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 CITY OF RALEIGH AND DEFENDANTS DECK-BROWN AND BOND'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 City of Raleigh's (the "City") and Defendants Cassandra Deck-Brown and Dedric Bond's Motions to Dismiss.

NATURE OF THE CASE

This case arises from the Defendants' perversion of the criminal justice system to suppress speech and retaliate against an individual who held a viewpoint disfavored by those in power. Declaring that "protesting is a non-essential activity" and agreeing among themselves to "make an example" of dissenters [Second Am. Compl. ¶¶ 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.] The pretextual reasons offered by Defendants—that she had violated the 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 the withholding of potentially exculpatory evidence [*Id.* ¶¶ 57, 61, 63-69], the filing of additional charges 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.] As with her 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, Sections 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. C.t 63, 66 (2020) (Gorsuch, J., concurring), and Defendants' attempts to shield themselves behind pretextual health and safety concerns is unavailing. Their motions 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. [Second. Am. Compl. ¶¶ 1, 7, 25-28.] In solidarity with the Governor's controversial approach, 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 plan a protest to be held 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, a courageous woman and frequent protestor against the governor and City of Raleigh administration, 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 between Captain Cedric Bond of the Raleigh Police Department ("Defendant Bond"), Wake County District Attorney Lorin 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 upon information and belief 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, which normally took place inside the General Assembly. [*Id.*] Use of this approach had resulted in the arrest of hundreds of Moral Monday protestors who expressed dissenting political opinions. [*Id.* ¶ 91.] 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," Defendants arranged for three transport vans to be 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 put their plan into action. 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.] 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 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." [*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. RPD spokesperson Donna-Maria Harris reaffirmed the City's position that protesting was not an "essential function." [*Id.* ¶ 47.] When asked for comment, Raleigh Mayor Mary-Ann Baldwin referred to the RPD statement. [*Id.*] 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.*] Except for those engaging in violent behavior, most of these protestors

were not arrested or their charges "have or will be dropped." [*Id.* ¶¶ 173-75.]

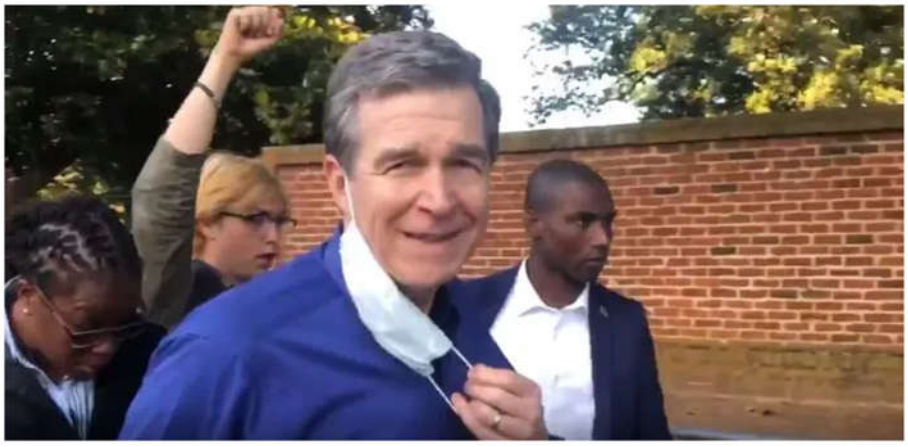
The group was sitting in the roadway and began chanting "march with us."

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.



In contrast, 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. [*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, Defendants Proctor and Hawley filed an additional charge against Ms. Ussery—this time for second degree trespass for being in a 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 rights 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, however, Defendants efforts to "make an example" of Ms. Ussery were not finished. On April 17, 2023, in their ongoing efforts to persecute, harass, and retaliate against

Ms. Ussery, the RPD filed a motion to show cause against her relating to body camera footage released on Twitter by a third party. [*Id.* ¶ 73.] After once again having to defend herself for holding a viewpoint disfavored by Defendants, Ms. Ussery managed to obtain a denial of this baseless motion. [*Id.* ¶ 74.]

LEGAL ARGUMENT

Plaintiff brings claims against Defendants—including the City, unknown John and Jane Doe RPD officers, Defendant Cassandra Deck-Brown ("Defendant Deck-Brown"), and Defendant Bond—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, these violations resulted from a policy created and implemented by the City, through its authorized policymakers and in coordination with the other Defendants, to suppress a disfavored viewpoint and deter the exercise of well-established, fundamental, constitutionally protected rights.

In response, the City argues it cannot be held liable for Plaintiff's federal claims because she has not alleged a municipal policy or custom that caused her constitutional deprivations. Defendants Deck-Brown and Bond contend that qualified immunity protects them from Plaintiff's federal claims because she has not alleged the violation of a clearly established right. All three Defendants argue that Plaintiff's claims under the North Carolina Constitution are barred by the existence of other state law remedies. Each of these arguments fails.

I. PLAINTIFF STATES A PLAUSIBLE *MONELL* CLAIM AGAINST THE CITY.

"To state a cause of action against a municipality, a section 1983 plaintiff must plead (1) the existence of an official policy or custom; (2) that the policy or custom is fairly attributable to the municipality; and (3) that the policy or custom proximately caused the deprivation of a

constitutional right." *Pettiford v. City of Greensboro*, 556 F. Supp.2d 512, 530 (M.D.N.C. 2008) (citing *Jordan v. Jackson,* 15 F.3d 333, 338 (4th Cir. 1994)). Contrary to the City's assertions, Plaintiff adequately alleges all of these requirements.

To avoid this result, Defendants first seek to elevate the pleading standard required for a § 1983 claim. There is a distinction, however, between what plaintiffs must plead to *state* a claim and what they must prove to *succeed* in a § 1983 case. As the Fourth Circuit recognizes, while "the substantive requirements for proof of municipal liability are stringent," § 1983 claims "are not subject to a 'heightened pleading standard' paralleling the rigors of proof demanded on the merits." *Jordan*, 15 F.3d at 338. Under the proper pleading standard, "[t]here is no requirement that [plaintiffs] detail the facts underlying [their] claims or that [they] plead the multiple incidents of constitutional violations that may be necessary at later stages to establish the existence of an official policy or custom and causation." *Id.* at 339. Rather, "a § 1983 plaintiff seeking to impose municipal liability must satisfy only the usual requirements of notice pleading specified by the Federal Rules." *Edwards v. City of Goldsboro,* 178 F.3d 231, 244-45 (4th Cir. 1999) (quoting *Jordan*, 15 F.3d at 339). While prevailing on a *Monell* claim may be difficult, "simply alleging such a claim is, by definition, easier." *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 679 n.4 (4th Cir. 2023) (quoting *Owens v. Balt. City State's Attys. Office*, 767 F.3d 379, 403 (4th Cir. 2014)). "So long as [plaintiff] has pleaded enough facts that, when assumed to be true, state a plausible First Amendment violation, then [her] official capacity claim should survive Defendants' [Rule 12] challenge." *Sharpe*, 59 F.4th at 679 n.4. "The recitation of facts need not be particularly detailed, and the chance of success need not be particularly high." *Id.*

Under this standard, Plaintiff has easily fulfilled her pleading requirements.[1]

A. An Official Policy Existed, Which Was Used to Suppress Disfavored Protests.

Plaintiff's Second Amended Complaint alleges an official policy, arising out of a coordinated plan among various state and local officials, to suppress a disfavored viewpoint and deter the exercise of First Amendment rights. [Second Am. Compl. ¶¶ 10, 37, 47, 83-86, 88-90, 101, 104.] This policy was created, implemented, and adopted by the City, through its authorized policymakers and their subordinate officers. [*Id.* ¶¶ 39, 41, 47, 83-86, 88-90.] Plaintiff's allegations show that Defendant Bond was both instrumental in creating this policy and authorized by the City to lead its implementation on April 14, 2020. [*Id.* ¶¶ 15, 35, 83-86, 89-90, 93-98.] Plaintiff also alleges that Defendant Deck-Brown was the RPD Chief, was Defendant Bond's commanding officer, and had actual or delegated authority to determine final policy related to the RPD's interaction with the protesters on April 14, 2020. [*Id.* ¶¶ 14, 39, 88.] Together, these allegations support the existence of a policy, attributable to the City of Raleigh, that protesting was "a non-essential activity" subject to criminal penalties, which the City implemented to shut down and deter disfavored speech clearly protected by the First Amendment.

Specific factual allegations supporting this policy include:

- The authority given by the City to Defendant Deck-Brown and Defendant Bond to deal with the protests on April 14, 2020. [*Id.* ¶¶ 14-15, 88.]

- The conference call referenced by Defendant Bond during which Defendants Bond, Hawley, Brock, Freeman, and Hooks discussed the plan to "make an example" of the ReOpenNC "agitators" for exercising their First Amendment rights and to deter further protests. [*Id.* ¶¶ 83-86.]

[1] This is equally true as to Plaintiff's individual capacity claims against Defendants Deck-Brown and Bond. *See Collin v. Rector & Bd. of Visitors of Univ. of Va.*, 873 F. Supp. 1008, 1015 (W.D. Va. 1995) (applying *Jordan*'s rejection of heightened pleading to individual capacity claims).

- Defendant Bond's instructions to the group of assembled officers and his emphasis that they needed to be "on the same sheet of music." [*Id.* ¶¶ 85-86.]

- The dispersal procedures utilized by Defendant Bond on April 14, 2020, which were patterned on official reaction to the prior Moral Monday protests, but which were modified from five minutes to one minute to abbreviate the compliance period. [*Id.* ¶¶ 90-91, 93.]

- RPD's notorious and revealing tweet confirming the City's policy that "Protesting is a non-essential activity." [*Id.* ¶ 37.]

- The subsequent reaffirmation by RPD spokeswoman Donna-Maria Harris that the City did not consider protesting "an essential function." [*Id.* ¶ 47.]

- Raleigh mayor Mary-Ann Baldwin's referral back to the RPD statement in communications with the press. [*Id.*]

The level of coordination between the multiple agencies, the harmonization of Plaintiff's arrest with the goals discussed during the conference call and the instructions given by Defendant Bond, and the repetition by multiple City officials that protesting was "non-essential" all give rise to a reasonable inference that a policy existed. Indeed, the Fourth Circuit recently came to a similar conclusion in a case with far less coordination than alleged by Plaintiff here. *See Sharpe v. Winterville Police Dep't*, 59 F.4th 674 (4th Cir. 2023). In *Sharpe*, the plaintiff was arrested by two officers for livestreaming a traffic stop. The plaintiff brought suit against the municipality, alleging that his arrest resulted from a policy or custom barring a car's occupant from livestreaming traffic stops and that such policy violated his First Amendment rights. The Court determined that the allegation of a municipal policy was plausible because "absent a policy the two officers would not have taken the same course, for the same reason . . . ." *Id.* at 680.

Likewise, in this case, it is reasonable to infer the existence of a policy from the facts that multiple City and other officials acted pursuant to the "same course" and seemingly for "the same reasons." As in *Sharpe,* if there were no policy, why would officers of both the RPD and

the State Capitol Police ("the SCP") act in a coordinated way to arrest and charge Plaintiff, the remaining protestor who was standing alone in a state government parking lot?[2] Why would the RPD's social media account, the RPD spokesperson, and Mayor Baldwin all confirm the view that protesting the lockdown orders was a non-essential activity subject to criminal prosecution? Certainly, a plausible (if not obvious) answer is that a policy existed and that the City of Raleigh, through its decisionmakers and other officials, was implementing it. *See id.* at 680 (indicating that, at Rule 12 stage, all reasonable inferences must be drawn in plaintiff's favor). While the precise contours of the policy remain to be determined through discovery, Plaintiff sufficiently alleges the existence of a policy based on the undeniable proposition that the City of Raleigh considered protesting a non-essential activity punishable under criminal statutes and implemented that policy through Defendant Deck-Brown, Defendant Bond, and the arresting RPD officers.

B. The Policy Was Fairly Attributable to the City.

Plaintiff also sufficiently alleges that the policy under which she was arrested was "fairly attributable" to the City. *Jordan v. Jackson*, 15 F.3d 333, 338 (4th Cir. 1994). As the foregoing discussion shows, the policy was created through the City's authorized policymakers, implemented through its officers, and endorsed by its officials. Plaintiff has alleged a plausible claim that Defendant Bond, Defendant Deck-Brown, the Raleigh Police Department, and the mayor (in coordination with other officials, like Defendant Freeman) promulgated, implemented, and approved the unconstitutional policy that protesting is a nonessential activity warranting arrest and criminal penalties. It was a policy clearly sanctioned by the City of Raleigh, and

[2] That SCP officers were involved does not absolve the City from its adoption and implementation of the policy. North Carolina law gives the RPD and the SCP concurrent jurisdiction over the State Government Complex, *see* N.C. Gen. Stat. § 143B-911; 14B N.C.A.C. 13.0102, and Plaintiff plainly alleges that both RPD and SCP officers were acting in concert under the leadership of City officials, including Defendant Bond. [Second Am. Compl. ¶¶ 15, 35, 85, 89-90.]

Plaintiff seeks to hold the City accountable "for its own violations of federal law." *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 679 (4th Cir. 2023) (quoting *Los Angeles Cty. v. Humphries*, 562 U.S. 29, 36 (2010)).[3]

Given the strength of these allegations, the City tacitly concedes the existence of a policy but seeks to shift responsibility by arguing that its officers and officials were simply enforcing state law. Additionally, the City argues that it cannot be held liable because Plaintiff alleges only a single incident of unconstitutional conduct insufficient to establish a widespread custom. Both arguments fail.

1. The City Made a Conscious Choice to Suppress Disfavored Protests.

Relying on non-binding authority, *see Bruce & Tanya & Assoc., Inc. v. Bd. of Supervisors of Fairfax Cty., Va.*, 854 Fed. Appx. 521 (4th Cir. 2021) (unpublished – copy attached), the City argues that its actions on April 14, 2020, were mandated by E.O. 121 and, as such, are attributable not to it but to the state. This argument is unavailing.

Contrary to the City's implication and the charges brought against Plaintiff, E.O. 121 did not prohibit public protesting. [Second Am. Compl. ¶ 137.] Rather, it limited mass gatherings to no "more than ten (10) persons" when congregating in a "confined indoor or outdoor space." [*Id.* ¶ 28; Ex. 1, p. 9.] Plaintiff clearly was not in violation of this requirement; she was 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,

[3] To the extent the City argues that Plaintiff is attempting to hold it responsible under a theory of respondeat superior [*see* D.E. 58, p. 5), it ignores the crux of Plaintiff's argument. The City is responsible for its own policies and the implementation of those policies by its employees and agencies.

88-90, 101, 104.]

That policy, as discussed above, was formulated and implemented by the City, not E.O. 121. In fact, the City concedes the E.O. "was silent as to citizens' right to peacefully assemble to petition their government for redress of grievances" [D.E. 58, p. 8], and the author of the E.O., Governor Cooper, affirmed that it permitted outdoor protests and the exercise of First Amendment liberties, calling "protesting 'a fundamental right' and indicating that it need not be listed in an executive order to be allowed." [Second Am. Compl. ¶ 50, Ex. 5.] That E.O. 121 did not mandate the arrest and prosecution of protestors is further shown by the City's dissimilar treatment of other protestors, including Governor Cooper himself, both preceding and following the events of April 14, 2020. [*Id.* ¶¶ 54, 164, 173-75.] Contrary to the City's assertions, its decisionmakers and officers were not merely enforcing a state mandate over which they had no discretion.[4] Rather, the City was making its own conscious choice that the ReOpenNC "agitators," including Plaintiff, should not be allowed to protest. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (acknowledging that policy results from "course of action consciously chosen"); *Bruce & Tanya & Assoc.*, 854 Fed. Appx. at 531 (indicating local government "can be held liable" for policy "it consciously chose to enforce").

As stated, the precise contours of the policy leading to Plaintiff's arrest and prosecution remain to be determined through discovery. For present purposes, however, Plaintiff has alleged a plausible claim that the City is responsible for the policy, and the City cannot evade liability even before all the facts are determined by pointing fingers at others.

2. <u>The City Adopted and Implemented Its Policy Through Authorized Policymakers.</u>

The City's argument that Plaintiff's claims are insufficient because based on one, single

[4] Defendants Deck-Brown and Bond seem to admit as much. *See* D.E. 60, p. 16 (stating that "some degree of discretion" was required "regarding when arrests should be made").

incident of unconstitutional activity fares no better. This argument misapprehends the core of Plaintiff's allegations, the law, and the pleading requirements for a § 1983 claim. Plaintiff does not allege one single incident, but rather a pattern of unconstitutional conduct in violation of her rights under the First and Fourteenth Amendments. Not only does she allege that she was targeted for arrest as part of a conspiracy to punish "agitators," quash her free speech rights, and deter her and others from future protesting, she also alleges a pattern of disparate treatment and harassment, which began the day of her arrest but continued for years thereafter.

The Second Amended Complaint raises reasonable inferences that Plaintiff was targeted because of her dissenting viewpoint, while Defendants allowed others holding more favorable views to gather without reprisal. [Second Am. Compl. ¶¶ 37, 83-84, 123.] While this policy of persecution was initially implemented on the date of her arrest, Plaintiff continued to be the target of official harassment for another three years, including the selective enforcement of charges not pressed against others, the withholding of exculpatory evidence, the retaliatory filing of additional charges, and the bringing of a baseless show cause petition. [*Id.* ¶¶ 52, 54, 56-57, 59, 61, 63-69, 73-74.] Plaintiff's claims do not stem from one incident but from a systematic and intentional course of unconstitutional conduct that flowed from the City's decision selectively to shutdown opposition to the lockdown orders while allowing favored expression to continue.[5]

Regardless, the law is clear that a municipality may be liable even for "a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. City of Cincinnati*,

[5] This conclusion is not negated by the fact that subsequent ReOpenNC protests were allowed following Plaintiff's arrest. First, it is reasonable to infer that the City modified its policy regarding arrests due to the embarrassing scrutiny that resulted from its unconstitutional actions on April 14, 2020. Second, the subsequent modification of its policy confirms that a policy in fact existed. Third, the policy to punish Plaintiff for her views clearly was not altered, as the subsequent events show. Finally, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Price v. City of Fayetteville, N.C.*, 22 F. Supp. 3d 551, 564 (E.D.N.C. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693 (2000)).

475 U.S. 469, 480 (1986). "[W]here action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Id.* at 481. Although municipal policy "is most easily found in municipal ordinances," it can also be found in "formal or informal ad hoc 'policy' choices or decisions of municipal officials authorized to make and implement municipal policy." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). Even a course of action "tailored to a particular situation and not intended to control decisions in later situations," *Pembaur*, 475 U.S. at 481, may give rise to municipal liability when adopted by a final decisionmaker. *Edwards*, 178 F.4th at 244. Moreover, because "municipalities often spread policymaking authority among various officers and official bodies," individual officers (in addition to formal boards and councils) "may have authority to establish binding [municipal] policy respecting particular matters and to adjust that policy for the [municipality] in changing circumstances." *Pembaur*, 475 U.S. at 483.

The City asserts that the Second Amended Complaint is "silent regarding the existence" of such policy choices by final decisionmakers, but nothing could be further from the truth. Plaintiff explicitly alleges that Defendant Deck-Brown "had the actual or delegated authority to determine policy related to the policing and control of assemblies, marches, protests, and rallies within the jurisdiction of the City of Raleigh." [Second Am. Compl. ¶ 14.] She further alleges that Defendant Bond "was the commander of the law enforcement activity at the North Carolina State Government Complex on April 14, 2020." [*Id.* ¶ 15.] Additionally, she alleges that these two policymakers, along with others, created and implemented the policy that led to her arrest. [*Id.* ¶ 88.] These allegations state a plausible basis for holding the City liable.

Neither *Connick v. Thompson*, 563 U.S. 51 (2011), nor *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), relied upon by Defendants, require a contrary result. As an initial matter, both cases

concerned an alleged failure to train municipal employees, a theory of liability that the Supreme Court has described as "tenuous" and "nebulous." *See Connick*, 563 U.S. at 61; *Tuttle*, 471 U.S. at 822. For that reason, the Court typically requires "[a] pattern of similar constitutional violations" before a municipality's training program can be considered the cause of such deprivations. *Connick*, 563 U.S. at 62. Plaintiff's claims are simpler and more straightforward; she alleges that the City's decisionmakers consciously chose to subject certain expression to criminal sanctions based on viewpoint. Second, in both cases, the plaintiffs' claims had gone to trial, meaning the plaintiffs had the opportunity to discover evidence of any policies that existed. *Connick*, 563 U.S. at 57; *Tuttle*, 471 U.S. at 811-12. Plaintiff should be afforded the same opportunity here.

At this stage, Plaintiff's allegations are more than sufficient to attribute the policy to the City. *See Estate of Bryant v. Baltimore Police Dep't*, Civil Action No. ELH-19-384, 2020 WL 673571, at *36 (D. Md. Feb. 10, 2020) ("At the motion to dismiss stage, courts should not expect the plaintiff to possess a rich set of facts concerning the allegedly unconstitutional policy and responsible policymakers."). The City's motion to dismiss is premature. Plaintiff has provided notice of the nature of her claims and is entitled to proceed with discovery to determine additional factual support for her case.

C. The City's Policy Caused Deprivations of Plaintiff's Constitutional Rights.

Finally, the City makes a halfhearted contention that Plaintiff has failed to allege that the City's policy caused any deprivation of her rights. This contention is plainly incorrect. As the foregoing discussion makes clear, the Second Amended Complaint is replete with allegations that she was the target of the City's policy to suppress and chill a disfavored viewpoint by making her an example. [Second Am. Compl. ¶¶ 10, 37, 47, 83-86, 88-90, 101, 104.] The

infringement of her First and Fourteenth Amendment rights flowed directly from this policy. *See*, *e.g.*, *Ramsek v. Beshar*, 989 F.3d 494, 496 (6th Cir. 2021) (labeling it "a textbook First Amendment violation" where government discouraged protests opposing COVID-19 policies but welcomed other protests advancing favorable views).

Once again, dismissal at this juncture would be premature. *See Jordan v. Jackson*, 15 F.3d 333, 339 (4th Cir. 1994) (stating that a plaintiff need not plead all the detailed facts "that may be necessary at later stages to establish the existence of an official policy or custom *and causation*") (emphasis added); *see also Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999) ("[W]hen as here, a Rule 12(b)(6) motion is testing the sufficiency of a civil rights complaint, '[courts] must be 'especially solicitous of the wrongs alleged' and 'must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory which might plausibly be suggested by the facts alleged.* '") (quoting *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988)) (emphasis in original). Plaintiff plausibly states a claim against the City, and she should be allowed to develop that claim through discovery.

II. DEFENDANTS DECK-BROWN AND BOND ARE NOT 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). "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 Defendants Deck-Brown and Bond, and their motions should be denied.[6]

A. Plaintiff Alleges Sufficient Allegations That Defendants Deck-Brown and Bond Violated Her Constitutional Rights.

Defendants Deck-Brown and Bond initially argue that they are entitled to qualified immunity because Plaintiff has not plausibly alleged they were responsible for depriving Plaintiff of her constitutional rights. This argument lacks merit.

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

To begin with, 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. [Second Am. Compl. ¶¶ 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. [Second Am. Compl. ¶¶ 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

[6] The § 1983 claims in Counts II, III, V, and VI against Defendants Deck-Brown and Bond are brought against them in their individual capacities. Claim I is a two-part claim: (1) conspiracy under § 1983 to violate Plaintiff's federal rights under the United States Constitution; and (2) conspiracy under state law to violate Plaintiff's analogous state constitutional rights. The former is brought against Defendants' in their individual capacities, while the latter is brought against them in their official capacities.

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. v. District of Columbia,* 82 F.4th 1122, 1141 (D.C. Cir. 2023) ("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. [Second Am. Compl. ¶ 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.

2. Defendants Deck-Brown and Bond Violated Plaintiff's First Amendment Rights.

Defendants Deck-Brown and Bond argue that they cannot be responsible for the plain violation of Plaintiff's constitutional rights because they did not personally arrest Plaintiff, order her arrest, or play any role in her arrest. This argument ignores Plaintiff's allegations, discussed above, that Defendant Deck-Brown was the final decisionmaker for the policy by which Plaintiff's rights were infringed and that Defendant Bond served as the ringleader and principal

agent for implementing that policy on April 14, 2020.

Contrary to Defendants' assertions, the Second Amended Complaint is replete with allegations connecting them to the violation of her rights. Specific factual allegations supporting her claim against these Defendants include:

- Defendant Deck-Brown's authority "to determine final policy relating to the policing and control of assemblies, marches, protests, and rallies." [*Id.* ¶ 14.]

- Defendant Deck-Brown's role as commanding officer over Defendant Bond and all other RPD officers present at the protest. [*Id.*]

- Defendant Bond's role as "commander of the law enforcement activity" and "all RPD officers present" at the State Government Complex on April 14, 2020. [*Id.* ¶¶ 15, 97.]

- Defendant Bond's participation in the conference call during which he and other officials discussed the plan to "make an example" of the ReOpenNC "agitators" for exercising their First Amendment rights and to deter further protests. [*Id.* ¶¶ 83-86.]

- Defendant Bond's statements that he wanted to start "locking up people as soon as possible" so "we won't have to go through the same things next Tuesday" because "we just can't allow that to continue." [*Id.* ¶ 85.]

- Defendant Bond's dispersal orders, which threatened the ReOpenNC protestors with physical arrest and which did not meet the requirements for dispersal of N.C.G.S. § 288.5, and his modification of the Moral Monday procedures to make arrests more likely. [*Id.* ¶¶ 35, 90, 93, 94, 96.]

- Defendant Bond's instructions that the arrest team, who were gathered without masks, to don Personal Protective Equipment because he was going to justify his orders on the pretext of "a public health hazard." [*Id.* ¶ 90.]

- The conduct of the officers under Defendant Bond's command, who forced protestors to leave the area, and the fact that protestors began to disperse pursuant to Bond's orders. [*Id.* ¶¶ 36, 40.]

- Defendant Bond's order that the officers sweep the parking lot and arrest protestors who did not disperse. [*Id.* ¶ 98.]

- Plaintiff's arrest by RPD officers under Defendant Bond's supervision and her subsequent transfer to the custody of State Capitol Police who were part of the

coordinated law enforcement efforts overseen by Defendant Bond.[7] [*Id.* ¶¶ 15, 30, 41-42, 97, 101-02.]

- Defendant Deck-Brown's responsibility for the RPD's justification of the dispersal and Plaintiff's arrest on the grounds that "protesting is a non-essential activity." [*Id.* ¶ 39, 88.]

These allegations clearly demonstrate that Defendant Bond coordinated with other Defendants to implement the plan to suppress and chill the protestors' free speech rights and that he oversaw the execution of that plan, which contrived artificial circumstances through unjustified dispersal orders, with abbreviated times, to justify the arrest of peaceful protestors. These allegations give rise to a reasonable inference that Plaintiff—the lone protestor remaining in public parking lot after the issuance of unlawful dispersal orders—became the "agitator" of whom Defendant Bond and the other Defendants wanted to "make an example" for daring to exercise her First Amendment Rights in support of a viewpoint disfavored by those in power. Similarly, they raise a reasonable inference that Defendant Deck-Brown—as the final policymaker for policing this and other protests during the spring and summer of 2020—ordered, approved, and supervised Defendant Bond's implementation of the infringing (and selective) policy. Inasmuch as Defendants argue for the drawing of other inferences, they erroneously ignore the standard under which their motion must be adjudicated. *See Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 680 (4th Cir. 2023) (indicating that, at Rule 12 stage, all reasonable inferences must be drawn in plaintiff's favor).

For the same reason, Defendants' argument that there are insufficient factual allegations to support a conspiratorial meeting of the minds rings hollow. The Second Amended Complaint specifically alleges: (1) that Defendant Bond participated in calls with Defendants Freeman,

[7] Defendant Proctor's Investigation Report states that Plaintiff was "handcuffed by Raleigh Police officers" and then "escorted by Raleigh Police officers to my awaiting patrol vehicle." [Second Am. Compl., Ex. 2.]

Brock, Hawley, and Hooks; and (2) the calls were designed to ensure that all law enforcement personnel were "on the same sheet of music" regarding the plan to "make an example" of "agitators" because "we just can't allow that to continue." [Second Am. Compl. ¶¶ 85-86.] These allegations reveal the substance of the calls and confirm a meeting of the minds to arrest protestors in an effort to suppress their expression and to deter additional protests. Accordingly, the Second Amended Complaint goes much further than the conclusory allegations in *Smith v. McCarthy*, 349 Fed.Appx. 851 (4th Cir. 2009) cited by Defendants, in which plaintiff alleged only that the defendants conferred or talked on cell phones, but did not allege the substance of what was said. *See id.* at 858.

Plaintiff plausibly states a claim that her First Amendment rights were violated by Defendants Deck-Brown and Bond, among others. Defendants' assertions to the contrary rely on improper attempts to draw inferences in their own favor. But "the purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint [rather than to] resolve contests surrounding the facts [or] the merits of a claim." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). Plaintiff has met her burden, and her claims against Defendants Deck-Brown and Bond should be allowed to proceed.[8]

[8] Defendants Deck-Brown and Bond make a passing argument that they cannot be held responsible for the *Brady* violations alleged by Plaintiff. Citing a concurrence to an equally divided en banc decision, *see Jean v. Collins*, 221 F.3d 656, 656-63 (4th Cir. 2000) (Wilkinson, J., concurring), Defendants assert that only the prosecutor can be liable under *Brady*. An equal number of judges in *Jean* disagreed, however, concluding that *Brady* "applies to all officials working in furtherance of the State's prosecution" and that "police officers are capable of breaching" its requirements. *See id.* at 664 (Murnaghan, J., dissenting). The dissent's view appears to be supported by other Fourth Circuit precedent. *See*, *e.g.*, *Owens v. Balt. City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014) (citing *Goodwin v. Metts*, 885 F.2d 157, 163-64 (4th Cir. 1989) and *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842, 846-47 (4th Cir. 1964)). The Second Amended Complaint specifically advances a separate *Brady* claim only against Defendant Freeman, the Wake County District Attorney. [Second Am. Compl., ¶¶ 148-59.] But the *Brady* violations formed part of the larger conspiracy to violate Plaintiff's constitutional rights, and where such violations pertain to evidence within RPD control [*see id.* ¶¶ 61, 64], they remain relevant to her claims against Defendants Deck-Brown and Bond as members of that conspiracy. Additionally, they support Plaintiff's allegations of disparate treatment in light of Defendant Deck-Brown's efforts to effect the immediate

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 Defendants Deck-Brown and Bond, 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 [Second Am. Compl. ¶¶ 38, 45-47], and no reasonable governmental official could reasonably claim she 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.)

Defendants Deck-Brown and Bond seek to avoid that result by arguing that the pandemic context in which Plaintiff's arrest occurred somehow obscured these longstanding liberties. Additionally, they assert that Plaintiff's claims are barred because there was probable cause for her arrest independent of her protected First Amendment activity. Neither contention is availing.

1. <u>There is No Pandemic Exception to the Constitution.</u>

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 unfettered, absolute power to enact unprecedented restrictions on 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. Plaintiff's rights to assemble, to protest, and to petition the government in a public

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release of body camera recordings related to a police shooting just one month before Plaintiff's arrest. [*Id.* ¶¶ 164, 168.]

forum were well-established before the events of April 14, 2020, and the pandemic did not change that.

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.[9] [Second Am. Compl. ¶¶ 30, 41, 101-02.] The reason for her

[9] 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

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," which occurred on December 30, 2010. *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013). As in that case, Plaintiff alleges that she was arrested for engaging in a peaceful protest of government policy. [Second Am. Compl. ¶¶ 2, 98, 131, 167, 176.] The rights violated by Defendants were thus clearly established when they implemented their unconstitutional policy against Plaintiff on April 14, 2020.

In light of these decisions, it is utterly disingenuous for Defendants—seasoned law enforcement officers of high rank—to argue that they did not know that it was constitutionally impermissible to create and implement a policy that subjected a peaceful citizen to criminal penalties for protesting against the government in a public forum. In fact, Defendant Deck-Brown was reported to have affirmed this right only a month earlier, *after* the first executive order was issued declaring a state of emergency related to COVID-19, when spontaneous protests broke out in Raleigh in reaction to the shooting of Javier Torres by an RPD officer. [*Id.* at ¶¶ 164, 166.] Indeed, the violation was so obvious that no similar cases were needed. *See Hope*, 536 U.S. at 741 (explaining that "officials can still be on notice that their conduct violates established law even in novel factual circumstances.") (internal quotations and alteration omitted). The national response garnered by the 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.

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purpose or justification underpins a facially content-neutral restriction … that restriction may be content based.").

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"). To the extent Defendants suggest these statements are inapposite because they post-date Plaintiff's arrest, they misconstrue the significance of these cases. The decisions just cited do not pronounce a new rule of constitutional law. Rather, they merely affirmed that the pandemic context does nothing to abrogate or modify longstanding, clearly established rights.

Defendants cite various non-binding, distinguishable opinions in support of their claim to the contrary. None of these cases changes the result, however. The slew of takings cases Defendants cite are inapposite. Regulatory takings claims are notoriously complicated and are adjudicated under much different standards than those governing violations of First Amendment rights. *See*, *e.g.*, *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (explaining that takings claims are typically subject to "ad hoc" multi-factor analysis). The Seventh Circuit's decision in *Elim Romanian Pentecostal Church v. Pritzker*, 22 F.4th 701 (7th Cir. 2022), is also distinguishable. To begin with, the plaintiff brought an official capacity suit against a state official, *id.* at 703, meaning that any discussion of qualified immunity was dicta.[10]

[10] This is also true of *Horizon Christian School v. Brown*, No. 21-35947, 2022 WL 17038695 (9th Cir. Nov. 17, 2022). *See id.* at *1 (indicating suit was brought "against Governor Kate Brown … in her official capacity"); *id.* at *2 (discussing qualified immunity in hypothetical context where "Brown had been sued in her individual capacity").

Moreover, the court indicated that, even if it "were to ignore the 'official capacity' language," the defendant would be entitled to qualified immunity because he had already won an earlier appeal (on which he presumably was entitled to rely) before intervening Supreme Court rulings made the law more favorable to the plaintiffs. *Id.* The qualified immunity discussion in *Allen v. Whitmer*, No. 21-1019, 2021 WL 3140318 (6th Cir. July 26, 2021) comes from a concurrence rather than a majority opinion. *See id.* at *4 (White, J., concurring). *Case v. Ivey*, No. 21-12276, 11th Cir. July 5, 2022) did not involve protesting or retaliatory arrests and, therefore, is factually distinguishable.

In short, none of the decisions cited by Defendants Deck-Brown and Bond 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.[11] On these facts, the Fourth Circuit law was clearly established that the Defendants' treatment of Plaintiff violated the First Amendment.

2. Plaintiff's Claims Are Not Barred by the Purported Finding of Probable Cause.

Defendants Deck-Brown and Bond also argue that Plaintiff's claims against them are barred by the issuance of warrants supported by probable cause in the underlying criminal matter. Once again, Defendants are mistaken.

[11] 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. *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).

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. 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. [Second Am. Compl. ¶ 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.) 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.) Accordingly, *Reichle v. Howards*, 566 U.S. 658 (2012), cited by Defendants, does not apply. Plaintiff sufficiently alleges facts giving rise to a reasonable inference that her arrest was not supported by probable cause, and she should have the opportunity to develop her case further through discovery. *See Tobey*, 706 F. 3d at 392 (indicating that "probable cause or its absence will be at least an evidentiary issue in practically all cases").[12]

[12] Defendants also assert that Plaintiff's now-defunct conviction in the Wake County District Court "establishes, as a matter of law, the existence of probable cause for arrest." [D.E. 60, p. 21.] This assertion

Even if Plaintiff's arrest was supported by probable cause, her case falls within the exception established by *Lozman v. Riviera Beach*, 138 S.Ct. 1945 (2018), and *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). In those cases, the Supreme Court held that "the no-probable-cause requirement should not apply 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." *Nieves*, 139 S. Ct. at 1727. The Second Amended Complaint satisfies Plaintiff's burden at this stage.[13] The allegations show that Plaintiff was arrested for speech disfavored by Defendants while other protestors, of whose viewpoints Defendants approved, were subjected to more favorable treatment. [Second Am. Compl. ¶¶ 54-55, 131, 164-79.]

In sum, Plaintiff adequately alleges the violation of a clearly established right, and her claims against Defendants Deck-Brown and Bond should be allowed to proceed. Any issues concerning the existence of probable cause and the reasonableness of and motivation for Plaintiff's arrest warrant factual development, and "the qualified immunity question cannot be resolved without discovery." *DiMeglio v. Haines*, 45 F.3d 790, 795 (4th Cir. 1995); *see also Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (explaining that, in resolving dispositive motions, "courts may not resolve genuine disputes of fact in favor of the party seeking [qualified immunity]").

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ignores the following facts: (1) Plaintiff appealed that conviction; (2) Plaintiff subsequently filed a motion to dismiss the charges against her; (3) before that motion could be heard, the district attorney offered informal deferral with dismissal and expungement; and (4) the charges against Plaintiff ultimately were dismissed. [Second Am. Compl. ¶¶ 62, 70-72.] The district court's decision—erroneous, neither final nor determinative, and ultimately annulled—hardly bears the weight that Defendants seek to give it.

[13] Although *Nieves* speaks of "objective evidence," that case dealt with the grant of summary judgment. *See* 139 S. Ct. at 1727. *Lozman* addressed the propriety of a judgment entered after a jury verdict. *See* 138 S. Ct. at 1950. In both cases, therefore, the plaintiff had been afforded the opportunity for discovery before either the requirement for or the existence of probable cause was decided.

III. PLAINTIFF'S CLAIMS UNDER THE STATE CONSTITUTION ARE NOT BARRED.

Both the City and Defendants Deck-Brown and Bond argue that Plaintiff's claims under the North Carolina Constitution are barred by the existence of adequate state law remedies. This argument demonstrates a fundamental misapprehension of the facts alleged and the nature of Plaintiff's claim.

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, 781-82 (1992). "A direct action against the State for its violations of free speech is essential to the preservation of free speech." *Id.* at 782. The provision of the North Carolina Constitution protecting free speech, N.C. Const. art. I, § 14, "is self-executing." *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[14] 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. [Second Am. Compl. ¶ 79.] 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

[14] Defendants appear to seek dismissal only of the state law claims advanced in Count I, relating to the conspiracy. [D.E. 58, p. 12; D.E. 60, p. 8.] Defendants do not mention Count VI, in which Plaintiff also pleads violations of the North Carolina Constitution. Therefore, their motions are not fully dispositive. *See Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012) (indicating issue is waived where party fails to develop argument in its brief).

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" for these violations. [*Id.* ¶ 111.] The claims advanced in Count I fall squarely within *Corum*.

Ignoring these allegations, Defendants seek to recharacterize Plaintiff's claims by focusing on the fact of her arrest (rather than the motivation behind it) and cherry-picking a single allegation (out of more than 30) that alludes to malicious prosecution and abuse of process. [*Id.* ¶ 107.] With the focus thus shifted, Defendants contend that her direct claim for free speech violations is barred by the possibility that she could bring tort actions for malicious prosecution and false imprisonment. But these actions protect different interests than expression, and 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 (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" and noting that "North Carolina courts have ruled that no state remedy exists for the violation of the state constitutional right to freedom of speech").

The false imprisonment and malicious prosecution cases cited by Defendants only support this conclusion. Most of them allege violations of Fourth Amendment and similar rights having nothing to do with free speech. *See Rousselo v. Starling*, 128 N.C. App. 439, 447 (1998) (barring *Corum* claim where plaintiff alleged violations of rights "to be free from unreasonable detention [and] search and seizure"); *DeBaun v. Kuszaj*, No. COA12-1520, 2013 WL 4007747, * (N.C. Ct. App. 2013) (barring *Corum* claim where plaintiff alleged violations arising from

seizure and resulting personal injuries). Only *Swick v. Wilde*, No. 1:10-cv-303, 2012 WL 3780350 (M.D.N.C. Aug. 31, 2012), appears to have involved free speech in any way. *See id.* at *18-20 (denying summary judgment on retaliatory arrest claims). To the extent that non-binding decision views a state law malicious prosecution claim to be an adequate remedy for free speech violations, it is simply inconsistent with North Carolina law. *See Corum*, 330 N.C. at 783 ("*Having no other remedy*, our common law guarantees plaintiff a direct action under the State Constitution for the alleged violations of his constitutional freedom of speech rights.") (emphasis added).

The bevy of employment cases cited by Defendants are inapposite. *See Phillips v. Gray*, 163 N.C. App. 52, 58 (holding that state law claim for wrongful discharge barred terminated employee's *Corum* claim); *Iglesias v. Wolford*, 539 F. Supp. 2d 831, 839 (E.D.N.C. 2008) (same); *see also Helm v. Appalachian State Univ.*, 363 N.C. 366 (2009) (adopting dissenting opinion from Court of Appeals, which concurred with majority that state Whistleblower Act barred former employee's *Corum* claim); *Swain v. Elfland*, 145 N.C. App. 383, 391 (2001) (holding that administrative hearing barred terminated employee's *Corum* claim). Unlike the plaintiffs in those cases, Plaintiff is not alleging an injury arising from an employment relationship. Rather, she is alleging violations of free speech rights, like those at issue in *Corum* itself, for which no other legal or administrative remedy exists under North Carolina law. *Cf. Howell v. Cooper*, 892 S.E.2d 445, 453 (N.C. Ct. App. 2023) (finding no adequate state remedy for alleged violations of state constitution's "fruits of labor" and "law of the land" clauses caused by COVID-19 lockdown policies).

CONCLUSION

For the foregoing reasons, Plaintiff Monica Faith Ussery respectfully prays the Court deny Defendant City of Raleigh and Defendants Cassandra Deck-Brown and Dedric Bond's Motions to Dismiss Plaintiff's Amended Complaint.

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

/s/ Anthony J. Biller
Anthony J. Biller
NC State Bar No. 24,117
Danielle Rose
NC State Bar No. 29,421
Adam P. Banks
NC State Bar No. 47,559
James R. Lawrence, III
NC State Bar No. 44,560
2601 Oberlin Rd, STE 100
Raleigh, NC 27608
Telephone: (919) 715.1317
Facsimile: (919) 782.0452
Email: ajbiller@envisage.law
Email: drose@envisage.law
Email: abanks@envisage.law
Email: jlawrence@envisage.law

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 11,730 words exclusive of caption, cover, signature lines, index, certificate of service, and certification of word count.

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

/s/ Anthony J. Biller
Counsel for Plaintiff