UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:23-cv-00219-BO-RJ

MONICA FAITH USSERY, Plaintiff, v. LORRIN FREEMAN, in her individual and official capacity as Wake County District Attorney, et al. Defendants.	)	**MEMORANDUM OF LAW IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS** [Fed. R. Civ. P. 12(b)(1) and 12(b)(6)]

NOW COME Defendants, in their individual and official capacities, the HONORABLE ERIK A. HOOKS, Secretary of the North Carolina Department of Public Safety; ROGER "CHIP" HAWLEY, Chief of North Carolina State Capitol Police; MARTIN BROCK, Chief of the North Carolina General Assembly Police Department; DERICK PROCTOR, officer of North Carolina State Capitol Police; and TITO FINK, an officer of the North Carolina State Capitol Police (hereinafter "State Defendants"), by and through undersigned counsel, and hereby submit this memorandum of law in support of their Motion to Dismiss Plaintiff's Second Amended Complaint, and all claims asserted therein.

NATURE OF THE CASE

Plaintiff commenced this action by filing a Complaint on April 21, 2023, naming Governor Roy Cooper (in his official capacity), Wake County District Attorney Lorrin Freeman (in her individual and official capacity) and several others as defendants [D.E. 1].

Plaintiff subsequently filed an Amended Complaint on May 1, 2023 [D.E. 11]. The Amended Complaint asserted claims pursuant to 42 U.S.C. § 1983 for an alleged violation of Plaintiff's constitutional rights under the First and Fourteenth Amendments; and a claim that Defendants conspired to deprive Plaintiff of her rights in violation of the North Carolina Constitution.

On May 17, 2023, Waiver of Service of Summons were filed for each of the State Defendants named in the Amended Complaint [D.E. 14-D.E. 19], making their deadline to respond due on July 6, 2023. With the consent of Plaintiff's counsel, State Defendants filed two Consent Motions for Extension of Time to file responsive pleadings.

On September 9, 2023, Plaintiff filed a Motion for Leave to file a Second Amended Complaint (SAC) [D.E. 42], which was granted on November 7, 2023 [D.E. 48]. Plaintiff subsequently filed her Second Amended Complaint on November 15, 2023 [D.E. 50].

The Second Amended Complaint removed Governor Cooper as a named defendant, and names the City of Raleigh, Raleigh's Chief of Police, a Raleigh Police Captain, and Raleigh Police Officers John and Jane Does 1-4, Wake County District Attorney, Lorrin Freeman; the Secretary of the North Carolina Department of Public Safety; several officers of the North Carolina State Capitol Police, and the Chief of the North Carolina General Assembly Police Department as defendants. All defendants are sued in both their individual and official capacities.

Plaintiff's Second Amended Complaint asserts six causes of action:

- Count I: Conspiracy to deprive Plaintiff of her rights under the North Carolina Constitution against all defendants [D.E. 50, ¶¶ 76-112];

- Count II: A 42 U.S.C. § 1983 claim for violation of the First Amendment against all defendants [*Id.* at ¶¶ 113-32];
- Count III: A Section 1983 claim for violation of due process under the Fourteenth Amendment to the United States Constitution against all defendants [*Id.* at ¶¶ 133-47];
- Count IV: A Section 1983 claim for a *Brady* violation against Defendant Freeman [*Id.* at ¶¶ 148-59];
- Count V: A Section 1983 claim for violation of equal protection under the Fourteenth Amendment against all defendants [*Id.* at ¶¶ 160-78]; and
- Count VI: Claims for violations of Article I, §§ 12, 14, and 19 of the North Carolina Constitution against all defendants [*Id.* at ¶¶ 184-91].

Collectively, Plaintiff seeks declaratory relief, compensatory and nominal damages, and costs and expenses of this action, including reasonable attorney's fees. [*Id.* at p 46]

On November 21, 2023, the parties filed a Joint Consent Motion to Establish Briefing Schedule [D.E. 51] which was granted on November 29, 2023 [D.E. 52]. The State Defendants now move to dismiss Plaintiff's SAC pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

BACKGROUND AND RELEVANT FACTS[1]

The COVID-19 pandemic was the worst public-health crisis that our country has

[1] While Plaintiff's allegations are assumed to be true for the purposes of this motion, the State Defendants reserve the right to contest them at the appropriate time if the case proceeds.

faced in a century. The virus has killed more than one million Americans.[2] North Carolina has not been spared from the virus's heavy toll: Although the State's response to the pandemic was especially effective,[3] COVID-19 still resulted in the death of almost 30,000 North Carolinians.[4]

The actions at issue in this case occurred three years ago, long before the first vaccines or effective treatments were developed, and before temporary restrictions designed to protect the public could be eased. At that time, the rapidly spreading disease had crippled medical systems in Europe and was threatening to do the same in the United States.[5] By late March 2020, hospitals in New York were "overwhelmed": They were "running out of ventilators," lacked medical supplies, and were "so overrun with dying patients" that they needed "refrigerated trucks to handle the bodies."[6] When state officials took the actions that are now challenged in this case, the overwhelming scientific and policymaking consensus was that swift and decisive measures were needed to prevent a similar outcome in North Carolina.

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[2] *See* Centers for Disease Control & Prevention, *COVID Data Tracker*, https://bit.ly/3RiZ9ZC (last visited December 13, 2023).

[3] *See* Adam McCann, *Safest States During COVID-19*, WalletHub (Oct. 23, 2022), https://bit.ly/3APXFz2 (finding that North Carolina had the fifth most effective response to Covid-19 among the fifty states) (last visited December 13, 2023).

[4] (Archive) *COVID-19 Cases and Deaths Dashboard*, NCDHHS COVID-19 Response (last visited May 2, 2023), https://bit.ly/4482FwK (last visited December 13, 2023).

[5] Marcus Walker & Mark Maremont, *Lessons From Italy's Hospital Meltdown. 'Every Day You Lose, The Contagion Gets Worse.'*, Wall St. J. (March 17, 2020), https://bit.ly/3LJNF14 (last visited December 13, 2023).

[6] Frank Miles & Cyd Upson, *NYC Hospitals 'Overwhelmed' By Coronavirus Patients, Resident Warns*, Fox News (Mar. 26, 2020), https://www.foxnews.com/health/nyc-hospitals-overwhelmed-by-coronavirus-patients-resident-warns (last visited December 13, 2023).

Starting on March 10, 2023, Governor Cooper exercised his statutory authority under the Emergency Management act to issue a series of executive orders to slow the virus's spread. *See* N.C. Gen. Stat. §§ 166A-19.30, 166A-19.31 (2020); *see Forest v. Cooper*, No. 20 CVS 7272, 2020 WL 4630333, at *13 (Wake Cnty. Super. Ct. August 11, 2020) (holding that the Governor's pandemic-related emergency orders fell within his statutory authority).[7]

On March 13, 2020, President Trump declared a national emergency in response to COVID-19 and warned that the virus "threaten[ed] to strain our Nation's healthcare systems." Proclamation No. 9994, 85 Fed. Reg. 15337, 15337 (March 13, 2020). The next day, Governor Cooper temporarily paused mass gatherings in any "confined indoor or outdoor space." EO 117, § 1.a, 34 N.C. Reg. 1831, 1832 (March 14, 2020).

On March 25, 2020, President Trump approved a Major Disaster Declaration for North Carolina. Press Release, FEMA, *President Donald J. Trump Approves Major Disaster Declaration for North Carolina*, (March 25, 2020), https://bit.ly/3mOm4lP. By March 27, COVID-19 cases in North Carolina had begun to alarmingly rise across the State. EO 121, 34 N.C. Reg. 1903, 1903 (March 27, 2020).

To contain further spread of the virus, Governor Cooper issued Executive Order 121, which ordered "all individuals currently in the State of North Carolina" to "stay at

[7] The Emergency Management Act has since been amended to require that the Governor obtain the Council of State's consent for orders like those at issue here. *See* Current Operations Appropriations Act of 2021, S.L. No. 2021-180, sec. 19E.6(c) (codified at N.C. Gen. Stat. § 166A-19.30(c1)(2)). Plaintiff does not contend that the Governor lacked statutory authority in 2020 to issue the orders at issue in this case.

home" except for limited purposes provided in the order.[8] *Id.* at 1905-06, 1911, §§ 1, 3.A.1. The order also limited "mass gatherings" to groups of ten or fewer individuals when gathered in a "confined indoor or outdoor space." [SAC ¶ 28] EO 121 further provided that:

> To the extent individuals are using shared or outdoor spaces when outside their residence, they must at all times and as much as reasonably possible, *maintain social distancing of at least six (6) feet from any other person, with the exception of family or household members,* consistent with the Social Distancing Requirements set forth in this Executive Order. All persons may leave their homes or place of residence only for Essential Activities, Essential Governmental Operations, or to participate in or access COVID-19 Essential Businesses and Operations, all as defined below.

EO 121 at 3.

On April 14, 2020, ReOpen NC, a group of activists organized on Facebook, held their first protest to criticize EO 121 in a parking lot (Lot 1) on the State Government Complex in Raleigh. Many of the protesters—who numbered more than 100—were not socially distanced in accordance with the requirements memorialized by EO 121, causing officers from the Raleigh Police Department (RPD) to warn the protesters to disperse. [SAC ¶ 35] RPD Captain Bond issued three warnings to the protesters gathered in Lot 1. [SAC ¶ 35-36, 95]

As other protesters dispersed, Plaintiff told her stepson to leave "while she walked out of Lot 1 to take pictures[.]" [SAC ¶ 40]. Plaintiff walked off the lot, and then returned to give her stepson the keys to the car and instructed him to drive away. When RPD officers

[8] EO 121 enumerates certain "essential activities," such as work, volunteering, taking care of loved ones, obtaining supplies, seeking medical care, or participating in socially distanced outdoor activities that justify leaving one's home. *Id.*

instructed Plaintiff to leave the lot, she replied that "I can't. My ride just left." [SAC ¶ 41]. Following repeated orders to leave, and Plaintiff's refusal to comply, Officers Proctor and Frink of the State Capitol Police (SCP) arrested her for violation of EO121.

The SCP officers drove Plaintiff to the Wake County Detention Center for processing, presented probable cause for the arrest to a Wake County Magistrate, and released Plaintiff after about an hour of detention with orders to appear in Wake County District Court on June 25, 2020. [SAC ¶¶ 42-44]. The SCP also filed a criminal complaint against Plaintiff for second-degree criminal trespass stemming from her failure to leave Lot 1 after being ordered to do so. [SAC ¶ 59].

One week later, on April 20, 2020, Plaintiff's counsel made an inquiry of the Governor's office regarding the scope of EO121. In response to that inquiry, the Governor's office explained that the executive order "provides room for outdoor protests to continue" as long as the "protesters maintain the Social Distancing Requirement that individuals remain at least six feet apart."[9]

Plaintiff contested the charges against her. As part of her defense, Plaintiff served subpoenas on Governor Cooper and his General Counsel to testify regarding the meaning of the Order. [SAC ¶ 58]. At a bench trial on June 4, 2021, Plaintiff was found guilty both of violating EO121 and of second-degree trespass and was fined $300. [SAC ¶ 60]. She promptly appealed to Superior Court. [*Id.*]

In May 2022, in advance of her appeal in Superior Court, Plaintiff petitioned the

[9] *See* SAC, Ex. 7 at 2.

Court for the release of RPD and SCP recordings from the day of her arrest. [SAC ¶ 67]. On July 27, 2022, Wake County Superior Court Judge Keith O. Gregory granted her petition and ordered RPD and SCP to release to Plaintiff recordings from that day. [SAC ¶¶ 67-68]. RPD complied with the order on July, 27 2022, while SCP did so on August, 18 2022. [SAC ¶ 69]

On November 23, 2022, Plaintiff moved to dismiss the criminal charges against her on constitutional grounds. In response, the District Attorney offered her a deferral in which the charges would be dismissed, and her criminal record expunged if she performed 25 hours of community service. [SAC ¶¶ 70-71]. Plaintiff accepted the terms of deferral and completed her 25 hours of service. The charges against her were subsequently dismissed on February 20, 2023. [SAC ¶ 72].

QUESTIONS PRESENTED

I. Whether Plaintiff's claims against the State Defendants in their official capacities are barred by the Eleventh Amendment and sovereign immunity.

II. Whether Plaintiff's claims against the State Defendants in their individual capacities are barred or should otherwise be dismissed for failure to state a claim.

III. Whether Plaintiff's claims against the State Defendants should be dismissed because she has failed to allege any actions by them that could legitimately give rise to any such claims.

IV. Whether Plaintiff's First Amendment claim should be dismissed for failure to state a claim.

V. Whether Plaintiff's Due Process claim should be dismissed for failure to state a claim.

VI. Whether Plaintiff's Equal Protection claim should be dismissed for failure to state a claim.

VII. Whether Plaintiff's claims are barred by the doctrine of qualified immunity.

STANDARD OF REVIEW

The question of sovereign immunity may be raised as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. On a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden of proving subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). "Without jurisdiction the court cannot proceed at all in any cause." *Stop Reckless Econ. Instability Caused By Democrats v. FEC*, 814 F.3d 221, 228 (4th Cir. 2016) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869)). "When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), the district court regards the pleadings as mere evidence on the issue, and may elect to consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans*, 166 F.3d at 647 (citations omitted).

To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a complaint must include facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the claim is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A claim is plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" – a standard that requires more than facts "that are 'merely consistent with' a defendant's liability." *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009) (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

ARGUMENT

I. ALL OF PLAINTIFF'S CLAIMS AGAINST THE STATE DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE BARRED BY THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY.

Plaintiff has alleged that the State Defendants' conduct violated her federal and state constitutional rights, and therefore seeks monetary damages.[10] She has brought her claims against the State Defendants in both their official and individual capacities. However, the Eleventh Amendment to the United States Constitution and the doctrine of sovereign immunity bar her official capacity claims.

The Eleventh Amendment to the U.S. Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. However, state sovereign immunity predated the Eleventh Amendment. Indeed, the state's sovereign immunity is "based on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Nevada v. Hall*, 440 U.S. 410, 416 (1979).

[10] Plaintiff's federal constitutional claims have been brought, as they must, pursuant to 42 U.S.C. § 1983. Her state constitutional claims have been brought directly.

"The Eleventh Amendment confirmed[,] rather than established[,] sovereign immunity as a constitutional principle." *Alden v. Maine*, 527 U.S. 706, 728-29 (1999). As such, the Fourth Circuit has described Eleventh Amendment immunity as "but an example of state sovereign immunity." *Stewart v. North Carolina*, 393 F.3d 484, 488 (4th Cir. 2005). It has long been settled that absent waiver or abrogation by Congress of a state's sovereign immunity as confirmed in the Eleventh Amendment, suits may not be brought in federal court against a state by one of its citizens. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Edelman v. Jordan*, 415 U.S. 651 (1974); *see also Guthrie v. North Carolina State Ports Authority*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983) ("It has long been established that an action cannot be maintained against the State of North Carolina or an agency thereof unless it consents to be sued or upon its waiver of immunity, and that this immunity is absolute and unqualified."); *Welch Contracting, Inc. v. N.C. Dep't of Transp.*, 175 N.C. App. 45, 51, 622 S.E.2d 691, 695 (2005) (recognizing that North Carolina, its agencies, and its officials "may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit").

This bar includes claims asserted pursuant to 42 U.S.C. § 1983. First, the State of North Carolina has not waived its sovereign immunity as to 42 U.S.C. § 1983. *Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1139 (4th Cir. 1990); *Stewart v. Hunt*, 598 F. Supp. 1342, 1350-51 (E.D.N.C. 1984). Second, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" for the purpose of recovering money damages. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 92 (1989); *Corum v.*

UNC, 330 N.C. 761, 771, 413 S.E.2d 276, 282-83 (1992). "State officers sued for damages in their official capacity are not 'persons' for purposes of the [Section 1983] suit because they assume the identity of the government that employs them." *Hafer v. Melo*, 502 U.S. 21, 27 (1991); *Corum*, 330 N.C. at 771, 413 S.E.2d at 282-83.

Plaintiff's pursuit of monetary damages against the State Defendants in their official capacities is barred by the Eleventh Amendment and the doctrine of sovereign immunity.[11] *See, e.g., Alden*, 527 U.S. at 747; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)*; Huang v. Bd. of Governors*, 902 F.2d 1134, 1138 (4th Cir. 1990). Indeed, a suit against government employees in their official capacities is a suit against the State. Thus, when the State is protected by sovereign immunity, so are individual defendants who are being sued in their official capacities. *See Harwood v. Johnson*, 326 N.C. 231, 239, 388 S.E.2d 439, 443 (1990). *Each* of the State Defendants in this case are protected from suit by sovereign immunity.

Further, "[i]t is well settled that the Eleventh Amendment bars a suit by private parties to recover money damages from the state or its alter egos acting in their official capacities." *Huang*, 902 F.2d at 1138. The Eleventh Amendment acts as a complete bar on

[11] Although the North Carolina Supreme Court has recognized that in very limited circumstances a plaintiff may file a direct North Carolina constitutional claim against the state or its agents, *see Corum*, 330 N.C. at 782-84, 413 S.E.2d at 289-91, those claims are still barred in federal court by the Eleventh Amendment. *See, e.g. Dove v. Stevens*, No. 5:05-CV-33-BO(1**),** 2006 U.S. Dist. LEXIS 111792, at *10-11 (E.D.N.C. Oct. 22, 2006) (noting that "the Eleventh Amendment divests federal courts of jurisdiction over such [*Corum*] claims").

claims which seek to impose a liability which must be paid from the state treasury. *Edelman*, 415 U.S. 651.

In sum, Plaintiff cannot assert claims for monetary damages against the State Defendants in their official capacity and those claims must be dismissed.

II. PLAINTIFF'S CLAIMS AGAINS THE STATE DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES ARE BARRED BY SOVEREIGN IMMUNITY AND OTHERWISE SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Plaintiff has also asserted her claims against the State Defendants in their individual capacities. However, Plaintiff cannot assert a state constitutional claim against a state official in their individual capacity. Moreover, Plaintiff has otherwise failed to allege any acts or conduct by the State Defendants that violated her constitutional rights.

A. Plaintiff May Not Assert *Corum* Claims Against the State Defendants in Their Individual Capacities.

In *Corum v. University of North Carolina*, 330 N.C. 761, 782-84, 413 S.E.2d 276, 289-91 (1992), the North Carolina Supreme Court held that in very limited circumstances, a plaintiff may file a direct North Carolina constitutional claim against the state or its agents. However, it has been clearly established that these so-called *Corum* claims are only available in official capacity claims and cannot be brought against government officials in their individual capacities. *Corum*, 330 N.C. at 789, 413 S.E.2d at 293; *Swain v. Elfland,* 145 N.C. App. 383, 391, 550 S.E.2d 530, 536 (2001) ("To the extent that plaintiff alleges a *Corum* claim against defendants in their individual capacity, the claim must be dismissed."); *see also Crain v. Butler*, 419 F. Supp. 2d 785, 793 (E.D.N.C. 2005). As such, plaintiff cannot state a *Corum* claim against the State Defendants in their individual

capacities and those claims must be dismissed. *See Corum*, 330 N.C. at 788, 413 S.E.2d at 292-93 ("As a matter of fundamental jurisprudence the [North Carolina] Constitution itself does not recognize or create rights which may be asserted against individuals.").

B. Plaintiff's Conspiracy Claim Fails As a Matter of Law.

Plaintiff alleges that the State Defendants conspired to violate her state constitutional rights. However, North Carolina courts do not recognize an independent cause of action for civil conspiracy. *Spirax Sarco, Inc.* v. *SSI Eng'g, Inc.*, 122 F. Supp. 3d 408, 420 (E.D.N.C. 2015); *Toomer v. Garrett*, 155 N.C. App. 462, 483 (2002) ("There is no independent cause of action for civil conspiracy."). Rather, it is a theory of liability; "once the elements of a civil conspiracy are established, all conspirators are jointly and severally liable for damages resulting from an act performed by any one of them in furtherance of the conspiracy." *Id.* (quoting *Jackson v. Blue Dolphin Comms of N.C., LLC*, 226 F. Supp. 2d 785, 791 (W.D.N.C. 2002)).

In order to pursue this theory of liability, a claimant must sufficiently allege (1) an agreement between two or more individuals; (2) wrongful acts done by the alleged conspirators; (3) resulting in an injury to the plaintiff; and (4) pursuant to a common scheme. *See Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 416, 537 S.E.2d 248, 265 (2000); *Privette v. Univ. of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989). At bottom, civil conspiracy claims require an underlying unlawful act which proximately caused an identified harm. *Toomer*, 155 N.C. App. at 483 ("Only where there is an underlying claim for unlawful conduct can a plaintiff state a claim for civil conspiracy by also alleging the agreement of two or more parties to carry out the

conduct and injury resulting from that agreement.").

In this case, Plaintiff has failed to sufficiently allege facts supporting a civil conspiracy claim.[12] Indeed, Plaintiff has not sufficiently alleged that there was an agreement amongst the State Defendants,[13] let alone sufficient facts indicating any wrongful acts that resulted in an injury to Plaintiff as part of a common scheme. Rather, Plaintiff's SAC is replete with vague and conclusory statements regarding the alleged conspirators and fails to state a claim for civil conspiracy liability.

III. THE STATE DEFENDANTS SHOULD BE DISMISSED FROM THE CASE BECAUSE PLAINTIFF HAS NOT ALLEGED ANY CONDUCT BY THEM THAT WOULD GIVE RISE TO ANY CLAIMS.

Even if Plaintiff could assert claims against the State Defendants, those claims necessarily fail because Plaintiff has not alleged any actions taken by the State Defendants that could give rise to *any* claims against them. Although Rule 8 requires only notice pleading, a complaint still must include allegations of some wrongful conduct *by a defendant* that resulted in harm to the plaintiff. Indeed, a complaint must set forth sufficient facts and detail so that it is clear exactly which defendant is alleged to have committed what acts and to whom. *See Fox v. City of Greensboro et al.*, 807 F. Supp. 2d 476, 494-95 (M.D.N.C. 2011) (dismissing plaintiffs' 14th Amendment claim because plaintiffs failed to

[12] Moreover, as detailed above, even if Plaintiff could plead a civil conspiracy claim, that claim necessarily fails because the state-constitutional claim underlying it fails as a matter of law.

[13] Plaintiff uses the general term "Defendants" throughout her SAC, rarely specifying which defendant did what. Thus, it is impossible to discern whether all the named defendants had any interactions with each other. This lack of detail and the fact the defendants worked for various different state and municipal entities makes it implausible that the defendants had an agreement.

provide an indication "of what actions each Defendant allegedly took"); *Bryant v. Wells Fargo Bank, N.A.*, 861 F. Supp. 2d 646, 653 (E.D.N.C. 2012) (dismissing plaintiff's amended complaint in part because plaintiff failed "to allege which of the multitude of defendants" did what to whom and when); *see also Boykin Anchor Co. v. AT&T Corp.*, NO. 5:10-CV-591-FL, 2011 U.S. Dist. LEXIS 40783, at *14 (E.D.N.C. Apr. 14, 2011) (finding that "plaintiff cannot rely on bare allegations relating to the conduct of all defendants . . . but must identify specific acts or conduct taken by each defendant to state a claim") (internal quotations omitted).

Here, Plaintiff's SAC barely mentions the State Defendants individually by name, reference, implication, or otherwise – and it is impossible to discern any action taken by any of these defendants that would substantiate Plaintiff's complaints. For most of these defendants, Plaintiff has not alleged that they have taken any action at all, much less an action that constituted constitutional violations.[14] For example, despite the fact that the SAC features 191 numbered paragraphs, Secretary Hooks is named in only three paragraphs [SAC ¶¶ 83, 85, 89], Chief Hawley in five [*id.* ¶¶ 59, 83, 85, 89, and 106], Officer Proctor in five [*id.* ¶¶ 42-43, 59, 62, and 106], Chief Brock in one [*id.* ¶ 83], and Officer Frink in one [*id.* ¶ 42].[15]

[14] It is axiomatic that a defendant in a Section 1983 suit may not be held liable for damages absent "person involvement" in the conduct resulting in the constitutional violation. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *King v. Riley*, 76 F.4th 259, 269 (4th Cir. 2023); *Victory v. Pataki*, 814 F.3d 47, 67 (2d Cir. 2016); *Butler v. City of New York*, 559 F. Supp. 3d, 253, 273 (S.D.N.Y. 2021).

[15] This does not include the section detailing the parties to the action, in which each of the State Defendants is named one time.

In sum, while Plaintiff has made general allegations and claims against "all Defendants," she has not made any specific allegations as to the individual State Defendants – at least not any that sufficiently support a claim against them. Accordingly, the State Defendants should be dismissed from the case.

IV. PLAINTIFF'S FIRST AMENDMENT CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

In this case, Plaintiff makes a facial and an as-applied challenge to EO 121. Specifically, Plaintiff alleges that EO 121 "on its face and as interpreted and as applied by [the State Defendants] infringed on" her First Amendment rights "by chilling, deterring, and restricting [her] protected speech.[16] [SAC ¶ 122] She complains that Defendants enforced EO 121's socially distancing requirement for mass gatherings of "protesters critical of Defendants' lockdown policies," but did not do so for other protests. [*Id.* ¶ 126]. As a direct result, Plaintiff asserts that she was punished, and her speech-based content and viewpoint was suppressed.[17] [SAC ¶ 117] Plaintiff also contends that because EO 121 infringed upon free-speech rights strict scrutiny applies. Plaintiff's First Amendment claim fails for several reasons.

First, the First Amendment is inapplicable in this case because the social distancing

[16] To the extent that Plaintiff is facially challenging an expired EO, her claim must be dismissed as moot. *See, e.g., Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (dismissing as moot constitutional challenges to expired COVID-19 orders); *Martinko v. Whitmer*, 465 F. Supp. 3d 774, 777 (E.D. Mich. 2020) (same).

[17] Plaintiff also alleges the defendants retaliated against her in violation of the First Amendment through the subsequent criminal proceedings. However, this claim cannot be asserted against the State Defendants because none of them were involved in the criminal proceedings against Plaintiff.

requirements in EO 121 and the laws of trespass involve the regulation of conduct, not protected speech. Second, the First Amendment does not protect the right to violate a generally applicable law (or Executive Order) like EO 121 or trespass in order to engage in speech. Finally, even if the First Amendment were applicable in this case, and the State Defendants deny that it is, the social distancing requirement for mass gatherings passes constitutional muster because it is a content and viewpoint-neutral requirement intended to protect the public's health and safety by reducing the spread of a deadly disease.

A. The First Amendment is inapplicable in this case because the social distancing requirement for mass gatherings at issue and the laws of trespass involve the regulation of conduct, not protected speech.

In resolving a First Amendment challenge, courts first decide whether the speech or speech-related activity at issue is "protected by the First Amendment, for, if it is not, [a court] need go no further." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *see also Barnes v. Glen Theatre*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring) (recognizing that a general law regulating conduct that is not specifically directed at expression is not subject to First Amendment scrutiny). An individual invoking First Amendment protection bears the burden of demonstrating that the First Amendment is even applicable. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984); *see also Hest Techs., Inc. v. North Carolina*, 366 N.C. 289, 297 (2012) ("It is well established "that not all speech is protected speech."). Defendant cannot meet that burden in this case.

Plaintiff contends that the social distancing requirements of EO 121 chilled, deterred, and otherwise restricted her "protected speech" in violation of the First Amendment. [SAC ¶ 122] However, a general law regulating conduct that is not specifically directed at expression is not subject to First Amendment protection. *Barnes*, 501 U.S. at 572. Rather, the First Amendment only protects speech or "conduct that is inherently expressive." *Rumsfeld v. Forum for Acad & Inst'l Rights, Inc.,* 547 U.S. 47, 66 (2006); *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) (rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

Conduct that is merely accompanied by speech is not protected simply because the speech itself might be so protected. *Rumsfeld*, 547 U.S. at 66. Indeed, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (citation omitted). A statute regulates conduct, not speech, when it affects what a person "must *do* . . . not what they may or may not *say*." *Id.* at 60.

In this case, the First Amendment is not implicated because the social distancing requirements at issue regulate conduct, not speech. *See* EO 121. The same is true with the State's statute prohibiting second-degree trespass. *See* N.C. Gen. Stat. §14-159.13.

EO 121's social-distancing requirements for mass gatherings made it clear that it was focused on *behavior or conduct* that could have spread COVID-19. The order made it clear that people were urged to stay at home in order to prevent the spread of the disease.

However, if people were to engage in voluntary outdoor activities, like protesting or group exercising, they needed to maintain appropriate social distance (at least six feet). Similarly, Second-Degree Trespass only applies to conduct; specifically, instances where a person "enters or remains on the premises of another" without authorization. N.C. Gen. Stat. § 14-159.13.

The plain language of EO 121 and the trespass statute establish a focus on regulating specific conduct or behavior of individuals, regardless of any message they may seek to convey. Thus, by their clear terms, the trespass statute and EO 121 regulate what a person can or cannot *do*, not what they can or cannot *say*.

B. The First Amendment Does Not Protect the Right to Violate a Generally Applicable Order Like EO 121, or a Law Like Trespass, In Order to Engage in Speech.

Moreover, the First Amendment does not provide a right to trespass, even for those seeking to gather information or engage in speech-related activities. *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 568 (1972); *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (recognizing that the First Amendment does not confer the right to trespass—or violate any other generally applicable law—in order to facilitate protected speech).

The Supreme Court has "vigorously and forthrightly" disavowed the premise that individuals have a constitutional right to engage in speech-related activities "whenever and however and wherever they please." *Lloyd Corp.*, 407 U.S. at 568; *see also Virginia v. Hicks*, 539 U.S. 113, 123 (2003) (determining trespassing plaintiff from the streets of a public housing development did not implicate the First Amendment). To hold otherwise "would tend to license a form of trespass." *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728,

737 (1970); *see also Adderley v. Florida*, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."); *United States v. Gump*, No. 3:10-CR-94, 2013 U.S. Dist. LEXIS 173355, at *44 (E.D. Tenn. May 6, 2013) (recognizing that Defendant's First Amendment rights to freedom of speech is not a defense to the crime of trespass). Even a person's authorized access to property does not warrant First Amendment protection if that person commits an act that exceeds and abuses the authorized entry. *See, e.g., United States v. Best*, 476 F. Supp. 34, 41 (D. Colo. 1979) ("The First Amendment doesn't guarantee someone a right to break the criminal law. Freedom of expression doesn't mean freedom to make, ignore or violate the criminal law.").

In this case, Plaintiff's acts violated the social distancing requirements of EO 121 and she refused to leave State property when repeatedly ordered to do so. By refusing to comply with these warnings, Defendant committed acts that exceeded her authority to remain on State property and, therefore, she was properly arrested.

C. Even if the First Amendment Applies, the Social Distancing Guidelines and the Trespass Statute Are Viewpoint and Content Neutral, and are Narrowly Tailored to Serve a Substantial Government Interest.

Plaintiff contends that EO 121 discriminates based on content and viewpoint and therefore requires strict scrutiny. However, EO 121 was a law of general application and there were no clear, discriminatory governmental purposes against viewpoint under the order.

Indeed, the plain language of the order demonstrates that it was viewpoint neutral. "[T]he test for viewpoint discrimination is whether – within the relevant subject category

– the government has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring). Here, EO 121 did not single out any subset of message for disfavor – it applied to all citizens (and mass gatherings). The viewpoint expressed by those at mass gatherings was irrelevant and immaterial to the application of the order.[18]

EO 121 was also content neutral. A statute will be considered content based if it "draw[s] content-based distinctions on its face," *McCullen v. Coakley*, 573 U.S. 464, 479 (2014), or if it regulates speech on only "specified disfavored topics." *Virginia v. Black*, 538 U.S. 343, 362 (2003). When a statute directly regulates only conduct, it is inherently content neutral – even if that conduct sometimes can be paired with protected speech. *McCullen*, 573 U.S. at 479-80. Here, the order merely regulates the *manner* in which mass gatherings were held. Such regulations are, by definition, content neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (determining that a law that bans loud music in Central Park is content neutral because it regulates speech based only on the place and manner of its delivery).

Similarly, liability under EO 121 (and the trespass statute) depended on content-neutral criteria. That is, the order allowed for mass gatherings if certain guidelines were followed (e.g., gatherings took place outdoors and people maintained social distancing).

[18] Notably, ReOpenNC held another mass gathering days after Plaintiff's arrest, and no protesters were arrested then. The fact that the same group held a similar protest only days later demonstrates that it was Plaintiff's conduct, rather than her speech, that led to her arrest.

The order applied to all gatherings, regardless of the purpose behind them or their message.

As a content-neutral law, EO 121 is examined under intermediate scrutiny. To prevail under this inquiry, the law must be "narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Reynolds v. Middleton*, 779 F.3d 222, 225-26 (4th Cir. 2015); *see also Ward*, 491 U.S. at 791. "A content-neutral regulation is narrowly tailored if it does not burden substantially more speech than is necessary to further the government's legitimate interests." *Reynolds*, 779 F.3d at 226 (internal quotations omitted). The First Amendment does not require that a restriction be the least invasive available in order to pass this test; instead, it must only not be more burdensome than necessary. *See Hill v. Colorado*, 530 U.S. 703, 726 (2000); *see also Reynolds*, 779 F.3d at 230.

There can be no doubt that EO 121 served a substantial government interest. Indeed, it was issued in order to slow the lethal spread of COVID-19. There can be no doubt that protecting public health is a "proper governmental purpose." *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest . . . ."); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 38 (1905); Ill. Republican Party v. Pritzker, 973 F.3d 760, 763-64 (7th Cir. 2020); *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 235 (D. Md. 2020) ("Reducing the spread of COVID-19 is a legitimate and substantial government interest."). Moreover, EO 121 was narrowly tailored. It did not prohibit mass gatherings, but merely

placed restrictions on the manner and location of those protests.[19] Indeed, EO 121 and the Governor's office made clear that mass gatherings were still permitted, provided that citizens conform to certain guidelines (e.g., gatherings occur outside and those involved maintained social distancing).

Furthermore, EO 121 did not unreasonably limit alternative avenues of communication. Plaintiff and her fellow protesters could have maintained social distancing, they could have protested in groups of 10 or fewer, and they could have communicated information in other ways such as through social media, the internet, newspapers, signs, or the media. Finally, EO 121's restrictions were temporary and were designed to assist North Carolinians to survive the early days of the pandemic.

Plaintiff alleges that the restrictions in EO 121 were unconstitutionally applied to her. [SAC ¶¶ 142] However, as previously noted, the restrictions on mass gatherings applied to all groups of more than 10 people, not just Plaintiff and her group. Moreover, Plaintiff has not alleged that the State Defendants somehow favored the message of other groups of protesters. To the extent that Plaintiff was treated any differently from other protesters, the distinction is based on conduct – refusing to adhere to the social restriction guidelines and refusing repeated instructions to leave State property – and not the content of her speech or expression.[20]

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[19] *See* Paragraph 45, commentary from Governor Cooper's spokesperson Ford Porter: "while protests can be subject to restrictions on time, place, and manner, they are held as a fundamental right under the Constitution and are not listed in the order".

[20] Moreover, as other federal courts have recognized when analyzing similar claims, "public officials need to have the flexibility to determine how to enforce the gathering

In sum, if the First Amendment applies in this case, the social distancing requirement in EO 121 passes constitutional scrutiny because it was a valid time, place, and manner restriction that was narrowly tailored to serve a legitimate government interest. Thus, the State Defendants' enforcement of the order dd not violated Plaintiff's rights. *See, e.g., Antietam*, 461 F. Supp. 3d at 235-36; *Butler v. City of New York*, 559 F. Supp. 3d 253 (S.D.N.Y. 2021) (dismissing First Amendment challenge to restriction on mass gatherings); *Zaal Ventures Corp. v. Baker*, No. 20-12054-LTS 2021 U.S. Dist. LEXIS 51036 (D. Mass. Mar. 17, 2021) (dismissing First Amendment challenge to restriction on mass gatherings); *Martin v. Warren*, 482 F. Supp. 3d 51 (W.D.N.Y. 2020) (upholding restrictions on mass gatherings in face of First Amendment challenge); *Geller v. De Blasio*, 613 F. Supp. 3d 742 (S.D.N.Y. 2020) (same).

V. PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Plaintiff brings a procedural due process claim against Defendants, arguing that the "vagueness" of EO 121, "the manner in which Defendants interpreted and applied the order, and the lack of procedural safeguards in the application of … the order violated Plaintiff's right to due process." [SAC ¶ 136]. Plaintiff alleges that as written, the mass gathering section of the statute lacked sufficient detail and clarity, and thereby encouraged arbitrary enforcement. Plaintiff's argument fails for two main reasons.

First, the social distancing requirement for mass gatherings in EO 121 was not

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restrictions, to determine the circumstance under which arrest may or may not be appropriate." *Geller v. Cuomo*, 476 F. Supp. 3d 1, 24 (S.D.N.Y. 2020).

unconstitutionally vague because it used commonly understood terms in line with their ordinary, dictionary definitions. Indeed, the text of the executive order provided sufficient notice to reasonable persons of what conduct was prohibited and did not encourage arbitrary enforcement.

Second, Plaintiff's claim runs afoul of the well-established principle that generally applicable regulations do not implicate procedural due process rights. Additionally, even if Plaintiff could advance past this initial hurdle, her claim should be rejected because no individualized process was due under the circumstances.

A. EO 121 Was Not Unconstitutionally Vague Because it Provided Sufficient Notice of the Prohibited Conduct and Did Not Encourage Arbitrary Enforcement.

Plaintiff's due process vagueness claim fails because EO 121 provided sufficient notice of the prohibited conduct and did not encourage arbitrary enforcement. To survive a vagueness challenge, a law must "give a person of ordinary intelligence adequate notice of what conduct is prohibited and must include sufficient standards to prevent arbitrary and discriminatory enforcement." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272 (4th Cir. 2019). A plaintiff must demonstrate that the law is impermissibly vague in all its applications and establish that the law specifies no standard of conduct at all. *Hoffman Estates v. Flipside*, 455 U.S. 489, 497 and 495, n. 7 (1982). "[P]erfect clarity and precise guidance have never been required[.]" *Ward*, 491 U.S. at 794. Thus, courts cannot declare a law unconstitutionally vague "simply because it does not include the most elaborate or the most specific definitions possible." *United States v. Shrader*, 675 F.3d 300, 310 (4th Cir. 2012).

Instead, a statute's ambiguity becomes unconstitutional only when its terms invoke "wholly subjective judgments" that are "untethered" from any "narrowing context, or settled legal meanings." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010). For example, a statute that bans "rogues and vagabonds" or "common night walkers" is impermissibly vague, whereas statutes that use common, ordinary terms like "training," "expert" and "personnel" are not. *Id.* (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 156 & n.1 (1972)).

When engaging in interpretation of statutory text, courts attempt to discern the lawmaker's intent by "examining the plain language of the statute." *United States v. Passaro*, 577 F.3d 207, 213 (4th Cir. 2009). "[A]bsent ambiguity or a clearly expressed legislative intent to the contrary," the court thus gives a law its "plain meaning." *United States v. Bell*, 5 F.3d 64, 68 (4th Cir. 1993). The plain meaning of a law is determined by examining its "ordinary meaning at the time of the statute's enactment." *United States v. Simmons*, 247 F.3d 118, 122 (4th Cir. 2001).

The clear, straightforward stay at home order and exceptions set forth in Executive Order 121 provided ample notice of what behavior must be limited, including mass gatherings featuring individuals in close proximity. Here, the executive order provided Plaintiff with fair notice that such conduct was prohibited. Indeed, EO 121 expressly states that those participating in mass gatherings – a gathering of more than 10 persons – must maintain at least six (6) feet distancing from other individuals, "with the exception of family or household members." *Id.* It is difficult to envision a requirement with more mathematical precision.

Furthermore, Plaintiff (and her fellow protesters) were warned repeatedly that they needed to adhere to the social distancing guidelines set out in EO 121, or they faced arrest. Accordingly, Plaintiff's due process vagueness claim fails. *See, e.g., Global Impact Ministries v. Mecklenburg Cty.*, No. 3:20-CV-00232-GCM 2022, U.S. Dist. LEXIS 36021, *25 (W.D.N.C. Mar. 1, 2022) (holdi-ng restrictions on mass gatherings were not unconstitutionally vague); *Butler*, 559 F. Supp. 3d at 271-72 (holding restrictions on mass gatherings were not unconstitutionally vague); *Case v. Ivey*, 542 F. Supp. 3d 1245, 1270-72 (M.D. Ala. 2021) (holding social distancing requirements were not unconstitutionally vague); *Hartman v. Acton*, 613 F. Supp. 3d 1015 (S.D. Ohio 2020) (finding stay at home order was not unconstitutionally vague); *Martin*, 482 F. Supp. 3d at 56 (finding mass gathering restriction was not unconstitutionally vague).

B. Plaintiff fails to state a procedural due process claim because generally applicable regulations do not implicate procedural due process rights.

Plaintiff's due process claim also fails because generally applicable rules, like EO 121, do not trigger procedural due process rights. Under well-established federal and state law, an individual plaintiff must be "exceptionally affected, in each case upon individual grounds" by government action to invoke the requirements of procedural due process. *See Debruhl v. Mecklenburg Cnty. Sheriff's Off.*, 259 N.C. App. 50, 55 (2018) (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915)) (Holmes, J.); *see also United States v. Locke*, 471 U.S. 84, 108 (1985).

In *Bi-Metallic*, Justice Holmes noted that "[g]eneral statutes within the state power" may be passed "that affect the person or property of individuals, sometimes to the point of

ruin, without giving them a chance to be heard." 239 U.S. at 445. In the context of such general statutes, the affected person's "rights are protected in the only way they can be in a complex society[:] by their power, immediate or remote, over those who make the rule." *Id.*; *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (noting that procedural due process rights are not violated by a law of general applicability because "the legislative determination provides all the process that is due").

Indeed, "[i]n altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements." *Locke*, 471 U.S. at 108. All citizens are "presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). Thus, to satisfy due process, "a legislature [generally] need do nothing more than enact and publish the law and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982).

This rule has been extended to gubernatorial executive orders on the grounds that executive orders are legislative in nature and seek to achieve a government purpose through policy. *See, e.g.*, *Hartman v. Acton*, 499 F. Supp. 3d 523, 536-37 (S.D. Ohio 2020) (finding that the plaintiffs' procedural due process rights were "not violated nor implicated" by a "Stay at Home Order" issued by the Director of the Ohio Department of Health); *Bauer v. Summey*, 568 F. Supp. 3d 573, 588-90 (D.S.C. 2021) (finding that an Executive Order

related to COVID-19 was a law of general applicability that did not violate procedural due process).

Applying these standards, the challenged portions of the Governor's order clearly does not give rise to the procedural requirements of notice and a hearing. Under the Emergency Management Act, the Governor is empowered to prohibit or restrict "movements of people in public places"; "the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate"; and, "activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency." N.C. Gen. Stat. §§ 166A-19.31(b)(1), (2) & (5); *id.* § 166A-19.30(c)(1). The challenged portions EO 121 "involve[s] general categories or classes of parties and facts and policies of general applicability." *See High Rock Lake Ass'n v. N.C. Env't Mgmt. Com.*, 39 N.C. App. 699, 705, 252 S.E.2d 109, 114 (1979).

Moreover, the order "rests on findings of a general nature and not upon 'individual grounds.'" *High Rock Lake*, 39 N.C. App. at 705, 252 S.E.2d at 114. It does not "involve[] a specifically named party and a determination of particularized legal issues and facts with respect to that party," *id.*, and have not "exceptionally affected" Plaintiff as compared to other people. *Bi-Metallic*, 239 U.S. at 446. EO 121 applied to all North Carolinians – not just members of ReOpen NC. It therefore does not give rise to a procedural due process claim. *See United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 245-46 (1973) (concluding that no due process right to a hearing was triggered by agency action applicable "across the board to all of the common carriers" where "[n]o effort was made to single out any

particular railroad for special consideration based on its own peculiar circumstances").

Moreover, the order did not single out Plaintiff, and instead, applied across the State to each of its citizens. Because it was a prospective order of general applicability, it did not trigger any individual procedural due process rights. It should therefore come as little surprise that courts in other jurisdictions have repeatedly and emphatically rejected similar claims challenging restrictions designed to combat COVID-19.[21]

Accordingly, Plaintiff is not entitled to a declaratory judgment that her rights have been violated, and she is not entitled to damages.

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[21] *See, e.g.*, *AJE Ent. LLC*, 2020 WL 6940381, at *6 (concluding that plaintiffs were unlikely to succeed on procedural due process claim related to closure orders in part because "the initial closure without individualized hearings does not offend due process"); *Hernandez v. Grisham*, 494 F. Supp. 3d 1044, 1088-89 (D.N.M. 2020) ("Here, the Defendants' school closure policies affect the entirety of New Mexico, and, accordingly are not subject to the traditional notice and hearing requirements. Although the policies may impact different students in different ways, they are generally applicable.") (citation omitted); *Savage v. Mills*, No. 1:20-cv-00165-LEW, 2020 WL 4572314, at *7 (D. Me. Aug. 7, 2020) ("As an initial matter . . . I find Plaintiffs are not entitled to any sort of pre-deprivation process when it comes to a generalized police policy imposed during this type of public health emergency."); *World Gym, Inc. v. Baker*, 474 F. Supp. 3d 426, 430 (D. Mass. 2020) (holding that plaintiffs were unlikely to succeed on procedural due process claim because pre-deprivation process would render public health measures ineffective and because general closure orders do not target individuals); *Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 36 (D. Maine 2020) ("Readers might not be surprised to learn that police power is routinely exercised in this Country without first conducting public or private hearings, and without offending the Constitution. So too here."); *Hartman*, 613 F. Supp. 3d at 1023 ("The State's Order directing non-essential businesses to cease operating their physical locations did not violate Plaintiffs' due process rights because the Director's Order was a generally applicable order affecting thousands of businesses, and not a decision targeting an individual or single business."); *Best Supp. Guide, LLC v. Newsom*, No. 2:20-cv-00965, 2020 WL 2615022 (E.D. Cal. May 22, 2020) ("[A]s the State argues, the Ninth Circuit has specifically rejected the notion that the Due Process Clause requires this type of pre-deprivation process before enacting and enforcing laws of general applicability.").

VI. PLAINTIFF'S EQUAL PROTECTION CLAIM FAILS TO STATE A CLAIM.

Plaintiff contends that Defendants' actions violated the Equal Protection Clause of the Fourteenth Amendment because she was arrested and prosecuted for engaging in protected protest activities, while other similarly situated persons were permitted to protest without issue. To prevail on her selective enforcement claim, Plaintiff was required to allege that (1) she was treated differently than other protesters; (2) that she was similarly situated to them; and (3) the different treatment was based on impermissible considerations. *See Wayte v. United States*, 470 U.S. 598, 608 (1985); *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 634-35 (4th Cir. 2016) (citations and quotations omitted). Plaintiff has failed to do so in this case.

Indeed, it is arguable that Plaintiff has sufficiently alleged facts supporting that she was similarly situated to other, non-ReOpenNC protesters. Moreover, even assuming *arguendo*, that the State Defendants' enforcement of the social distancing requirements of EO 121 (and the State's second-degree trespass statute) constituted discriminatory effect, Plaintiff has failed to sufficiently allege that the State Defendants were motivated by any discriminatory intent.[22] Accordingly, Plaintiff's Equal Protection Claim fails and must be

[22] Furthermore, under the appropriate standard of review, it is the statutory text that matters the most. *O'Brien*, 391 U.S. at 384. The text of EO 121 reveals no animus toward any group. EO 121 is a facially neutral, generally applicable law that broadly applied to all citizens.[22] The text of the order does not mention or implicitly reference Plaintiff, ReOpen NC, or any other specific type of organization.

dismissed.

VII PLAINTIFF'S CLAIMS ARE BARRED BY THE DOCTRINE OF QUALIFIED IMMUNITY.

Finally, Plaintiffs claims against the State Defendants should be dismissed because they are barred by the doctrine of qualified immunity. The privilege of qualified immunity shields government officials performing discretionary functions from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In determining whether qualified immunity applies, the courts apply a two-step analysis that asks (i) whether a constitutional violation occurred and (ii) whether the right violated was clearly established. *Melgar v. Greene*, 593 F.3d 348, 353 (4th Cir. 2010). In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Supreme Court held that courts are permitted to exercise their discretion in determining which prong of the analysis should be addressed first in light of the facts and circumstances of the particular case. *See id.* at 236. A defendant is entitled to qualified immunity if the answer to either question is "no." *See Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

As noted above, Plaintiff cannot demonstrate any violation of her constitutional rights. Indeed, there are no allegations (nor can there be) that the State Defendants enforced the social distancing requirements (and the trespass statute) against Plaintiff because of any

content- or viewpoint-based discriminatory purpose. *See Ross v. Early*, 746 F.3d 546, 660-61 (4th Cir. 2014) ("The Supreme Court has made clear that, for a discrimination claim rooted in the First Amendment, a plaintiff must show that a government official 'cted with discriminatory purpose, i.e., that he acted because of, not merely in spite of, the action's adverse effects upon an identifiable group.") (citation and quotation omitted). Moreover, even assuming she could, Plaintiff failed to adequately allege a clearly established right under the Constitution to pass Rule 12 muster.

To be clearly established, the constitutional right that a defendant is accused of violating had to be clear enough at the time of the challenged conduct "that every 'reasonable official would [have understood] that what he is doing violates'" that right. *Ashcroft,* 563 U.S. at 735, 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, "qualified immunity affords protection to a government officer who takes an action that is not clearly forbidden—even if the action is later deemed wrongful." *Rogers v. Pendleton*, 249 F.3d 279, 286 (4th Cir. 2001).

Plaintiff has neither sufficiently pled a constitutional violation nor identified a *clearly* establish constitutional right that the State Defendants all violated. As state employees performing official state duties, the State Defendants are immune from suite and the claims against them should be dismissed pursuant to Rule 12(b)(1).

CONCLUSION

WHEREFORE, the State Defendants respectfully request that the Court grant their motion to dismiss Plaintiff's Second Amended Complaint, and grant any other relief the Court deems proper.

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

JOSHUA H. STEIN
Attorney General

/s/ Matthew Tulchin
Matthew Tulchin
Special Deputy Attorney General
N.C. State Bar No. 43921
mtulchin@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6900
Facsimile: (919) 716-6761

Attorney for State Defendants

CERTIFICATE OF COMPLIANCE WITH RULE 7.2(f)

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/ Mathew Tulchin
Matthew Tulchin
Special Deputy Attorney General