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 THE STATE DEFENDANTS' 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 the Motion to Dismiss filed by Secretary Erik A. Hooks, the 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 the North Carolina State Capitol Police, and Tito Fink, officer of the North Carolina State Capitol Police (hereinafter, collectively referred to as the "State Defendants").

NATURE OF THE CASE

This case arises from a conspiracy formed by a group of state and local officials 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), the defendants in this case 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 had signaled for her to enter the parking lot. (*Id.* ¶ 40.) On its face, the Executive Order she was charged with violating did not prohibit what she was doing. (*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.

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 the State Capitol Police's failure to turn over *all* of the potentially exculpatory evidence in its custody pursuant to a court order, (*id.* ¶¶ 65, 67-69), the State Defendants' filing of an additional charge of trespass almost a year later to punish Plaintiff for defending herself against the unjust charges (*id.* ¶ 59), and the RPD's 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 viewpoints favored by this ruling class. (*Id.* ¶¶ 52, 54, 56, 164-180.) As with Ms. Ussery's initial detention and arrest, no reasonable public official 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 the State Defendants' attempt to shield themselves behind qualified immunity and pretextual health and safety concerns is unavailing. Their 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 business, 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 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, despite the lack of conditions of rioting or disorderly conduct. (*Id.* ¶¶ 35, 94.) "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.) While technically, there were three warnings, they occurred in three minutes, as opposed to the routine fifteen-minute interval. 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 three warnings in the abbreviated three minutes. (*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 Fink ("Defendant Fink") 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 ("E.O. 121"). (*Id.* ¶ 43.) Contrary to the narrative that the State Defendants promote throughout their memorandum in support of their motion to dismiss – that Ms. Ussery had violated the social distancing requirements of E.O. 121 – she was not charged with a social distancing violation. (*See* D.E. 50, Exhs. 3 and 8.)[1] Plaintiff socially distanced from other protestors, remaining in/on the same car as her stepson. (*Id.* ¶¶ 127, 101.) She was arrested while standing *alone* in a massive government parking lot on State Capitol grounds. (*Id.* ¶ 84.) Moreover, Defendant Proctor's Incident Report is devoid of any mention of any failure by Ms. Ussery to comply with the social distancing provisions of E.O. 121. (*See* D.E. 50, Exh. 2.) Nor was she violating any other posted rules and regulations of Lot 1. (*Id.* ¶ 129.) Under these circumstances, she was

[1] Exhibit 3 to the Second Amended Complaint is the Magistrate's Order, dated 4/14/20, regarding the Violation of Executive Order. Exhibit 8 is the Criminal Summons and Misdemeanor Statement of Charges, dated 3/31/21, for trespass.

arrested and charged for publicly expressing a view with which Defendants disagreed and wanted to suppress. (*Id.* ¶ 131.)

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 unconstitutional 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.

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 unmasked BLM protestors, even removing his mask for a photo op. (*Id.*)

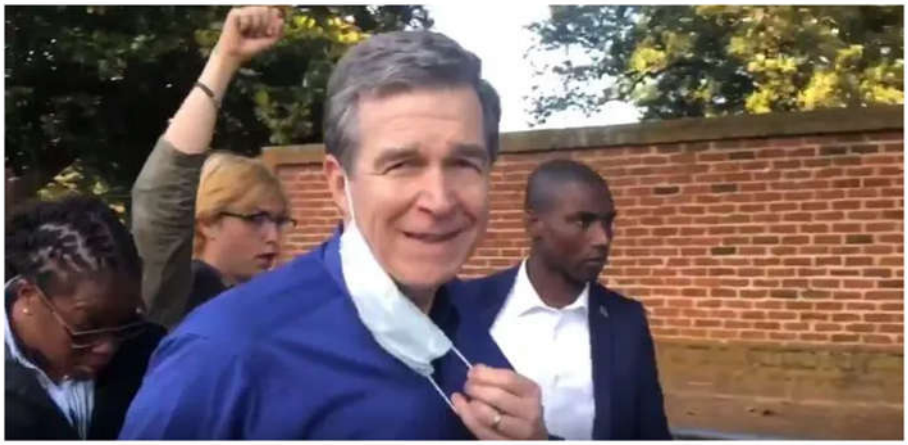
The group was sitting in the roadway and began chanting "march with us."

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.) Contrary to the State Defendants' factual claim that they complied with the Court's order (D.E. 56, p. 8), neither the State Capitol Police nor Defendant Freeman have produced all the *Brady* evidence identified, requested, and ordered.[2] (*Id.* ¶¶ 67-69, 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*,[3] 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,

[2] Recordings from Officer Fink's body camera, which were documented in the incident report, have not been produced despite 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.")

[3] The State Defendants imply that the violation of E.O. 121's mass gatherings provision and the trespass charge were brought concurrently, (D.E. 56, p. 7), when in fact, the trespass charge was brought almost a year later. (*Id.*¶ 59.)

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 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

To clarify, Plaintiff brings Counts I, II, III, and V against the State Defendants in their individual capacities, not their official capacities. Plaintiff is bringing Count VI, for violation of Plaintiff's state law constitutional rights against the State Defendants in their official capacities, not their individual capacities. However, 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 Bank 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 the State Defendants' arguments, they are unavailing.[4]

[4] Plaintiff challenges the State Defendants' inclusion in their Statement of Facts of material outside the pleadings. While it may be appropriate to include information relative to a defense of subject matter jurisdiction under Rule 12(b)(1), the information offered regarding the pandemic is irrelevant to jurisdictional issues and presumably is intended to color the Court's overall perception of the factual

I. PLAINTIFF HAS ALLEGED A CONSPIRACY CLAIM UNDER BOTH SECTION § 1983 AND UNDER STATE LAW FOR CONSPIRACY TO VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS AGAINST THE STATE DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES.

As noted above, Plaintiff's direct constitutional claims under state law are made against the State Defendants in their official capacities, and she consents to the dismissal without prejudice of those claims against the State Defendants in their official capacities. The State Defendants' remaining arguments challenge whether Plaintiff states a claim for conspiracy and whether Plaintiff has stated sufficient facts against each State Defendant to support the claim.[5]

To clarify, Count I alleges a conspiracy to violate Plaintiff's rights under both the United States and the North Carolina Constitutions and is divided into two subclaims. The first is a conspiracy to violate Plaintiff's federal rights under 42 U.S.C. § 1983 against Defendants in their individual capacities. Accordingly, there is no basis to dismiss this claim against the State Defendants. *See Hafer v. Melo*, 502 U.S. 21, 30-31 (1991). The second is a common law tort claim for conspiracy under North Carolina law with the underlying unlawful act being the deprivation of Plaintiff's state constitutional rights. If the Court finds that the state law conspiracy claim cannot be stated against Plaintiffs in their individual capacities, Plaintiff respectfully requests that the Court dismiss this part of Count I without prejudice for refiling in state court. *See Farlow*, 259 F.3d at 316-17.

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circumstances of the case. Plaintiff acknowledged the circumstances of the pandemic in her Complaint, D.E. 50, ¶¶ 4-6, and the State Defendants' attempt to introduce information outside the pleadings is entirely inappropriate. *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013). Plaintiff further contends that the State Defendants' multiple attempts to proffer different facts than those alleged is further support that their motion to dismiss should be denied. This case requires factual development through discovery, making disposition on a motion to dismiss premature.

[5] Plaintiff also incorporates by reference the legal arguments made regarding the state law constitutional claims in her responses to Defendants' City of Raleigh, Deck-Brown and Bond's motions to dismiss and Defendant Freeman's motion to dismiss.

A. Count I Supports a Claim for Conspiracy under 42 U.S.C. § 1983 and an Analogous Claim Under State Law.

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). Similar to a § 1983 claim, under North Carolina law, "a plaintiff can state a claim for conspiracy by also alleging the agreement of two or more parties to carry out the conduct and injury resulting from that agreement." *Toomer v. Garrett,* 155 N.C. App. 462,483, 574 S.E.32d 76, 92 (2002).

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.* If this showing is made, all the conspirators "are jointly and severally liable for the act of any one of them done in furtherance of the agreement." *Id.* Plaintiff has clearly met this standard.

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," and to "suppress the speech of Plaintiff and others gathered at the ReOpenNC protest on April 14, 2020, and to prevent other protests by ReOpenNC planned each week until the lockdown was lifted." (D.E. 50, ¶ 89, 83-110.) As explained in detail below, Plaintiff has stated sufficient allegations against the State Defendants to support an agreement and overt acts committed in furtherance of the agreement.

B. Plaintiff's Allegations Against Each State Defendant Are Clearly Sufficient To Satisfy the Notice Pleading Standards of Rule 8 for the Claim of Conspiracy.

Plaintiff's conspiracy claims are not subjected to a heightened pleading standard under Rule 9. *See Bell Atlantic v. Twombly*, 550 U.S. 544, 569-70 (2007) (rejecting "heightened fact pleading of specifics" with regard to a conspiracy claim and requiring instead "only enough facts to state a claim to relief that is plausible on its face.") Plaintiff meets the *Twombly* standard by alleging both: (1) "an agreement" and "meeting of the minds" to deprive the protestors, including Ms. Ussery, of the constitutional rights to protest peacefully, to assemble, and to petition the government for redress; and (2) overt acts committed by co-conspirators to implement this agreement, including acts by the State Defendants, in furtherance of the conspiracy. (*Id.* ¶¶ 89, 98.)

Specifically, Plaintiff has alleged the following:

- Plaintiff discovered that Executive Order No. 121 and public health were a pretext to Defendants Freeman, Bond, Hawley, Brock, and Hooks to suppress the critical speech of Plaintiff and others gathered at the ReOpenNC protest on April 14, 2020, and to prevent other protests by ReOpenNC planned for each week until the lockdown was lifted. (*Id.* ¶ 83.)

- Defendants Bond, Freeman, Brooks, Hawley, and Hooks "held a conference call with Defendant Bond to plan how to stop the protest and they reached an agreement on how to proceed." (*Id.* ¶ 85.)

- Defendant Bond explained the plan: "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 and the rest will automatically disperse." (*Id.*)

- Defendant Bond further explained that there are videos online about the protest and "we just can't allow that to continue" . . . "we have intel they're planning on doing this again next Tuesday." (*Id.*)

- To prevent the crowd from growing, Defendant Bond wanted to start "locking people up as soon as possible." (*Id.*)

- This call between Defendants Bond, Freeman and State Defendants Brock, Hawley, and Hooks shows "an agreement and meeting of the minds to do an unlawful act in an unlawful way . . ." (*Id.* ¶ 89.)

- Defendant Bond issued unlawful dispersal orders that did not meet the statutory criteria specified in N.C. Gen. Stat. § 14-288.5, as no riot or disorderly conduct was occurring "by an assemblage of three or more persons." (*Id.* ¶¶ 93- 94).

- Defendant Bond only allowed one minute between warnings, instead of the standard five minutes. (*Id.* ¶ 94.)

- After all other protestors had left, Plaintiff, having been granted access by another RPD officer, (*id.* ¶ 40), was opportunistically arrested when she reentered the parking lot to give car keys to her stepson so he could leave. (*Id.* ¶¶ 100-101.)

- RPD officers arrested Plaintiff, who was then transported to the Wake County Detention Facility by Defendants Proctor and Fink. (*Id.* ¶ 42.)

- Defendant Proctor, who is listed as the "arresting officer" on the Magistrate's Order, attached as Exhibit 3 to the Second Amended Complaint, presented the purported probable cause information to the Magistrate, for "VIOLATING EXECUTIVE ORDER 121 BY DEFENDANT'S WILLINGNESS TO GATHER IN A MASS GATHERING OF MORE THAN 10 PERSONS IN A SINGLE GROUP OR SPACE. . ." (*Id.* at 43, Exh. 3.)

- On March 31, 2021, a year after the protest, Defendants Hawley and Proctor brought additional charges against Plaintiff (swearing that she committed criminal trespass on April 14, 2020), which lacked probable cause and which were filed in retaliation for Ms. Ussery's recent issuance of a subpoena against Governor Cooper while trying to defend herself in the underlying criminal trial for the purported violation of E.O. 121's mass gatherings provision. (*Id.* ¶¶ 59, 106.)

Accordingly, Plaintiff has alleged: (1) the substance of phone calls held by Defendants, (*id.* ¶¶ 85-86), in which Defendant Hooks, Hawley, and Brock are alleged to have participated (*id.*); (2) the specific details of the "plan of action" (*id.*); (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, in which Defendants Proctor and Fink were involved,[6] (*Id.* ¶ 42);

[6] The RPD and State Capitol Police acted pursuant to joint statutory and regulatory authority. 14B N.C.A.C. 13.0102 provides that State Capitol Police, City of Raleigh Police, and the Wake County

(5) Defendant Proctor's appearance before the magistrate to present the purported probable cause charge for violating E.O. 121's mass gatherings provision (*id.* ¶ 43); and (6) Defendants Proctor and Hawley's act *a year later* of swearing out another charge against Plaintiff for trespass (that lacked probable cause) to harass Plaintiff and retaliate against her. (*Id.* ¶¶ 59, 106.) In addition to the allegations in the Second Amended Complaint, Exhibits 2, 3, and 8 attached to the Complaint contain additional factual support, some of which is disputed by Plaintiff, of Defendant Proctor, Fink, and Hawley's involvement. These factual allegations clearly meet the notice requirements under Rule 8 and state a claim for conspiracy. *See Toomer*, 155 N.C. App. at 483, 574 S.E.2d at 92 (allegations that state employees who "wantonly or intentionally schemed to retaliate against plaintiff by committing the unlawful acts alleged" were sufficient for a conspiracy claim).

The cases the State Defendants cite are inapposite. Plaintiff has not made "threadbare recitals of the elements" or "conclusory allegations and unsupported assertions," as in *Bryant v. Wells Fargo Bank, N.A.*, 861 F. Supp. 2d 646, 653 (E.D.N.C. 2012). *Boykin Anchor Co., Inc. v. AT&T Corp.*, No. 5L10-CV-591-FL, 2011 WL 1456388 (April 14, 2011 E.D.N.C.) is not a conspiracy case and the complaint at issue contained specific allegations only in relation to one employee while using the term "AT&T" or "Defendants" to broadly refer to AT&T and various related entities, making it impossible to know which entity did what.

In contrast, Plaintiff has alleged specific facts supporting an agreement and overt acts committed by multiple conspirators, when allegations of an overt act by only one co-conspirator is necessary. Accordingly, Plaintiff plainly states a conspiracy claim under § 1983 and state law

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Sheriff's Department all have concurrent jurisdiction on the property owned, leased, or maintained by the State located in Wake County. N.C. Gen. Stat. § 143B-911 also provides for SCP to exercise authority within "the same territorial jurisdiction as exercised by the police officers of the City of Raleigh."

against Defendants Hooks, Brock, Hawley, Proctor, and Fink, for conspiring to deprive Plaintiff of her constitutional rights under federal and state law.[7]

II. PLAINTIFF CLEARLY STATES A FIRST AMENDMENT CLAIM AGAINST THE STATE DEFENDANTS.

The State Defendants make three arguments in support of their motion to dismiss Plaintiff's First Amendment Claim (Count II).[8] First, they inexplicably misconstrue the facts and claims undergirding Plaintiff's First Amendment Claim, recharacterizing the protected speech as the enforcement of social distancing requirements, instead of rights under the First Amendment to assemble and protest peacefully, to express dissent from government policies, to seek redress, and to do so without the threat of retaliation and viewpoint discrimination. (D.E. 56, p. 17.) Second, they argue that the First Amendment does not protect the right to violate generally applicable law. Third, they argue that the "social distancing requirement for mass gatherings passes constitutional muster" as a viewpoint neutral regulation. (D.E. 56, p. 18.)

Each of these arguments is unavailing, as they utterly misapprehend the basis of Plaintiff's claims and contradict the facts alleged on a motion to dismiss. Furthermore, under any level of scrutiny, the State Defendants' conduct was unconstitutional.

[7] The State Defendants' contention that Plaintiff has "not sufficiently alleged that there was an agreement *among* State Defendants" misapprehends the claim and the law. (D.E. 56, p. 15). The claim is that the State Defendants conspired with the other defendants, *i.e.*, Defendant Freeman, Defendant Deck-Brown, and Defendant Bond. Given the quantity of defendants in this action, it is impracticable to identify each defendant in each allegation. However, as discussed above, Plaintiff has made specific allegations against each State Defendant and, accordingly, has satisfied the notice pleading standards under Rule 12(b)(6).

[8] The State Defendants make a passing attempt in a footnote to argue that the facial challenge to E.O. 121 is moot. (D.E. 56, p. 17, n. 16.) This argument fails for the reasons articulated in Plaintiff's Response to Defendant Freeman's Motion to Dismiss, pp. 24-26, which is incorporated herein by reference.

A. Neither Plaintiff's Claims Nor Any Charges Brought Against Her Related to a Social Distancing Requirement or Violation.

The State Defendants attempt to sidestep the quintessentially constitutional context of this case by mischaracterizing Plaintiff's claims, a strategy which is belied by both the allegations of the Second Amended Complaint and the actual charges that Defendant Proctor brought against Ms. Ussery.

The State Defendants argue that "Plaintiff contends that the social distancing requirements of EO 121 chilled, deterred, and otherwise restricted her 'protected speech' in violation of the First Amendment." (D.E. 56, p. 19.) While Plaintiff does make reference to social distancing on occasion, alleging that she was social distancing, (*id.* ¶ 127), and that other protestors at favored protests, like Governor Cooper, were not social distancing (*id.* ¶ 54), these allegations support her contentions of pretext and disparate treatment. Nowhere does Plaintiff assert that the social distancing provisions of E.O. 121 were unconstitutional, and Plaintiff was never charged with a social distancing violation. (*Id.* ¶¶ 43, 55, 84; Exh. 3; ¶ 59, Exh. 8) The State Defendants' myopic view of Plaintiff's Second Amended Complaint lacks merit.

This case is about a conspiracy to chill dissent and deter future protests regarding the state government's unprecedented lockdown orders by arresting Plaintiff, the last remaining protestor at a ReOpenNC protest, for exercising her rights to assemble, to peacefully protest, and to seek redress—clearly established, fundamental, bedrock rights guaranteed by the First Amendment. (D.E. 50, ¶¶ 8, 11, 29, 35, 41, 42, 49, 79-90, 93-103.) There is simply no other reasonable interpretation of Plaintiff's claims and allegations.[9] Any attempt to recharacterize this

[9] For comparison's sake, a word search of the Second Amended Complaint reveals that *nine* of Plaintiff's 191 allegations refer to social distancing; *154* refer to protesting.

case would require the consideration of evidence beyond the pleadings, which is wholly inappropriate on a motion to dismiss.

B. Plaintiff's Conduct Was Clearly Constitutionally Protected Speech

The State Defendants also argue that the First Amendment does not protect the right to violate a generally applicable law, *i.e,* a provision of an executive order or a trespass law. (D.E. 56, p. 20.) While this argument may have a degree of superficial merit, upon closer examination, it falls flat. In the context of the First Amendment, conduct and speech cannot be easily separated. As one court has rightly observed, "[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, which is 'conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative." *Ramsek v. Beshear*, 468 F. Supp.3d 904, 917 (E.D. Ky. 2020) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984)).

The Supreme Court has held various forms of conduct to be protected by the First Amendment, including "flag burning, funeral protests, and Nazi parades." *McCutcheon v. Fed. Election Com'n*, 572 U.S. 185, 192 (2014). *See also Iota Xi Chapter of Sigma Chi Frat. v. George Mason Univ.*, 993 F.2d 386, 391 (4th Cir. 1993) (a fraternity skit "even as low-grade entertainment, was inherently expressive and thus entitled to First Amendment protection.")

The facts of this case present clear First Amendment implications. Under Fourth Circuit precedent, "[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." *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013) (quoting *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001)). "This

holds true even when the act of the public official, absent retaliatory motive, would otherwise have been proper." *Trulock*, 275 F.3d at 405-06.

A survey of protest cases makes clear that Plaintiff's conduct falls squarely within the ambit of First Amendment protections, and the State Defendants' attempt to reframe this case as a mere trespass violation fails. In *Occupy Columbia v. Haley*, 738 F.3d 107 (4th Cir. 2013), a group of protesters stated a § 1983 claim for violation of the First Amendment where they alleged they were arrested when "gathered in a peaceful and lawful manner" not violating any laws on the State House grounds. *Id.* at 125. In *Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013), the Fourth Circuit held that Plaintiff stated a claim for retaliation under the First Amendment where Plaintiff was arrested at an airport after engaging in a "silent, peaceful protest" – that is writing the text of the Fourth Amendment on his bare chest, which he displayed in protest after being selected for heightened security screening. *Id.* at 391. *See also 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). In *Frederick Douglass Found, Inc. v. D.C.*, 82 F.4th 1122, 1136-37 (D.C. Cir. 2023), plaintiffs stated a claim for selective enforcement and viewpoint discrimination under the First Amendment where they were arrested when the district enforced a facially neutral non-defacement statute against them for writing "Black Pre-born Lives Matter" on the sidewalk but where the district had allowed massive murals to be painted with "Black Lives Matter" slogans without enforcement. *Id.* at 1142-43.

The Second Amended Complaint alleges that Plaintiff was arrested for being an "agitator" of whom Defendants wanted to "make an example" to chill protests of a particular viewpoint. (D.E. 50, ¶¶84- 85.) Plaintiff also alleges that as a peaceful protestor, she was

arrested, charged, prosecuted, and otherwise treated in a disparate manner than other similarly situated protestors. (*Id.* ¶¶ 161-182). At the time of her arrest, Plaintiff had returned to the parking lot to give car keys to her stepson, believing she had been permitted access by the hand motion of another officer. (*Id.* ¶¶ 40-41.) It also alleges that she was in full compliance with applicable social distancing requirements and was not violating any posted rules. (*Id.* ¶¶ 41, 101-02, 128.) Furthermore, there was no justification for the dispersal orders; there was no riot or disorderly conduct. (*Id.* ¶ 94.) Under these facts, no reasonable officer could have believed he had probable cause to arrest Plaintiff for violating E.O. 121 or any other offense with which she was charged. (*See also* ¶ 106, alleging subsequent trespass charge lacked probable cause.) While later, the parties may argue about causation or whether probable cause existed, it is not appropriate for disposition on a motion to dismiss.[10] *See Tobey*, 706 F.3d at 379 (explaining that "probable cause or its absence will be at least an evidentiary issue in practically all such cases") (internal quotations and citations omitted).

The cases cited by the State Defendants are simply inapposite, none addressing the rights of protestors in a traditional public forum. For example, *Lloyd Corp. Ltd, v. Tanner*, 407 U.S. 551 (1972) addresses whether a person has a right to distribute handbills as a form of protest at a mall. *Virgina v. Hicks,* 539 U.S. 113 (2003) concerned a challenge to a trespass policy at a public housing authority. *U.S. v. Best,* 476 F. Supp. 34 (D. Colo 1979) dealt with a regulation governing trespass at a nuclear power plant. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) stands for

[10] 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.

the proposition that the press is not relieved from following generally applicable rules because of other protections they may enjoy under the First Amendment.

Indeed, the State Defendants cite no case that addresses the right of a person to exercise her First Amendment rights to protest in a traditional public forum, like the grounds of the State Capitol, which are recognized to be a "natural symbol of the political process . . . where the public is understandably drawn to express its views." *Hulbert v. Pope*, 70 F.4th 726, 738 (4th Cir. 2023). *Adderly v. Florida*, 385 U.S. 39 (1966), cited by the State Defendants, makes this precise point. In *Adderly*, the Supreme Court upheld the arrest of student protestors who refused to leave a state jail facility where protesters were occupying a driveway used for jail purposes only, distinguishing the facts from *Edwards v. South Carolina*, 372 U.S. 229 (1963), where demonstrators were protesting on State Capitol grounds. *Adderly*, 385 U.S. at 40-14.

Accordingly, Plaintiff's challenged conduct falls under the ambit of protected speech and is entitled to the protections of the First Amendment.

C. Regardless of What Level of Scrutiny is Applied, Defendants' Policies and Their Enforcement Were Unconstitutional.

Once again, the State Defendants perplexingly focus on the social distancing aspects of E.O. 121 as the source of Plaintiff's First Amendment claim. In reality, the crux of Plaintiff's challenge is Defendants' use of E.O. 121 and the City of Raleigh's adoption of a complete ban on protesting, which the municipal defendants, Defendant Freeman, and the State Defendants enforced by arresting Plaintiff as a warning and deterrent to other would-be protestors against the government's lockdown policies.[11]

[11] According to the State, E.O. 121 did not prohibit public protesting. (D.E. 50 ¶ 137.) Rather, As Governor Cooper, through legal counsel, clarified, E.O. 121 "provides room for outdoor protests to continue . . . outdoor protests are allowed so long as the space occupied by the protestors is not enclosed (i.e. with walls) and so long as the space occupied by the protesters maintain the Social Distancing Requirement. . ." (*Id.* ¶ 50; Exh. 7.) Plaintiff clearly was not in violation of this requirement; she was

Regardless, the State Defendants appear to argue that E.O. 121 placed content neutral "manner and location" restrictions on the protests by requiring that gatherings occur outside and that participants maintain social distancing. (D.E. 56, p. 24). They also argue that E.O. 121 "did not unreasonably limit alternative avenues of communication." (*Id.*) However, these arguments ignore the facts as pleaded—Plaintiff was socially distancing; Defendants arrested her for violating the mass gathering provision of E.O. 121 and charged her a year later for trespass, because of Defendants' conspiracy and the City's policy that protesting was an impermissible, non-essential activity. In any event, the State Defendants' enforcement of E.O. 121 and the City's policy fails constitutional muster, regardless of what level of scrutiny is applied.

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

As a threshold matter, the enforcement of E.O. 121 and the City's policy requires analysis under strict scrutiny. "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

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standing by herself in an open air, uncovered, unenclosed, public parking lot. (*Id.* ¶¶ 30, 41, 101-02.) Rather, as her allegations plausibly state, she was arrested because Defendants, including the City, adopted and implemented a policy—one that made protesting an impermissible, non-essential activity and thus was even more restrictive than E.O. 121—which they utilized to suppress protests opposing the government's approach to handling COVID-19. (*Id.* ¶¶ 10, 37, 47, 83-86, 88-90, 101, 104.)

enforcement aimed at ReOpenKentucky protestors with Kentucky 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 withdrew the order, partially mooting the inquiry, the underlying district court case is instructive. *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 had 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, as this court should. Ms. Ussery was 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, ¶¶ 56, 117, 161-182.) There is simply no other plausible justification for why Plaintiff was arrested, prosecuted, and then charged again with a second trespass offense a year later, when other similarly situated protestors expressing more favored viewpoints had either not been charged or had their charges dropped. While the State Defendants may be tempted to argue that they are not in charge of prosecutorial decisions, Defendants Hawley and Proctor's swearing of the trespass charge a year later belies any such contention. They committed intentional acts calculated to harass and retaliate against Plaintiff.

Plaintiff's 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.*

Nonetheless, 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. City 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, no defendant, including the State Defendants, attempted to provide an alternative channel of communication. While the State Defendants appear to argue that "Plaintiff and her fellow protesters could have maintained social distancing" and "protested in groups of 10 or fewer" (D.E. 56, p. 24), this argument ignores the actual allegations of the Second Amended Complaint. Plaintiff alleges that the City of Raleigh had enacted a complete ban on protesting as evidenced by RPD's infamous tweet, "Protesting is a non-essential activity." (*Id.* ¶¶ 37, 88.) It further ignores that Plaintiff alleges that she was "socially distanced from other protestors, remaining in/on the same car as her stepson" (*id.* ¶ 27) and that when she was arrested upon returning to the parking lot to give her stepson the car keys, she "was standing by herself in full

compliance with all social distancing mandates." (*Id.* ¶ 41.) At least on April 14, 2020, the City's policy, enforced by the State Defendants, was a complete curtailment of protesting with no other channels of communication available, let alone "ample channels." The State Defendants' suggestion that the Executive Order merely provided time, place, and manner restrictions must be squarely rejected both on the facts alleged and the law. (D.E. 56, pp. 23-24).

Furthermore, the State Defendants' contention that "social media, the internet, newspapers, signs, or the media" provided "alternative avenues of communication" is unavailing. Consider whether the Civil Rights Movement of the 1960's would have been as effective if the protestors had been limited to online communication or what they could convince the media to publish. Moreover, 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").

Finally and importantly, online communication 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. The suggestion that typing a message of protest on a keyboard and launching it into cyberspace serves as an adequate replacement is disingenuous. 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.

IV. PLAINTIFF STATES A CLAIM FOR VIOLATION OF THE PROCEDURAL DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The State Defendants argue Plaintiff's claim for violation of the procedural due process clause should be dismissed for two reasons: first, E.O. 121 was not constitutionally vague because "it used commonly understood terms," providing sufficient notice, and "did not "encourage arbitrary enforcement; and second, that "generally applicable regulations do not implicate procedural due process rights." The first is unavailing; the second argues a distinct theory of the case outside the allegations contained in Count III of the Second Amended Complaint.

Regarding the first argument, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Supreme 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." *Id*. 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—which the State Defendants were involved in enforcing—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. Moreover, the challenged order and policy clearly infringed on First Amendment rights, as discussed, *supra* pp. 17-28.

Accordingly, Plaintiff has stated factual allegations that support her claim for violation of procedural due process and the State Defendants' motion should be denied.

V. PLAINTIFF STATES AN EQUAL PROTECTION CLAIM UNDER THE FOURTEENTH AMENDMENT.

The State Defendants halfheartedly argue that Plaintiff has not stated an equal protection claim under the Fourteenth Amendment because she has not alleged sufficient facts supporting that "she was similarly situated to other, non-ReOpen NC protesters" or that the State Defendants were motivated by any discriminatory animus. (D.E. 56, p. 32.) Each of these arguments lacks merit.

As an initial matter, Plaintiff states a selective enforcement claim under both the First Amendment based on viewpoint discrimination and under the Equal Protection Clause of the Fourteenth Amendment. Discriminatory animus must be alleged only in relation to the Equal Protection claim. *See Frederick Douglass Foundation, Inc. v. D.C.*, 82 F.4th 1122, 1144-45 (D.C. Cir. 2023). "Despite the general presumption against judicial review of prosecutorial decisions, courts may review selective enforcement claims to assess whether the executive's choice of prosecution infringes on constitutional rights. The executive cannot selectively enforce the law in a way that violates the Constitution." *Id.* at 1137.

To state a claim for selective enforcement under the First Amendment, a plaintiff must allege "(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.* at 1136. To state a claim for selective enforcement under the Equal Protection Clause, a plaintiff must also allege "invidious discrimination." *Id.* at 1147. "Invidious discrimination means taking an action 'because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.* (quoting *Iqbal*, 556 U.S. 662, 681 (2009) (cleaned up)). That is, a plaintiff must "plausibly plead

the [government's] enforcement decisions were rooted in 'animus' against the [plaintiff's] viewpoint." *Id.*

In *Frederick Douglass Foundation*, allegations such as those made by Ms. Ussery withstood a motion to dismiss for selective enforcement under the First Amendment. The Court of Appeals for the District of Columbia 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 of both groups were on matters of public concern, the locations were similar, and the time period was proximate (summer of 2020). However, no arrests were made in connection with any defacement related to BLM protests while the police showed up in force to arrest the plaintiffs. *Id.*

In this case, Plaintiff's allegations mirror the allegations made by the plaintiffs in *Frederick Douglass Foundation*, which satisfy the first two prongs of the test for selective enforcement under the Equal Protection Clause. Plaintiff alleges that the City of Raleigh's policy was enforced 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)). Like the plaintiffs in *Frederick Douglass,* the messages conveyed were on matters of public concern, the locations of the protests

were similar (traditional public fora), and the time period was proximate (spring/summer of 2020). *Id.* at 1142-43. Finally, Count V, (D.E. 50, ¶¶160-183), 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, peaceful 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.

While the Court in *Frederick Douglass Foundation* did not find that plaintiffs had sufficiently alleged discriminatory animus to withstand the district's motion to dismiss, *id.* at 1147, Plaintiff's allegations are distinguishable. Plaintiff has pleaded facts that support the existence of a conspiracy to suppress ReOpenNC's protests, which demonstrates that the State and municipal defendants' enforcement of E.O. 121 and the City's policy was "rooted in animus" against Plaintiff's anti-lockdown viewpoint, which was hostile to the government's policies and orders. *Compare Frederick Douglass*, 82 F.4th at 1148 (no allegations that pro-life beliefs were targeted; the district continued to enforce the non-defacement statute against all groups except Black Lives Matter). In contrast to *Frederick Douglass*, Plaintiff alleges that the State Defendants, Defendant Freeman, and the municipal defendants targeted her specifically because of her anti-lockdown viewpoints. This targeting consisted of a continuous course of retaliation and harassment, including bringing charges against Plaintiff a year later for trespass (even though other similarly situated protesters were either not charged or had their charges dropped) and as well as subjecting her to the burden of defending herself three years later in a baseless show cause hearing. (*Id.* ¶ 181). Plaintiff has sufficiently alleged facts that clearly support discriminatory animus and Plaintiff's allegations withstand the State Defendants' motion to dismiss Count V under the Equal Protection Clause.

VI. THE STATE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The State Defendants' final argument is that they are entitled to qualified immunity, arguing that Plaintiff has not alleged facts showing that "the State Defendants enforced the social distancing requirements (and the trespass statute) against Plaintiff because of content or viewpoint-based discriminatory purpose." (D.E. 34, pp. 33-34.) This argument is both factually inaccurate, *see supra*, pp. 18-19, and disregards the clearly established bedrock principles of the First Amendment—principles so established that the common citizen was aware that sacred rights had been transgressed.

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.at 118 (denying qualified immunity against First Amendment claims where police arrested protestors assembled on State House grounds for purposes of protesting and petitioning the government). "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 by the State Defendants of clearly established constitutional rights, and their motion to dismiss should be denied.

A. Peaceful Protesting is a Foundational Right Under the First Amendment.

To begin, Plaintiff sufficiently alleges that her First Amendment rights were violated when she was arrested for protesting against the government's lockdown policies while standing by herself in a traditional public forum—a public visitor parking lot at the State Government Complex. (D.E. 50, ¶¶ 2, 8, 29-30, 35, 41, 83-84, 88-89, 98, 100-03, 105.) Plaintiff further

alleges that her First Amendment, due process, and equal protection rights were violated by the selective enforcement, differential treatment, and subsequent retaliation she endured because of her disfavored protest. (D.E. 50, ¶¶ 54-55, 57-59, 61, 63-67, 73-74, 144-46, 153-55, 173-75.)

Both the Fourth Circuit and the Supreme Court have long held that the right to protest against the government is a core, fundamental right guaranteed by the First Amendment. *See Occupy Columbia v. Haley*, 738 F.3d 107, 121 (4th Cir. 2013). The Fourth Circuit recognizes 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); *see also Ramsek v. Beshear*, 989 F.3d 494, 498-99 (6th Cir. 2021) (affirming, in context of COVID-19 lockdown order, that "right to assemble and to free speech" are "bedrock constitutional guarantees"). 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)). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

When speech occurs in a public forum, "the ability 'of the state to limit expressive activity [is] sharply circumscribed.'" *Id.* at 125 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see also Frederick Douglass Foundation, Inc.,* 82 F.4th at 1141 ("The First Amendment also applies with particular force in traditional public fora, which are 'used for public assembly and debate.'") (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)). But even in a nonpublic 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.2d at 391; *see also Ramsek*, 989 F.3d at 496

(labeling it "a textbook First Amendment violation" where government discouraged protests opposing COVID-19 policies but welcomed other protests advancing favorable views).

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. Moreover, both *Occupy Columbia* and *Tobey* indicate that arresting a peaceful protestor for exercising such First Amendment rights is plainly unconstitutional. As those cases demonstrate, Plaintiff's right to engage in just such a peaceful protest was infringed by her arrest and subsequent prosecution.

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 from the Governor of South Carolina ordering their removal. *Occupy Columbia*, 738 F.3d at 120; *see also United States v. Grace*, 461 U.S. 171, 176 (1983) ("There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment.") 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 the message when subjected to additional screening measures at the airport. *Tobey*, 706 F.3d at 387-88.

Like the protestors in *Occupy Columbia*, Plaintiff alleges that she was arrested for standing in a public forum—without violating any other laws and in full compliance with social distancing mandates—protesting against the government. (D.E. 50, ¶ 41.) 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 lockdown orders). (*Id.* ¶¶ 83-

89.) Plaintiff manifestly alleges a violation of a constitutionally protected right.

B. Plaintiff's Right to Protest Peacefully in a Public Forum Was Clearly Established.

As the foregoing discussion shows, not only has Plaintiff alleged constitutional violations by the State Defendants, those violations concern rights that were clearly established on April 14, 2020. Indeed, the rights at issue were so clearly established that the ordinary citizen recognized Defendants' violations of Plaintiff's constitutional rights, (D.E. 50 ¶¶ 38, 45-47), and no reasonable governmental official could reasonably claim he was unaware of them. *See Tobey*, 706 F.3d at 394 (denying qualified immunity to arresting officers on a motion to dismiss); *Occupy Columbia*, 738 F.3d at 125 (denying qualified immunity to state officials on a motion to dismiss); *Trulock v. Freeh*, 275 F.3d 391, 406 (4th Cir. 2001) ("it was clearly established at the time of the search that the First Amendment prohibits an officer from retaliating against an individual for speaking critically of the government.")

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 v. Haley*, 738 F.3d 107, 124 (4th Cir. 2013). 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. 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 *Occupy Columbia*, the court held "that the right of the protestors to assemble and speak out against the government on the State House grounds in the absence of valid time, place, and manner restrictions has been clearly established since *Edwards v. South Carolina*, 372 U.S.

229, 235, 83 S. Ct. 690, 9 L. Ed.2d 697 (1963)." *Occupy Columbia*, 738 F.3d at 125. The Second Amended Complaint alleges that Plaintiff was arrested for doing just the sort of activity recognized in *Occupy Columbia*—assembling in a public forum to protest and speak out against the government. Moreover, as in *Occupy Columbia*, Plaintiff's allegations show that she was not violating any valid time, place, and manner restriction. At the time of her arrest, she was standing by herself in an outdoor, uncovered, unenclosed government parking lot in full compliance with all social distancing mandates.[12] (D.E. 50, ¶¶ 30, 41, 101-02.) The reason for her arrest, as demonstrated above, was the exercise of her First Amendment rights, and the unconstitutionality of that arrest was clearly established.

In *Tobey*, the court held that the right to engage in "peaceful non-disruptive … protest of a government policy without recourse was clearly established at the time of [the plaintiff's] arrest" (in 2010). *Tobey*, 706 F.3d at 391. The right to not be retaliated against for speaking critically of the government was also clearly established (in 2001). *See Trulock*, 272 F.3d at 405-06. As in those cases, Plaintiff was arrested for engaging in a peaceful protest of government policy, (D.E. 50, ¶¶ 2, 98, 131, 167, 176), and later charged with a second offense of trespass in a continued act of retaliation for her critical viewpoints of Defendants (*id.* ¶¶ 59, 106, 131).

In light of these decisions, it is utterly disingenuous for the State Defendants—high ranking state officials and seasoned law enforcement officers —to argue that they did not know that it was constitutionally impermissible to create and implement a policy that subjected a

[12] Even if Plaintiff was subject to a time, place, and manner restriction, she has alleged that Defendants' application to her was not content-neutral, thus rendering any such restriction invalid. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that time, place, and manner restriction must be "justified without reference to the content of the regulated speech"); *see also City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 76 (2022) ("If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction … that restriction may be content based.").

peaceful citizen to criminal penalties for protesting against the government in a public forum or to bring charges against her to retaliate for her speech critical of the government. The State Defendants cite no case to overcome the clearly established nature of the rights at issue here. Plaintiff alleges she was protesting peacefully and arrested while standing alone in a parking lot, the last dissenter to leave and only "agitator" left whom the police could charge as an example to deter future protests opposing the lockdown orders. On these facts, the Fourth Circuit law was clearly established that the Defendants' treatment of Plaintiff violated the First Amendment.[13] Accordingly, the State Defendants are not entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, Plaintiff Monica Faith Ussery respectfully prays the Court deny the State Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint.

[13] 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); *see also id.* at 69 (Gorsuch, J., concurring) ("Government is not free to disregard the First Amendment in times of crisis."); *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."); *Global Impact Ministries, Inc. v. City of Greensboro*, No. 1:20CV329, 2022 WL 801714, at *7 (M.D.N.C. March 16, 2022) (rejecting argument "that constitutional analysis is different in an emergency"). These decisions affirm that the pandemic context does nothing to abrogate or modify longstanding, clearly established rights.

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 11,541 words exclusive of caption, cover, signature lines, index, and certificate of service, and certification of word count.

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

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