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' OPPOSITION TO DURHAM'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

The matter before the Court is the City of Durham's motion to dismiss the Forty-First Cause of Action of Plaintiffs' Second Amended Complaint. [Docs. #179 & 180].

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)).

I. DURHAM'S ARGUMENTS FOR DISMISSAL DEPEND ON ITS MISREPRESENTATION OF PLAINTIFFS' ALLEGATIONS

Like its prior briefings, Durham devotes much of this Briefing to mischaracterizing Plaintiffs' allegations to support its argument that Plaintiffs fail to state a claim under the North Carolina Constitution. [Doc. #180, *passim*]. The City ignores what Plaintiffs' actually allege, and asserts that "the true nature" of Plaintiffs' allegations is "that investigators should have taken less time investigating; that they should have weighed the available evidence differently; and that they never should have suspected these Plaintiffs of any wrongdoing." [Doc #180 at 9]. That is the same gross mischaracterization of Plaintiffs' allegations Durham employed in its prior briefings, but with a twist: Durham transparently restyles its mischaracterization to fit neatly within the holding of *Wolf v. Fauquier County Bd. of Supervisors*, 555 F.3d 311 (4th Cir. 2009). *Wolf* affirmed the dismissal of procedural due process claims based on (actual) allegations that DSS investigators "sought too much information and spent too long investigating" allegations. *Id.* at 323. In *Wolf*, the Court explained:

> In a sense, plaintiffs' claim is the opposite of most procedural due process claims. Where most plaintiffs allege that government officials act too precipitously and without adequate information in depriving a

> plaintiff of a protected interest, in this case plaintiffs allege that DSS sought too much information and spent too long investigating.

Id. Plaintiffs allege that Durham, in concert with others, accused Plaintiffs of participating in a horrific crime, knowing that Plaintiffs could not have committed the crime, and that no crime occurred. Plaintiffs also allege that Durham conspired with its co-defendants to manipulate and fabricate evidence to convict Plaintiffs and their teammates as principals or accessories to those same horrific crimes that Durham's policymakers, officials, police officers, and employees knew never occurred. Plaintiffs summarize the SAC's hundreds of pages of allegations that document that conduct in their *Iqbal* Briefing. [Doc. #129 at 3-4, § 2, & § 3(C)]. Plaintiffs incorporate that Briefing by reference here.

And, yet, it is on this quicksand of misrepresentations that Durham grounds its claims that Plaintiffs' state constitutional claims should be dismissed.

II. PLAINTIFFS ALLEGE VIOLATIONS OF THE NORTH CAROLINA CONSTITUTION

A. PLAINTIFFS' ALLEGATIONS STATE A DUE PROCESS CLAIM UNDER ARTICLE I, SECTION 19

Durham asserts that Plaintiffs fail to state any due process claim under Article I, § 19 because, Durham contends, Plaintiffs do not allege the deprivation of a "cognizable liberty or property interest." [Doc. #180 at 3]. To support this assertion, Durham makes a number of arguments, most of which are recycled and all of which are meritless.

First, Durham continues to assert that Plaintiffs cannot recover for reputational injury because, Durham asserts, Plaintiffs have no recognized due process based

"liberty interest" in their reputations. [Doc. #180 at 4]; *see also* [Doc. #62 at § IV(F)] (making same argument). Plaintiffs responded to the same contention in the original briefing on the Defendants' Motions to Dismiss. [Doc. #82, consolidated discussion at § II(A)(2)-(5)]. Durham's contention (still) comes to nothing because Plaintiffs do not contend that their interest in their reputations is a liberty or property interest. Rather, the unlawful NTID Order, search warrants and accompanying searches and seizures, for which Durham is jointly responsible with its co-defendants, caused Plaintiffs to suffer compensable reputational harms. Among other things, those harms included falsely linking Plaintiffs to the false, horrific, and most widely publicized allegations of a racially-motivated gang rape in modern American history. Durham caused these harms because its policymakers, officials, police officers, and employees participated in the conduct that subjected Plaintiffs to that global obloquy. *See, e.g.,* SAC § IX-XVI, XXI-XXXVI. Because § 1983 incorporates 'the common law of torts,' Plaintiffs may recover all damages that flow from those constitutional deprivations, including damages for "impairment of reputation…, personal humiliation, and mental anguish and suffering." *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974)); *see also Randall v. Prince George's County,* 302 F.3d 188, 208 (4th Cir. 2002). The City cited no case that overrules this settled law in its Reply to Plaintiffs' first discussion of these authorities, and fails to do so in this Briefing. Thus, Durham's assertion that Plaintiffs have no property or liberty interest in their reputations comes to nothing.

Next, Durham asserts that the cancellation of the lacrosse team's 2006 season is not actionable because, first, it is not a "cognizable deprivation of liberty" and, second, that deprivation flowed from Durham's deliberate evisceration of Plaintiffs'

reputations. [Doc. #80 at 4]. These assertions are identical to the claims Durham made in prior briefings. Here, as before, they fail to defeat Plaintiffs' constitutional claims for the many reasons Plaintiffs documented in their Response to Durham's original Motion to Dismiss. *See* [Doc. #82, consolidated discussion at § II(A)(2)-(5)]. To summarize just two of those points: First, a "stigma-plus" claim requires only that the stigmatization be "in connection with" the deprivation of a "tangible interest," not a constitutionally protected interest. *See, e.g., Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306-07 (4th Cir. 2006).[1] Second, Plaintiffs' "stigma-plus" claims specifically identify numerous deprivations of tangible interests in connection with Durham's stigmatization of Plaintiffs. Plaintiffs explicitly identify the damages to numerous tangible interests in a long list that includes but plainly is not limited to the cancellation of the 2006 season. SAC at ¶ 957(A)-(G). Durham ignores, for example, its deprivation of Plaintiffs' constitutional right to be free from searches and seizures without probable cause, its deprivation of Plaintiffs' statutory entitlement to the results of tests conducted with the products of the NTID procedures; its deprivation of Plaintiffs' rights under statutes protecting the privacy of their financial accounts and educational records; and the litany of other "tangible interests" identified in Plaintiffs' allegations. *See, e.g.,* SAC §§ XXIV, XXVII, XXXI, XXXVIII, 286-98, and 387-90.

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[1] In *Paul v. Davis,* 424 U.S. 693 (1976), "the *Paul* Court instructed that no deprivation of a liberty interest occurs when, in the course of defaming a person, a public official solely impairs that person's *future* opportunities, without subjecting him to a *present* injury…" *Ridpath,* 447 F.3d at 309, n.16 (emphasis in original)*; see also Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir. 1990) (to invoke the due process clause, a plaintiff must show "publication of stigmatizing charges" and "damages to 'tangible interests'") (quoting *Paul,* 424 U.S. at 701).

Next, Durham asserts that the statutory entitlement to the results of tests conducted with the DNA and photographs it obtained in the NTID procedures is not a sufficient deprivation to support Plaintiffs' "stigma-plus" claim. [Doc. #180 at 5-6]. This is nonsense, and Plaintiffs rebutted it when Durham and others asserted the same thing in prior briefings. *See* [Doc. #77 at § II(A)(1) and Doc. #82, consolidated discussion at § II(A)(2)-(5)]. In fact, Durham's deprivation of Plaintiffs' unconditional right to the results of such tests is not only sufficient to ground Plaintiffs' "stigma-plus" claim under the due process clause, the deprivation of that entitlement is also a sufficient basis, standing alone, for Plaintiffs' Section 1983 claim for deprivation of Plaintiffs' property interests in violation of the due process clause. *See* [Doc. #77 at § II(A)(3), Doc. #79, consolidated discussion at § III(A)(1), Doc. #80, consolidated discussion at § II(A)(3), and Doc. #82, consolidated discussion at § II(A)(1)].

B. PLAINTIFFS STATE A SUBSTANTIVE DUE PROCESS CLAIM UNDER ARTICLE I, SECTION 19.

Durham asserts that Plaintiffs allegations do not state a substantive due process claim under the North Carolina Constitution, and offers two reasons. [Doc. #180 at 6-7]. The first is Durham's recycled assertion that *Albright v. Oliver,* 510 U.S. 266 (1994) precludes a state due process claim grounded on pre-trial conduct. But 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 (a fact Durham no longer habitually invokes in its briefings). Because of that fact, Plaintiffs' claims are not subject to the limitations that 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 Durham's original motion to dismiss. *See, e.g.,* [Doc. #75, consolidated discussion at § II(A)(2), Doc. #80, consolidated discussion at III(A)(2), and Doc. #81, consolidated discussion at § III(A)(2)]. 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. *Chavez,* 538 U.S. at 779-80 (opinion of the court); *see also id.* at 783-90 (Stevens, J., concurring).

Second, Durham asserts that Plaintiffs allegations do not satisfy the state constitutional standard for "conscience-shocking" conduct that marks the threshold of a substantive due process claim under Article 1, Section 19. [Doc. #180 at 7]. Durham asserts that conduct that "shocks the conscience" is limited only to "depravity, torture, or wanton infliction of bodily harm," but Durham cites no authority declaring its 'torture-only' theory of substantive due process. *Id.* And so Durham's only new contention in this context is also its least supportable. For example, it is contradicted by, among other authorities, the very case Durham relies on to defeat Plaintiffs' Article I, § 19 claims: *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 his personnel file without authorization was sufficient to state a substantive due process claim under the North Carolina Constitution. *Id.* at 472. Of course, the plaintiff's allegations in *Toomer* did

not involve "depravity, torture, or wanton infliction of bodily harm," and the Court did not invoke any rule remotely akin to the one Durham urges on the Court here. To the contrary, plaintiff alleged a malicious disclosure of plaintiff's personnel records, and the court found that sufficient to state substantive due process claim under Article I, § 19. *Id.*

Contrary to Durham's obfuscations, North Carolina's law-of-the-land clause, like federal substantive due process, is violated when the government coerces witnesses to lie, manipulates or fabricates evidence, and frames innocent parties for a crime that never took place. The Fourth Circuit clearly established that unremarkable principle when 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").

C. PLAINTIFFS STATE A CLAIM FOR DEPRIVATION OF CONSTITUTIONALLY PROTECTED PROPERTY INTERESTS.

Next, Durham asserts (again) that *North Carolina v. Pearson* defeats Plaintiffs claim for its investigators' deprivation of their constitutionally protected property interests in reports of tests conducted with the products of Plaintiffs" NTID procedures. [Doc. #180 at 5-6]. Plaintiffs rebutted this assertion in earlier briefings, see [Doc. #77 at § II(A)(3) and Doc. #79, consolidated discussion at § III(A)(1)], and incorporate those same arguments here. As Plaintiffs have explained, *Pearson* applies suppression analysis, which asks whether evidence was obtained *as a result of* a violation of the Constitution or significant statutory rights. Pearson claimed that, after his DNA was lawfully obtained, the State's investigator did not produce the results of tests conducted with it, in violation of N.C.G.S. § 15A-282. 551 S.E.2d 471*,* 478 (N.C. Ct. App. 2001). Because Pearson's contention was completely unrelated to the means by which his DNA sample was obtained, there was no basis to suppress the results of the tests conducted with his DNA at trial. *Id.* at 476. Further, because the trial court made a factual finding (after an evidentiary hearing) that the investigator's violation of

N.C.G.S. 15A-242 was not intentional, Pearson's conviction stood. *Id.* at 476. The analyses employed in *Pearson* are inapposite to the constitutional analysis required for deprivations of constitutionally protected property interests, and, as such, *Pearson* is completely irrelevant to Plaintiffs' federal and state constitutional claims pursuant to that theory.

D. Plaintiffs state an Equal Protection claim under Article I, Section 19

Durham raises no new assertions to support Plaintiffs' state constitutional claims based upon theories of equal protection. [Doc. #180 at 9-10]. Specifically, Durham asserts that those claims should be dismissed because "Plaintiffs do not allege that they are members of a protected class, nor do they allege that any particular Defendants acted out of racial animus against them." *Id.* at 9. Plaintiffs rebutted these arguments in their Briefings on Durham's original motions to dismiss. [Doc. #77, discussion at § III(E)(1) and (2)]. As before, the argument has no merit.

E. Plaintiffs state a citizenship-based discrimination claim under Article I, section 1

Plaintiffs' Second Amended Complaint alleges facts that show "more than a sheer possibility" that Durham, through its policymakers, employees, and agents, caused the deprivation of rights guaranteed by Article I, Section 1 of the North Carolina Constitution. *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (May 18, 2009). Article I, Section 1 provides:

> "The Equality and Rights of Persons. All persons are created equal; that they are endowed by their Creator with certain inalienable rights; that

> among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."

N.C. CONST. ART. I, § 1. This language is much the same as the language employed in the classic statement of the meaning of the phrase "privileges and immunities" of citizenship provided by Justice Busrod Washington in *Corfield v. Coryell*, which held that the Privileges and Immunities Clause of Article IV, § 2 protects:

> [interests which are] fundamental; which belong, of right, to the citizens of all free governments …. [They] may be comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue happiness and safety; subject nevertheless to such restraints as the government may describe for the general good of the whole.

6 F. Gas. 546, 551, 4 Wash.C.C. 371, No. 3230 (Cir. Ct. E.D. Pa. 1823). The language of *Corfield* and of Article I, Section 1 are parallel by design: they both track the language of the Declaration of Independence. Both Article I, Section 1 and the privileges and immunities clause of Article IV, § 2 explicitly recognize the existence of the same "inalienable rights." As they are applied in the courts, the rights protected by Article I, Section 1 of the North Carolina Constitution are protected in the federal context by the privileges and immunities clause of Article IV, § 2, and, more recently, by the privileges or immunities clause of the Fourteenth Amendment, *Saenz v. Roe*, 526 U.S. 489 (1999).[2]

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[2] In *Saenz*, the Court declared unconstitutional the California practice of limiting new residents of California, for their first year in the state, to benefits at the level set by their previous state of residence. The Court applied the privileges or immunities clause of the Fourteenth Amendment, in lieu of the privileges and immunities clause of Article IV, because the state was not distinguishing between in-staters and out-of-staters, but instead was drawing a distinction among its own residents (new vs. long-term residents of the state).

Durham contends that Plaintiffs allegations do not state a claim under Article I, Section 1 because, Durham asserts, "*despite the provision's broad language* … it applies only in one narrow context—protection against undue business regulation." [Doc. #180 at 11] (emphasis supplied). Durham cites no authority to support that proposition because none exists. To the contrary, Article I, Section 1 is expansive. Textually, the plain language of this provision's enumeration of inalienable rights—"'that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness'--is exemplary, not exhaustive; the text makes it clear that the enumerated rights are only 'among' the protected rights." John V. Orth, THE NORTH CAROLINA CONSTITUTION 39. Durham's argument to the contrary has no merit.

F. PLAINTIFFS STATE A RETALIATION CLAIM UNDER THE NORTH CAROLINA CONSTITUTION

Durham contends that Plaintiffs' retaliation claims under the state constitution should be dismissed, asserting the same four reasons it employed to support its motion to dismiss Plaintiffs' analogous federal claims. All of them fail for the same reasons – they do not support dismissal of the analogous federal claims. Plaintiffs detailed the failures of Durham's contentions in this regard in Plaintiffs' briefing of the Defendants' original Motions to Dismiss. [Doc. #77 at 25-26 and Doc. #75, consolidated discussion at § II(A)(6)].

First, Durham argues that the NTID cannot be a basis for a retaliation claim because, it contends, the NTID was supported by probable cause. [Doc. #180 at 13.] This contention is nonsense, and Plaintiffs rebut it fully in their *Franks* analysis in Plaintiffs' briefing in opposition to Durham's original Motions to Dismiss. [Doc. #77, consolidated discussion at § II(A)(1)]. That analysis shows the lack of probable cause

or reasonable grounds by documenting the material omissions and fabrications in the affidavits Durham's police officers presented to a Superior Court judge in order to mislead him into issuing the NTID, all the while knowing that no probable cause or reasonable grounds existed to support it. That analysis also documents the allegations showing that the Durham officers were well aware that no probable cause or reasonable grounds existed, and the allegations also that show that, but for the Durham officers' material omissions and fabrications, the NTID would not have issued. *Id.* Durham's argument is both recycled and meritless.

Second, Durham argues that Plaintiffs were not engaged in constitutionally protected conduct when they declined to submit to police interrogation without the benefit of counsel. [Doc. #180 at 13-14]. But Plaintiffs right to refuse to submit to interrogation without the benefit of counsel is clearly protected by Article I, Section 19 of the North Carolina Constitution. *See, e.g., State v. Shores,* 102 N.C. App. 473 (N.C. Ct. App. 1991) (Article I, Section 19 protects both the right to decline to submit to police questioning without the benefit of counsel, and the right to refuse to submit to police questioning at all); *North Carolina v. Murphy,* 467 S.E.2d 428, at 434 (N.C. 1996) (holding that interrogation must immediately cease upon invocation of right to remain silent); *North Carolina v. Morris,* 422 S.E.2d 578, 584 (N.C. 1992) (holding that interrogation must immediately cease upon invocation of right to counsel). Plaintiffs' rights under Article I, Section 19 are at least as broad as their federal counterparts. Durham's argument is meritless.

Third, Durham contends that Plaintiffs "fail to allege any 'adverse affect' on *their*" constitutionally protected rights. [Doc. #180 at 13] (emphasis added). Even if Durham's claim were true, it would come to nothing because the law does not require

Plaintiffs to show an adverse effect on their own constitutionally protected rights. Instead, to state a cause of action for retaliation, Plaintiffs need to allege facts showing that the retaliatory conduct would be likely to deter "a person of ordinary firmness" from exercising the right. *Constantine v. Rectors & Visitors of George Mason Univ.,* 411 F.3d 474, 500 (4th Cir. 2005). Plaintiffs allege that because they declined to submit to police interrogation without the benefit of counsel, they were subjected to a public vilification of historic and global portions. *See, e.g.*, SAC, §§ XXI ("The Conspiracy to Convict By Stigmatization in Retaliation for Plaintiffs' Exercise of Their Constitutional Rights")((A)-(B) (documenting Addison's and Nifong's retaliatory acts and public statements)); XXI(F) and XL (documenting Durham policymakers' ratification of the retaliatory conduct of their employees). In fact, the retaliatory conduct alleged begins on page 154 of the SAC and continues for over 130 pages. SAC ¶¶ 500-890. It is absurd to suggest, as Durham does here, that the retaliatory conduct Plaintiffs allege would not be likely to deter a person of ordinary firmness from exercising the right not to submit to interrogation without the benefit of counsel.

Finally, Durham asserts that Plaintiffs retaliation claims lack causation. [Doc. #180 at 14]. To support the assertion, Durham contends, contrary to Plaintiff's allegations, "the rape investigation in general, and the search for DNA evidence in particular, was under way prior to" Plaintiffs refusal to submit to police questioning without the benefit of counsel. *See* [Doc. #180 at 14]. But the facts Plaintiff allege plainly show that the investigation, conducted by Sgt. Shelton and others, was closed as unfounded for scores of reasons, including, for example, the accuser's recantation, her well-known history of unreliability, her long history of substance abuse, her well-

documented history of psychosis, her demonstrably false reports of pain, and her myriad accounts of events, all of which invariably contradicted common sense, logic, and one another. SAC §§ VII-XI. The Complaint goes on to allege that Sgt. Gottlieb, with a well-documented history of maliciously prosecuting Duke Students and having been recently removed from the East Campus patrol due to reports of his abuses in dealings with Duke students, "adopted" the case and re-opened it solely to use it as a vehicle to express his malice. SAC §§ III(F), IV, and XII. Durham would have the Court believe that these allegations, viewed in the light most favorable to Plaintiffs, are merely complaints about legitimate investigative steps and the "true nature" of Plaintiffs claim is that investigators "should have weighed the available evidence differently." [Doc. #180 at 9.] Durham's argument misleads. It has no basis in the facts Plaintiffs' allege. And it has no merit.

G. Deprivation of Plaintiffs Right to Education under Article I, Section 15 and Article IX, Section 1

Durham asserts that Plaintiffs fail to state a claim for deprivation of Plaintiffs' rights under Article I, § 15 and Article IX, § 1 for the same reasons Duke University asserts in its Briefing. [Doc. #180 at 14-15]. Plaintiffs rebutted these arguments in Plaintiffs' Brief in Opposition to Duke University's Motion to Dismiss the Second Amended Complaint, [Doc. #181 at § III(F)], and incorporate those arguments by reference here.

III. DURHAM'S "ADEQUATE REMEDIES" ARGUMENT WAS REJECTED BY THE SUPREME COURT IN *CRAIG*

Durham asserts Plaintiffs' remedies cannot be "inadequate" because Plaintiffs have asserted several common law claims in the SAC, and that it is "irrelevant"

whether or not remedies on those claims may precluded by various defenses and immunities. [Doc. #180 at 15-17]. But that is the same illogic—and the same rule—that the North Carolina Supreme Court emphatically—and unanimously—rejected in *Craig*.

Consistent with its pursuit of an argument that ignores the Supreme Court's central ruling in *Craig*, Durham relies on state and federal cases decided prior to *Craig*, all of which were based upon the same reasoning the Supreme Court repudiated in *Craig*. [Doc. #180 at 15-16] (citing *Alt v. Parker*, 435 S.E.2d 773, 779 (N.C. Ct. App. 1993); *Rousselo v. Starling*, 495 S.E.2d 725, 731 (N.C. Ct. App. 1998); *Glenn-Robinson v. Acker*, 538 S.E.2d 601, 632 (N.C. Ct. App. 2000)). While Durham stops short of relying on the repudiated Court of Appeals decision in *Craig,* it does rely on federal cases that did rely on the repudiated decision. [Doc. #180 at 15-16]; *see, e.g.*, *Iglasias v. Wolford,* 539 F. Supp. 2d 831, 838-39 (E.D.N.C. 2008) (holding that state-law claim was adequate even though it would, "in the end, be fruitless because the state retains immunity to such a claim" and citing *Craig v. Hanover County*, 648 S.E.2d 923, 926-27 (N.C. Ct. App. 2007)); *Cooper v. Brunswick Co. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 45010, at *9-12 (E.D.N.C. May 26, 2009) (relying on the repudiated Court of Appeals holding in *Craig* to hold that plaintiff had no state constitutional claims because state tort claims were "adequate"—despite being barred by "governmental immunity").

Finally, Durham offers up the liability of its police and policymakers as a human shield of sorts—a bulwark between itself and Plaintiffs' state constitutional claims—asserting that Plaintiffs claims against its police and policymakers will exact remedies "adequate" to redress the constitutional violations Plaintiffs allege. *See* [Doc. #180 at 16]. But the mere existence of alternate defendants does not, *ipso facto,*

produce "adequate remedies." If that were true, the City (which cannot act except through its employees, policymakers, officials and agents) could never be subject to a state constitutional claim. Moreover, if it that were true, the Court in *Craig* could not have ruled as it did because, there, the plaintiff had asserted common law claims against the school board's employee (the school principal) in her individual capacity. *See Craig,* 678 S.E.2d at 352-53 & n.2. The Court did not incorporate those claims into its analysis of the adequacy of Plaintiffs' claims against an entity defendant.

Similarly, the North Carolina Supreme Court analyzed the "adequate remedy" issue only as to the entity defendant and without regard to the claims against its co-defendants in *Copper v. Denlinger,* 688 S.E.2d 426 (N.C. Jan. 29, 2010). There, the Supreme Court analyzed the dismissal of the state constitutional claim against the school board and concluded that the plaintiff had an adequate remedy at law, not because the plaintiff had been able to sue the individual defendants, but because the plaintiff failed to exhaust or pursue the administrative remedies against the board. *Id.* at 429 (citing N.C.G.S. §§ 115C-45(c) & 391(c) (2007)). Here, as in *Craig* and *Copper,* Plaintiffs' common law claims against Durham's police and policymakers do not, *ipso facto,* produce "adequate" state law remedies, and Durham's argument to the contrary is meritless.

CONCLUSION

All of Durham's contentions, new and recycled, have no merit. For all of the foregoing reasons, Durham'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 Duke's Motion to Dismiss Plaintiff's Second Amended Complaint [Doc. #181].

Dated: April 9, 2010

Respectfully submitted by:

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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
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