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

MONICA FAITH USSERY, **Plaintiff,** **v.** **LORRIN FREEMAN, in her individual and official capacity as Wake County District Attorney, HONORABLE ERIK A. HOOKS, is his individual and official capacity as Secretary of the North Carolina Department of Public Safety, CASSANDRA DECK-BROWN, in her individual and official capacity as Chief of the City of Raleigh Police Department, DEDRIC BOND, in his individual and official capacity as City of Raleigh Police Department Captain, ROGER "CHIP" HAWLEY, in his individual and official capacity as Chief of North Carolina State Capitol Police, MARTIN BROCK, in his individual and official capacity as Chief of the North Carolina General Assembly Police Department, DERICK PROCTOR, in his individual and official capacity as an officer of North Carolina State Capitol Police, TITO FINK, in his individual and official capacity as an officer of the North Carolina State Capitol Police, and The City of Raleigh, City of Raleigh Police Department Officers, John and Jane Does 1-4** **Defendants**	)	**Civil Action No. 5:23-cv-00219-BO-RJ** **PLAINTIFF'S RESPONSE TO DEFENDANT FREEMAN'S MOTION TO DISMISS**

NOW COMES Plaintiff Monica Faith Ussery ("Ms. Ussery" or "Plaintiff"), by and through undersigned counsel, and offers this Memorandum of Law in Opposition to Defendant Lorrin Freeman's Motion to Dismiss.

NATURE OF THE CASE

This case arises from a conspiracy formed by a group of state and local officials, including Defendant Freeman, to pervert the criminal justice system to suppress speech and retaliate against an individual who held a political viewpoint disfavored by those in power. Declaring that "protesting is a non-essential activity" and agreeing among themselves to "make an example" of dissenters (D.E. 50, Second Am. Compl. ¶¶ 10, 37, 85), Defendants adopted and implemented a policy designed to stifle public demonstrations against the government's COVID-19 policies. On April 14, 2020, as a group of concerned citizens gathered to do just that, Defendants found their "example" in the person of Plaintiff Monica Ussery.

As a reprisal for exercising her First Amendment rights to protest peacefully, assemble, and petition the government for redress, Ms. Ussery was arrested. (*Id.* ¶¶ 2, 41.) The pretextual reasons offered by Defendants—i.e., that she had violated the mass gatherings and social distancing mandates of an Executive Order—were belied by the very circumstances of the arrest. At the time of her arrest, Ms. Ussery was standing by herself in an open air, uncovered, unenclosed public parking lot. (*Id.* ¶¶ 30, 41.) Moments earlier, a police officer signaled for her to enter the parking lot. (*Id.* ¶ 40.) On its face, the Executive Order she was charged with violating did not prohibit the conduct in which she engaged. (*Id.* ¶¶ 28, 137.) Ms. Ussery's arrest resulted from her constitutionally protected conduct rather than any infringement of the Executive Order, and no reasonable public official could have believed her arrest was lawful.

But Defendants' scheme to "make an example" of would-be protestors was not limited to Ms. Ussery's arrest alone. Over the next three years, Ms. Ussery endured repeated rights violations flowing from Defendants' conspiracy, including Defendant Freeman's withholding of potentially exculpatory evidence (*id.* ¶¶ 57, 61, 63-69), the filing of an additional charge of

trespass almost a year later to punish her for defending herself (*id.* ¶ 59), and the bringing of a baseless show cause action against her for conduct committed by a third party. (*Id.* ¶¶ 73-74.) The unconstitutional animus motivating these actions is revealed by the very different ways in which Defendants treated similar protestors holding more favorable viewpoints. (*Id.* ¶¶ 52, 54, 56, 164-180.) As with Ms. Ussery's initial detention and arrest, no reasonable public official, let alone a skilled and experienced attorney such as Defendant Freeman, could have believed such targeted harassment, retaliation, and selective enforcement for exercising her rights accorded with the Constitution.

Starting with her arrest and continuing through the punitive pattern that followed, Defendants violated Ms. Ussery's clearly established rights under the First and Fourteenth Amendments to the United States Constitution, as well as her rights under Article 1, §§ 12, 14, and 19 of the North Carolina Constitution. These rights are so firmly established, and Defendants' infringement of them was so obvious, that even the common citizen recognized the unconstitutional attack on Ms. Ussery's civil liberties. (*Id.* ¶¶ 35, 37, 38) "Government is not free to disregard the First Amendment in times of crisis," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (Gorsuch, J., concurring), and Defendant Freeman's attempt to shield herself behind prosecutorial and qualified immunity and pretextual health and safety concerns is unavailing. Her motion should be denied.

STATEMENT OF FACTS

During March 2020, Governor Roy Cooper issued a series of sweeping, authoritarian executive orders that locked down the State of North Carolina, shuttering houses of worship, closing schools, and destroying small businesses, all while permitting larger chains such as Target and Costco to remain open and prosper. (D.E. 50, Second Am. Compl. ¶¶ 1, 7, 25-28.)

Wake County issued a similar proclamation on March 26, 2020. (*Id.* ¶¶ 47, 88.) The inconsistencies and inequities inherent in these "lockdown" orders led a group of citizens calling themselves "ReOpenNC" to hold a protest on April 14, 2020, in the State Visitor Parking Lot at the North Carolina State Government Complex. (*Id.* ¶¶ 11, 29.) After watching her friends lose their livelihoods because of the shutdowns, Ms. Ussery joined the ReOpenNC protest with her stepson. (*Id*. ¶¶ 8, 11, 29, 31,110.) Her decision to do so subjected her to a years-long campaign by powerful state and local officials who had agreed in advance to suppress opposition to the government's COVID-19 response. (*Id.* ¶¶ 10, 84-86, 89, 101.)

A. Defendants' Coordinated Effort to Chill Opposing Viewpoints.

Unbeknownst to Ms. Ussery until much later (after she was forced to petition a court for the release of exculpatory body camera footage withheld by Defendants), a conference call took place prior to the protest among Captain Cedric Bond of the Raleigh Police Department ("Defendant Bond"), Wake County District Attorney Lorrin Freeman ("Defendant Freeman"), Chief Roger Hawley of the North Carolina State Capitol Police ("Defendant Hawley"), Chief Martin Brock of the North Carolina General Assembly Police ("Defendant Brock"), and Secretary Erik Hooks of the North Carolina Department of Public Safety ("Defendant Hooks"). (*Id.* ¶¶ 83, 85.) During this call, these Defendants coordinated to suppress the ReOpenNC protest and deter further such protests, which had been planned to occur weekly until the lockdowns were lifted. (*Id.* ¶¶ 10, 16, 83).

As later explained by Defendant Bond, this group of state and local officials, including Defendant Freeman, planned to use the criminal justice system to chill the protestors' expression and prevent them from further exercising their rights to assemble and petition. Relaying the substance of the conference call to the group of law enforcement officers present on April 14,

2020, Defendant Bond stated:

> Avoid parents with kids…What I want to do is make an example out of [agitators]. I'm hoping we'll start locking up a few of the agitators that the rest will automatically disperse…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…And then we already have intel that they're planning on doing this again next Tuesday so it's our opportunity to get it right this time and hope we won't have to go through the same thing again next Tuesday.

(*Id.* ¶ 85.) To prevent the crowd of protestors from growing, Defendant Bond indicated that the officers should start "locking up people as soon as possible." (*Id.*) Defendant Bond also indicated that he had confirmed with Defendant Freeman that "we were all on the same sheet of music on our plan of action" and reassured the officers that Defendant Freeman "was cool with the matter" to shut down the protest via the planned arrests. (*Id.* ¶ 86.)

On April 14, 2020, when it came time to implement this scheme of suppression, Defendant Bond met with a group of roughly 50 officers—who gathered in a tight circle without masks—and informed them of the plan of action. (*Id.* ¶ 90.) Defendant Bond would provide a three-part dispersal order similar to those used for Moral Monday protests. (*Id.*) Although the officers met in close proximity without masks while receiving Defendant Bond's instructions, he told them to put on their Personal Protective Equipment before encountering the protestors to aid the pretextual justification that his dispersal orders were related to public health rather than suppression of speech. (*Id.* ¶ 90.) Consistent with their desired goal of "mak[ing] an example" of the ReOpenNC "agitators," three transport vans were staged at the protest site to take arrested protestors to the Wake County Detention Center. (*Id.* ¶¶ 85, 89, 91, 98.)

B. Defendants Implement Their Scheme by Arresting Ms. Ussery.

The stage being set, Defendants proceeded to implement their plan. After the protestors gathered in the parking lot, Defendant Bond told them they could not gather there and told them

to disperse. (*Id.* ¶ 35.) "If you do not disperse," he continued, "you will be subject to physical arrest." (*Id.*) Although, upon information and belief, standard Raleigh Police Department ("RPD") procedure was to give five minutes between dispersal warnings, Defendant Bond shortened the time to one minute, intending to make it more difficult for protestors to comply before arrests would ensue. (*Id.* ¶ 93, 96.) Defendant Bond then ordered officers to sweep the parking lot and to arrest any protestors who did not disperse. (*Id.* ¶¶ 36, 98.)

At some point, Ms. Ussery told her stepson to drive away, and she then left the parking lot on foot. (*Id.* ¶¶ 40, 99.) Accordingly, she did not hear Defendant Bond's instructions. (*Id.* ¶ 99.) Subsequently realizing that she had the keys to the car, Ms. Ussery returned to the parking lot to give them to her stepson. (*Id.* ¶¶ 40-41, 100.) The lot was almost empty except for law enforcement officers and members of the press. (*Id.* ¶ 100.) As she approached the parking lot, Ms. Ussery waved the keys at an officer talking with her stepson, and the officer gave her a "thumbs up" signal. (*Id.* ¶ 40.) She handed the keys to her stepson, who then drove away, leaving Ms. Ussery by herself. (*Id.* ¶ 41.)

It was then that Defendants found the "example" they desired. Standing alone in an outdoor, uncovered, unenclosed public parking lot—in full compliance with social distancing mandates—Ms. Ussery was arrested by RPD officers. (*Id.* ¶¶ 30, 41, 101-02.)

She was then transferred to the custody of Officers Derick Proctor ("Defendant Proctor") and Tito Frink ("Defendant Frink") of the State Capitol Police, who escorted her to the Wake County Detention Facility. (*Id.* ¶ 42.) Defendant Proctor then submitted evidence to a magistrate judge, resulting in a charge against Ms. Ussery for attending a "mass gathering of more than 10 people in a single group or space as defined and prohibited by Executive Order 121." (*Id.* ¶ 43.) Executive Order 121 ("E.O. 121") did not prohibit mass gatherings, however, such that Ms. Ussery was charged with a crime that did not exist. (*Id.* ¶¶ 28, 137.) Rather, she was arrested and charged for publicly expressing a view with which Defendants disagreed and wanted to suppress.

C. Defendants' Policy to Suppress Disfavored Viewpoints is Revealed.

Ms. Ussery's arrest sparked interest and outcry on social media, to which the RPD responded with a tweet revealing the true reasons for her arrest: "Protesting is a non-essential activity." (*Id.* ¶ 37.) This Orwellian statement garnered widespread attention and caused citizens across the State and nation to question how it comported with First Amendment liberties. (*Id.* ¶¶ 38, 45-47.)

Despite the national scrutiny and plainly obvious constitutional implications, Raleigh officials remained committed to their policy that protesting was a non-essential activity. (*Id.* ¶ 47.) Defendant Freeman, a trained and experienced attorney who admitted she was evaluating the charge against Ms. Ussery, remarkably stated to the public that the RPD's reading of the Executive Order was "technically correct." (*Id.* ¶¶ 47, 51.)

Ms. Ussery retained the undersigned counsel, Anthony Biller, Esq., to seek clarification from the Governor regarding E.O. 121's effect on the right to engage in political protests. (*Id.* ¶ 49.) Through counsel, Governor Cooper affirmed that E.O. 121 permitted outdoor protests and the exercise of other First Amendment liberties. (*Id.* ¶ 50.) Despite this clarification, Defendants

continued their campaign against Ms. Ussery while allowing other protests that advocated viewpoints agreeable to Defendants.

D. Defendants' Dissimilar Treatment of Favored Expression.

Both prior to and following Ms. Ussery's arrest, Raleigh was a hotbed of protests. On or about March 10, 2020, a violent protest erupted in reaction to a shooting by an RPD officer, but only one person was charged with simple assault. (*Id.* ¶ 164.) After Ms. Ussery's arrest, Black Lives Matter ("BLM") protestors and nurses supporting the lockdowns were allowed to gather and freely exercise their First Amendment rights, despite their noncompliance with the social distancing requirements and even though some of the BLM protests turned violent and destructive. (*Id.* ¶ 54.) On June 1, 2020, despite the purported public health risk, Governor Cooper marched shoulder-to-shoulder in solidarity with BLM protestors, even removing his mask for a photo op. (*Id.*)

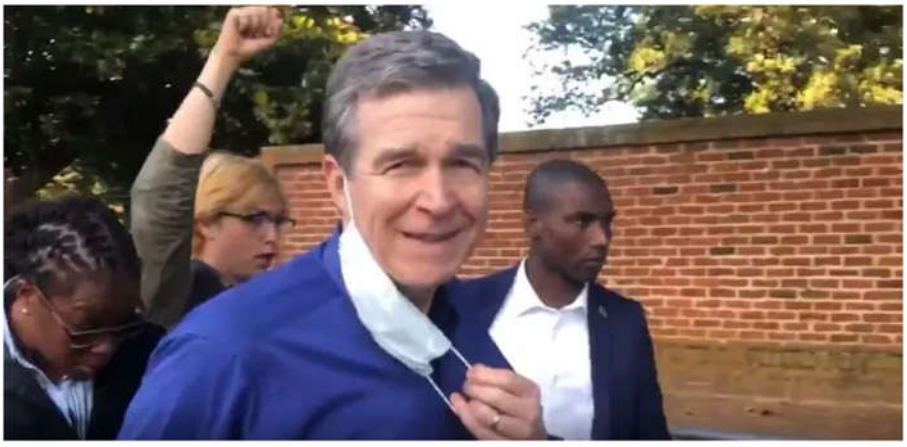
The group was sitting in the roadway and began chanting "march with us."

Cooper then began to walk south on Blount Street and around the block.

The protest in front of the Executive Mansion marks the third night of demonstrations in Raleigh in the wake of the death of George Floyd in Minneapolis a week ago.

The scene outside the Executive Manson on June 1, 2
(Bridget Chapman/CBS 17)

The protests turned violent over the weekend – resulting in several arrests and destruction across the city.



Defendant Freeman told "WRAL that more than 160 people were arrested during the Black Lives Matter protests but most of those charges were for misdemeanors "like failing to disperse and have or will be dropped." (*Id.* ¶ 175.)

In contrast, Defendant Freeman and other Defendants continued their selective enforcement against Ms. Ussery for expressing a disfavored viewpoint they wanted silenced. While dropping charges against the favored protestors, Defendant Freeman refused to drop the charges against Ms. Ussery. On June 25, 2020, Ms. Ussery was arraigned on the pretextual charges Defendant Proctor had brought against her. (*Id.* ¶ 55.)

E. Defendants Continue to Retaliate Against Ms. Ussery.

While defending the criminal charges, Ms. Ussery continued to be the object of unfair, disparate persecution and prosecution flowing from Defendant's scheme to squelch a disfavored

viewpoint. Defendant Freeman further violated Ms. Ussery's constitutional rights by refusing to provide copies of the police body camera footage from Ms. Ussery's arrest and other potentially exculpatory evidence required under *Brady v. Maryland*, 373 U.S. 83 (1963), until ordered to do so by a court *more than two years later*. (*Id.* ¶¶ 57, 61, 63-67, 153-55.) Even now, Defendant Freeman has failed to produce all the *Brady* evidence identified, requested, and ordered.[1] (*Id.* ¶¶ 69, 156.)

Forced to go to trial on charges that should have been dropped, Ms. Ussery's counsel subpoenaed Governor Cooper and William McKinney, General Counsel to the Governor and the author of the response letter to Mr. Biller that clarified the meaning of E.O. 121. (*Id.* ¶ 58.) Just six days later, in retaliation for serving these subpoenas and to hinder her defense, and a year after her initial arrest, Defendants Proctor and Hawley filed an additional charge against Ms. Ussery—this time for second degree trespass for being in the public parking lot—arising out of the same events on April 14, 2020. (*Id.* ¶¶ 59, 144-46).

Ultimately, Mr. Biller entered an appearance as substituted counsel for Ms. Ussery, obtained via petition and court order the *Brady* evidence and exculpatory recordings for April 14, 2020, and filed a motion to dismiss the consolidated criminal cases on multiple constitutional grounds. (*Id.* ¶¶ 65, 67, 70). Before that motion could be heard, the D.A.'s office offered Ms. Ussery an informal deferral of 25 hours of community service with dismissal and expungement of her record. (*Id.* ¶ 71.) After amassing legal bills, missed time from work, embarrassment, physical and emotional distress, and the consequential loss of her marriage -- as well has having been deterred from the continued exercise of her First Amendment and similar rights under state

[1] Defendant Freeman still has not produced the recordings from Officer Fink's body camera, despite such recordings being documented in the incident report, multiple requests, and a court order requiring their disclosure. (*Id.* ¶¶ 67-69, 156-57), (D.E. 50, Exh. 2) ("Frink (sic) was wearing a body camera and recording during the transport.")

law, Ms. Ussery completed the conditions for deferral, and her case was dismissed on February 20, 2023. (*Id.* ¶¶ 72, 75, 131.)

Even then, Defendants' campaign against Ms. Ussery continued when, on April 17, 2023, the RPD filed a motion to show cause against her relating to body camera footage released on Twitter by a third party. The proceeding terminated in Ms. Ussery's favor. (*Id.* ¶¶ 73-74.)

LEGAL ARGUMENT

Plaintiff brings claims against Defendants -- including Defendant Lorrin Freeman, Wake County's District Attorney -- for violating her First and Fourteenth Amendment rights, as well as similar rights secured by the North Carolina Constitution. As the allegations of the Second Amended Complaint adequately demonstrate, Defendant Freeman's participation in the City of Raleigh's policy that "protesting is a non-essential activity," her legal advice to the RPD forming a "plan of action," her withholding of specifically requested, potentially exculpatory evidence, even after ordered by a court, and her involvement and legal advice in relation to prior and subsequent protests in Raleigh, implemented a coordinated plan of viewpoint discrimination and selective enforcement, which form the basis of Plaintiff's claims.

In response, Defendant Freeman argues that Plaintiff's federal claims against her are barred (in her official capacity) and that she is entitled to absolute or qualified immunity (in her individual capacity). She further argues that Plaintiff's facial challenges to the Executive Order are moot and that Plaintiff fails to state a claim regarding Count I (for conspiracy under state and federal law to deprive Plaintiff of her constitutional rights), Count II (for violation of the First Amendment), Count III (claim for violation of procedural due process), and Count VI (for violations of the state constitution).[2] Defendant Freeman also argues that the Court should

[2] Notably, Defendant Freeman does not argue that Plaintiff fails to state a claim regarding Count V, a §1983 claim for violation of the Fourteenth Amendment for equal protection.

decline to exercise supplemental jurisdiction over the state law claims in Count VI.

To clarify, Plaintiff is bringing Counts I, II, III, IV, and V against Defendant Freeman in her individual capacity, not her official capacity. Plaintiff is bringing Count VI, for violation of Plaintiff's state law constitutional rights against Defendant Freeman in her official capacity, not her individual capacity. Regarding Count VI, Plaintiff concedes that this claim would be more properly brought in state court and consents to its dismissal without prejudice for refiling in state court. *See Farlow v. Wachovia Ban of N.C., N.A.*, 259 F.3d 309, 317-17 (4th Cir. 2001) (dismissal of state law claims should be without prejudice). As for the remainder of Defendant Freeman's arguments, they are unavailing.

I. DEFENDANT FREEMAN'S CLAIM OF ABSOLUTE IMMUNITY IN RELATION TO COUNTS I, II, III, IV, AND V IS OVERLY BROAD.

Defendant Freeman's attempt to shield herself from responsibility for the conduct alleged against her on the grounds of absolute immunity must fail, in large part, as a considerable portion of Plaintiff's allegations (as Defendant Freeman concedes) involves conduct that is outside the scope of absolute immunity.

The Supreme Court has divided prosecutorial functions into two categories, those performed as an advocate and those performed as an administrator or investigator. The former are immune; the latter are not. *See Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1978) (prosecutorial actions "intimately associated with the judicial phase of the criminal process" are entitled to absolute immunity). However, the Court later clarified, "a prosecutor neither is, nor should consider himself to be an advocate before he has probable cause to have anyone arrested." *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993). "A prosecutor's administrative duties and those 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." *Nivens*, v.

Gilchrist, 444 F. 3d 237, 250 (4th Cir. 2006) (quoting *Buckley*, 509 U.S. at 272). "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question," *Buckley*, 509 U.S. at 269 (*quoting Burns v. Reed*, 500 U.S. 478, 486 (1993), and that the "acts in question are 'directly connected' with the judicial process, justifying the protections of absolute immunity." *Savage v. Maryland*, 896 F.3d 260, 269 (4th Cir. 2018) (internal citations omitted).

Accordingly, the rather murky line between absolute and qualified immunity afforded to a prosecutor is drawn when a prosecutor prepares to seek an indictment. *See Kalina v. Fletcher*, 522 U.S. 118, 126 (1997); *Annaparedy v. Pascale,* 996 F.3d 120, 139 (4th Cir. 2021) (explaining that actions taken before a probable cause determination tend to be investigative and actions taken after probable cause determination are generally advocative, although "a determination of probable cause does not guarantee a prosecutor absolute immunity for all actions taken afterwards"). On the one hand, appearing in court to get a search warrant at a probable cause hearing is an action protected by absolute immunity. *See Kalina*, 522 U.S. at 126. On the other, providing legal advice to the police during their pretrial investigation of the facts, statements made to the press, and the fabrication of evidence is not. *See id.*; *Buckley*, 509 U.S. at 277; *Nivens*, 444 F.3d at 250.

> A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial.

Buckley, 509 U.S. at 276. Therefore, preparation to initiate criminal process is not de facto immune. *Id.* at 276, n. 6.

Defendant Freeman attempts to classify the allegations against her into three categories: (1) consulting with law enforcement prior to Plaintiff's arrest (which she concedes may not be protected by absolute immunity) (D.E. 54, p. 13); (2) withholding exculpatory evidence during the subsequent prosecution; and (3) prosecuting Plaintiff for the violation of E.O. 121 and the second-degree trespass. (*Id*). Defendant conveniently omits a fourth category: allegations that show how she treated other similarly situated protestors differently – by not charging them or dropping charges, even though some destroyed property or committed other offenses. (*Id.* ¶¶ 164-180).

A. Defendant Freeman Concedes, She Is Not Entitled to Absolute Immunity Related to Pre-Indictment, Advisory, Investigatory, and Administrative Conduct.

While Defendant Freeman may be immune relating to her decision to charge and prosecute Plaintiff, Plaintiff has asserted a plethora of allegations which provide factual support for prosecutorial conduct lying outside the protections of absolute immunity. This conduct includes her approval and aiding of the City of Raleigh's policy that "protesting is a non-essential activity" criminally punishable (the "City's policy") and any legal advice provided to the RPD and its officers regarding the protest on April 14, 2020, including advice related to the "plan of action," in advance of Plaintiff's arrest. (D.E. 50, ¶ 86.) Strategies, goals, and procedures related to the implementation of the City's policy, as well as the legal counsel or investigatory activities that preceded Freeman's determination of purported probable cause and the actual arrest of Ms. Ussery, also dwell outside the protections of absolute immunity. *See*, *e.g., Lacey v. Maricopa County, et al.*, 693 F.3d 896, 914 (9th Cir. 2012) (absolute immunity denied in relation to "ordering or advising those making arrests," including legal advice about the existence of probable cause for the arrest).

Moreover, Ms. Ussery is entitled to discovery to determine the nature and timing of Defendant Freeman's decisions, advice, and other conduct in order to establish a factual basis for evaluating what is and is not protected by absolute immunity. And this should include not only conduct relative to April 14, 2020, but also Defendant Freeman's conduct in relation to the racial justice protests, which both preceded and followed Plaintiff's arrest (D.E. 50, ¶¶ 164-168, 173) and which continued throughout May and June 2020. **(***Id.* ¶¶ 172-175).

For example, in *Barboza v. D'Agata*, 151 F. Supp.3d 363 (S.D.N.Y. 2015), a court held that a prosecutor was not entitled to either absolute or qualified immunity when he ordered the arrest of a citizen who had exercised his First Amendment rights by writing an offensive epithet on a form he had returned to the clerk's office related to a speeding violation. *Id.* at 367-68 (granting summary judgment *against* the prosecutor). *Id.* at 376. The clerk delivered the returned form to the local judge who referred it to the town's assistant district attorney to determine if the communication constituted a crime under a New York harassment statute. *Id.* at 367-68. The DA and the ADA discussed the matter and decided to charge the plaintiff with aggravated harassment and instructed an officer to arrest the plaintiff. *Id.* The charge was ultimately dismissed as violating plaintiff's First Amendment rights. *Id.* at 370. While the court recognized that the prosecutor was protected by absolute immunity related to the charges, he was not entitled to absolute immunity for ordering plaintiff's arrest or for his participation in the execution of the arrest. *Id.* at 374. In denying qualified immunity as well, the court observed that an attorney is distinct from the average public employee, is trained in the law and to understand constitutional limits, and should have known that his actions were unconstitutional. *Id.* at 375.

Likewise, here, Defendant Freeman's conduct prior to her establishing probable cause and determining any charges against Plaintiff remains outside the protections of absolute

immunity. In addition, Defendant Freeman's involvement with respect to other police actions taken against Ms. Ussery, including her potential involvement in filing the trespass charge a year later, her advice or involvement in any policies governing other protests during the spring/summer of 2020, and the motion to show cause filed by the RPD attorney remains to be determined by discovery.

B. Defendant Freeman Is Not Immune From Withholding Evidence In Violation of a Court Order.

With respect to Defendant's failure to turn over the recordings from Defendant Fink's body camera pursuant to Judge Gregory's order, this failure is not protected by absolute immunity. A prosecutor may lose the protection of absolute immunity when she withholds exculpatory evidence in violation of a court order. *See Munchinski v. Solomon*, 747 Fed. Appx. 52, 59 (3d Cir. 2018) (denying absolute immunity where court order removed all discretion from the prosecutor); *Siehl v. City of Johnstown*, 365 F.Supp.3d 587, 598 (W.D. Pa. 2019) (same). When an order "by its terms severely circumscribes the prosecutor's discretion," the prosecutor's duty "is not to advocate, but simply to comply; it is ministerial or administrative rather than advocative."[3] *Munchiniski,* 747 Fed. Appx. at 59. As in *Munchinski,* Judge Gregory's order eliminated any degree of prosecutorial discretion. Defendant Freeman's role was merely to comply with the order.

[3] Judge Gregory's Order on the Petition for Release of Custodial Law Enforcement Agency Recording, which is attached as Exhibit A within Exhibit 10 of the Second Amended Complaint, is very specific, ordering that the "custodial law enforcement agency shall release to Envisage Law the following portions of the recordings: The entirety of the recordings, with the exception of a portion of one recording that shall be redacted which inadvertently recorded non-official activity (restroom visit)."

C. Intentionally Withheld, Specifically Requested, Exculpatory, *Brady* Evidence, Ought Not Be Shielded Under Absolute Immunity.

As a final matter, while the Fourth Circuit has stated broadly that prosecutors are protected by absolute immunity regarding their disclosure of *Brady* evidence, *Annaparedy*, 996 F.3d 120, 141 (4th Cir. 2021), its application to these facts should be questioned. Immunity for Defendant's failure to provide exculpatory evidence, specifically requested by the defendant in advance of trial (D.E. 50, ¶ 57), which continued to be requested by the undersigned counsel a year later in May 2022, (D.E. 50, ¶¶ 65-66, Exh. 9), and which even after having obtained a court order signed by Wake County Superior Court Judge Keith O. Gregory, (*id.* ¶ 67), was partially withheld, without explanation, (*id.* ¶ 69), would undermine the constitutional guarantees of the criminal judicial process.

There are three forms of *Brady* evidence: (1) "where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured;" (2) "where the Government failed to accede to a defense request for disclosure of some kind of exculpatory evidence;" and (3) "where the Government failed to volunteer exculpatory evidence never requested or requested only in a general way." *Kyles v. Whitley*, 514 U.S. 419 433 (1995) (internal citations omitted).

When it comes to the second category, not acceding to a defense request for disclosure of exculpatory evidence, traditional prosecutorial functions like evaluating the credibility of witnesses or weighing the probative value of evidence do not come into play. As Justice White comments in his dissent in *Imbler*, "I disagree with any implication that *absolute* immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence because I believe such a rule would threaten to *injure* the judicial process and interfere with Congress' purpose in enacting 42 U.S.C. § 1983, without any support in statutory language or history." *Id.*

at 432-33 (observing that the judicial process is better served by erring "on the side of overdisclosure," *id.* at 447.)

Defendant Freeman's failure to disclose specifically requested exculpatory evidence undermined Ms. Ussery fundamental right to defend herself against charges which were brought with unconstitutional motivations from the outset.

Accordingly, Count IV should not be dismissed against Defendant Freeman.

II. NEITHER IS DEFENDANT FREEMAN'S CONDUCT PROTECTED BY QUALIFIED IMMUNITY.

In the alternative, or for conduct not protected by absolute immunity, Defendant Freeman argues that she is entitled to qualified immunity.

Government officials are not entitled to qualified immunity against a §1983 claim where: "(1) the allegations underlying the claim, if true, substantiate a violation of a federal statutory or constitutional right; and (2) this violation was of a clearly established right of which a reasonable person would have known." *Occupy Columbia v. Haley*, 738 F.3d 107, 118 (4th Cir. 2013) (denying qualified immunity against First Amendment claims where police arrested protestors assembled on State House grounds for purposes of protesting and petitioning the government). If the law at the time is clearly established, the defense of qualified immunity should fail, "since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Whether a right is clearly established depends on the law of the relevant jurisdiction;" in this case, that means decisions from the United States Supreme Court, the Fourth Circuit, and the Supreme Court of North Carolina. *Id.* at 124. Plaintiff has plausibly alleged violations of clearly established rights by Defendant Freeman and her motion should be denied.

In this case, the constitutional rights violated are so clearly established that the ordinary

citizen recognized Defendants' violations of Plaintiff's constitutional rights and no reasonable government official, let alone a trained and experienced attorney such as Defendant Freeman, could reasonably claim she was unaware of them. Even if the Court were to find that Defendant is entitled to qualified immunity with respect to the arrest of Plaintiff for the purported violation of E.O. 121, it is an incredulous stretch to argue that it exonerates her from any legal advice which was used to support retaliation, viewpoint discrimination and selective enforcement by the City of Raleigh or the withholding of *Brady* evidence pursuant to a court order.

A. Peaceful Protesting is a Foundational Constitutional Right under the First Amendment of the United States Constitution.

Both the Fourth Circuit and the Supreme Court have long held that the right to protest against the government is one of the core fundamental rights of the American people. *See Occupy Columbia*, 738 F.3d at 122. The Fourth Circuit recognized that "[a]bedrock First Amendment principle is that citizens have a right to voice dissent from government policies." *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013). Organized political protest is a form of "classically political speech." *Dayton v. City and County of Denver*, 649 F. Supp.3d 1124, 1135 (D. Colo 2023). Further, "speech regarding 'matters of public concern . . . . is at the heart of the First Amendment's protection." *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985)). "The Supreme Court 'has repeatedly held that police may not interfere with orderly, nonviolent protests merely because they disagree with the content of the speech or because they simply fear possible disorder." *Dayton*, 649 F. Supp.3d at 1135.

"The First Amendment also applies with particular force in traditional public fora, which are used for public assembly and debate." *Frederick Douglass Found. v. D.C.*, 82 F.4th 1122, 1141 (D.C. Cir. 2023). Indeed, even in a non-public forum, "it is crystal clear that the First Amendment protects peaceful nondisruptive speech [and] such speech cannot be suppressed

solely because the government disagrees with it." *Tobey,* 706 F.3d. at 391 (holding that plaintiff's "right to display a peaceful nondisruptive message in protest of a government policy without recourse was clearly established at the time of his arrest.")

There can be no doubt that protesting to dissent from government policies, and doing so without retaliation from the government, is a core, long established, fundamental right in this Circuit and nation. Both *Occupy Columbia* and *Tobey* indicate that arresting a peaceful protestor for exercising such First Amendment rights is plainly unconstitutional.

In *Occupy Columbia,* the Fourth Circuit found sufficient the plaintiffs' allegations that they were arrested for being peacefully "assembled on State House grounds for the purpose of protesting and petitioning the government" in violation of a letter "order" from the Governor of South Carolina ordering their removal. *Occupy Columbia,* 738 F.3d at 120. In *Tobey*, the Fourth Circuit held that the plaintiff stated a claim for retaliation under the First Amendment where he was arrested because of protected First Amendment activity – writing the text of the Fourth Amendment on his chest and then removing his clothing to reveal it when subjected to additional screening measures at the airport. *See Tobey*, 706 F.3d at 387-88.

Like the protestors in *Occupy Columbia*, Plaintiff alleges that her First Amendment rights were violated when she was arrested for standing in a traditional public forum—without violating any other laws and in full compliance with social distancing mandates—protesting against the Governor's lockdown and shutdown orders. Like the plaintiff in *Tobey*, she alleges that she was arrested in retaliation for exercising her right to free speech (and more shockingly, in an effort to chill further protests against the Governor's lockdown orders). Plaintiff manifestly alleges a violation of her constitutionally protected rights.

B. Plaintiff's Right to Protest Peacefully in a Public Forum Was Clearly Established, Which Defendant Freeman, as Any Trained Attorney, Should Have Known.

Contrary to Defendants' assertions, the overlay of the pandemic does not abrogate the firmly and historically established rights to protest or to be free from retaliation for doing so. One must examine the sheer hubris of governmental actors who argue that they have the unrestricted, absolute power to enact unprecedented restrictions on the citizens -- including locking down the population and shuttering small businesses, schools, and churches -- and then claim that those very lockdowns create novel circumstances that render longstanding rights unclear or opaque.

The issue here is "whether the First Amendment right allegedly violated by [Defendants] was a 'clearly established' right 'of which a reasonable person would have known.'" *Occupy Columbia,* 738 F.3d at 124. (denying qualified immunity to appellants on motion to dismiss.) As described above, the rights at issue—to protest, assemble, and voice dissent in a public forum on matters of public concern—are bedrock, foundational First Amendment guarantees; as was the right to do so without retaliation. *See Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001) ("[i]t is well established that a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right.") The Fourth Circuit's decisions in *Occupy Columbia* and *Tobey*, decided roughly seven years prior to Plaintiff's arrest, gave Defendants "fair warning that their alleged treatment of [Plaintiff] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

In light of these decisions, it is utterly disingenuous for Defendant Freeman to argue that she did not know that approving or facilitating the City's policy or advising the police that it was constitutionally permissible to arrest peaceful protestors in a traditional public forum would

violate the First Amendment. As the court in *Barboza* noted, when awarding summary judgment *against* the prosecutor, "attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." *Id.* at 376. Indeed, the national response garnered by RPD's now infamous tweet declaring protesting "a non-essential activity" demonstrates that even the common citizen knew that sacred constitutional rights had been trampled upon. (D.E. 50, ¶¶ 37-38.)

The context of the pandemic does nothing to alter that conclusion. As the Supreme Court has observed, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); s*ee also Berean Baptist Church v. Cooper*, 460 F. Supp.3d 651, 654 (E.D.N.C. 2020) ("There is no pandemic exception to the Constitution of the United States or the Free Exercise Clause of the First Amendment."); *Global Impact Ministries, Inc. v. City of Greensboro*, No. 1:20CV329, 2022 WL 801714, at * 5 (M.D.N.C. March 16, 2022) (denying defendant's motion to dismiss on First Amendment freedom of speech claim, regarding municipal stay-at-home orders in response to the Covid-19 pandemic, noting "[e]ven in times of emergency, the First Amendment does not allow that disparate treatment to occur.") None of the foregoing decisions announced a new rule of constitutional law. They merely affirmed that the pandemic context does nothing to abrogate or modify longstanding, clearly established rights. *See Owens v. Baltimore City State's Attys Office*, 767 F.3d 379, 401 (4th Cir. 2014) (even though an opinion was issued after officers acted, it did not alter the clearly established constitutional rule already established in prior case law that required officers to hand over exculpatory evidence); *see also Hope*, 536 U.S. at 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances.")

Neither does *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), or the other cases cited by Defendant Freeman, alter this conclusion. As noted by the court in *Global Impact Ministries*, "*Jacobson* does not stand for a different type of constitutional analysis during a pandemic." *Id.* at *6. Moreover, unlike the free speech rights implicated here, the vaccine mandate in *Jacobson* did not affect a fundamental right. *Id.* Similarly, the other cases cited by Defendant Freeman all concern the state government's right to quarantine or, in the case of *Armstrong v. Newsom*, to 2021 U.S. App. LEXIS 37877 (9th Cir. Dec. 21, 2021), to issue a COVID-19 related stay at home order. None addresses the right of a government official to suppress political speech through protests in violation of the First Amendment.

Indeed, when faced with a similar argument in *Tobey* because of the novel circumstances surrounding the sensitive nature of airport security, the Fourth Circuit denied defendants' qualified immunity defense and rejected the argument that safety and security overrides the protections of the First Amendment. Noting that the plaintiff had engaged in a silent, peaceful protest using the text of the Constitution, the Court observed, "while it is tempting to hold that the First Amendment should acquiesce to national security in this instance, our Forefather Benjamin Franklin warned against such a temptation by opining that those 'who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.' We take heed of his warning and are therefore unwilling to relinquish our First Amendment protections – even at an airport." *Id.* at 393. *Compare Hulbert v. Pope*, 70 F.4th 726, 736-38 (4th Cir. 2023), *cert. denied*, 2023 WL 8531928 (U.S. Dec. 11, 2023) (officer entitled to qualified immunity defense where he asked protestors to move "mere steps away" from sidewalk to grassy area at state capitol grounds (in contrast to a total ban on protesting as enforced against Plaintiff.)

It is equally difficult to fathom how the pandemic affects longstanding, clearly

established rights to be free of viewpoint discrimination, retaliation, selective enforcement, or the withholding of *Brady* evidence pursuant to a court order. *See, e.g. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant"); *Kyles v. Whitley,* 514 U.S. 419, 432 (1995) (*Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. . . "); *Eberhart v. Gettys*, 215 F. Supp.2d 666, 679-80 (M.D.N.C. 2002) (summary judgment on qualified immunity defense denied against city officials in selective enforcement action).

In any event, the determination of qualified immunity is more appropriate after discovery. *Tobey*, 706 F.3d at 389 (when it is unclear about whether defendants' behavior was reasonably motivated by conduct or unreasonably motivated by protected protest, greater factual development is required and "is better decided once discovery has been conducted."); *DiMeglio v. Haines*, 45 F.3d 790, 795 (4th Cir. 1995) (issues concerning the existence of probable cause and the reasonableness of and motivation for Plaintiff's arrest warrant factual development through discovery) *See also Corum v. Univ. of N.C.*, 330 N.C. 761, 780, 413 S.E.2d 276, 288-89 (1992) (finding that in a § Section 1983 qualified immunity analysis, that plaintiff had presented sufficient evidence of an improper motive to withstand a motion for summary judgment). Defendant's claim that she is entitled to a determination of qualified immunity on a motion to dismiss is premature and should be denied.

III. PLAINTIFF'S FACIAL CHALLENGES IN COUNTS II AND III ARE NOT MOOT.

Defendant Freeman challenges as moot Plaintiff's allegations that E.O. 121 and the City's policy were facially unconstitutional.(D.E. 50, ¶¶ 116, 122, 125, 130, 136.)

According to Defendant Freeman, any claims premised on these allegations ceased when E.O. 121 expired and the City abandoned its policy. Although the expiration of an order or policy might moot a challenge to it, *see*, *e.g.*, *Eden, LLC v. Justice*, 36 F.4th 166 (4th Cir. 2022); *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157 (4th Cir. 2021), that is not the case here for two reasons.

First, unlike in either *Eden, LLC* or *Lighthouse Fellowship*—where the plaintiffs sought only injunctive and declaratory relief—Plaintiff seeks damages against both the City and the other Defendants in their individual capacities. (D.E. 50 ¶¶ 132, 147.) Inasmuch as these damages claims are based on Defendants' actions in carrying out E.O. 121 and/or the City's policy, the constitutionality of the order and policy (and whether any reasonable official could have believed them to allow the suppression of peaceful protests) remain live issues. Accordingly, Plaintiff's requests for declaratory relief as to the validity of E.O. 121 and the City's policy are "predicate to a damages award," *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974), and, thus, not moot. *See Crue v. Aiken*, 370 F.3d 668, 677 (7th Cir. 2004) (explaining that "a declaratory judgment as a predicate to a damages award can survive"); *PETA v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002) ("[W]e consider declaratory relief retrospective to the extent that it is intertwined with a claim for monetary damages that requires us to declare whether a past constitutional violation occurred."); *Marks v. City Council of City of Chesapeake*, 723 F. Supp. 1155, 1160 (E.D. Va. 1988) (finding request for declaratory relief "not moot" where "damages claim is contingent upon" finding of unconstitutionality), *aff'd* 883 F.2d 308 (4th Cir. 1989).

Second, the Second Amendment Complaint plainly seeks nominal damages, as well as compensatory and declaratory relief. (D.E. 50, ¶¶ 132, 147.) Although "[i]n some cases, the

repeal of a statute or regulation renders moot a challenge to that law," such is not the case where a plaintiff, if "correct on the merits," "is entitled to at least nominal damages." *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007); *see also Uzuegbunam v. Preczewski*, 592 U.S. 279, 141 S. Ct. 792, 801-02 (2021) (holding that nominal damages can redress free speech violations, reversing lower court's finding of mootness).

IV. PLAINTIFF STATES A CLAIM AGAINST DEFENDANT FREEMAN FOR VIOLATION OF THE FIRST AMENDMENT, INCLUDING RETALIATION.

Defendant Freeman argues that Plaintiff's First Amendment claim fails because E.O. 121 created content-neutral time, place, and manner restrictions and survives intermediate scrutiny. (D.E. 54, pp. 18-19.) She further argues that Plaintiff fails to state a claim for an "as applied" challenge because Defendant Freeman's advice to the police before Plaintiff's arrest could not have violated her First Amendment rights and there is no allegation that Defendant Freeman ordered Plaintiff's arrest. *Id.* Each of these arguments is unavailing.

A. Regardless of the Level of Scrutiny, Defendants' Suppression of Free Speech Does Not Pass Constitutional Muster.

Defendant Freeman contends that E.O. 121's restriction on mass gatherings and the City's policy of a complete ban are content-neutral regulations that are subject to intermediate scrutiny. (D.E. 54, p. 18.) However, because the implementation of the order and the City's policy were content-based, a stricter level of scrutiny should apply. Under either level of scrutiny, however, the restrictions are unconstitutional.

1. *Strict scrutiny should be applied to E.O. 121 and the City's policy.*

"If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction … that restriction may be content based." *City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 76 (2022). If a law is content-based, it is

"presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

This case is almost identical to a series of cases brought by a plaintiff involved with the ReOpenKentucky movement. In those cases, plaintiffs made various First Amendment challenges to a very similar Executive Order on very similar facts, even contrasting threats of enforcement aimed at ReOpenKentucky protestors with Governor Beshear's attendance at a BLM rally on the Capitol lawn, during which the Governor tweeted a picture of himself standing before "the large, nonsocially distanced crowd." *Ramsek v. Beshear*, 989 F.3d 494, 498-500 (6th Cir. 2021) (observing that "plaintiffs had been the victims of a textbook First Amendment violation, given Beshear's content-based application of the Order").

While the Sixth Circuit did not reach the merits of the plaintiffs' claims because Governor Beshear had withdrawn the order, partially mooting the inquiry, the underlying district court case is instructive regarding what level of scrutiny should be applied to these facts. *See Ramsek,* 989 F.3d at 499-500. Although the district court ultimately determined that the order was content-neutral (even though the Sixth Circuit later suggested it was not), one of the determining factors was that no protestor had actually been arrested. *Ramsek v. Beshear*, 468 F. Supp.3d 904, 916-18 (E.D. Ky. 2020) (noting that no plaintiff had been arrested or faced sanctions for protesting in person)

On the facts of Plaintiff's case, the court may very well have decided differently. Ms. Ussery was actually arrested, charged, and prosecuted, and there are ample allegations in the Second Amended Complaint that support her claim that she was treated disparately from similarly situated protestors with favored viewpoints. (D.E. 50, ¶¶ 117, 161-182.) Such

allegations support an argument that (at least "as applied"), Defendants created and implemented content-based restrictions, which are "presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 164.

2. *The E.O. and the City's policy also fail an intermediate scrutiny analysis.*

Regardless, even under an intermediate scrutiny analysis, any purported content-neutral regulations in the Executive Order and the City's policy do not pass constitutional muster. While the First Amendment "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired," governmental entities are still "strictly limited in their ability to regulate private speech in such 'traditional public fora.'" *Ramsek*, 468 F.Supp.3d at 915. Rights of free speech, assembly, and petition are treated under the same analysis. *Id.* Time, place, and manner restrictions on speech are permissible only if they are content-neutral and only "to the extent they are 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Neither E.O. 121 nor the City's policy were narrowly tailored or left "open ample alternative channels of communication." As the district court noted in *Ramsek*, "it is suspect that a generally applicable ban of groups larger than ten – or fifty beginning June 29 – is narrowly tailored, when nothing but the size of the gathering is taken into consideration." *Ramsek*, 468 F.Supp.3d at 919. "Kentucky must do better than prohibiting large gatherings for protest outright." *Id.* Likewise, in *Global Impact Ministries, Inc.*, the Court evaluated a similar stay at home order and concluded, "[u]nder any tier of scrutiny, the Order cannot be considered constitutional when it prevents Plaintiffs from associating in compliance with the Order's mass

gathering restrictions but allows others who are not engaged in the same expressive conduct as Plaintiffs to associate." *Id.* at * 9. "[A]n all hours prohibition on demonstrating in a public forum is an absolute ban." *Id.* at * 5.

Other non-pandemic related cases also support the conclusion that E.O. 121, both facially and as applied, fail to meet the rigors of intermediate scrutiny. Indeed, the precise conduct at issue here, arresting protestors in traditional public fora, was found to be suspect. *See NAACP v. Peterman,* 479 F. Supp.3d 231, 239 (M.D.N.C. 2020) (injunction issued where protestors alleged that, on multiple occasions through summer of 2020, they had been explicitly threatened with arrest while protesting in traditional public fora such as sidewalks, courthouse steps, and grounds, and finding a total prohibition of protesting on courthouse grounds an extreme remedy that was not narrowly tailored). *See also Price v. Cty. of Fayetteville*, 22 F. Supp.3d 551, 560-61 (E.D.N.C. 2014) (where plaintiffs were ordered to cease distributing pamphlets or leave, no ample alternative channels of communication existed thereby violating the First Amendment).

Here, the City and RPD, advised by Defendant Freeman, did not even attempt to provide an alternative channel of communication. At least on April 14, 2020, the City's policy, approved by Defendant Freeman, was a complete curtailment of protesting with no other channels of communication available, let alone "ample channels." Defendant Freeman's suggestion that the Executive Order merely provided time, place, and manner restrictions, and presumably that "protesting online" satisfied the requirement that there be "open ample alternative channels of communication" must be squarely rejected. (D.E. 54, p. 20). As the Court in *Ramsek* rightly observes, "[t]he First Amendment protects the freedom of assembly just as much as it protects freedom of speech. And the right to freedom of speech also covers expressive conduct. . ." *Ramsek*, 989 F. Supp. 3d at 917.

Online speech is an inadequate substitute for three reasons. First, an online "protestor" can be censored or deplatformed should the private, third-party platform determine that the speech violates "community guidelines" or other standards, which can be influenced by, or even coerced by the government itself (*see generally Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), *cert. granted*, *Murthy v. Missouri*, 144 S.Ct. 7 (2023), (issuing injunction (stayed by the Supreme Court) against federal defendants, including the White House, in relation to coercive actions employed by government defendants to compel moderation by third party, social media companies related to Covid-19 "misinformation"). Second, it does not allow for the same qualitative or quantitative form of speech. "[I]t is not just the speaking, chants, and signs that are expressive; it is also the message implicit in the size of the crowd." *Ramsek,* 468 F. Supp.3d. at 915. "And the Constitution protects that as well." *Id.* at 917. Finally, state capitols are "natural symbols of the political process" "where the public is understandably drawn to express its views." *Hulbert*, 70 F.4th at 736. The suggestion that typing a message of protest on a keyboard and launching it into cyberspace serves as an adequate replacement is incongruous.

And contrary to Defendant Freeman's assertions, she is not immune from her involvement in a conspiracy to arrest lawful protestors engaged in clearly established, constitutionally protected speech, or in advising or participating in the City's policy.

Finally, Defendant's argument that plaintiff did not specifically allege that Defendant Freeman ordered her arrest is misguided. While Plaintiff does not specifically allege that Defendant Freeman *ordered* Plaintiff's arrest, she does state allegations that lead to the plausible inference that Defendant Freeman participated in that decision. (D.E. 50, ¶¶ 13, 47, 48, 85, 86, 88, 89). *See Tobey*, 706 F.3d at 385 ("Plaintiff was not required to state these magical words in order to plausibly plead that [defendants] actions caused his arrest.") *Id.* Plaintiff's allegations

that Defendant Freeman participated in the conspiracy (*e.g.*, *id.* ¶¶ 88-89), had long conversations with Defendant Bond, (*id.* ¶ 85), and that Bond made "sure we were all on the same sheet of music on our plan of action" all create the logical inference that Defendant Freeman was involved in causing Plaintiff's arrest. Plaintiff is at least entitled to discovery to determine the extent of Defendant Freeman's involvement and the timing thereof.

Because neither E.O. 121 nor the City policy was "narrowly tailored" or "provided an open ample alternative channel of communication," they fail intermediate scrutiny and are unconstitutional.

C. In Addition to the Right to Protest and Petition, Plaintiff Also States a Claim for Retaliation and Viewpoint Discrimination Under the First Amendment Against Defendant Freeman.

1. *Retaliatory First Amendment Claim*

"It is well established that a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right." *Tobey*, 706 F.3d at 391. The First Amendment "prohibits an officer from retaliating against an individual for speaking critically of the government." *Id.* (quoting *Trulock v. Freeh*, 706 F.3d 391, 406 (4th Cir. 2001)). To state a claim for retaliation in violation of her First Amendment rights, a plaintiff must 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 defendant's retaliatory action." *Mauler v. Arlotto*, 777 Fed. Appx. 59, 60 (4th Cir. 2019) (plaintiff stated a claim for retaliation where she alleged she was arrested without probable cause for trespass after refusing to leave when instructed by government officials to stop her protest). *See also Tobey*, 706 F.3d at 387 (plaintiff stated a claim where he pleaded he was engaged in a "constitutionally protected, non-violent protest," was seized as a

result of the protest, and his arrest was unsupported by probable cause.); *Dayton*, 649 F. Supp.3d at 1136 (retaliation claim stated where adverse action was taken to punish plaintiff for exercising First Amendment rights and "to silence him, and deter him from speaking in the future.")

Here, Plaintiff has made the same allegations and more, *see, e.g.* (D.E. 50, ¶¶ 98-110, 131.) Plaintiff was arrested as an "agitator" in violation of her clearly established constitutional rights. She was not violating any posted rules. (D.E. 50, ¶¶ 102, 128). There were no grounds for the order to disperse under N.C.G.S. § 14-288.5, which requires a reasonable belief "that a riot, or disorderly conduct by an assemblage of three or more persons, is occurring." *Id.* at ¶ 94. Plaintiff further alleges that the trespass charge brought a year later in retaliation for Plaintiff's defense of the E.O. 121 violation charge and her subpoena to Governor Cooper lacked probable cause. *Id.* at ¶ 106. And she alleges that other actions were taken against her in retaliation for exercising as well as to deter her from exercising her free speech rights. *Id.* at ¶ 131. While later, the parties may argue about causation or whether probable cause existed, it is not appropriate for disposition on a motion to dismiss.[4] *See Tobey*, 706 F.3d at 392 ("probable cause or its absence will be at least an evidentiary issue in practically all [] cases.") (internal quotations and citations omitted); *Lacey*, 693 F.3d at 916 (allegations of retaliation sufficient where plaintiff shows defendant's actions "chilled or deterred" political speech and deterrence was "a substantial or motivating factor in the [defendant's] conduct.")

Regarding a retaliatory First Amendment claim, Defendant Freeman contends that any advice she provided to law enforcement preceded Plaintiff's speech (which is beyond the

[4] In any event, *Nieves v. Bartlett*, 139 S.Ct. 1715, 1727 (2019) articulates an exception to the general requirement that an arrest be unsupported by probable cause "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." Plaintiff has made allegations that support this exception. *See* D.E. 50, ¶¶ 131, 164-179.

pleadings) and cannot form the basis for retaliation. (D.E. 54, p. 26). Defendant's argument is nonsensical. The agents in *Tobey* did not know plaintiff before they arrested him. They arrested him *because of* his constitutionally protected speech. *See Tobey*, 706 F.3d at 390-91 (causation can be inferred from allegations that "the arrest was directly precipitated by his constitutionally protected peaceful protest.") Plaintiff alleges the same. (D.E. 50, ¶ 131.) While Defendant Freeman may be immune regarding the actual charges brought against Plaintiff, she is not immune in relation to legal counsel provided to law enforcement leading up to Plaintiff's arrest, which reasonably inferred was the impetus behind Plaintiff's arrest and an overt act in the Defendants' conspiracy. Nor is she necessarily immune in relation to any counsel related to the trespass charges brought against Plaintiff a year later, a known protestor who chose to vindicate her constitutional rights, instead of accepting the unjust misdemeanor charges and paying a small fine. The extent and timing of Defendant Freeman's involvement in these charges are subject to discovery; dismissal at this juncture is premature.

2. *Selective Enforcement/Viewpoint Discrimination Claim*

While the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," "the executive cannot selectively enforce the law in a way that violates the Constitution." *Frederick Douglass Found, Inc. v. D.C.*, 82 F.4th at 1136-37. To make out a selective enforcement claim, a plaintiff must demonstrate two elements: that (1) he was similarly situated in material respects to other individuals against whom the law was not enforced, and (2) the selective enforcement infringed a constitutional right. *Id.*

As the United States Court of Appeals for the District of Columbia decided in *Frederick Douglass Foundation*, allegations such as those made by Ms. Ussery withstand a motion to dismiss for selective enforcement and viewpoint discrimination. In *Frederick Douglass*

Foundation, the court held that where the district enforced a facially neutral no defacement ordinance against plaintiffs for writing "Black Pre-born Lives Matter" on a sidewalk, but where the district had permitted massive murals to be painted with "Black Lives Matter" and "Defund the Police" slogans, the plaintiffs had stated a plausible claim for viewpoint discrimination and selective enforcement. *Id.* at 1142-43. Notably, the messages were both on matters of public concern, the locations were similar (traditional public fora), and the time period was proximate (summer of 2020). However, no arrests were made in connection with the defacement related to BLM protests while the police showed up in force to arrest the plaintiffs. *Id. See also Global Impact Ministries, Inc.*, 2022 WL 801714, at *8 ("Even in times of emergency, the First Amendment does not allow that disparate treatment occur.").

In this case, Plaintiff's allegations mirror the allegations made by the plaintiffs in *Frederick Douglass Foundation.* Plaintiff alleges that the City of Raleigh's policy was applied against her in a way that punished and suppressed her speech and viewpoint, D.E. 50, ¶ 117, that the order was used as the basis for "arresting and imposing fines on Plaintiff while allowing others to gather and express other views in support of Governor Cooper's order and other views supported by Governor Cooper," *id.* ¶ 123, and that Defendants continued "to prosecute her criminally for purportedly violating the mass gatherings provision of E.O. 121 and the City of Raleigh's policy implemented in response . . . when similarly situated protestors were either not arrested or had their charges dropped" (*id.* ¶ 131(2)). Count V also alleges in detail various protests where similarly situated protestors were either not charged or had their charges dropped – even those who had burned flags, or committed other offenses, while Plaintiff, the last remaining protestor at the disfavored April 14 protest, was arrested while standing alone in a massive government parking lot in front of the State Capitol. *See*, *e.g.*, D.E. 50, ¶¶ 175-176.

Accordingly, Plaintiff has stated multiple violations of the First Amendment against Defendant Freeman, and Defendant Freeman' motion to dismiss Count II for failure to state a claim should be denied.

V. PLAINTIFF STATES A CLAIM UNDER COUNT III FOR VIOLATION OF THE PROCEDURAL DUE PROCESS CLAUSE OF THE 14TH AMENDMENT.

Defendant Freeman makes three arguments in support of the dismissal of Count III: (1) the claim is moot; (2) E.O. 121 is not vague under the standards articulated by the Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972); and (3) plaintiff has not articulated a liberty interest for an as applied challenge.

First, the claim is not moot. *See, supra*, pp. 24-25.

Next, Defendant Freeman argues that E.O. 121 and the City's policy survive the three standards articulated in *Grayned v. City of Rockford*, 408 U.S. 104 (1972) related to a determination of whether a regulation is void for vagueness. In fact, they arguably survive only one of the three. In *Grayned*, the Court explains that to withstand a challenge for vagueness, a regulation must: (1) "give a 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 sensitive areas of basic First Amendment freedoms." *Grayned*, 408 U.S. at 108-09. Assuming for the sake of argument that E.O. 121 and the City policy meet the first standard, neither E.O. 121 nor the City's policy provide "explicit standards" to "prevent arbitrary enforcement," as is clear from Plaintiff's allegations of selective enforcement and viewpoint discrimination grounded in the circumstances of Plaintiff's arrest in comparison to other similarly situated protestors holding more favored viewpoints. Additionally, the challenged order and policy infringed First Amendment rights, as discussed, *supra* pp. 26-34.

Finally, Defendant's argument that Plaintiff cannot make an as applied challenge because "she has not stated a property or liberty interest that has been violated," lacks merit. (D.E. 54, p. 24). Plaintiff's liberty interest includes the rights to petition the government, to assemble to protest, and to be free from arrest for the exercise of these fundamental, constitutionally protected rights. The Fourth Circuit recognizes a liberty interest in the right of free association, which includes expressive association or the "right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances." *Iota Xi Chapter of Sigma Chi Frat. v. Patterson*, 566 F.3d 138, 146 (4th Cir. 2009) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)).

Accordingly, Defendant Freeman's motion to dismiss Count III for due process violations should be denied.

VI. PLAINTIFF STATES A CONSPIRACY CLAIM UNDER BOTH FEDERAL AND STATE LAW (COUNT I) AS WELL AS A DIRECT CLAIM FOR CONSTITUTIONAL VIOLATIONS UNDER THE NORTH CAROLINA CONSTITUTION (COUNT VI).

Defendant Freeman argues that Count I fails to state a claim both under 42 U.S.C. § 1985 and under the North Carolina Constitution. (D.E. 54, p. 28.) The first argument misapprehends Plaintiff's claim; the second argument is unavailing.

A. Count I Does Not State a 42 U.S.C. § 1985 Claim, But Rather a Conspiracy Claim under 42 U.S.C. § 1983 and a State Law Conspiracy Claim.

To state a conspiracy claim under § 1983 a plaintiff must "present evidence that [defendants] acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in the [plaintiff's] deprivation of a constitutional right." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 421 (4th Cir. 1996). Similarly, under North Carolina law, a conspiracy claim "requires the showing of an agreement between two or more persons to do an

unlawful act or to do a lawful act in an unlawful way that results in damages to the claimant." *Dalton v. Camp*, 135 N.C. App. 32, 42, 519 S.E.2d 82, 89 (1999). The plaintiff must also "present evidence of an 'overt act' committed by at least one conspirator committed in furtherance of the conspiracy." *Id.* Ms. Ussery has alleged that Defendants Freeman, Bond, Hawley, Brock, and Hooks (among others) "conspired to punish and make an example of 'agitators' for exercising their First Amendment rights to protest against Governor Cooper's lockdown orders." (D.E. 50, ¶ 89, 83-110.)

Plaintiff specifically alleges that there was "an agreement" and "meeting of the minds" to deprive the protestors, including Ms. Ussery, of the constitutional rights to protest peacefully, assemble, and petition the government. She also provides specific factual allegations of the agreement, including: (1) the substance of phone calls held by Defendants, (*id.* at ¶¶ 85-86), in which Defendant Freeman is alleged to have participated (*id.*); (2) the specific details of the plan (*id.*), which Defendant Freeman is alleged to have approved, (*id.* at ¶¶ 85-89); (3) the overt acts, through details about the implementation, including the truncating of the dispersal orders from five minutes to one minute to cause confusion and disorder, (*id.* at ¶¶ 90, 93, 96, 98, 101, 103); (4) all of which culminated in Plaintiff's arrest, the purpose of which was to retaliate against Plaintiff for her exercise of free speech and to deter future protests. (*Id.* at ¶¶ 83-86, 88, 89, 93, 101, 131.) Accordingly, Plaintiff plainly states a conspiracy claim under § 1983 and under North Carolina law against Defendant Freeman.

B. Plaintiff Also States a Claim for Violations of the North Carolina Constitution as a Predicate to the State law Conspiracy Claim under Count I and As an Independent Claim under Count VI.

Defendant Freeman also argues that Plaintiff cannot state a conspiracy claim under *Corum* and that her claims under the North Carolina Constitution are barred by the existence of

adequate state law remedies. These arguments demonstrate a misapprehension of the facts alleged and the nature of Plaintiff's claim. However, as stated, Plaintiff consents to the dismissal of Count VI's state law constitutional claim without prejudice for refiling in state court.

North Carolina recognizes direct claims under its Constitution against governmental officials who violate a plaintiff's rights to free expression. *Corum v. Univ. of N.C. Through Bd. of Gov.*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992). "A direct action against the State for its violations of free speech is essential to the preservation of free speech." *Id.* at 782. Accordingly, because there is no other remedy for a free speech violation, "our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of [her] constitutional freedom of speech rights." *Id.* at 783.

The claims advanced in Count I of the Second Amended Complaint are predicated on Plaintiff having "exercis[ed] her First Amendment rights and free speech rights under N.C. Const. art. I, §§ 12, 14 to hold a different political position and to be openly critical" of the government. (D.E. 50, ¶¶ 79, 80.) She has specifically alleged that Defendants "suppressed her rights to engage in the constitutionally protected activities including assembly, free speech, the instruction of her representatives, and to petition the government for redress of grievances." (*Id.* ¶ 109.) She also alleged she was treated disparately in comparison to similarly situated protestors in violation of Section 19 of the N.C. Constitution (*id.* ¶¶ 111, 188, 189) and that she "has no adequate state remedy against certain Defendants"[5] for these violations. (*Id.* at ¶¶ 111, 190.) The claims advanced in Count I fall squarely within *Corum*'s direct claim for free speech violations.

Ignoring these allegations, Defendants seek to recharacterize Plaintiff's claims by

[5] Insofar as Defendant argues that Plaintiff's allegation refers to "certain Defendants," Plaintiff respectfully directs the Court to ¶ 190, which more broadly alleges "Plaintiff lacks an adequate state common law or statutory remedy." The inadvertent use of the term "certain" ought not affect the claim.

focusing on her arrest (rather than the motivation behind it) and cherry-picking an allegation (out of more than 30) that alludes to malicious prosecution and abuse of process. (*Id.* ¶ 107.) Defendant Freeman's attempt to limit Plaintiff's claims to her arrest on April 14, 2020, disregards the fundamental gist of Plaintiff's claims, which are rooted in federal and state constitutional provisions protecting free speech and similar rights. The relevant provisions of the North Carolina Constitution are construed to give "a liberal interpretation in favor of its citizens" because they were "designed to safeguard the liberty and security of its citizens in regard to both person and property." *Corum*, 330 N.C. at 783. While Plaintiff's factual allegations may have some overlap with a malicious prosecution or abuse of process claim, those narrow claims do not provide a remedy for the broader, core violations that Plaintiff suffered, which were constitutional in nature.

Further, Defendant's argument that the conspiracy claim somehow abrogates the *Corum* claim is perplexing. Conspiracy is not an independent cause of action but is predicated on an underlying claim for unlawful conduct. *Sellers v. Morton*, 191 N.C. App. 75, 83, 661 S.E.2d 915, 922 (2008). Just as a plaintiff may bring a claim under 42 U.S.C. § 1983 for conspiring to deprive a person of her constitutional rights, a plaintiff should be able to make an analogous claim under the state Constitution. Regardless, the underlying unlawful acts in Count I are state and federal constitutional violations. Because a conspiracy claim cannot constitute an independent claim, it cannot serve as an adequate state law remedy to defeat a *Corum* claim. (*See* D.E. 50, ¶¶ 77-80).

Defendant's reliance on *Taylor v. Wake Cty.*, 258 N.C. App. 178, 611 S.E.2d 648, *disc. rev. denied and appeal dismissed by*, 371 N.C. 569, 819 S.E.3d 394 (2018), is also misplaced. *Taylor* stands for the proposition that a plaintiff could not recover for a violation of the North

Carolina Constitution in state court, where there was an adequate remedy available through the Industrial Commission for claims arising "*out of the same facts and seek to recover for the same injuries*." *Id.* at 181 (Emphasis added). Plaintiff's claims are not only predicated on a baseless, false arrest without probable cause arising out of a political protest; they are also based on a pattern and course of conduct explained *supra*, pp. 26-34, alleging retaliation, viewpoint discrimination, and disparate treatment claims that go to the heart of the First Amendment, Fourteenth Amendment and art. 1, §§ 12, 14, and 19 of the N.C. Constitution.

Because abuse of process and malicious prosecution protect different interests than expression, neither would adequately remedy the violations of Plaintiff's free speech rights asserted in Count I. *See*, *e.g.*, *Alt v. Parker*, 112 N.C. App. 307, 317, 435 S.E.2d 773, 779 (1993) (distinguishing "right to free speech" from "common law claim for false imprisonment," which doesn't protect expression but "right to be free from restraint"); *cf. Allen v. City of Graham*, No 1:20-CV-997, 1:20-CV-998, 2021 WL 2223772 at *6 (M.D.N.C. June 2, 2021) (rejecting argument that "common law claims for assault and battery are an adequate remedy for free speech and assembly injuries").

In sum, Plaintiff clearly states a claim for relief under Count I for conspiracy to violate both the state and federal constitution as well as the independent claim for the unlawful violations of the state constitution in Count VI.

CONCLUSION

For the foregoing reasons, Plaintiff Monica Faith Ussery respectfully prays that the Court deny Defendant Lorrin Freeman's Motions to Dismiss Plaintiff's Amended Complaint.

Respectfully submitted this the 24th day of January, 2024.

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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 contains 11,966 words exclusive of caption, cover, signature lines, index, and certificate of service.

Respectfully submitted, this the 24th day of January, 2024.

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