anyone who "has a claim or defense that shares with the main action a common question of law or fact" to intervene on timely motion. Fed. R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ.

P. 24(b)(3); see Bussian v. DaimlerChrysler Corp., 411 F. Supp. 2d 614, 631 (M.D.N.C. 2006).

In Stuart, the Fourth Circuit also affirmed the district court's denial of permissive intervention. 706 F.3d at 355. The court explained that adding the intervenors would complicate discovery in the case and result in possible delay without accruing any benefit to the existing parties. Id. The court also noted that the would-be intervenors were not without recourse, because they could seek leave to file an *amicus curiae* brief both in the district court and in the Fourth Circuit. Id. Similarly, the United States does not object in this case to the Proposed Intervenors' participation as *amici*. (Doc. 38 at 19–20.)

The court concludes that, on the record before it, participation of the Proposed Intervenors as two additional parties would consume additional and unnecessary judicial resources, further complicate the discovery process, potentially unduly delay the adjudication of the case on the merits, and generate little, if any, corresponding benefit to the existing parties. See Brock v. McGee Bros. Co., 111 F.R.D. 484, 487 (W.D.N.C. 1986) (denying permissive intervention where interests were adequately represented and intervention would needlessly increase the cost and delay disposition of the case). This is particularly so given Judicial Watch's professed interest in

using the litigation as a vehicle to enhance its ability to collect records from the parties. (See Doc. 27 at 11.) Therefore, the motion for permissive intervention will be denied.[2]

While intervention is denied, the court recognizes that the Proposed Intervenors may bring a useful perspective and expertise to the litigation. In the event they conclude that they have a unique contention to make, or that the State Defendants have not raised an appropriate argument, they may follow the procedure set out in Local Rule 7.5 and this court's case scheduling order (Doc. 30) and file a motion for leave to file an *amicus* brief along with a brief and a proposed order.

III. CONCLUSION

For the reasons stated,

IT IS THEREFORE ORDERED that the Proposed Intervenors' motion to intervene (Doc. 26) is DENIED.

/s/ Thomas D. Schroeder
United States District Judge

February 6, 2014

[2] The court's decision on this point is not inconsistent with its prior ruling granting several individuals leave to intervene as plaintiffs in League of Women Voters. (See Doc. 62 in case 1:13CV660 at 6–8.) There, additional discovery could not be avoided because the intervenors could have simply brought their own case had they been denied intervention. (Id. at 7.) In addition, they raised claims not brought by the original plaintiffs. (Id. at 8.) Here, the addition of defendants will increase the already heavy burden created by discovery in these cases with little, if any, corresponding benefit to the existing parties. Any benefit that the Proposed Intervenors could bring to the litigation may be achieved as *amici*, without necessitating further discovery.