

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

NORTH CAROLINIANS FOR PRIVACY,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:16-cv-845-TDS-JEP
)	
U.S. DEPARTMENT OF JUSTICE AND)	JOINT STATEMENT
U.S. DEPARTMENT OF EDUCATION, et al.,)	REGARDING OVERLAPPING
)	CLAIMS
Defendants.)	
<hr/>		

Pursuant to the Court’s Order dated July 14, 2016, the parties submit this joint statement regarding the elimination of overlapping claims in the four related cases pending before this Court: (1) the above-captioned case; (2) *Carcaño v. McCrory*, No. 1:16-cv-236; (3) *United States v. North Carolina*, No. 1:16-cv-425; and (4) *Berger v. U.S. Dep’t of Justice*, No. 1:16-cv-844. See Order at 5, ECF No. 37. The parties have conferred but have been unable to reach an agreement. Therefore, they briefly explain their respective positions below.

Plaintiff’s Position

Plaintiff North Carolinians for Privacy (NCFP) proposes that the best way to streamline these cases and eliminate overlapping claims is to allow NCFP to intervene in *United States v. North Carolina* and to raise its counterclaims and defenses in that action. If that happens, NCFP will voluntarily dismiss this lawsuit, and pursue its claims and defenses in the *United States* case.

As NCFP explained in its briefing in support of its Motion to Intervene in the *United States* case, see Pl.’s Reply at 6-7, ECF No. 105, NCFP’s involvement in the *United States* case is necessary to protect its and its members’ rights because the United States bases its arguments in that case on facts submitted through expert and lay declarations that, if insufficiently rebutted, would undermine the claims and interests that NCFP asserts in this case. For example, the

federal government has grounded its Title IX arguments on its assertion 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, *United States v. North Carolina*, No. 1:16-cv-00425, ECF 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. *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 this case. Consequently, allowing NCFP to intervene is imperative to ensure that its members’ rights are not jeopardized by the factual record created in the *United States* action.

If the Court accepts NCFP’s request to intervene in the *United States* case (and, as a result, NCFP dismisses this case), NCFP will agree to be bound by the discovery and briefing schedule that the parties adopt in the *United States* case. Moreover, NCFP will coordinate its discovery and briefing with the defendants in that case to avoid overlap and to ensure that the case moves expeditiously.

Should the Court decline NCFP’s request, NCFP proposes to the Court an expedited discovery and pretrial plan with the goal of completing discovery quickly and briefing cross-motions for summary judgment soon enough so that this case can be tried with the *United States* case (if a trial is necessary following resolution of the parties’ cross-motions for summary judgment). The central disagreement between NCFP and Defendants on the proposed schedule is whether NCFP will have the opportunity to conduct discovery. Defendants would prefer to forgo a discovery period, while NCFP requests a short time for discovery. NCFP asserts that the need for discovery is evidenced by the many factual assertions (some of which are discussed

above) that the United States has presented in its own action and that bear on the legal issues NCFP raises in this case.

Defendants' Position

For the reasons stated in its brief in opposition to plaintiff's motion to intervene in *United States v. North Carolina*, No. 16-cv-425, ECF No. 100, the United States opposes plaintiff's intervention in that case, as plaintiff raises significant collateral issues of law distinct from the claims and counterclaims at issue in that case. Instead, as explained in Defendants' Rule 26(f) Report, ECF No. 42, the United States believes that this case should proceed on a separate track and should be resolved through dispositive motions, rather than a trial. As explained in Defendants' Rule 26(f) Report, the United States believes that discovery and a trial are neither necessary nor appropriate in this case, as all of plaintiff's claims—including their claims under the Administrative Procedure Act (APA) and their two non-APA claims—turn on questions of statutory and regulatory interpretation. Therefore, the United States believes that the most expeditious way of resolving this case is through expedited dispositive motions and without any discovery.

Dated: July 22, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director, Federal Programs Branch

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK
Massachusetts Bar No. 679207
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
1 Courthouse Way, Suite 9200
Boston, MA 02210
Telephone: (617) 748-3129
Facsimile: (617) 748-3965
Email: Benjamin.L.Berwick@usdoj.gov

Counsel for Defendants

Dated: July 22, 2016

/s/ James A. Campbell

Jeremy D. Tedesco, AZ 023497
James A. Campbell, AZ 026737
Kristen K. Waggoner, AZ 032382
Joseph E. LaRue, AZ 031348
Jonathan Caleb Dalton, AZ 030539
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 Fax
jtedesco@adflegal.org
jcampbell@adflegal.org
kwaggoner@adflegal.org
jlarue@adflegal.org
cdalton@adflegal.org

David A. Cortman, GA 188810
J. Matthew Sharp, GA 607842
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road NE
Suite D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
(770) 339-6744 Fax
dcortman@adflegal.org
msharp@adflegal.org

Counsel for Plaintiff

/s/ Deborah J. Dewart

Deborah J. Dewart
North Carolina Bar No. 30602
LIBERTY, LIFE AND LAW FOUNDATION
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
(877) 326-4585 Fax
debcpalaw@earthlink.net
Local Civil Rule 83.1 Counsel

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, a copy of the foregoing Joint Statement Regarding Overlapping Claims was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ James A. Campbell _____
James A. Campbell