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 PHIL BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIM MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants, and NORTH CAROLINIANS FOR PRIVACY, an unincorporated nonprofit association, Proposed Defendant-Intervenor.	Case No. 1:16-CV-00425-TDS-JEP

PROPOSED DEFENDANT-INTERVENOR NORTH CAROLINIANS FOR PRIVACY'S REPLY TO UNITED STATES' MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE

In this case, Plaintiff United States challenges North Carolina's right to maintain sex-specific changing facilities, locker rooms, and restrooms, claiming that the state must open these facilities to people of the opposite sex based on their professed gender identity. To protect the dignity, privacy, and safety of its members, NCFP filed suit

against the United States in the Eastern District of North Carolina. *See North Carolinians for Privacy v. United States Department of Justice*, Case No. 5:16-cv-00245-FL (E.D.N.C. May 10, 2016). That case was subsequently transferred to this Court, *see* Order, *North Carolinians for Privacy v. United States Department of Justice*, Case No. 5:16-cv-00245-FL (Dkt. No. 34), where it now sits pending with this case.

Because this case already involves nearly all of the questions presented in NCFP's case, and because the resolution of this case threatens to prejudice the rights and interests of NCFP's members absent their participation here, NCFP seeks to intervene in this case (Dkt. No. 58). The United States filed an opposition (Dkt. No. 100), arguing, among other things, that NCFP's intervention will cause undue delay and unnecessarily complicate this case. But the United States is mistaken—allowing NCFP to intervene will enhance judicial economy and streamline resolution of the related cases pending before this Court.

ARGUMENT

I. North Carolinians for Privacy should be granted permissive intervention because allowing it to intervene here will promote judicial efficiency.

The United States does not deny that NCFP has satisfied two of the three prerequisites for permissive intervention: (1) NCFP timely filed its motion; and (2) NCFP's defenses and counterclaims share common questions of law and fact with the claims that the United States raises in this case. *See* NCFP's Mem. in Supp. at 16 (Dkt. No. 59). Rather, the United States insists only that allowing NCFP to intervene will consume unnecessary judicial resources, complicate discovery, and potentially delay the

adjudication of this case. *See* Mem. in Opp. at 15. But this argument is unpersuasive.

To begin with, the United States' arguments do not sufficiently account for the fact that NCFP has its own related lawsuit pending before this Court. Because, as the United States admits, NCFP's proposed counterclaims and defenses in this case are "identical" to the claims in its own case, *see* Mem. in Opp. at 1, 6, this Court will need to address those issues one way or the other. The United States, however, has provided no plausible reason why resolving those issues as part of this case, where nearly all of NCFP's claims and arguments are already at issue, would undermine rather than promote judicial economy. The United States is particularly unable to provide such an explanation because NCFP has informed the United States that if NCFP is allowed to intervene in this case and permitted to raise its counterclaims and defenses in this action, NCFP will voluntarily dismiss its separate lawsuit.

As support for its argument that NCFP's involvement in this case would bring added complication and delay, the United States asserts that NCFP's defenses and counterclaims are significantly distinct from the legal questions already at issue here. *See* Mem. in Opp. at 15-16. This is not true. As the United States has acknowledged, NCFP raises at least six substantive arguments under its Administrative Procedure Act (APA) claim—violations of Title IX, the Spending Clause, constitutional rights to privacy, constitutional rights to direct the upbringing of one's children, constitutional rights to the free exercise of religion, and the Religious Freedom Restoration Act (RFRA). *See* Mem. in Opp. at 3. Notably, the existing defendants have already raised four of those six

arguments, and thus those questions are already at issue here. *See* Intervenor-Defendants' Answer and Counterclaims ¶ 98 (Dkt. No. 66) (raising Title IX counterclaim); *id.* ¶ 102 (raising APA counterclaim); *id.* ¶ 111 (raising counterclaim based upon constitutional rights of privacy and rights of parents to direct the upbringing of their children); *id.* ¶¶ 113-114 (raising counterclaim based upon Spending Clause requirements); Defendant Governor McCrory's Answer and Counterclaims at 15-17 (Dkt. No. 32) (raising APA defenses, including APA defenses based on constitutional rights to privacy and the Spending Clause). The United States does not deny that.

Instead, the United States discusses only the two additional arguments that NCFP raises (those based on religious-freedom principles) and suggests that those will needlessly complicate the litigation. Mem. in Opp. at 16. But this Court will have to consider those additional arguments in NCFP's separate action, and the United States has indicated that it does not need to conduct discovery related to those claims. *See* Defendants' Rule 26(f) Report at 1, *North Carolinians for Privacy v. United States Department of Justice*, No. 1:16-cv-00845-TDS-JEP (Dkt. No. 42) (indicating the United States' "belie[f] that discovery" in conjunction with NCFP's claims "is not appropriate"). It is thus implausible to suggest that the addition of those claims could possibly result in excessive complication or delay.[1]

[1] Despite what the United States claims, NCFP has not acknowledged that its free-exercise and RFRA arguments are "ancillary" to this case. Mem. in Opp. at 16; *see also id.* at 7 n. 1. Rather, NCFP recognized that the free-exercise and RFRA arguments are two of at least six substantive bases upon which to invalidate the United States' actions under the APA. And NCFP further and acknowledged that if the Court agrees with one of

Furthermore, the United States' insistence that NCFP's participation in this case will complicate discovery and trial, *see* Mem. in Opp. at 16-17, is unfounded. If allowed to intervene, NCFP will abide by the agreed-upon schedule and coordinate discovery and trial tasks among the existing defendants—it will not extend the schedule or duplicate litigation efforts. Nor does NCFP anticipate requesting any discovery that will not otherwise be sought by the existing defendants.

Instead of creating undue delay or complication, permitting NCFP to intervene will streamline this Court's consideration of the related issues in this case and in NCFP's separate action. It will enable NCFP to dismiss its separate lawsuit and this Court to consider all the issues in one action. Judicial economy will thus be best served by allowing NCFP to intervene.

The United States cites to this Court's prior intervention ruling in *United States v. North Carolina*, No. 1:13CV861, 2014 WL 494911 (M.D.N.C. Feb. 6, 2014)—a case challenging the validity of North Carolina's election laws. But that intervention denial is inapposite because it did not involve a proposed intervenor who had, or could, file its own lawsuit. The more appropriate guidance is found in *League of Women Voters of North Carolina v. North Carolina*, *see* Order at 6-8, No. 1:13CV660 (Dkt. No. 62), an intervention decision that this Court distinguished in *United States v. North Carolina*. *See* 2014 WL 494911, at *5 n.2. In *League of Women Voters*, this Court granted permissive intervention to proposed intervenors because those intervenors "retain[ed] the right to file

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the other arguments that NCFP raises under its APA claim, the Court might not even need to reach the free-exercise or RFRA arguments.

their own suit, which would likely [have] be[en] consolidated with the existing three [related] cases in any event." Order at 7, No. 1:13CV660 (Dkt. No. 62). This Court thus concluded that intervention would serve to streamline related litigation. *Id*. The situation here is remarkably similar, especially because NCFP has agreed to dismiss its lawsuit if it is permitted to intervene. Thus, as it did in *League of Women Voters*, this Court should grant NCFP's request for permissive intervention.

II. North Carolinians for Privacy is entitled to intervention as of right.

A. North Carolinians for Privacy's ability to protect its and its members' interests will be impeded if it is not permitted to intervene.

The United States argues that NCFP's ability to protect its interests will not be adversely affected if the Court bars it from intervening because NCFP has its own lawsuit. *See* Mem. in Opp. at 6-8. This argument falls flat. NCFP's participation in this case is necessary to protect its and its members' rights because the United States bases its arguments on facts submitted through expert and lay declarations that, if insufficiently unrebutted, would undermine the claims and interests that NCFP asserts in its case.

For example, the federal government has grounded its Title IX arguments on its claim that an "understanding of the real-life meaning of the term 'sex,'" as purportedly recognized in the United States' expert declarations, shows that the word "sex" in Title IX includes "gender identity." *See* Mem. of Law in Support of Pl.'s Mot. for Preliminary Injunctive Relief at 24-25 (Dkt. No. 76). The United States has also supported its claims with declarations that try to undermine the privacy rights and safety concerns that NCFP raises in its suit. *See id.* at 44-51. Thus, the United States has put facts at issue and relied

on declarations that directly bear on the legal questions that NCFP presents in its own case. Consequently, allowing NCFP to intervene is imperative to ensure that its members' rights are not jeopardized by the factual record created in this case.

The United States suggests that NCFP will not be prejudiced if this Court were to deny its intervention request because the existing defendants do not raise the free-exercise and RFRA arguments that NCFP advances. *See* Mem. in Opp. at 7. This argument is also unconvincing. To begin with, it incorrectly assumes that the United States' factual evidence (some of which was discussed in the prior paragraph) will have no effect on NCFP's free-exercise and RFRA arguments. On the contrary, that evidence is likely relevant to assessing the strength of the federal government's asserted interest in overriding NCFP's members' free-exercise and RFRA rights. *See* 42 U.S.C. § 2000bb-1(b)(1) (asking whether the government's actions are "in furtherance of a compelling governmental interest"). Moreover, the United States' focus on NCFP's free-exercise and RFRA arguments ignores that because this case already presents every other issue that NCFP raises in its own action, the resolution of this case threatens to directly impede NCFP's ability to prevail on all the other arguments it raises in its own action.

B. North Carolinians for Privacy and its members have a significantly protectable interest in their constitutional right to bodily privacy.

The United States contends that the constitutional right to bodily privacy "does not constitute a sufficient basis for intervention of right." Mem. in Opp. at 8. But it cites no case law to support its suggestion that a fundamental constitutional right somehow fails to qualify as a significantly protectable interest for purposes of intervention. The United

States' argument essentially blurs two distinct questions: whether NCFP has a significantly protectable interest in this litigation; and whether NCFP will ultimately prevail on the merits of its privacy-based counterclaims and defenses. By addressing the latter point, the United States fails to rebut NCFP's case for intervention. The United States' discussion of the right-to-bodily-privacy cases thus misses the mark.

Even as the United States proceeds into the merits, it does so with inaccurate claims about Fourth Circuit case law. In particular, it claims that the Fourth Circuit in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), "found that a transgender student's use . . . of a restroom will not implicate comparable interests in bodily privacy." Mem. in Opp. at 9 (quotation marks omitted). The United States, however, overlooks the Fourth Circuit's disclaimer that "there [was] no constitutional challenge to the regulation or agency interpretation" at issue there. *G.G.*, 822 F.3d at 723. Here, in contrast, NCFP and its members raise constitutional challenges to the federal government's actions. Thus, the United States' reliance on *G.G.* is unavailing and does not refute NCFP's and its members' significantly protectable interest in this litigation.

C. North Carolinians for Privacy's interests are not adequately represented by existing parties.

The United States devotes much of its adequacy-of-representation argument to its claim that the University of North Carolina Defendants (UNC Defendants) will adequately represent NCFP's interests in this case. Specifically, the United States argues that NCFP "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, [NCFP's] interest." Mem. in Opp. at 14 n. 5. Yet the UNC Defendants have already taken a position adverse to NCFP's interest when they announced that they are not enforcing H.B. 2. That, in and of itself, is adverse to NCFP's university members' privacy interests because those students object to sharing changing facilities and restrooms with people of the opposite sex (regardless of whether their professed gender identity). The United States' insinuation that the UNC Defendants will adequately defend H.B. 2 when they will not even enforce it is impossible to credit. The Court should thus permit NCFP to intervene as of right.

CONCLUSION

For the foregoing reasons, NCFP respectfully requests that this Court allow it to intervene in this case.

Respectfully submitted this 21st day of July, 2016.

/s/ James A. Campbell

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2016, I electronically filed the foregoing Reply 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: July 21, 2016

/s/ James A. Campbell
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