UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN McFADYEN, MATTHEW WILSON, and BRECK ARCHER
Plaintiffs,

v.

DUKE UNIVERSITY, *et al.*,
Defendants.

1:07-cv-953

PLAINTIFFS' RESPONSE TO DUKE UNIVERSITY'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

The matter before the Court is Duke University's motion to dismiss the Forty-First Cause of Action in Plaintiffs' Second Amended Complaint. [Docs. #177 & 178]. Plaintiffs Forty-First Cause of Action asserts a direct cause of action under the North Carolina Constitution against Duke, as an alternative theory of liability in the event that Plaintiffs' state law remedies prove "inadequate" under *Craig v. New Hanover Co. Bd. of Educ.*, 678 S.E.2d 351 (N.C. June 18, 2009).

Duke asserts that Plaintiffs' state constitutional claims should be dismissed for three reasons. First, Duke asserts that *Craig* applies only to governmental immunity defenses, which Duke has not raised; second, Plaintiffs fail to allege state constitutional claims "as a pleading matter" (a euphemism for the same "plausibility" argument Duke advanced and Plaintiffs rebutted in the *Iqbal* Briefing); third, Plaintiffs fail to allege state constitutional claims "as a substantive matter." [Doc. #178 at 2]. All three of Duke's contentions come to nothing.

I. DUKE'S ASSERTION THAT *CRAIG*'S HOLDING IS LIMITED TO GOVERNMENTAL IMMUNITY CASES IS CONTRADICTED BY *CRAIG* ITSELF

Duke asserts that Plaintiffs' state constitutional claims should be dismissed because Plaintiffs will have "an adequate state remedy" on their common law claims even if Plaintiffs' state law remedies were barred by the defenses Duke asserts. [Doc. #178 at 2-10.] This is merely a clone of the same argument Duke unsuccessfully advanced to defeat Plaintiffs' Motion for Leave to Amend. *Compare,* Duke Br. Opp. Pls.' Mot'n to Amend, § III.B. [Doc #132], *with,* Duke Br. Supp. Mot'n to Dismiss, § I [Doc # 178]. The argument re-asserts Duke's peculiar sense of what "inadequate remedies" means, contending that a plaintiff's state law remedies are "inadequate" only where all "common law claims are 'entirely precluded by the application of the doctrine of sovereign immunity.'" [Doc. #178 at 3]. But Duke fails to square that myopic interpretation with the *Craig* Court's discussion of its holdings in *Midgett v. Highway Comm'n*, 260 N.C. 241, 132 S.E.2d 599 (N.C. 1963), *Sale v. Highway Comm'n,* 242 N.C. 612, 89 S.E.2d 290 (1955), and *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276 (N.C. 1992), all of which authorized plaintiffs to pursue state constitutional claims because their common law remedies were foreclosed for reasons *other than governmental immunity*. *Craig*, 678 S.E.2d at 356. Because Duke continues to argue to the contrary, Plaintiffs reproduce the Supreme Court's discussion of its holdings in *Corum*, *Sale*, and *Midgett* below:

> In addition to *Corum [v. University of North Carolina],* our holding here is likewise consistent with the spirit of our reasoning in *Sale v. State Highway & Public Works Commission*, and *Midgett v. North Carolina State Highway*

Commission. In *Corum*, state law did not provide for the type of remedy sought by the plaintiff; as such, this Court did not consider the relevance of sovereign immunity in its initial determination that he had no adequate remedy at state law. Nevertheless, as outlined above, this Court did clearly establish the principle that sovereign immunity could not operate to bar direct constitutional claims. Here, although plaintiff does have a negligence claim under the common law, such claim is automatically precluded by sovereign immunity due to the language of the excess, liability insurance policy excluding coverage for negligent acts. If plaintiff is not allowed to proceed in the alternative with his direct colorable constitutional claim, sovereign immunity will have operated to bar the redress of the violation of his constitutional rights, contrary to the explicit holding of *Corum*.

In *Sale*, the plaintiffs sued the State Highway Commission after buildings that it had contracted with the plaintiffs to remove and reconstruct at a different site were destroyed by fire during the process. Although the plaintiffs had no statutory claim, this Court essentially allowed the plaintiff's negligence claim to proceed under the common law as an allegation of the State agency's violation of his constitutional rights. The State agency defendant in *Sale* contended that, based on the facts alleged in the plaintiff's complaint, it could not be sued under statute, in contract, or in tort, this last due to immunity at common law. Likewise, defendant Board of Education here argues that it is entitled to summary judgment because its sovereign immunity bars the claim on the facts alleged by plaintiff. The Court in *Sale*, when faced with a plaintiff who would otherwise receive no compensation for a constitutional wrong, recognized the significance of such a

> "violation of the fundamental law of this State," and fashioned a remedy at common law to ensure an opportunity for the plaintiff to have the merits of his case heard and his injury redressed if successful on those merits.
>
> Finally, in *Midgett*, the plaintiffs alleged a taking by the State Highway Commission after the agency constructed a highway, allegedly altering the natural flow of water and causing recurring flooding on the plaintiffs' private property. Under those circumstances, a statutory remedy to recover damages against the State Highway Commission existed and was ordinarily exclusive when available. Nevertheless, after finding that the plaintiffs' damages did not accrue until after the time for the statutory cause of action had expired, this Court allowed the plaintiffs to proceed with a constitutional claim for just compensation.

Craig, 678 S.E.2d at 356 (internal citations omitted). Duke's recycled contention that "none of the Duke Defendants have moved to dismiss any of Plaintiffs' claims against them based on governmental immunity" (still) comes to nothing. As *Craig* explains, governmental immunity is just one of the many immunities, defenses, and other circumstances that may leave a plaintiff without an adequate remedy for violations of the state constitution, giving rise to the right to proceed directly under the state constitution. Because Duke can point to no authority holding that the public duty doctrine overrides North Carolina's "supreme law," Plaintiffs may proceed on their constitutional claims against Duke should Plaintiffs be left without a remedy for Duke's participation in the deprivation of their state constitutional rights.

II. *TWOMBLY* AND *IQBAL* DO NOT AUTHORIZE DUKE TO RECAST, REWRITE, OR IGNORE THE FACTS PLAINTIFFS ALLEGE

Duke asserts that Plaintiffs state constitutional claims should be dismissed because they are "deficiently pleaded" under *Twombly* and *Iqbal*. [Doc. #178 at 7, § II.A]. This argument, too, merely recycles the same contentions they employed and Plaintiffs' rebutted in the *Iqbal* Briefing. [Doc. #129]. Duke's argument fails for all the same reasons Plaintiffs articulate there.

As before, Duke proceeds from its misrepresentation of Plaintiffs' allegations. This time, Duke argues for dismissal by plucking the phrase "willful abuses and perversions" from Plaintiffs' allegations, and then insisting that Plaintiffs' constitutional claims should be dismissed because *that phrase*, standing alone, is insufficient to state a claim. [Doc. #178 at 9-10]. But Duke's contention ignores over 1,300 paragraphs of allegations in the SAC. Neither Rule 8, Rule 12, *Twombly*, nor *Iqbal* suggest that a defendant may establish the implausibility of a complaint's causes of action by recasting, rewriting, or ignoring its allegations. *See Lane v. Page*, 649 F. Supp. 2d 1256, 1286 (D.N.M. Jul. 17, 2009) (rejecting defendant's mischaracterization of allegations under *Iqbal*); *Fuji Photo Film U.S.A., Inc. v. McNulty*, 640 F. Supp. 2d 300, 321 (S.D.N.Y. Jul. 17, 2009) (same); *Martrano v. Quizno's Franchise Co.*, No. 08-0932, 2009 WL 1704469, at *11 (W.D. Pa. June 15, 2009) (same). The well-settled rule, reaffirmed in *Iqbal*, requires courts, "in evaluating a Rule 12(b)(6) motion to dismiss, a court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. Dec. 29, 2009);

see also Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. Dec. 2, 2009). For the third time in as many briefings, Duke refuses to proceed on its motion in the manner prescribed by Rule 12, *Iqbal* and *Twombly*, all of which require Duke to identify—at step one—the non-conclusory, well-pled factual allegations in the complaint, and then test the sufficiency of those allegations under the law of the claim at issue. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564-70 (2008) (carefully identifying the well-pled allegations relevant to the specific element of the antitrust claim at issue, then analyzing their sufficiency under the law governing that claim); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950-53 (May 18, 2009)(same, applying the law governing First Amendment discrimination claims). For those and all of the foregoing reasons, Duke's contention that plaintiffs' allegations fail "as a pleading matter" comes to nothing.

III. PLAINTIFFS ALLEGATIONS SHOW "MORE THAN A SHEER POSSIBILITY" THAT DUKE OFFICIALS DEPRIVED PLAINTIFFS OF RIGHTS GUARANTEED BY NORTH CAROLINA'S CONSTITUTION.

A. The Standard of Review

With respect to all of Plaintiffs' state constitutional claims, the North Carolina Supreme Court "gives [its] Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Corum v. Univ. of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (Martin, J.) (cited with approval by *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 338-39, 678 S.E.2d 351, 354-56 (June 18, 2009)). The author of the Court's opinion in *Corum*

explained that, in *Corum* and other constitutional decisions, the "North Carolina Supreme Court has made it clear" that the North Carolina Constitution is "a rich and vibrant source of personal liberties," akin to the "font of individual liberties" that Justice Brennan described all state constitutions to be in his famous 'challenge' to state courts. Justice Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1749-50, n.5 (1992) (quoting, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977)).

B. PLAINTIFFS HAVE STATED UNLAWFUL SEARCH AND SEIZURE CLAIMS UNDER ARTICLE I, SECTION 19.

Duke asserts that Plaintiffs' state constitutional claims for unlawful search and seizure are more properly brought under Article I, §20 (which Plaintiffs do not cite in their Forty-First Cause of Action) as opposed to Article I, § 19 (which Plaintiffs do cite in that claim). *See* [Doc. #178 at 15-16]. Duke's contention, however, limits Article I, § 19 to its first sentence and ignores all that follows, including protection against being "taken, imprisoned, or disseized" in violation of "the law of the land." North Carolina courts have interpreted Article I, § 19 to protect the same right to be free from unreasonable searches and seizures that the Fourth Amendment protects. *See, e.g.*, *North Carolina v. Wiley*, 565 S.E.2d 22, 32 (N.C. 2002) (identifying Section 19 as creating rights parallel to the Fourth Amendment's "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); *North Carolina v. Williams*, 447 S.E.2d 817, 819 (N.C. Ct. App. 1994) (same); *North Carolina v. Putman*, 220 S.E.2d 176, 179 (N.C. Ct. App. 1975) ("It is settled that the Fourth Amendment to the Federal Constitution and Art. 1, Sec. 19, of

our State Constitution guarantee that, in ordinary circumstances, even the strong arm of the law cannot invade a home except under authority of a search warrant issued in accordance with statutory provisions, and evidence obtained by an illegal search without a search warrant is inadmissible."). Therefore, North Carolina courts apply the law-of-the-land clause of Article I, § 19, to protect the right to be free from the same "unreasonable searches and seizures" that the Fourth Amendment forbids.

Moreover, Duke does not identify any North Carolina authority rigidly locating rights analogous to the search and seizure clause of the Fourth Amendment within one constitutional provision, to the exclusion of all others. There is nothing remarkable about overlapping protections in the North Carolina Constitution. That is particularly true with respect to the law-of-the-land clause because North Carolina courts give that clause a remarkably expansive application and employ the clause to incorporate protections that were "sacred" at common law but the Declaration of Rights does not enumerate. For example, unlike the United States Constitution's explicit protection against double jeopardy, U.S. CONST., amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."), the North Carolina Constitution makes no explicit guarantee of the common-law doctrine against double jeopardy. Nevertheless, since 1934, the North Carolina Supreme Court has interpreted the law-of-the-land clause of the state constitution as incorporating the common law right. *North Carolina v. Mansfield*, 207 N.C. 233, 236, 176 S.E. 761, 762 (1934); *North Carolina v. Brunson,* 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990). Originally viewed as "a sacred principle of the common law," *State v. Prince*, 63 N.C. 529, 531 (1869), the Supreme Court subsequently held that the law-of-

the-land clause incorporates the former jeopardy protection into the state constitution. *Mansfield*, 207 N.C. at 236.

Nevertheless, should the Court conclude that it is necessary for Plaintiffs to locate the right to be free from unreasonable searches and seizures specifically in Article I, § 20, Plaintiffs hereby move for leave to amend the Forty-First Cause of Action by adding the words "and Section 20" after "Section 19." *See Wall v. Fruehauf Trailer Servs. Inc.*, 123 F. App'x 572, 577 (4th Cir. 2005) (affirming leave to amend, where "amendment did not substantively change the claim, only the statute under which the claim proceeded").

C. PLAINTIFFS STATE A CLAIM FOR DEPRIVATION OF THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP GUARANTEED BY ARTICLE I, §§1 AND 19

Duke asserts that Plaintiffs do not state any state constitutional claim for discrimination as "out-of-staters" because, Duke contends, "'out-of-staters' are not a suspect or protected class" under the United States Constitution, and therefore "they are not a suspect class under the North Carolina Constitution." [Doc. #178 at 17]. Because Duke is wrong on the federal law, it is also wrong on the state law.

"Out-of-staters" are protected from discrimination by the United States Constitution by two provisions. First, the privileges and immunities clause of Article IV, § 2, protects "out-of-staters" from discrimination by foreign States. *See Hague v. Committee for Industrial Organization*, 307 U.S. 496, 511 (1939) (noting that the privileges and immunities clause of Article IV, § 2 "prevents a State from discriminating against citizens of other States"). Second, the newlyarrived citizen of a state is protected from discrimination in favor of long-term residents by the privileges or immunities

clause of the Fourteenth Amendment. *See Saenz v. Roe*, 526 U.S. 489 (1999) (striking down a California law because it favored long-term residents of the state over newly arrived who had lived in the state for less than one year.). Thus, Duke's assertion that the federal constitution does not protect out-of-staters from discrimination is plainly false.

Duke makes no other argument to support dismissal of Plaintiffs' state-citizenship discrimination claims under the North Carolina Constitution. Specifically, Duke makes no argument supporting dismissal of those claims under either Article I, § 1 (which is coextensive with the privileges and immunities clause of Article IV, § 2), or under the law-of-the-land clause of Article 1, § 19 (which is coextensive with the Fourteenth Amendment's privileges or immunities clause).[1] Therefore, Plaintiffs should be allowed to proceed on those claims in the event their state law remedies against Duke prove "inadequate" to redress its violation of Plaintiffs' state constitutional rights.

D. PLAINTIFFS' ALLEGATIONS STATE AN EQUAL PROTECTION CLAIM AGAINST DUKE UNDER ARTICLE I, SECTION 19

Next, Duke contends that Plaintiffs fail to state an equal protection claim under the North Carolina Constitution because, Duke asserts, "the alleged victim described her assailants to the Durham police as white men who attended a Duke lacrosse party, and the investigation proceeded based on that description." [Doc. #178 at 18]. But

[1] Should Duke attempt to assert, for the first time, in its Reply that the rights protected by the privileges and immunities clause of Article IV, § 2 and the privileges or immunities clause of the Fourteenth Amendment are not protected at all by the North Carolina Constitution, Plaintiffs incorporate by reference the discussion rebutting that contention in their Brief in Opposition to Durham's Motion to Dismiss. *See* Doc. #182, discussion at § II(E) ("Article I, Section 1").

Duke is fighting the facts that Plaintiffs' actually allege. In rewriting Plaintiffs' allegations this way is a transparent attempt to somehow fit the SAC within the holding of *Monroe v. City of Charlottesville*, 579 F.3d 380, 388 (4th Cir. 2009). Duke's attempt to fit Plaintiffs' allegations within the holding of Monroe is futile for numerous reasons; below Plaintiffs identify three of them.

First, *Monroe* involved an investigation of a multiple crimes—that actually occurred. *Monroe* involved the investigation of a serial rapist. *Id.* at 382. Here, of course, no crime occurred, and the Duke Defendants were aware of that inescapable conclusion long before they conspired to deprive Plaintiffs of rights guaranteed to them by the North Carolina Constitution. SAC §§ VII, VIII, IX, X, XI; *see also,* [Docs #145 -148 (SAC Exhibits 8-12)]. Second, the victims of the serial rapist in *Monroe* gave descriptions of the rapist sufficiently detailed to enable police to a develop composite image of him. *Id.* at 382. By contrast, when Mangum was not recanting the allegations, she was providing multiple, contradictory, vague, and sometimes surreal descriptions of her "attackers," how many there were, and the attack itself. *See, e.g.,* SAC § XI ("The Body of Evidence Amassed in the First 48 Hours Proved Mangum's Rape Claim Was a Hoax."); *see also, id.* §§ VII, VIII, IX, X, XII, XIII. Third, in *Monroe,* with few exceptions, "only persons reasonably matching a developed composite image," and those who came to light after having been arrested on a sexual misconduct charge and did not have a DNA sample on file with police, were asked if they would submit a DNA specimen. *Monroe,* at 382 & n.1. As a result, the Plaintiff in *Monroe* did not allege that the evidence already excluded him as a plausible suspect when police asked him to submit a DNA sample. *Id.* In stark contrast, Plaintiffs allege Duke's collaboration and participation in police and forensic

tactics that are the polar opposite of those alleged in *Monroe*. *See, e.g.*, SAC §§ XVI (The Conspiracy to Retaliate Against Plaintiffs for Exercising Constitutional Rights), XXVI (The Duke-Durham Joint Command Meets), XXXIV (The SANE Conspiracy), XVII (The Chairman's Directive)„ XVIII, & XXXVII-XXXIX, XX (The University's Effort to Coerce Confessions in the Absence of Counsel), XXI (The Conspiracy to Convict by Stigmatization in Retaliation for Plaintiffs' Exercise of Their Constitutional Rights). Moreover, long before the Plaintiffs were vilified for declining to submit to custodial police interrogation without the benefit of counsel, Duke Police provided close-up photos of the face of each of the Plaintiffs, Durham Police presented Mangum with them, and Mangum reported that she did not recognize any of them at all, thereby ruling each of them out as plausible suspects. SAC ¶¶ 372-73 (documenting facts showing Plaintiffs McFadyen, Wilson, and Archer were all eliminated as suspects by Mangum within 48 hours of the alleged "attack."); *see also, id*, § XII(G) (all of Plaintiffs' teammates ruled out by March 21, 2006). Duke is grasping at smoke. This argument has no merit.

E. PLAINTIFFS STATE A CAUSE OF ACTION UNDER THE SUBSTANTIVE DUE PROCESS GUARANTEE OF ARTICLE I, SECTION 19.

Duke asserts that Plaintiffs allegations do not state a substantive due process claim under the North Carolina Constitution. [Doc. #180 at 7]. Duke no longer claims that Albright bars Plaintiffs' substantive due process claim, because, as Plaintiffs have already explained that *Albright* does not prohibit Plaintiffs' substantive due process claim under the Fourteenth Amendment precisely because Plaintiffs were never charged or prosecuted. Because of that fact, Plaintiffs' claims are not subjected to the rigid categorical approach the Supreme Court applies to Section 1983 plaintiffs who were charged or convicted. *See, Chavez v. Martinez*, 538 U.S. 760 (2003)

(holding that, because plaintiff was not charged or tried, he could proceed with a Fourteenth Amendment substantive due process claim for coercive police tactics). This, too, Plaintiffs explained in the previous Briefing on Defendants' original motion to dismiss. *See, e.g.,* [Doc. #75, discussion at 9-10]. There, Plaintiffs explained that, for "the accused," the right to be free of coerced incriminating speech is located in the Fifth Amendment, and where the plaintiff has not been charged, the right is located within the broader sweep of the substantive dimension of the Fourteenth Amendment's due process clause. *Id.* 538 U.S. 760, 779-80 (opinion of the court); 783-790 (Stevens, J., concurring).

Second, Duke asserts that Plaintiffs allegations do not satisfy the state constitutional standard for "conscience-shocking" conduct, which marks the threshold of a substantive due process claim under Article 1, Section 19. *See,* Doc. # 180, at 7. Duke's contention is contradicted by, among other authorities, *Toomer v. Garrett*, 155 N.C. App. 462 (N.C. Ct. App. 2002), *discretionary review denied,* 579 S.E.2d 576 (N.C. 2003). *Toomer* held that the plaintiff's allegation that defendants disclosed defamatory material in his personnel file without authorization was sufficient to state a substantive due process claim under the North Carolina constitution. *Id.* at 472.

North Carolina's "law of the land," like federal substantive due process rights, is violated when the government coerces witnesses to lie, manipulates or fabricates evidence, and frames innocent parties for a crime that never took place. Every judge on the Fourth Circuit concurred with the proposition that

> the bad faith manipulation of evidence on the part of the police cannot be countenanced. Constitutional absolution for the concealment, doctoring, or destruction of evidence would fail to protect the innocent, fail to assist the

> apprehension of the guilty, and fail to safeguard the judicial process as one ultimately committed to the ascertainment of truth.

Jean v. Collins, 221 F.3d 656, 663 (4th Cir. N.C. 2000); *see also id.* at 677 (Murnaghan, J., dissenting); *id.* at 679 (Luttig, J., dissenting). "[T]he right not to be deprived of liberty or property based on the *deliberate* use of evidence *fabricated by* or *known to be false* to a law enforcement official… [and] an officer who violates this right may be subject to civil liability." *White v. Wright*, 150 F. Appx. 193, 198 (4th Cir. 2005) (emphasis in the original) (holding such conduct is actionable as a violation of substantive due process), citing with approval, *Moran v. Clarke*, 296 F.3d 638, 643-45 (8th Cir. 2002) (en banc) (concluding that "evidence that [the plaintiff] was investigated, prosecuted, suspended without pay, demoted and stigmatized by falsely-created evidence" reflected conscience-shocking behavior prohibited by substantive due process); *see also Moran*, 264 F.3d at 647 ("officials purposely conspired to manufacture evidence in order to make him an innocent scapegoat" in order to avoid the "embarrass[ment] [of] the police department and its managers."). Indeed, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004) (such actions "necessarily violate due process").

Here, Plaintiffs allege that Duke University by and through its policymaking officials, employees, and agents participated in conspiracies that far exceed the threshold conscience-shocking conduct that violates North Carolina's substantive due process guarantee. As the Complaint shows, Duke's policymakers designed and drove

much of the the culpable conduct alleged, but also rationalized it. See, e.g., SAC § XVII-XVIII, XXI, XXIII, XIV, XXVI, XXXIV, XXXVI, XXXVII-XL. Exemplary of the philosophy that drove Duke's participation in the ordeal, Plaintiffs show Duke's Chairman, knowing or deliberately indifferent to the fact that no crime occurred, rationalizing the persecution of plaintiffs and their teammates by asserting "sometimes individuals have to be sacrificed for the good of the organization." SAC ¶ 454.

Duke engaged in these conspiracies to subject plaintiffs and their teammates to wrongful convictions through its Police Department, its President, its Chairman of the Board, its Crisis Management Team, the Duke SANE Defendants, the DUMC Defendants, the Duke Police Defendants, the Duke University Defendants conspired with City of Durham officials and policymakers, Durham Police Department officials and policymakers, the DNASI Defendants, and the Durham Police Defendants, David Addison, Kammie Michael, Mark Gottlieb, Benjamin Himan, and Michael Nifong, among others. Duke's assertion that the SAC fails to state a substantive due process claim under North Carolina's Constitution has no merit.

F. Plaintiffs have stated claims for the deprivation their right to education in violation of Article I, Section 15.

Duke asserts that Plaintiffs cannot state a violation of educational rights guaranteed by the North Carolina constitutions because, it contends, the North Carolina constitution protects only the rights of schoolchildren. [Doc. #178 at 10-11.] To support that assertion, Duke relies on cases that enforce and describe the

educational rights guaranteed by the state Constitution. *Id.* at 11.[2] While those cases involve plaintiffs asserting the rights of elementary and secondary students, none of them hold that the "fundamental right" to education guaranteed by Article I, Section 15 applies only to school children or otherwise terminates at the University's gates. *See id.*

Of course, no such authority exists because the plain meaning of the text of Article I, Section 15 does not tolerate any such limitation. To the contrary, the text of Article I, Section 15 declares the fundamental right to education without limitation, providing:

> The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

N.C. CONST. art. I, § 15. Article I, Section 15 does not establish "the rights of schoolchildren," as Duke suggests; it establishes the right to education broadly and guarantees that right to "the people." But that is not all. Article I, Section 15 also creates an affirmative constitutional duty to "guard and maintain" that right of "the people." *Id.* Unsurprisingly, the Fourth Circuit has held that the text of Article 1, Section 15 means what it says. *Webster v. Perry*, 512 F.2d 612 (4th Cir. 1975) (lauding the district court for its "prescience and awareness" of Article I, § 15, which "mandates… the untrammeled privilege of education for all students, and 'the duty

[2] *See, Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 113 (1980) (adjudicating rights of ___ school students); *Leandro v. State*, 488 S.E.2d 249, 255 (1997) (adjudicating rights of elementary and secondary school students); *Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432, 436 (1987) (adjudicating rights of ___ school students); *Mebane Graded School Dist. v. Alamance County*, 189 S.E. 873, 879 (1937) (adjudicating rights of ___ school students).

of the State to maintain and guard that right,' while guaranteeing equal opportunities to all students.").

And there is more. Article IX, Section 1 provides:

> Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.

N.C. CONST., art. IX, § 1. Like the establishment of education as a fundamental right in Article I, § 15, nothing in this constitutional guarantee limits itself only to schoolchildren. Instead, contrary to Duke's assertion, the provision directs itself to "the happiness of mankind" and "the means of education" generally. While North Carolina's fundamental right to education does extend to elementary and secondary students, the plain meaning of the text extends to "the people," including Plaintiffs. Consistent with the declaration of the right of education guarantees for "the People," Article IX, § 1 protects "the means of education" broadly. And, as the North Carolina courts have consistently held, the educational rights established and protected by the cumulative force of Article I, § 15 and Article IX, § 1 are fundamental rights guaranteed by the North Carolina Constitution.

G. PLAINTIFFS' ALLEGATIONS STATE A RETALIATION CLAIM UNDER THE NORTH CAROLINA CONSTITUTION

Duke asserts that Plaintiffs do not state a claim for retaliation under the North Carolina Constitution for the same reasons it asserted Plaintiffs failed to state a retaliation claim under the federal constitution in its original Briefing. [Doc. #46]. Plaintiffs rebutted each of Duke's contentions in their Response Brief [Doc. #75,

discussion at §II(A)(6)]. Here, again, Duke asserts that Plaintiffs' retaliation claims fail because "Plaintiffs do not allege that they were forced to disseminate a particular political or ideological message or to subsidize speech to which they object." Duke Br., Doc. #178, at 14. But political speech is not all that the North Carolina Constitution protects, and its free speech clause, like its federal counterpart, protects the "right not to speak" with no less force than it protects the "right to speak." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.") "The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."" *Id.* (quoting *W.Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943)).

Moreover, in the context of criminal accusations, the "constitutional right to remain silent is an interest in liberty that is protected against federal impairment by the Fifth Amendment and from state impairment by the Due Process Clause of the Fourteenth Amendment." (Stevens, J., concurring in the judgment). In that context, to the extent that a citizen is never charged with a crime, the right either remains with the First Amendment or passes over to either the Fourteenth. *Chavez v. Martinez,* 538 U.S. 760 (2003) (holding that, because Fifth Amendment unavailable to plaintiff who was not charged or tried, a Fourteenth Amendment's substantive due process a claim was available in that context).

Duke does not renew its contentions that Plaintiffs fail to allege the remaining elements of a retaliation claim, and its assertion that Plaintiffs fail to allege that they engaged in any conduct protected by the North Carolina Constitution is meritless.

H. DUKE'S CONTROL OVER A FULLY AUTHORIZED POLICE DEPARTMENT AND ITS CONSPIRACIES WITH DURHAM OFFICIALS AND POLICE MAKE DUKE A STATE ACTOR.

Finally, Duke asserts that neither Duke nor its Police Department is a state actor. Br. n.5. But the public duty doctrine is available only to those who by virtue of their office have a duty to the public, in other words, state actors. Duke asserts these contradictory claims throughout its briefing, makes no effort to reconcile them, and by failing to do so, impugns them both. Moreover, Plaintiffs have alleged facts that clearly establish that Duke University was engaged in state action at all relevant times. The Complaint shows that Duke University operates the Duke Police Department. Plaintiffs have shown that the Duke Police Department entered into a jurisdiction allocation agreement that confers upon Duke primary law enforcement authority over the unlawful conduct alleged in the complaint; and that the Duke Police Department, as a matter of law and practice, is cloaked in all of the state powers that the North Carolina statutes confer upon its municipal police departments. As the North Carolina Supreme Court held in *Craig*, "individuals may seek to redress all constitutional violations, in keeping with the "fundamental purpose" of the Declaration of Rights to "ensure that the violation of [constitutional] rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." *Craig,* 678 S.E.2d 351, 355, quoting *Corum,* 330 N.C. at 782-83, 413 S.E.2d at 289-90 (emphasis in the *Craig* court's recitation).

CONCLUSION

For all of the foregoing reasons, Duke's Motion to Dismiss Plaintiffs' Forty First Cause of Action should be denied. Furthermore, for all of the reasons explained

in Plaintiffs' prior Briefings in this matter,[3] which Plaintiffs incorporate by reference here, all Defendants' Motions to Dismiss the Second Amended Complaint should be denied.

[3] Plaintiffs incorporate by reference here all of its prior briefings, including: Plaintiffs' Briefing on all Defendants' original motions to dismiss, [Doc. #74, Doc. #75, Doc. #76, Doc. #77, Doc. #78, Doc. #79, Doc. #80, Doc. #81, Doc. #82, and Doc. #83]; the points and authorities raised in Plaintiffs Briefing on its Motion to Strike or Exclude, [Doc. #73] (Plaintiffs do not renew that motion, but, rather, incorporate the points and authorities raised therein by reference in this Briefing); Plaintiffs' Briefing in opposition to Durham's Motion for Partial Summary Judgment [Doc. #96]; Plaintiffs Suggestion of Subsequently Decided Authority [Doc. #114]; Plaintiffs Briefing in response to the Court's Order requesting supplemental briefs regarding the applicability of *Ashcroft v. Iqbal* to this action [Doc. #129]; the points and authorities raised in Plaintiffs' Motion for Leave to Amend the Pleadings [Doc. #130], and in response to Duke and Durham's opposition to Plaintiffs' Motion for Leave to Amend [Doc #133]; and Plaintiffs Briefing in Opposition to Durham's Motion to Dismiss Plaintiff's Second Amended Complaint [Doc. #182].

Dated: April 9, 2010

Respectfully submitted by:

EKSTRAND & EKSTRAND LLP

/s/ Robert C. Ekstrand

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THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN McFADYEN, MATTHEW WILSON, and BRECK ARCHER *Plaintiffs,* *v.* DUKE UNIVERSITY, *et al.*, *Defendants.*	1:07-cv-953

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties and counsel of record, all of whom are CM/ECF participants.

Respectfully submitted by:

/s/ Robert C. Ekstrand
Robert C. Ekstrand (NC Bar No. 26673)