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' RESPONSE TO MOTION TO EXPEDITE THE RESPONSES TO MOTION TO INTERVENE

Multiple cases, including North Carolinians for Privacy's ("NCFP") lawsuit, present virtually identical and overlapping legal issues to this Court. And this case, as a result of the United States' pending Motion for Preliminary Injunction, now calls for expedited consideration of some of the controlling legal issues at issue in all of the

related cases. Thus, NCFP will be greatly prejudiced in its ability to protect the interests of its members absent an order from this Court expediting responses to its Motion to Intervene (Dkt. No. 58). Notwithstanding this, Plaintiff United States has filed a Response (Dkt. No. 87) in opposition to NCFP's Motion to Expedite (Dkt. No. 78).

In its Response, the United States claims that an expedited response is not necessary because the federal government "does not seek to enjoin any action by NCFP or its putative members and, thus, NCFP has no interest in [the United States' Motion for Preliminary Injunction] other than, at best, a general interest in the legal issues it presents." Response at 3 (Dkt. No. 87). The United States thus suggests that it would be sufficient to allow NCFP to file an amicus brief "set[ting] forth NCFP's views of the law" rather than allowing it to intervene and oppose the Motion for Preliminary Injunction. *Id*. Moreover, the United States argues that expedited responses are unnecessary because intervention itself is inappropriate. *Id.* These arguments, however, fail to justify denying NCFP's request for expedited responses to its Motion to Intervene.

I. NCFP's Members have a direct personal stake in the outcome of this case, and thus intervention and not mere amicus involvement is appropriate.

The argument that NCFP and its members have no interest other than a general one is flatly contradicted by the Complaint for Declaratory and Injunctive Relief that NCFP filed in *North Carolinians for Privacy v. United States Department of Justice*, No. 1:16-cv-00845-TDS-JEP (Dkt. No. 1) (hereinafter "NCFP Complaint"), and the corresponding Proposed Answer that they have filed in this case (Dkt. No. 58-1). NCFP is comprised of university, high-school, middle-school, and elementary students in North

Carolina, the parents of students who are minor children, and victims of sexual abuse—all of whom object to sharing multi-user changing facilities, shower facilities, locker rooms, and restrooms with members of the opposite biological sex. NCFP's members thus have a personal interest in ensuring that their personal dignity and privacy, and the personal dignity and privacy of their loved ones, is protected and not sacrificed by the United States' efforts to redefine the word "sex" in Title IX of the Education Amendments of 1972 ("Title IX") or its efforts to misapply the Violence Against Women Act ("VAWA"). That personal interest is directly at stake here because if the United States obtains a preliminary injunction imposing its view of federal law on North Carolina, it would require schools to allow people of one biological sex to access changing facilities and restrooms reserved to people of the opposite biological sex simply because of their professed gender identity. Yet if schools permit that, they would violate the dignity and privacy rights of NCFP's members by, among other things, creating an intolerably high risk that they will disclose their fully or partially unclothed bodies to people of the opposite sex.

That the United States does not seek to enjoin any activity by NCFP is quite immaterial. The United States seeks to prevent North Carolina schools and other public entities from maintaining sex-specific changing facilities and restrooms based upon biological sex. As explained above, that directly jeopardizes NCFP's members' constitutional rights to bodily privacy.

Furthermore, the United States' suggestion that NCFP should be relegated to filing an amicus brief detailing its legal views on the Motion for Preliminary Injunction is unpersuasive. This is especially true given that the United States has largely predicated its motion on expert and lay declarations, some of which present a novel view of sex and gender, and others of which outline the personal stories of people who oppose H.B. 2. *See, e.g.*, Memorandum in Support of Motion for Preliminary Injunction, Exhibits 1-45 (Dkt. No. 76) (appending hundreds of pages of evidentiary materials). Thus, in order for NCFP to adequately protect its members' interests, it must be able to respond to both the legal *and factual* case that the United States asserts. An amicus brief will not enable it to do that.

II. NCFP's claims and defenses are nearly identical to those already raised in this and the other related cases before this Court.

The United States argues that "NCFP's claims . . . are sufficiently legally and factually distinct from the issues raised in the United States' case and in the . . . motion for a preliminary injunction as to make intervention inappropriate." Response at 4 (Dkt. No. 87). The United States, however, is incorrect.

It raised the same argument in the Eastern District of North Carolina when opposing NCFP's Motion to Consolidate Cases. *See* Memorandum in Opposition to Plaintiff's Motion to Consolidate Cases at 3-5, *North Carolinians for Privacy v. United States Department of Justice*, Case No. 5:16-cv-00245-FL (Dkt. No. 15). But that court did not adopt the United States' argument and in fact recognized the substantial similarity between NCFP's claims and the issues raised in this and the other related cases now

pending before this Court. *See* Order at 12, *North Carolinians for Privacy v. United States Department of Justice*, Case No. 5:16-cv-00245-FL (Dkt. No. 34) (hereinafter "Transfer Order") ("*United States* [*v. North Carolina*, i.e., the instant case] presents for decision nearly the full complement of issues presented in this district in *McCrory*, *Berger*, and *NCFP*."); *id.* at 16 (noting the risk of inconsistent adjudication regarding these cases, and acknowledging that "the similar substantive and procedural issues raised by *McCrory*, *Berger*, and *NCFP* are presented now through the . . . *United States*" litigation); *id.* at 17 (observing that each of these cases "presents a collection of substantively identical claims along side different, but related claims"). Because NCFP raises virtually identical claims and defenses to those that are already at issue in this case, the Court should reject the United States' attempt to bar NCFP from this litigation.

In trying to paint NCFP's claims and defenses as outliers, the United States asserts that NCFP "seeks to bring claims under the Free Exercise and RFRA [the federal Religious Freedom Restoration Act]." Response at 4 (Dkt. No. 87). This is not accurate. In one of its claims, NCFP alleges that the federal government's redefinition of "sex" in Title IX violates the Administrative Procedure Act ("APA"). *See* NCFP Complaint ¶¶ 130-248. And because the APA forbids agency action that contravenes federal law, both constitutional and statutory, NCFP has identified multiple constitutional and statutory provisions that the actions of the Departments of Justice and Education violate. One of those provisions is the Free Exercise Clause, and another is RFRA. *See id.* at ¶¶ 182-189, 213-223. But NCFP does not present these as standalone claims.

The United States then suggests that these purportedly additional claims "will likely delay the resolution of the United States' claims in this case." Response at 4 (Dkt. No. 87). This too is wrong. For the same reasons that Judge Flanagan in the Eastern District transferred to this Court cases raising similar and overlapping issues, judicial efficiency will not be compromised but actually enhanced by allowing NCFP to intervene here. *See* Transfer Order at 20 (concluding that "the joint administration of *Berger* and *NCFP* alongside" this case "will accrue significant administrative and financial benefits to all interested parties").

Indeed, promptly granting NCFP's intervention request and allowing it to participate in the preliminary-injunction proceedings will enable this Court to streamline the pending litigation in two ways. First, if NCFP is not permitted to participate in the preliminary-injunction proceedings, it will likely need to take steps to expedite the adjudication of its case, and the joint consideration of that case and this case both on an expedited basis will needlessly complicate matters. Second, allowing NCFP to intervene in time to respond to the United States' Motion for Preliminary Injunction might obviate the need to consider NCFP's alternative APA arguments, which include the free-exercise and RFRA issues mentioned above. 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 Preliminary Injunction—the Court might not need to reach any of NCFP's other APA arguments.

For the foregoing reasons, NCFP respectfully requests that the Court order expedited briefing on its Motion to Intervene.

Respectfully submitted this 10th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 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 10, 2016

/s/ James A. Campbell
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