IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No: 5:23-cv-219-BO-RJ

MONICA FAITH USSERY,

Plaintiffs,

v.

LORRIN FREEMAN, in her individual and official capacity as Wake County District Attorney, *et al.*,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OF DEFENDANT LORRIN FREEMAN

NOW COMES Defendant Lorrin Freeman, in her individual and official capacity as Wake County District Attorney ("Defendant Freeman") and provides this Memorandum of Law in support of her motion to dismiss.

NATURE OF MATTER BEFORE COURT

Plaintiff, Monica Ussery, filed this action on April 21, 2023, naming Defendant Freeman, among others, as defendants. (D.E. 1) On May 1, 2023, Plaintiff amended her complaint as of right. (D.E.11) Defendant Freeman waived service of the amended complaint on June 7, 2023. (D.E. 23) By text order issued on July 31, 2023, the Clerk of Court granted Defendant Freeman an extension of time up to and including September 21, 2023, by which to answer or respond to the Amended Complaint.

On September 8, 2023, Plaintiff moved for leave to amend the Amended Complaint. (D.E. 42) This Court subsequently entered an order granting Defendant Freeman an

extension of time to twenty-one days after a ruling on the motion to amend by which to answer or respond to the operative complaint. (D.E. 47) On November 8, 2023, this Court granted Plaintiff's motion to amend. (D.E. 48)

On November 15, 2020, Plaintiff filed the Second Amended Complaint asserting six causes of action: (1) a claim of conspiracy to deprive her of her state constitutional rights under Article I, §§ 12, 14, and 19 of the North Carolina Constitution (D.E. 50, ¶¶ 76-112) ("Count I") against all defendants; (2) a claim under 42 U.S.C. § 1983 for violation of her rights under the First Amendment to the United States Constitution (*Id.* at ¶¶ 113-32) ("Count II") against all defendants; (3) a claim under 42 U.S.C. § 1983 for violation of her right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution (*Id.* at ¶¶ 133-47) ("Count III") against all defendants; (4) a claim under 42 U.S.C. § 1983 for violation of her right to procedural due process under the Fourteenth Amendment to the United States Constitution and *Brady v. Maryland*, 373 U.S. 83 (1963) (*Id.* at ¶¶ 148-59) ("Count IV") against Defendant Freeman; (5) a claim under 42 U.S.C. § 1983 for violation of her right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution (*Id.* at ¶¶ 160-78) ("Count V") against Defendant Freeman; and (6) claims for violations of her rights under Article I, §§ 12, 14, and 19 of the North Carolina Constitution (*Id.* at ¶¶ 184-91) ("Count VI") against all defendants. In the Second Amended Complaint, Plaintiff seeks declaratory relief that defendants violated her rights under the North Carolina Constitution, compensatory and nominal damages, and costs and expenses of this action, including reasonable attorney's fees. (*Id.* at p 46)

STATEMENT OF THE FACTS[1]

On March 27, 2020, Governor Roy Cooper issued Executive Order No. 121 ("the Executive Order") which, in part, required individuals in the State to "stay at home" except for certain delineated purposes set out in the Executive Order. (D.E. 50, ¶ 28) The Executive Order also limited mass gatherings to groups of ten or fewer individuals when gathered in a "confined indoor or outdoor space." (*Id.* at ¶ 28)

A group of individuals, calling themselves ReOpenNC, planned a protest for April 14, 2020, in State Visitor Parking Lot 1 ("Lot 1") in the downtown Raleigh State government complex. (*Id.* at ¶ 29) Lot 1 is an open air, uncovered parking lot. (*Id.* at ¶ 30) After learning of the scheduled protest, Plaintiff planned to attend with her stepson, Corey Phellan, who drove Plaintiff to the event. (*Id.* at ¶ 31)

Sometime after 12:00 p.m., officers of the Raleigh Police Department ("RPD") and the State Capitol Police ("SCP") gathered at the corner of Lot 1. (*Id.* at ¶ 35) Based upon RPD body camera footage, RPD Captain Dedric Bond ("Defendant Bond") informed the assembled officers that he had been part of a conference call with Defendant Freeman, SCP Chief Roger Hawley ("Defendant Hawley"), and then-Secretary of the North Carolina Department of Public Safety Eric Hooks ("Defendant Hooks"), among others, during which it was discussed how to proceed regarding the ReOpenNC protest. (*Id.* at ¶ 85) Defendant Bond stated that "what I want to do is make an example out of [agitators]," and

[1] For purposes of this motion, the facts are those set forth in the Second Amended Complaint. Upon consideration of a motion made pursuant to Rule 12(b)(6), the court should "accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993).

that he was hoping that "we'll start locking up a few of the agitators" and that "the rest will automatically disperse." (*Id.*) Also, Defendant Bond said that "we had a long conversation with Lorrin Freeman and when you see the videos that are already online and everything, it's obvious that we just can't allow that to continue[,]" indicating that the goal was to avoid having to deal with ReOpenNC's protest planned for April 21, 2020. (*Id.*) According to Defendant Bond, he wanted to start "locking up people as soon as possible," and that Defendant Freeman "was cool with the matter" and law enforcement's plans with how to proceed. (*Id.*)

Defendant Bond then addressed the protestors, telling them they were in violation of the Executive Order and asking them to disperse and leave the parking lot. (*Id.* at ¶ 35) Defendant Bond informed the protestors that, "If you do not disperse, you will be subject to physical arrest." (*Id.*) Officers repeated those warnings to the assembled crowd two additional times and then walked the parking lot, going car to car, to get the attendees to disperse. (*Id.* at ¶¶ 35-36) As they did so, RPD's Twitter account responded to a post questioning what provision of the Executive Order the protestors were violating by saying "Protesting is a non-essential activity." (*Id.* at ¶¶ 36-37) Defendant Freeman was not responsible for the tweet. (*Id.* at ¶ 39)

Plaintiff told her stepson to leave while she walked out of Lot 1 to take pictures of the cars leaving the protest. (*Id.* at ¶ 40) After Plaintiff returned to Lot 1 to give her stepson the car keys, he drove off, leaving Plaintiff standing by herself, the only person remaining who had not followed commands to leave. (*Id.* at ¶ 41) When an officer told her to do so, Plaintiff responded in frustration, "I can't. My ride just left." (*Id.*) RPD officers at the scene

then arrested Plaintiff. (*Id.*) SCP Officers Derick Proctor ("Defendant Proctor") and Tito Fink ("Defendant Fink") drove Plaintiff to the Wake County Detention Facility. (*Id.* at ¶ 42) Defendant Fink's body worn camera was recording during the transport to the detention facility but, although Plaintiff requested the footage both informally and by petitioning the state courts, the footage was never disclosed to her. (*Id.*) Defendant Proctor went before a North Carolina magistrate and provided sufficient probable cause for the magistrate to find that Plaintiff had violated the Executive Order in violation of N.C.G.S. § 14-288.20(2), a misdemeanor. (*Id.* at ¶ 43 & Ex. 3 thereto)

In the wake of Plaintiff's arrest, assorted individuals sought clarification from Governor Cooper whether the Executive Order prohibited peaceful protests. (*Id.* at ¶¶ 45-46, 49 & Ex. 4 and 6 thereto) In response, Governor Cooper explained that the Executive Order did "not interfere with people's constitutional rights to express themselves," but rather prohibited "unlawful mass gatherings." (*Id.* at ¶ 47) During one media interview, Defendant Freeman contended that RPD's interpretation of the Executive Order was "technically correct" and that protestors "were given an opportunity to social distance" and told that they could stay if they spread out. (*Id.* at ¶ 47) In another such interview, Defendant Freeman explained that she had discussed with law enforcement agencies how to respond to ReOpenNC's next protest, planned for April 21, 2020, and was both reviewing the police footage of Plaintiff's April 14, 2020, arrest and evaluating the evidence of the charge against her. (*Id.* at ¶ 51) ReOpenNC's protest on April 21, 2020, produced no arrests despite a larger crowd and less social distancing among the attendees. (*Id.* at ¶ 52) In the ensuing months, multiple protests were held in Raleigh, including by

ReOpenNC, the Black Lives Matter movement, and nurses who supported Governor Cooper's executive orders, and none of the protestors were arrested aside from those who engaged in violence or destruction of property. (*Id.* at ¶¶ 54, 56)

On June 25, 2020, Plaintiff was arraigned on the charge of violating the Executive Order, to which Plaintiff pled not guilty. (*Id.* at ¶ 55) Although Defendant Freeman had the opportunity to drop the charges against Plaintiff, she declined to do so. (*Id.*) Subsequently, Plaintiff's criminal defense attorney asked Defendant Freeman for copies of the police body cam footage and any other exculpatory evidence her office was required to disclose pursuant to *Brady v. Maryland*. (*Id.* at ¶ 57) However, Defendant Freeman failed to provide "evidence of the RPD arrest of" Plaintiff. (*Id.*)

On or about March 25, 2021, Plaintiff's defense counsel issued subpoenas to Governor Cooper and the Governor's General Counsel, William McKinney, to appear at Plaintiff's criminal trial, scheduled for April 8, 2021. (*Id.* at ¶ 58) A few days later, Defendant Proctor and Defendant Hawley filed a complaint for criminal summons against Plaintiff for second-degree trespass, which charge was consolidated with the original charge for violating the Executive Order. (*Id.* at ¶¶ 59, 106 and Ex. 8 thereto) Plaintiff was ultimately convicted in Wake County District Court on both charges and immediately appealed for a trial de novo in Wake County Superior Court. (*Id.* at ¶¶ 60, 62)

In the ensuing months, two different assistant district attorneys handled Plaintiff's case and Plaintiff's defense counsel sought discovery from both. (*Id.* at ¶ 63) In response, Plaintiff's attorney was provided with portions of body camera footage from the custodial pat down search of Plaintiff at the time of her arrest and her arrival at the Wake County

Detention Center; no other footage was disclosed. (*Id.*) When Plaintiff learned that additional body camera footage existed, her new defense counsel wrote to the assigned ADA and requested the RPD and SCP body camera footage pursuant to *Brady v. Maryland*. (*Id.* at ¶¶ 64-65 & Ex. 9 thereto) After the case was reassigned to a third ADA, Plaintiff's defense counsel reiterated the request for the missing body camera footage. (*Id.* at ¶ 66) In May 2022, Plaintiff filed a petition pursuant to N.C.G.S. § 132.14A(f) for release of the RPD and SCP body camera footage from April 14, 2020. (*Id.* at ¶ 67) The court granted the petition and ordered the SCP and RPD to release the recordings in their custody and control. (*Id.*) After being served with the order, the SCP did not produce all the body camera footage, a deficiency Plaintiff's defense counsel pointed out to the assigned ADA, to no effect. (*Id.* at ¶ 69)

After Plaintiff moved to dismiss the criminal charges on constitutional grounds, Defendant Freeman's office offered Plaintiff an informal deferral of twenty-five hours of community service, upon completion of which Plaintiff's charges would be dismissed and her record expunged. (*Id.* at ¶¶ 70-71) After Plaintiff satisfied those conditions, the charges against her were dismissed on or about February 20, 2023. (*Id.* at ¶ 72)

DISMISSAL STANDARD

Plaintiff's claims should be dismissed under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

In a Rule 12(b)(1) challenge to subject matter jurisdiction, the pleadings merely constitute evidence on the issue and materials outside the pleadings, if considered, do not convert the motion to one for summary judgment. *Evans v. B. F. Perkins Co.*, 166 F.3d

642, 647 (4th Cir. 1999) (citations omitted). The plaintiff bears the burden of proving subject matter jurisdiction exists. *Id.*

A complaint will survive a Rule 12(b)(6) motion if it contains "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint states a facially plausible claim "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, the court need not consider "legal conclusions, elements of a cause of action and bare assertions devoid of further factual enhancement[,]" nor "'unwarranted inferences, unreasonable conclusions, or arguments.'" *Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted).

ARGUMENT

I. ELEVENTH AMENDMENT IMMUNITY BARS ANY CLAIMS AGAINST DEFENDANT FREEMAN IN HER OFFICIAL CAPACITY.

The Fourth Circuit has not clarified "whether a dismissal on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)." *Andrews v. Daw*, 201 F.3d 521, 524 n.2 (4th Cir. 2000). When a court relies solely on the pleadings to resolve the Eleventh Amendment immunity issue, it may evaluate the pleadings under either Rule. *Jennette v. Beverly*, No. 5:15-CT-3019-D, 2015 U.S. Dist. LEXIS 152450, at *6 (E.D.N.C. Nov. 9, 2015).

The Eleventh Amendment bars suits against an unconsenting state brought in federal courts by a state's own citizens or the citizens of another state to the extent the suit seeks retrospective relief, including damages and/or declaratory relief for past conduct that is not ongoing. *See Edelman v. Jordan*, 415 U.S. 651, 662–68 (1974) (explaining that *Ex Parte Young*, 209 U.S. 123 (1908) and subsequent Supreme Court cases have limited relief against unconsenting states to prospective injunctive relief necessary to comply with federal law); *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("holding that the Eleventh Amendment to the United States Constitution and applicable principles governing the issuance of declaratory judgments forbid the award of [a declaration that defendants' prior conduct violated federal law]"). Because a suit against a state official in his or her official capacity "is no different from a suit against the State itself," the Eleventh Amendment also bars suits brought in federal court that seek retrospective relief from state officials in their official capacity. *Will v. Mich. Dep't of State Police*, 491 U.S. 59, 71 (1989); *see also Biggs v. Meadows*, 66 F.3d 56, 61 (4th Cir. 1995) (noting that compensatory or punitive damages are unavailable as relief in official capacity suits).

North Carolina has not waived its Eleventh Amendment immunity as to any of Plaintiff's claims. While Congress may abrogate a state's Eleventh Amendment immunity in certain limited circumstances, the Supreme Court has determined that Congress did not intend to abrogate Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983. *Will*, 491 U.S. at 66. Claims brought pursuant to 42 U.S.C. § 1985 are similarly barred. *Quern v. Jordan*, 440 U.S. 332 (1979); *Clark v. Md. Dep't of Pub. Safety & Corr. Servs.*, 247 F. Supp. 2d 773, 776, n.2 (D. Md. 2003); *Kirby v. N.C. State Univ.*, No. 5:13-cv-850-FL, 2015

U.S. Dist. LEXIS 30135, at *8 (E.D.N.C. Mar. 10, 2015). Eleventh Amendment immunity also bars claims based on North Carolina's state constitution. *See Dove v. Stevens*, No. 5:05-cv-33-BO(1), 2006 U.S. Dist. LEXIS 111792, at *10 (E.D.N.C. Oct. 23, 2006) (finding that "the Eleventh Amendment also prevents federal jurisdiction over [plaintiff's] state constitutional law claims").

Here, the Second Amended Complaint only seeks retrospective relief in the form of damages and declaratory relief regarding past conduct. It alleges no ongoing violation of Plaintiff's rights. (D.E. 50) There is no allegation that the Executive Order remains in effect; to the contrary Plaintiff acknowledges that it has expired. (*Id.* at ¶ 121) Plaintiff's criminal charges have been dismissed and her record expunged. (*Id.* at ¶¶ 71-72) Moreover, the Prayer for Relief makes clear that Plaintiff seeks only retrospective declaratory relief, as she requests declarations that "Defendants **violated**" her rights under the First and Fourteenth Amendments to the United States Constitution as well as assorted provisions of the North Carolina Constitution. (D.E. 50, p 46) (emphasis added).

Plaintiff's claims against Defendant Freeman in her official capacity seeking damages or declaratory relief for past conduct are barred by the Eleventh Amendment because she is a state official, and the State of North Carolina has not waived its Eleventh Amendment sovereign immunity. *See* N.C. Const., Art. IV, § 18(1) (setting forth District Attorneys are constitutional officers of the state); *Will*, 491 U.S at 71; *Green*, 474 U.S. at 65; *Nivens v. Gilchrist*, 444 F.3d 237, 249 (4th Cir. 2006) (affirming dismissal of suit against district attorney in official capacity on Eleventh Amendment grounds given district attorney's constitutional and statutory responsibilities and State's obligation to pay

judgments awarded against State employees). Therefore, this Court lacks subject matter jurisdiction over Plaintiff's claims against Defendant Freeman in her official capacity for compensatory or monetary damages and declaratory relief in Counts I, II, III, IV, V, and VI as they are barred by Eleventh Amendment immunity and must be dismissed.

II. THIS COURT SHOULD DISMISS THE OFFICIAL CAPACITY CLAIMS IN COUNTS I, II, III, IV, AND V BECAUSE NEITHER SECTION 1983 CLAIMS NOR SECTION 1985 CLAIMS MAY BE BROUGHT AGAINST THE STATE.

Section 1983 limits viable private rights of action to those brought against a "person" who deprives an individual of constitutional rights under color of state law. *Will*, 491 U.S. at 65-66. However, a State is not "a 'person' within the meaning of [42 U.S.C.] § 1983." *Id.* A suit against Defendant Freeman in her official capacity is the equivalent of a suit against the State of North Carolina. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (noting that official capacity suits "generally represent only another way of pleading against an entity of which an officer is an agent"). As a result, when sued in her official capacity, Defendant Freeman is not a "person" subject to liability under § 1983. *Hafer v. Melo*, 502 U.S. 21, 26 (1991). Accordingly, this Court should dismiss the Section 1983 claims brought against Defendants Freeman in her official capacity in Counts II, II, IV and V. Nor is the State of North Carolina a "person" within the meaning of 42 U.S.C. § 1985. *Coffin v. South Carolina Dep't of Soc. Servs.*, 562 F. Supp. 579, 585 (D.S.C. 1983). Therefore, Plaintiff's claims in Count I against Defendant Freeman in her official capacity, if predicated upon a violation of 42 U.S.C. § 1985, should also be dismissed.

III. PROSECUTORIAL IMMUNITY BARS PLAINTIFF'S INDIVIDUAL CAPACITY CLAIMS IN COUNTS I, II, III, IV, AND V AGAINST DEFENDANT FREEMAN.

Generally, prosecutors have immunity from civil suits arising out of the performance of their duties as advocate for the State. *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976); *Buckley v. Fitzsimmons*, 509 U.S. 259, 272 (1993). Any conduct "intimately associated with the judicial phase of the criminal process" enjoys absolute immunity from suit. *Id.* at 273; *see also Goldstein v. Moatz*, 364 F.3d 205, 215 (4th Cir. 2004) (noting that "[t]he protection afforded by absolute immunity extends to activities 'intimately associated with the judicial phase of the criminal process,' because those activities, like judicial decisionmaking, involve the substantial exercise of discretion.") (quoting *Imbler*, 424 U.S. at 430). The Fourth Circuit and Supreme Court have found that such conduct includes professional evaluation of evidence presented by law enforcement, decisions to seek an arrest warrant, deciding whether to initiate a prosecution, preparing and filing charging documents, and presenting evidence at trial. *See Buckley*, 509 U.S. at 272; *Nero v. Mosby*, 890 F.3d 106, 118 (4th Cir. 2018); *Savage v. Maryland*, 896 F.3d 260, 270 (4th Cir. 2018) (citing *Burns v. Reed*, 500 U.S. 478, 486 (1991)); *Goldstein v. Moatz*, 364 F.3d 205, 215 (4th Cir. 2004). "A prosecutor's administrative duties and investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity, only qualified immunity." *Buckley*, 509 U.S. at 273.

The Second Amended Complaint identifies three different types of conduct by Defendant Freeman: (1) consulting with law enforcement prior to Plaintiff's arrest (D.E.

50, ¶¶ 85-87); (2) withholding exculpatory evidence during the subsequent prosecution of Plaintiff (*Id.* at ¶¶ 57, 61, 63-69); and (3) prosecuting Plaintiff for violating the Executive Order and second-degree trespass (*Id.* at ¶¶ 55-56). However, the precise conduct upon which Plaintiff relies to establish liability of Defendant Freeman for Counts I, II, III, IV and V is unclear. This Court must dismiss any individual capacity claims in Counts I, II, III, IV and V to the extent that these claims are based on allegations that Defendant Freeman withheld exculpatory evidence or prosecuted Plaintiff for violating the Executive Order and for second-degree trespass because prosecutorial immunity bars these claims. *See Buckley*, 509 U.S. at 272; *Nero v. Mosby*, 890 F.3d 106, 118 (4th Cir. 2018); *Savage v. Maryland*, 896 F.3d 260, 270 (4th Cir. 2018) (citing *Burns v. Reed*, 500 U.S. 478, 486 (1991)); *Goldstein*, 364 F.3d at 215. While Defendant Freeman may not have prosecutorial immunity for claims based on advice that she provided to law enforcement, there are other grounds to dismiss claims based on that conduct as provided in the sections that follow.

IV. DEFENDANT FREEMAN IS ENTITLED TO QUALIFIED IMMUNITY FOR PLAINTIFF'S CLAIMS IN COUNTS I, II, III, AND V ALLEGING VIOLATIONS OF THE FIRST AND FOURTEENTH AMENDMENTS AND CONSPIRACY TO VIOLATE THESE RIGHTS.

Qualified immunity "shields government officials performing discretionary functions from personal-capacity liability for civil damages under § 1983, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006) (internal quotation marks omitted). "To be clearly established, a right must be sufficiently clear that every reasonable official would have

understood that what he is doing violates the law." *Taylor v. Barkes*, 575 U.S. 822, 825 (2015). While a case directly on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate." *Taylor*, 575 U.S. at 826 (finding that the right was not "clearly established," because no decision the Supreme Court had established a right to it and there was no "robust consensus of cases of persuasive authority in the Courts of Appeals") (internal quotations omitted). "When determining whether a reasonable [official] would have been aware of a constitutional right, we do not impose on the official a duty to sort out conflicting decisions or to resolve subtle or open issues." *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998). Accordingly, "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

In assessing whether a government official deserves qualified immunity from personal liability, courts conduct a two-pronged inquiry: (1) whether the official violated a constitutional right; and if so (2) whether the right was "clearly established" at the time of its violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The steps can be addressed in any order at the discretion of the district court "in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Moreover, a court must "identify the specific right that [Plaintiff] asserts was infringed by the challenged conduct at a high level of particularity" when evaluating whether it was clearly established. *Edwards v. City of Goldsboro*, 178 F.3d 231, 250-51 (4th Cir. 1999). Here, Defendant Freeman is entitled to qualified immunity on Counts I, II, III, and V because she did not violate Plaintiff's clearly established rights.

Defined at a high degree of particularity, Plaintiff alleges that her First Amendment speech and Fourteenth Amendment procedural due process and equal protection rights were violated when Defendant Freeman advised law enforcement that they could enforce the Executive Order against protestors who planned to protest on April 14, 2020, and that in giving that advice she agreed it was okay for law enforcement to make an example out of those protestors to prevent further protests in violation of the Executive Order. (D.E. 50, ¶¶ 85-86; 117, 122).[2] At the time that this alleged advice was provided, however, there was no clearly established law that prohibited it.

As Plaintiff acknowledges, the "novel coronavirus … ultimately turn[ed] the world upside down" and the "Secretary of Health and Human Services of the United States, determined that a public health emergency existed." (DE 50 at ¶ 4). Leaders followed the "playbook" of the last known epidemic, "the Spanish influenza pandemic of 1918," and "issu[ed] stay-at-home orders and quarantine mandates." (*Id.* at ¶ 7). Governor Cooper followed suit and issued various stay-at-home orders and quarantine mandates, eventually issuing the Executive Order, which ordered individuals to stay-at-home except for limited circumstances, deemed "Essential Activities." Even when conducting essential activities, the Executive Order prohibited "mass gatherings of more than ten individuals "in a confined indoor or outdoor space." (*Id.* at ¶¶ 25-28).

[2] Since Defendant Freeman is entitled to prosecutorial immunity for alleged conducted related to Plaintiff's prosecution, including allegations regarding the withholding of evidence, that conduct is not evaluate for qualified immunity. *See* Section III, *supra*.

As of April 14, 2020, there was no clearly established case law providing that the First or Fourteenth Amendments prohibited enforcement of the Executive Order, including against protestors and the Plaintiff. The Executive Order was issued to address the compelling government interest of limiting the spread of a highly contagious virus that has caused a public health crisis of epidemic proportions as declared by the Secretary of Health and Human Services of the United States. Courts have historically upheld such stay-at-home and quarantine orders. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety"); *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health*, 186 U.S. 380, 387 (1902) ("[T]he power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants . . . is beyond question."); *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174 (2d Cir. 2020) (granting qualified immunity on a procedural due process claim to defendants that issued quarantine orders); *Armstrong v. Newsom*, 2021 U.S. App. LEXIS 37877, *2 (9th Cir., Dec. 21, 2021) (finding that California's analogous COVID-19 "stay-at-home order did not violate clearly established law"). Accordingly, even if this Court were to find that enforcement of the Executive Order violated Plaintiff's constitutional rights, Defendant Freeman could not have been expected to know that it did so. The law not being clearly established on either constitutional right, Defendant Freeman is entitled to qualified immunity on any claims in Counts I, II, III and V brought against her in her individual capacity based on her advice to law enforcement.

V. PLAINTIFF'S FACIAL CHALLENGES IN COUNTS II AND III ARE MOOT.

Plaintiff appears to challenge the facial constitutionality of the Executive Order. (*Id.* at ¶¶ 116, 122, 125) in Counts II and III. These claims are moot. Plaintiff expressly pleads that the Executive Order has expired. (D.E. 50, ¶ 121). This alone renders the claim moot. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (noting that, a lawsuit becomes moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome"); *Trump v. Hawaii*, 583 U.S. 941 (2017) (instructing circuit court to dismiss action as moot on grounds that challenged provisions of executive order that expired on their own terms did not present a live case or controversy). Lower federal courts addressing constitutional challenges to subsequently expired COVID-19 orders have dismissed those claims as moot. *See, e.g.*, *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020); *Martinko v. Whitmer*, 465 F. Supp. 3d 774, 777 (E.D. Mich. 2020). Since this Court only has jurisdiction to "adjudicate actual, ongoing controversies," *Honig v. Doe*, 484 U.S. 305, 317 (1988), and because Plaintiff has no cognizable interest in a determination that the Executive Order, now expired, was unconstitutional on its face, any facial challenge in Counts II and III must be dismissed for lack of subject matter jurisdiction.

Plaintiff also appears to assert a facial challenge to a purported "policy" adopted by Defendant City of Raleigh and "ratified" through its "authorized decisionmakers" that "protesting is a non-essential activity," as expressed in the RPD's tweet on April 14, 2020. (D.E. 50, ¶¶ 88, 124, 125) Even assuming for the sake of argument that the RPD's tweet constitutes a formal policy subject to a constitutional challenge, Plaintiff's own factual

allegations demonstrate that, at least as of ReOpenNC's subsequent protest on April 21, 2020, that "policy" had been abandoned. (*Id.* at ¶¶ 52, 54) As with the expired Executive Order, this Court lacks subject matter jurisdiction to assess the facial constitutionality of a "policy" that Defendant City of Raleigh abandoned more than three years ago.

Accordingly, this Court should dismiss as moot any facial challenges in Counts II and III to the Executive Order and to the Defendant City of Raleigh's purported policies.

VI. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED FOR ALL OTHER ASPECTS OF HER CLAIMS IN COUNTS II AND III.

The facial and as-applied claims in Counts II and III should also be dismissed for failure to state a claim.

A. Count II – First Amendment Violations

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Supreme Court has explained that "government regulation of expressive activity is 'content neutral' if it is justified without reference to the content of regulated speech." *Hill v. Colorado*, 530 U.S. 703, 720 (2000). This is so even if the regulation "has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. Distilling these principles, the Fourth Circuit has explained that:

> [A] regulation is not a content-based regulation of speech if (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not

> adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech.

Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 433 (4th Cir. 2007) (internal quotations and alteration omitted). Here, the Executive Order did not regulate speech even if it imposed some restrictions on where, when, or how some speech could occur. Moreover, the Governor adopted the Executive Order to limit the spread of a global pandemic, not because of any disagreement North Carolina citizens had with earlier executive action.

Because the Executive Order was content neutral and its "stay-at-home" restrictions applied equally to all North Carolinians (D.E. 50-1, Section 1.1), it is subject to intermediate scrutiny. *Ward*, 491 U.S. at 791. Under that level of scrutiny, any time, place, and manner restrictions must be narrowly tailored to serve a substantial government interest and must not "unreasonably limit alternative avenues of communication." *Id.*

Plaintiff does not appear to dispute the public health interests advanced by the Executive Order, as she lists it among several issued by Governor Roy Cooper "in view of the emerging COVID-19 pandemic." (D.E. 50, ¶¶ 25-28) Nor does she identify how or which of the actual provisions of the Executive Order unreasonably limited alternative avenues of communication. The Executive Order did place restrictions on public, outdoor gatherings and imposed social distancing from non-family members when outdoors, *see, e.g.*, (D.E. 50-1, Section 1.1) (providing that, when using spaces outside their residence, individuals "must at all times and as much as reasonable possible, maintain social distancing of at least six (6) feet from any other person, with the exception of family or

household members").[3] However, it imposed no further restrictions on protesting in public and no restrictions whatsoever on protesting online. Therefore, Plaintiff has not alleged that, on its face, the Executive Order violated Plaintiff's rights under the First Amendment.

Plaintiff also alleges that the Executive Order was unconstitutional as applied to her based on the defendants' interpretation and enforcement of it. (*Id.* at ¶¶ 117-18, 121-23, 125, 129-130). "In order to prevail on an as-applied First Amendment challenge, a plaintiff must show that the regulations are unconstitutional as applied to their particular speech activity." *Fusaro v. Howard*, 19 F.4th 357, 368 (2021). A successful "as applied" challenge, therefore, precludes the enforcement of a statute against a plaintiff alone. *See FEC v. Wisc. Right To Life, Inc.*, 551 U.S. 449, 481 (2007).

As discussed in Section III above, Defendant Freeman's decisions to prosecute Plaintiff and to continue to prosecute her for charges stemming from April 14, 2020, are protected by absolute prosecutorial immunity and, so, an as-applied challenge based upon that conduct must fail. That leaves Plaintiff with one avenue – proving that the advice and consultation Defendant Freeman provided to law enforcement officers on the morning of April 14, 2020, regarding the enforcement of the Executive Order violated Plaintiff's First Amendment rights. However, any legal advice Defendant Freeman may have provided to law enforcement about the Executive Order before Plaintiff's arrest could not, in and of itself, violate Plaintiff's First Amendment rights. Moreover, the Second Amended Complaint makes no allegation that law enforcement officers obtained Defendant

[3] Plaintiff also clearly recognized and abided by those restrictions. (*Id.* at ¶ 127) (noting that "Plaintiff socially distanced from other protestors, remaining in/on the same car as her stepson").

Freeman's authorization to arrest Plaintiff under the specific factual circumstances facing the RPD and SCP officers present in Lot 1 on the afternoon of April 14, 2020. As a result, Plaintiff fails to state a plausible claim for relief against Defendant Freeman for an as-applied First Amendment violation.

B. Count III – Fourteenth Amendment Procedural Due Process Violations

In Count III, Plaintiff identifies three purported bases for Defendants' collective violation of her due process rights: (1) the vagueness of the Executive Order, the manner in which it was interpreted and applied, and the lack of procedural safeguards; (2) the vagueness of the "mass gathering" section of the Executive Order and its application against her; and (3) the bringing of second-degree trespass charges against her without sufficient grounds for doing so. (D.E. 50, ¶¶ 136, 142, 146). As noted above Defendant Freeman is entitled to prosecutorial immunity for the bringing of trespassing charges, *see* Section III, *supra*, and any claims that the Executive Order is vague are moot, *see* Section V, *supra*.

Even if the claim was not moot, however, Plaintiff still fails to state a claim that, facially, the Executive Order was unconstitutionally vague in violation of the Due Process Clause. To survive such a challenge, a contested regulation must (1) "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited;" (2) "provide explicit standards" to prevent "arbitrary and discriminatory enforcement;" and (3) "not impinge upon first amendment rights." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The Executive Order satisfies all three elements.

As the Fourth Circuit has explained, "we consider whether a statute's prohibitions 'are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.'" *United States v. Shrader*, 675 F.3d 300, 310 (4th Cir. 2012) (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973)). However, the statute need not provide "perfect clarity and precise guidance," if its "prohibitions are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Shrader*, 675 F.3d at 310.

In the Second Amended Complaint, Plaintiff alleges that the Executive Order "failed to mention or otherwise address North Carolinians' Constitutionally enshrined rights" and "was silent" regarding the "right to peacefully assemble to petition their government for redress of grievances." (D.E. 50, ¶ 28) Plaintiff does not allege that, before April 14, 2020, she or any other member of ReOpenNC sought clarification from the Governor or challenged the Executive Order's failure to explicitly address the right to protest. (D.E. 50) More importantly, however, the now-challenged omissions from the Executive Order clearly did not dissuade members of ReOpenNC or Plaintiff from protesting in Lot 1 on April 14, 2020. (*Id.* at ¶¶ 29-31) Plaintiff relates having suffered from no personal confusion, now or on April 14, 2020, about whether the Executive Order banned protesting at all, let alone in the way she allegedly protested. Moreover, the Second Amended Complaint attributes confusion about the permissibility of the ReOpenNC protest not to the express provisions of the Executive Order, but to a tweet from RPD's Twitter account during the protest stating that "Protesting is a non-essential activity." (*Id.*

at ¶¶ 45-47) Whatever its purpose or accuracy, the tweet does not render the Executive Order itself unconstitutionally void for vagueness. Plaintiff does not allege any provisions of the Executive Order that she, as a person of presumably ordinary intelligence, was unable to understand.

As for the second element, the Executive Order included amply sufficient standards to prevent arbitrary or discriminatory enforcement. (D.E. 50-1) For example, it specified that individuals could engage in outdoor activity provided they complied with both social distancing requirements and the restrictions on mass gatherings, and the activities satisfied the limitations on "events or convenings in Section 3." (*Id.* at Section 1.3.iii) Elsewhere, the Executive Order expressly defined both "Social Distancing Requirements" (*id.* at Section 3.E), and "mass gathering" (*id.* at Section 3.A.1). Although Plaintiff clearly challenges the defendants' interpretation of the Executive Order, any alleged misapplication by defendants does not render **the terms** of the Executive Order unconstitutionally vague.

With respect to the third element, as argued in Section V.A.1. above, the Executive Order did not infringe upon Plaintiff's rights under the First Amendment. The Executive Order was content neutral and its "stay-at-home" restrictions, which applied equally to all North Carolinians, operated as time, place, and manner restrictions narrowly tailored to serve North Carolina's undoubtedly substantial government interest in reducing the spread of a global pandemic. (D.E. 50-1, Section 1.1) Nor did the Executive Order limit alternative avenues of communication, let alone do so unreasonably, and Plaintiff makes no such allegations otherwise. All in all, Plaintiff has failed to allege any facts suggesting how the

Executive Order, on its face, violated her due process rights because of some purported vagueness. Accordingly, any facial challenge in Count III to the Executive Order on due process or vagueness grounds fails.

To the extent that Plaintiff makes an as-applied challenge in Count III it must be dismissed because she has not stated a property or liberty interest that has been violated. To state a procedural due process claim, a plaintiff must allege: "(1) a cognizable liberty or property interest; (2) the deprivation of that interest by some form of state action; and (3) that the procedures employed were constitutionally inadequate." *Kendall v. Balcerzak*, 650 F.3d 515, 528 (4th Cir. 2011). When assessing a procedural due process claim, "[u]nless there has been a 'deprivation' [of a protected liberty or property interest] by 'state action,' the question of what process is required . . . is irrelevant, for the constitutional right to 'due process' is simply not implicated." *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 (4th Cir. 1988).

While in Count III Plaintiff protests the purported vagueness of the Executive Order, nowhere does she identify the liberty or property interest infringed upon by defendants generally or Defendant Freeman specifically. (D.E. 50, ¶¶ 135-42) Plaintiff does complain that the "defendants' order to disperse" on April 14, 2020, "did not comply with North Carolina law and was based on pretextual reasons," and that "defendants did not have grounds to charge [her] with second-degree trespass." (*Id.* at ¶¶ 143, 146) However, Plaintiff identifies no liberty or property interest implicated by an unlawful order to disperse from a location at which she allegedly had the right to be present or by the issuance of criminal charges initiated upon a finding of probable cause by a magistrate. Nor could

she. *See, e.g., Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 (4th Cir. 1996) (noting that a plaintiff possesses no liberty interest protected by the Fourteenth Amendment's due process clause in prosecution upon less than probable cause and dismissing, on Rule 12(b)(6) grounds, a claim that officer violated due process by failing to terminate criminal proceedings after it became apparent plaintiff was innocent and not the perpetrator). Because, regardless of the "state action" involved, Plaintiff has no protected liberty or property interest here, she cannot satisfy the first element of a procedural due process claim and, so, the claim must be dismissed.

VII. PLAINTIFF FAILS TO STATE A FIRST AMENDMENT RETALIATION CLAIM AGAINST DEFENDANT FREEMAN IN COUNT II.

Plaintiff also alludes to the pursuit of a First Amendment retaliation claim. (D.E. 501, ¶¶ 117-19, 131) "A cognizable First Amendment retaliation claim requires a plaintiff to show: (1) 'that [plaintiff's] speech was protected'; (2) 'defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech'; and (3) 'a causal relationship exists between [plaintiff's] speech and the defendant's retaliatory action.'" *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685-86 (4th. Cir. 2000). To establish a causal connection, a plaintiff must demonstrate that the defendants were aware that she engaged in protected activity. *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998).

In the Second Amended Complaint, Plaintiff identifies an assortment of "retaliatory" acts, including arresting her, prosecuting her, issuing an additional charge of second-degree trespass, delaying or refusing to disclose exculpatory evidence, and bringing

a show cause action against her. (D.E. 50, ¶ 131) Of these alleged acts, however, only two – prosecuting her and failing to disclose exculpatory evidence – are attributable to Defendant Freeman. As argued in Section III above, Defendant Freeman is entitled to absolute prosecutorial immunity from liability for either act. Moreover, any advice Defendant Freeman allegedly provided to law enforcement cannot support a retaliation claim either. If any advice from Defendant Freeman preceded Plaintiff's speech, it could not be retaliatory and, therefore, not only could not have "adversely affected" Plaintiff's speech, but it also could not support any "causal relationship" either. *See, e.g., Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013) (concluding that, in case where plaintiff was arrested by law enforcement for public disturbance after displaying the text of the Fourth Amendment on his chest at an airport security checkpoint, plaintiff's complaint survived a motion to dismiss when the complaint "satisfies all three elements of a First Amendment claim as he alleges: (1) he engaged in constitutionally protected non-violent protest; (2) he was seized as a result of the protest; and (3) the temporal proximity of his peaceful protest and his arrest, unsupported by probable cause, shows Appellants engaged in impermissible retaliation"). Accordingly, Plaintiff fails to state a claim for relief against Defendant Freeman in her individual capacity in Count II for retaliation in violation of the First Amendment.

VIII. IF IT DOES NOT OTHERWISE DISMISS THEM, THIS COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER ANY CLAIMS PLAINTIFF PURPORTS TO BRING AGAINST DEFENDANT FREEMAN IN COUNTS I AND VI UNDER THE NORTH CAROLINA CONSTITUTION OR STATE LAW.

When faced with claims outside of their express adjudicatory authority, a federal court can address those claims if they "are so related to claims . . . within [federal-court competence] that they form part of the same case or controversy." 28 U.S.C. § 1367(a). In order to even exercise supplemental jurisdiction over state law claims, a district court must find that "[t]he state and federal claims . . . derive from a common nucleus of operative fact" if a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

If, however, the court dismisses all claims over which it has original federal jurisdiction, "it ordinarily dismiss[es] all related state claims." *Artis v. Dist. of Columbia*, 538 U.S. 71, 71 (2018). Moreover, the Western District of North Carolina has declined to exercise supplemental jurisdiction over some *Corum* claims if it has dismissed a § 1983 claim predicated on a violation of an analogous provision of the United States Constitution. *See, e.g.*, *Carmona v. Union Cty. Sheriff's Office*, No. 3:21-cv-00366-MR, 2022 U.S. Dist. LEXIS 40083, *9-10 (W.D.N.C. 2022). District courts "enjoy wide latitude in determining whether or not to retain [supplemental] jurisdiction over state claims when all federal claims have been extinguished." *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). Because, as argued above, Plaintiff cannot maintain any viable claim against Defendant Freeman pursuant to 42 U.S.C. § 1983 for purported violations of the United States Constitution, this Court

should decline to exercise supplemental jurisdiction over Plaintiff's analogous *Corum* claims brought against Defendant Freeman in her official capacity.

IX. PLAINTIFF'S CLAIM IN COUNT I FOR CONSPIRACY TO VIOLATE HER CONSTITUTIONAL RIGHTS FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In Counts II through V, Plaintiff specifically pleads her claims as arising under 42 U.S.C. § 1983. (D.E. 50, ¶¶ 114, 134, 149, 161) However, in Count I, Plaintiff provides no such reference to federal law. (*Id.* at ¶¶ 76-112) In Count I, Plaintiff does identify several specific provisions of the North Carolina Constitution which she claims defendants conspired to violate and appears to predicate the conspiracy claim upon those provisions. (*Id.* at ¶¶ 77-79, 109, 111) However, Plaintiff also alleges that the purported conspiracy violated assorted rights of hers under the United States Constitution. (*Id.* at ¶¶ 98, 109) While the distinction between state and federal constitutional rights might ordinarily matter, here it does not, as Plaintiff cannot state a claim upon which relief can be granted under either body of law.

A. Plaintiff Fails to State a Claim under 42 U.S.C. § 1985

Congress has provided that:

> If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3). If Plaintiff's claim in Count I is predicated under this federal provision, her failure to specifically cite it in the Second Amended Complaint requires dismissal. *Rice v. Scholastic Book Fairs, Inc.*, 579 F. Supp. 3d 786, 798-99 (E.D. Va. 2022). However, even if Plaintiff had cited 42 U.S.C. § 1985 anywhere in Count I, her allegations still do not state a claim.

As the Fourth Circuit has explained:

> An action under section 1985(3) consists of these essential elements: (1) A conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus, to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985) (citing *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 828-829 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Ward v. Connor*, 657 F.2d 45, 47 n.2 (4th Cir. 1981)). "To meet the requirement of a class-based discriminatory animus, under this section the class must possess the 'discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex.'" *Buschi*, 775 F.2d at 1257 (quoting *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025, 1028 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974)). The Second Amended Complaint, however, contains no allegations suggesting, let alone permitting this Court to infer, that Plaintiff can satisfy that second element. Instead, the Second Amended Complaint alleges that Plaintiff was targeted for arrest and continued prosecution because of her political viewpoint and her open criticism of Governor Cooper and the Executive Order. (D.E. 50, ¶¶ 79-85, 89-91, 101, 104, 110) Plaintiff's political

viewpoint is neither insular nor immutable and bears no similarity to the class characteristics that qualify for protection under 42 U.S.C. § 1985. Accordingly, if brought pursuant to § 1985, Count I should be dismissed.

B. Plaintiff Fails to State a Conspiracy Claim Under North Carolina State Law

To the extent that Plaintiff brings Count I pursuant to North Carolina law, it is not immediately clear under which theory she seeks to proceed. Plaintiff makes one specific reference to the Supreme Court of North Carolina's decision in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), and another more general reference to a portion of its holding, (D.E. 50, ¶¶ 78, 111). In *Corum*, the court recognized the plaintiff's right to pursue a direct cause of action for money damages from state officials, in their official capacities, for violations of the free speech rights embodied in the North Carolina Constitution. *Corum*, 330 N.C. at 783, 413 S.E.2d at 290. Moreover, *Corum* reiterated both that this direct cause of action was available only in the absence of "an adequate state remedy," *id.* at 782, 413 S.E.2d at 290, and that the doctrine of sovereign immunity "cannot stand as a barrier" to a claim for the vindication of one's rights under the state constitution, *id.* at 785, 413 S.E.2d at 291.

However, Plaintiff can state no viable "conspiracy" claim under *Corum* against Defendant Freeman for two reasons. First, *Corum* recognizes the right to bring direct actions against state officials in their official capacities for violations of specific constitutional rights, not claims predicated on a conspiracy to violate those rights. Second, and more importantly, as Plaintiff implicitly concedes, she has an adequate state remedy

against some defendants for the violations of her state constitutional rights. (D.E. 50, ¶ 111) (alleging that "Plaintiff has no adequate state remedy against certain Defendants").

In the wake of *Corum*, North Carolina's Court of Appeals specifically addressed "whether the adequacy of a remedy depends upon a plaintiff's ability to recover for a particular injury or to recover from a particular defendant." *Taylor v. Wake Cty.*, 258 N.C. App. 178, 178, 611 S.E.2d 648, 649, *disc. rev. denied and appeal dismissed by*, 371 N.C. 569, 819 S.E.2d 394 (2018). In *Taylor*, the plaintiff sought to pursue a direct *Corum* claim against the Wake County Department of Social Services in state superior court while simultaneously pursuing a claim against the North Carolina Department of Health and Human Services in the North Carolina Industrial Commission, where "both claims arise out of the same facts and seek to recover for the same injuries." *Id.* at 181, 811 S.E.2d at 651. The trial court granted Wake County DSS's motions to dismiss and for summary judgment on the grounds that Taylor's claims were barred by the doctrine of governmental immunity and that Taylor had an adequate remedy through her Industrial Commission action against DHHS. *Id.*, 811 S.E.2d at 651. On appeal, the *Taylor* court held that "[s]o long as a plaintiff has a means of recovering for the alleged constitutional injury, the plaintiff may not use *Corum* to assert a direct constitutional claim against the State as a means of bypassing some fatal defense." *Id.* at 189, 811 S.E.2d at 656. *See also Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 437, 528 S.E.2d 911, 915-16 (2000), *rev'd on other grounds by*, 354 N.C. 327, 554 S.E.2d 629 (2001) (holding that "[a]n adequate state remedy exists if, assuming the plaintiff's claim is successful, the remedy would compensate the plaintiff for the same injury alleged in the direct constitutional claim");

Rousselo v. Starling, 128 N.C. 439, 448, 495 S.E.2d 725, 731 (1998) (holding that "the existence of an adequate alternate remedy is premised on whether there is a remedy available to plaintiff for the violation, not on whether there is a right to obtain that remedy from the State in a common law tort action"). Accordingly, if Plaintiff has a state law remedy against ***any*** defendant for the constitutional injuries she allegedly sustained, then no *Corum* claim is available even if her novel "conspiracy" claim under *Corum* conceivably exists.

1. Plaintiff's Available State Law Remedies

The Second Amended Complaint demonstrates quite clearly the existence of multiple state law causes of action for the alleged violations of Plaintiff's rights under Article I, §§ 12, 14, and 19 of the North Carolina Constitution.

a. Malicious Prosecution

To state a claim for malicious prosecution, a plaintiff must prove four essential elements: "(1) that defendant initiated the earlier proceeding, (2) that he did so maliciously and (3) without probable cause, and (4) that the earlier proceeding terminated in plaintiff's favor." *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 12 (1984) (quoting *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979)). Plaintiff herself pleads the elements of this very cause of action in Count I. (D.E. 50, ¶¶ 106-08) Plaintiff's inclusion of these allegations in the Second Amended Complaint quite clearly indicates her recognition of this state cause of action and its applicability to the facts of this case.

b. Abuse of Process

Additionally, a state law claim for abuse of process is also available for the alleged violation of Plaintiff's rights. *See Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, (2007) (quoting *Stanback*, 297 N.C. at 200, 254 S.E.2d at 624). Here, Plaintiff alleges the elements of that alternative state claim by pleading that Defendants had an ulterior motive to illegally enforce the Executive Order against her and undertook various acts in pursuit of that motive. (D.E. 50, ¶¶ 83-86, 89-90, 94, 98, 103, 106-108). Accordingly, Plaintiff herself recognizes that she has an alternative adequate state law remedy for abuse of process.

c. Civil Conspiracy

Plaintiff also alleges elements of state claim for civil conspiracy. To establish civil liability for conspiracy, a plaintiff must allege: "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do [a] lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Privette v. Univ. of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989).

Here, Plaintiff has alleged that "Defendants had agreed to much more than simply stopping a protest and arresting her for being present." (D.E. 50, ¶ 83) Instead, according to the Second Amended Complaint, several defendants participated in a conference call during which an "agreement was reached" on how to deal with ReOpenNC's protest on April 14, 2020. (*Id.* at ¶ 85) That agreement allegedly included arresting protestors for violating the Executive Order despite no prohibition against peaceful assembly. (*Id.* at ¶¶

89, 98, 101, 106-09, 112) The existence of a state civil conspiracy claim under the facts as alleged by Plaintiff here precludes pursuit of any *Corum*-related claims under the North Carolina Constitution against Defendant Freeman, in her official capacity, here. Therefore, this Court should dismiss Count I.

2. Plaintiff's Available State Law Remedies Provide Relief for Her Injuries

Notably, Plaintiff does not allege having suffered any unique injuries for the violations of any specific constitutional right under the North Carolina Constitution. In the Second Amended Complaint, Plaintiff alleges the following:

> [a]s a result of her conviction and then appeal, Ms. Ussery has amassed legal bills, missed time from work, had to travel to her home in High Point to Raleigh, North Carolina, multiple times, has suffered embarrassment, and physical and emotional distress. The prolonged legal process caused significant strain on and the ultimate end of Ms. Ussery's marriage.

(*Id.* at ¶ 75) Her allegations within the individual counts of the Second Amended Complaint are even more conclusory. *See, e.g.*, *id.* at ¶¶ 112, 132, 147, 159, 183, 191.

Since Plaintiff can bring a claim for civil conspiracy, and her claims for malicious prosecution and abuse of process, by her own allegations, originated prior to her arrest on April 14, 2020, and continued until the dismissal of her criminal charges, a potential recovery from ***any*** defendant would compensate her for the injuries she allegedly sustained from her arrest and subsequent prosecution. It does not matter whether she can assert those causes of action against and recover from ***every*** defendant, only that she can recover for the injury from ***some*** defendant. *Taylor*, 258 N.C. App. at 189, 611 S.E.2d at 656. Since Plaintiff has – and tacitly admits to having – state law remedies against some defendants,

she cannot state a claim for relief under *Corum* or its progeny against Defendant Freeman. Therefore, Count I should be dismissed.

X. FOR SIMILAR REASONS, PLAINTIFF'S CLAIMS IN COUNT VI, AS AGAINST DEFENDANT FREEMAN, FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

For the same reasons set forth in Section IX.B. above, any direct cause(s) of action for money damages Plaintiff purports to have against Defendant Freeman in her official capacity under the North Carolina Constitution fails to state a claim upon which relief can be granted. As explained, to the extent that such claims are not categorically barred by Eleventh Amendment immunity, Plaintiff has numerous alternative and adequate state law remedies for which she can recover for her alleged financial and emotional damages arising out of the alleged violations of her state constitutional rights.

CONCLUSION

For the foregoing reasons, as summarized in the chart below, this Court should grant Defendant Freeman's motion to dismiss the Second Amended Complaint.

Claim	Official Capacity	Individual Capacity
Count I: Civil Conspiracy to violate *state* constitutional rights (all defendants)	The Eleventh Amendment Bars this claim. *See* Section I. In addition, to the extent this claim is brought as a *Corum* claim, only direct constitutional claims, not conspiracies, are recognized under *Corum*. *See* Section IX.B. Finally, this Court should decline to exercise supplemental jurisdiction over these state constitutional claims. *See* Section VIII.	To the extent this claim is brought as a *Corum* claim, only direct constitutional claims, not conspiracies are recognized under *Corum*. *See* Section IX.B. *Corum* also does not authorize individual capacity claims. *See* Section IX.B.

Count I: Civil conspiracy to violate *federal* constitution rights (all defendants)	The Eleventh Amendment Bars this claim. *See* Section I. In addition, to the extent that this claim is being brought pursuant to Section 1985, Plaintiff fails to state a claim because she has not alleged a Section 1985 claim specifically and because she has not alleged that she is being subjected to class-based discriminated. *See* Section IX.A.	Prosecutorial immunity bars this claim to the extent it is based on Defendant Freeman's prosecution of Plaintiff, including allegations that evidence was withheld in the prosecution. *See* Section III. In addition, to the extent that this claim is being brought pursuant to Section 1985, Plaintiff fails to state a claim because she has not alleged a Section 1985 claim specifically and because she has not alleged that she is being subjected to class-based discriminated. *See* Section IX.A.
Count II: 1983 First Amendment claim (all defendants)	The Eleventh Amendment Bars this claim. *See* Section I. In addition, Section 1983 does not authorize official capacity claims for money damages or retrospective relief. *See* Section I.	Prosecutorial immunity bars this claim to the extent it is based on Defendant Freeman's prosecution of Plaintiff, including allegations that evidence was withheld in the prosecution. *See* Section III. In addition, Defendant Freeman is entitled to qualified immunity for her advice to law enforcement on enforcement of Executive Order 121. *See* Section IV. Further, to the extent this claim makes a facial challenge against the Executive Order, it is moot. *See* Section V. Finally, Plaintiff fails to state an as-applied challenged against Defendant Freeman. *See* Section VI.
Count III: 1983 Due Process (all defendants)	The Eleventh Amendment Bars this claim. *See* Section I. In addition, Section 1983 does not authorize official capacity claims for money damages or retrospective relief. *See* Section I.	Prosecutorial immunity bars this claim to the extent it is based on Defendant Freeman's prosecution of Plaintiff, including allegations that evidence was withheld in the prosecution. *See* Section III. In addition, Defendant Freeman is entitled to qualified immunity for her advice to law enforcement on enforcement of the Executive Order. *See* Section IV. Further, to the extent this claim makes a facial challenge against the Executive Order, it is moot. *See* Section V. Finally, Plaintiff fails to state an as-

		applied challenge against Defendant Freeman. *See* Section VI.
Count IV: 1983 due process/*Brady* (Defendant Freeman)	The Eleventh Amendment Bars this claim. *See* Section I. In addition, Section 1983 does not authorize official capacity claims for money damages or retrospective relief. *See* Section I.	Prosecutorial immunity bars this claim. *See* Section III.
Count V: 1983 equal protection (Defendant Freeman)	The Eleventh Amendment Bars this claim. *See* Section I. In addition, Section 1983 does not authorize official capacity claims for money damages or retrospective relief. *See* Section I.	Prosecutorial immunity bars this claim because it is based on Defendant Freeman's prosecution of Plaintiff. *See* Section III.
Count VI: *Corum* (all defendants)	The Eleventh Amendment Bars this claim. *See* Sections I, X. Further, Plaintiff has failed to state a *Corum* claim because other remedies are available. *See* Sections IX.B., X. Finally, this Court should decline to exercise supplemental jurisdiction over these state constitutional claims. *See* Section VIII.	*Corum* does not authorize individual capacity claims. *See* Section IX.B.

Respectfully submitted, this the 20th day of December, 2023.

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CERTIFICATION OF WORD COUNT

The undersigned hereby certifies that the foregoing memorandum complies with this Court's Order (D.E. 52) in that, according to the word processing program used to produce this brief (Microsoft Word), the document does not exceed 12,000 words exclusive of caption, cover, signature lines, index, and certificate of service.

Respectfully submitted, this the 20th day of December, 2023.

/s/Joseph Finarelli
Joseph Finarelli
Special Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OF DEFENDANT LORRIN FREEMAN** using the CM/ECF system, which will send notification of such filing to all registered CM/ECF users at the following addresses:

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This the 20th day of December, 2023.

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