

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA**

**NORTH CAROLINIANS FOR  
PRIVACY**, an unincorporated  
nonprofit association;

Plaintiff,

vs.

**UNITED STATES DEPARTMENT  
OF JUSTICE; LORETTA E.  
LYNCH**, in her official capacity as  
United States Attorney General;  
**UNITED STATES DEPARTMENT  
OF EDUCATION**; and **JOHN B.  
KING, JR.**, in his official capacity as  
United States Secretary of  
Education.

Defendants.

Case No. 1:16-CV-00845-TDS-JEP

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF PARTIALLY  
UNOPPOSED MOTION TO PROCEED USING INITIALS**

Plaintiffs and fact witnesses who are seeking to proceed in this case using initials are minor students, parents of minor students, and victims of sexual abuse. Because much their intended testimony implicates matters of the utmost privacy and sensitivity, and because this case involves highly controversial subject matter, Plaintiffs request that this Court permit the individually listed plaintiffs—Y.K., A.K., C.K., B.K., D.H. (parent), D.H. (minor child), S.H., and R.F. (all of whom are minor children or the parents of

minor children)—and the following fact witnesses—S.B., E.S., C.C., D.H., and S.H.—to proceed in this case and the related cases using their initials. Protecting these individuals from public disclosure of their names will shield them from threats, harassment, or retaliation for their involvement in these cases. And granting anonymity will cause no prejudice or inconvenience to Defendants.

### **Background**

Plaintiff Y.K. is the parent and legal guardian of minor children A.K., C.K., and B.K, each of whom is also a plaintiff in this case. *See* Amended Compl. ¶¶ 41, 55, 62 (Doc. No. 50-1). Plaintiff A.K. was enrolled in a school within the Charlotte-Mecklenburg School System last school year, but plans to attend a different school during this upcoming school year. *Id.* ¶ 41. Plaintiff C.K. currently attends a middle school within the Charlotte-Mecklenburg School System, and Plaintiff B.K. attends an elementary school within that school district. *Id.* ¶¶ 55, 62. Y.K.’s, A.K.’s, C.K.’s, and B.K.’s rights are threatened by Defendants’ unlawful agency actions.

Plaintiff D.H. is the parent and legal guardian of minor children D.H. and S.H, both of whom are also plaintiffs in this case. *See* Amended Compl. ¶¶ 69, 73. Plaintiff minor child D.H. attends a high school within the Union County Public School System, and Plaintiff S.H. also attends a high school

within the Union County Public School System. *Id.* All these Plaintiffs—parent D.H., minor child D.H., and S.H.—will be aggrieved by Defendants’ invalid agency actions.

Plaintiff R.F. is the parent and legal guardian of a female minor who attends the North Carolina School of Science and Mathematics. *See* Amended Compl. ¶ 81. R.F. will be injured and his rights compromised by Defendants’ actions.

Fact witness S.B. is a parent whose adopted children were victims of sexual abuse. *See* S.B. Decl. ¶¶ 1-5 (Ex. 1). Her children attended school in a district that adopted a policy allowing students to use the restrooms, locker rooms, and other facilities based on their professed gender identity. *Id.* ¶ 6. She will testify about the difficulties that this policy has created for her children and their family. *Id.* ¶ 7.

Fact witness E.S. is a member of North Carolinians for Privacy, a mother, and victim of sexual abuse. *See* E.S. Decl. ¶¶ 1-5 (Ex. 2). She will testify how the government’s declaring that all citizens may access sex-specific multi-user facilities based on their professed gender identity rather than their sex impacts her as a sex-abuse survivor. *Id.* ¶ 7.

Fact witness C.C. is a parent whose minor children attend North Carolina schools that adopted and subsequently suspended a policy

regulating access to multi-user restrooms and locker rooms based on students' professed gender identity. She intends to testify about the impact that Defendants' and her children's schools' actions have had on her and her children.

Fact witness S.H. is a minor student who attended a school that implemented the federally demanded restroom, locker-room, and changing-facility policy that Plaintiffs challenge here. D.H. Decl. ¶¶ 1-2 (Ex. 3). Fact witness D.H. is S.H.'s parent. *Id.* ¶ 1. They intend to testify about how this experience has affected them. *Id.* ¶ 3.

### **Argument**

The Fourth Circuit has recognized that in certain circumstances “the general presumption of open trials . . . should yield in deference to sufficiently pressing needs for party or witness anonymity.” *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir. 1993). The decision whether to permit parties or witnesses to proceed anonymously is left to the “informed discretion” of the trial court, and that calculus is guided by a number of “judicially recognized factors.” *Id.*

The factors to be considered are:

1. whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;

2. whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent non-parties;
3. the ages of the persons whose privacy interests are sought to be protected;
4. whether the action is against a governmental or private party; and
5. the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

*Id.* at 238. An analysis of each factor reveals that the “appropriate circumstances,” *id.*, exist for a grant of anonymity here.

#### **Factor One: Preservation of Privacy**

As to the first factor, the subject matter of this case has engendered heated and vociferous debate, which has often devolved into personal invective and harassment. Given the notoriety of these cases and the rancor that often surrounds them, the above-listed Plaintiffs and fact witnesses seek anonymity not because they wish to avoid mere annoyance or criticism, but rather because they seek to protect themselves from harassment and retaliation. *See* E.S. Decl. ¶ 12 (Ex. 2) (“I am fearful that if my identity is known to the public, my family and I could suffer retaliation for speaking about these issues.”); D.H. Decl. ¶ 5 (Ex. 3) (“I am aware that the subject matter of these cases is very controversial, and that some people who have voiced concerns with restroom and locker room policies like the federal

government is demanding have been harassed, threatened, and retaliated against for speaking out.”); S.B. Decl. ¶ 10 (Ex. 1) (“I am fearful that if my identity is known, my children and I will suffer retaliation for speaking about this controversial issue.”).

More generally, one of Plaintiffs’ primary goals through this litigation is to ensure that their privacy rights are not compromised. Existing case law supports a request to proceed anonymously under these circumstances. *See, e.g., John Does 1-5 v. McCrory*, No. 1:13CV711, 2014 WL 29352, at \*2 (M.D.N.C. Jan. 3, 2014) (granting motion to proceed under fictitious names where Plaintiffs alleged that the “statute at issue interfere[d] impermissibly with a variety of rights . . . traditionally considered ‘sensitive and highly personal’ privacy interests”).

### **Factor Two: The Risk of Retaliatory Physical or Mental Harm**

Given the high-profile and divisive nature of this legal dispute, the individual Plaintiffs and the above-listed fact witnesses—which, again, include minor students, parents of minor students, and victims of sexual abuse—have a reasonable apprehension that the widespread publication of their names and their involvement in these cases will potentially subject them to harm, whether physical, mental, emotional, or psychological.

With respect to sexual abuse victims in particular, courts have found that anonymity is warranted because disclosing those victims' names, along with the "highly private and sensitive experiences of sexual assault," could result in "psychological harm from having these experiences made widely available." *E.E.O.C. v. v. Spoa, LLC*, No. CIV. CCB-13-1615, 2014 WL 47337, at \*2 (D. Md. Jan. 3, 2014). The testimony provided by these abuse victims or their legal guardian will involve private details regarding the effect of their horrific experiences on their mental and physical health. These individuals have an objectively reasonable fear that the disclosure of their identities will exacerbate their anxiety and inflict a host of other harms. *See* S.B. Decl. ¶ 9 (Ex. 1) ("If it were publicly known that my daughters have suffered sexual abuse, it could significantly hinder their recovery process."); E.S. Decl. ¶¶ 9-10 (Ex. 2) ("I want to be anonymous, blend in, and be treated the same as any other woman. I do not want to have people look at me differently because of what was done to me in the past. . . . I do not want knowledge of my abuse to be public because in my experience when I have told someone about those experiences, it has changed how they relate to me."). This palpable risk of injury supports this request for anonymity. *See Doe v. New Ritz, Inc.*, No. CIV. WDQ-14-2367, 2015 WL 4389699, at \*2 (D. Md. July 14, 2015) (rejecting challenge to anonymity where plaintiff's "unrebutted affidavit articulate[d] a

legitimate fear of physical and mental harm that may [have] arise[n] if her identity [was] revealed”).

**Factor Three: The Ages of the Persons Whose Privacy is at Stake**

A similar justification for anonymity applies with respect to the minor children involved here. Indeed, Federal Rule of Civil Procedure 5.2 provides that a “filing with the court” pertaining to a minor may only contain “the minor’s initials.” Courts adjudicating issues involving minors thus routinely opt to protect the anonymity of children over the disclosure of their names. *See, e.g., Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (reversing the trial court’s determination that it lacked jurisdiction to issue protective order, noting “the special status and vulnerability of the child-litigants,” and concluding that “the almost universal practice of disclosure must give way in th[e] case to the privacy interests at stake”); *Doe v. Porter*, 370 F.3d 558, 561 (6th Cir. 2004) (noting the “special vulnerability of . . . child-plaintiffs,” thus explaining the “heightened protection” granted to them with respect to the public disclosure of their identities); *P.D. ex rel. C.D. v. Carroll Consol. Sch. Corp.*, 820 F. Supp. 2d 907, 909 (N.D. Ind. 2011) (noting that where “children [are] involved in [a] suit,” that is a “significant factor in favor of anonymity,” and explaining that such anonymity is especially appropriate where a case involves “inflammatory subject matter”).

Additionally, given that the identification of these minors' parents would compromise the protection provided to the minors themselves, the parents' anonymity should also be maintained. *See P.D.*, 820 F. Supp. 2d at 909 (noting that plaintiff children risked experiencing harm "if their identities were made known through the revealing of their parents' names"). This is consistent with the rationale supporting minor anonymity, and Defendants have recognized that by consenting to the anonymity of parents.

**Factor Four: Action against a Governmental Party**

Plaintiffs have brought this action against federal agencies and officials. This factor weighs in favor of anonymity. *See Doe*, 2014 WL 29352 at \*2 ("Plaintiffs bring this action against a governmental party, which weighs in favor of anonymity.")

**Factor Five: Risk of Unfairness to the Opposing Party**

Permitting the individual plaintiffs and above-listed fact witnesses to proceed anonymously poses no risk of prejudice or unfairness to Defendants. Indeed, this is true for the very same reasons cited by federal defendants in the Memorandum in Support of Unopposed Motion to File Witness Declarations Using Witness Initials filed in *United States v. North Carolina*, *see* Doc. No. 72 at 9-10—a motion that this Court summarily granted. *See* Text Order (July 14, 2016). Plaintiffs seek here to withhold publicly the

complete names of the individual plaintiffs and above-listed fact witnesses because of the real danger of harassment, retaliation, or other harms that may come because of the public disclosure of their identities. Plaintiffs have already agreed to negotiate a protective order that will permit Defendants access to reasonable information that they think they might need from the anonymous individuals. *See Doe*, 2014 WL 29352 at \*2 (finding that there was “very little risk of unfairness to . . . Defendants . . . when . . . Plaintiffs’ proposed protective order . . . [provided that] . . . Defendants [would] have access to Plaintiffs’ identities for purposes of . . . litigation”).

### **Conclusion**

For the foregoing reasons, Plaintiffs respectfully request that the Court permit the individually listed plaintiffs—Y.K., A.K., C.K., B.K., D.H. (parent), D.H. (minor child), S.H., and R.F.—and the following fact witnesses—S.B., E.S., C.C., D.H., and S.H.—to proceed in this case and the related cases using their initials.

Respectfully submitted this 5th day of August, 2016.

/s/ James A. Campbell

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## CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on August 5, 2016, I electronically filed the foregoing memorandum with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

/s/ James A. Campbell  
James A. Campbell

# **EXHIBIT 1**

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

**NORTH CAROLINIANS  
FOR PRIVACY**, an unincorporated  
nonprofit association,

Plaintiff,

vs.

**UNITED STATES  
DEPARTMENT OF JUSTICE;  
LORETTA E. LYNCH**, in her official  
capacity as United States Attorney  
General; **UNITED STATES  
DEPARTMENT OF EDUCATION;**  
and **JOHN B. KING, JR.**, in his  
official capacity as United States  
Secretary of Education,

Defendants.

Case No. 1:16-CV-00845-TDS-JEP  
(consolidated for purposes of  
discovery with 1:16-CV-00236 and  
1:16-CV-00425).

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**Declaration of S.B. In Support of Motion to Proceed Using  
Initials**

I, S.B., declare as follows:

1. I am a mother of minor children.
2. I am also a foster parent.
3. All of my children came to me through the foster parent program.
4. I live in a rural, conservative area in the Midwest where all my children attend public school.

5. Of my five children, I have two daughters who have been the victims of unspeakable sexual abuse.
6. In 2015, the school district my children attended adopted a policy allowing students to use the restrooms, locker rooms, and other facilities of the gender they identify with. This means that biological boys are allowed to use the same restrooms, showers, and changing areas as biological girls, and vice versa.
7. I intend to testify in these cases regarding the impact of this policy on my children, especially my two daughters who have experienced sexual abuse.
8. I wish to use only my initials in order to protect my children's privacy both now and in the future.
9. If it were publicly known that my daughters have suffered sexual abuse, it could significantly hinder their recovery process.
10. I am aware that the subject matter of these cases—whether students should be allowed to access restrooms, locker rooms, and changing facilities based on their professed gender identity—is divisive and hotly debated. I am also aware that some who have spoken out against opening restrooms, locker rooms, and changing facilities based on professed gender identity have faced threats, retaliation, and

harassment. I am fearful that if my identity is known, my children and I will suffer retaliation for speaking about this controversial issue.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 4, 2016.

SB  
S.B.

# **EXHIBIT 2**

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

**NORTH CAROLINIANS  
FOR PRIVACY**, an unincorporated  
nonprofit association,

Plaintiff,

vs.

**UNITED STATES  
DEPARTMENT OF JUSTICE;  
LORETTA E. LYNCH**, in her official  
capacity as United States Attorney  
General; **UNITED STATES  
DEPARTMENT OF EDUCATION;**  
and **JOHN B. KING, JR.**, in his  
official capacity as United States  
Secretary of Education,

Defendants.

Case No. 1:16-CV-00845-TDS-JEP  
(consolidated for purposes of  
discovery with 1:16-CV-00236 and  
1:16-CV-00425).

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**Declaration of E.S. In Support of Motion to Proceed Using  
Initials**

I, E.S., declare as follows:

1. I am a member of North Carolinians for Privacy (NCFP).
2. I have personal knowledge of the events giving rise to this lawsuit, and  
I make this declaration based on my personal knowledge.
3. I am the parent of minor children.
4. I am over the age of eighteen.
5. I was sexually abused as a minor.

6. The abuse I suffered still impacts me today.
7. I intend to testify in these cases regarding how adopting the federal government's demands to allow all citizens to access sex-specific multi-user facilities based on their professed gender identity rather than their sex impacts me as a sex-abuse survivor and as a mother of minor children.
8. Only a few people know that I was abused, and it is a very private issue.
9. Testifying about my past abuse is difficult and distressing because of the trauma that I relive every time I discuss it.
10. I want to be anonymous, blend in, and be treated the same as any other woman. I do not want to have people look at me differently because of what was done to me in the past.
11. I do not want knowledge of my abuse to be public because in my experience when I have told someone about my experiences, it has changed how they relate to me.
12. I am aware that the subject matter of this case and House Bill 2 are very controversial topics and that some supporters of the law have been threatened and harassed for speaking out in support of it. I am fearful that if my identity is known to the public, my family and I could suffer retaliation for speaking about these issues.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 5, 2016.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

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E.S.

# EXHIBIT 3

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

**NORTH CAROLINIANS FOR  
PRIVACY**, an unincorporated  
nonprofit association,

Plaintiff,

vs.

**UNITED STATES  
DEPARTMENT OF JUSTICE;  
LORETTA E. LYNCH**, in her official  
capacity as United States Attorney  
General; **UNITED STATES  
DEPARTMENT OF EDUCATION;**  
and **JOHN B. KING, JR.**, in his  
official capacity as United States  
Secretary of Education,

Defendants.

Case No. 1:16-CV-00845-TDS-JEP  
(consolidated for purposes of  
discovery with 1:16-CV-00236, and  
1:16-CV-00425).

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**Declaration of D.H. In Support of Motion to Proceed Using Initials**

I, D.H., declare as follows:

1. I am the father of a female minor, S.H.
2. Recently, the school district my daughter attended adopted a policy allowing students to use the restrooms, locker rooms, and other facilities based on their professed gender identity. This means that biological boys are allowed to use the same restrooms, showers, and changing areas as biological girls, and vice versa.

