IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:07-CV-00953

RYAN MCFADYEN, *et al.*,	
Plaintiffs,	**REPLY BRIEF WITH RESPECT TO THE CITY OF DURHAM'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**
v.	
DUKE UNIVERSITY, *et al.*,	
Defendants.	

FAISON & GILLESPIE

Reginald B. Gillespie, Jr.
North Carolina State Bar No. 10895
5517 Chapel Hill Boulevard, Suite 2000
Durham, North Carolina 27717-1729

STEPTOE & JOHNSON LLP

Roger E. Warin*
Michael A. Vatis*
Matthew J. Herrington*
John P. Nolan*
Leah M. Quadrino*
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
*Motion for Special Appearance to be filed

Attorneys for Defendant City of Durham

Plaintiffs' Section 19 claim lacks the most fundamental element of due process (substantive *or* procedural): the deprivation of a cognizable liberty or property interest. Plaintiffs' retaliation claim is riddled with the same defects as its federal counterpart. And no North Carolina authority provides support either for Plaintiffs' "interstate discrimination" claim (Article I, Section 1) or their "right to education" claims (Article I, Section 15 and Article IX). Plaintiffs' request—that this Court create such rights out of whole cloth—is not only entirely unpersuasive but wholly inappropriate. *See Frye v. Brunswick County Bd. of Educ.*, 612 F. Supp. 2d 695, 707-08 (E.D.N.C. 2009) ("[A] federal court should not create or expand a State's public policy [or] elbow its way into [a] controversy to render what may be an uncertain and ephemeral interpretation of state law.'") (quoting *Time Warner Entm't-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d 304, 314-15 (4th Cir. 2007)). Because of these fundamental defects, *and* because their underlying allegations do not meet *Iqbal*'s pleading requirements,[1] *and* because alternative remedies are available to them, Plaintiffs' claims under the North Carolina Constitution must be dismissed.[2]

---

[1] As the City has previously pointed out, *see* City's Iqbal Br. (Doc. No. 123) at 5-14, the Complaint is full of conclusory allegations not entitled to the presumption of truth. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951-52 (2009). The fact that Plaintiffs have typed out "hundreds of pages of allegations," Opp. at 3, is a reflection only of verbosity. Once the conclusory allegations are removed from consideration, as *Iqbal* requires, it is clear that Plaintiffs do not state a plausible claim.

[2] Moreover, Plaintiffs' constitutional claims, as pleaded, provide no notice as to what theories might underlie them, and should be dismissed for that reason alone. *See, e.g., Coakley v. Jaffe*, 49 F. Supp. 2d 615, 628 (S.D.N.Y. 1998) ("[Plaintiffs' state constitutional claim] contains little more than the vague and conclusory allegation that

As the City has explained, *see* Supp. Br. (Doc. No. 180) at 3-6, Plaintiffs have failed to allege any deprivation of a cognizable liberty or property interest in their Second Amended Complaint ("SAC" or "Complaint"). Plaintiffs once again suggest various theories about where such a deprivation might be found, but none suffices.

Plaintiffs first argue that harm to reputation alone is enough to state a due process claim, without the need to allege the deprivation of a cognizable liberty or property interest. Opp. at 5. But as the City showed in its prior briefs, courts have held again and again that the "stigma plus" test—which applies under both the federal and state constitutions—requires that plaintiffs show an independent deprivation of liberty or property *in addition to* any reputational harm. *See* Supp. Br. at 4.

Next, Plaintiffs move to their fallback argument—that deprivation of *any* "tangible interest" in liberty or property will suffice, and it need not be a "constitutionally protected interest." Opp. at 5. But the cases Plaintiffs cite confirm the very requirement they attempt to evade: A plaintiff must show "that he has a *constitutionally protected* 'liberty' or 'property' interest, and that he has been 'deprived' of that *protected* interest by . . . 'state action.'" *Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir. 1990) (citation omitted) (emphases added); *see also Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 307 n.14 (4th Cir. 2006); *Paul v. Davis*, 424 U.S. 693, 701 (1976).

---

the defendants violated the equal protection, search and seizure, and due process provisions of the New York State constitution 'by their conjoined conspiratorial conduct as described above.' . . . [T]his allegation is too vague and conclusory to state a claim and must be dismissed on that basis alone.") (citations omitted); *see also id*. at 625 (noting complaint's "'shotgun pleading' . . . illustrates plaintiffs' utter disrespect for Rule 8").

None of the specific liberty or property interests Plaintiffs mention even comes close to meeting this standard. Plaintiffs again claim that they had a property interest in their 2006 lacrosse season. Opp. at 4-5. But they make no effort to rebut the cases the City cited in its supplemental brief, which soundly reject the idea that students have a property interest in playing sports. *See* Supp. Br. at 4-5; *see also* City's Open. Br. (Doc. No. 62) at 23; *Giuliani v. Duke Univ.*, 1:08CV502, 2010 WL 1292321, at *6 (M.D.N.C. March 30, 2010) ("[E]ven contractual athletic scholarships do not ensure a student's right to play a sport . . . .") (citations omitted).

Plaintiffs also contend that the City's alleged failure to deliver the NTID test results qualifies as a "property deprivation." *See* Opp. at 9-10. But Plaintiffs do not explain how this is so, or cite any cases to support this contention. Instead, their entire argument consists only of an assertion that one of the cases cited by the City, *State v. Pearson*, 551 S.E.2d 471, 478 (N.C. Ct. App. 2001), is "inapposite" because it arose in the context of an evidentiary proceeding. Opp. at 9-10. But that is exactly the City's point: *Pearson* reflects the fact that the statute is designed to enhance fairness in criminal procedure, not to provide some sort of monetizable property benefit. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766 (2005) (restraining order not property because it "does not 'have some ascertainable monetary value'") (citation omitted); *see also Fischer v. Steward*, No. 4:07CV1798, 2010 WL 147865, at *8 (E.D. Mo. Jan. 11, 2010) (rejecting Section 1983 claim premised on officers' "not providing [the plaintiff], before the grand jury proceeding, with the results of the tests comparing DNA samples").

Plaintiffs next assert that a sufficient deprivation of liberty or property may be found in various "statutes protecting the privacy of their financial accounts and educational records." Opp. at 5. But, once again, Plaintiffs make no effort whatsoever to address the cases cited by the City, *see* Reply Br. at 22-23, which make clear that there is no statute that creates *any* such interest.[3]

With respect to substantive due process, Plaintiffs first try to circumvent *Albright v. Oliver*, 510 U.S. 266, 274 (1994), by arguing that it applies only where a plaintiff has been arrested and tried. But nothing in the case law remotely supports this bizarre theory, either as a matter of federal or state constitutional law. The constitutional prohibition of unreasonable searches and seizures applies regardless of whether a person is arrested or tried. Thus, the principle enunciated in *Albright*—that no substantive due process claim can arise from alleged search-and-seizure violations—clearly precludes Plaintiffs' claims.[4]

---

[3] Plaintiffs also cite their interest in remaining "free from searches and seizures without probable cause." Opp. at 5. But claims involving alleged unreasonable searches and seizures must be brought under the Fourth Amendment, *see infra* at 4-5, or Section 20 of the state constitution. *See State v. Carter*, 370 S.E.2d 553, 555 (N.C. 1988). In any event, the NTID and search warrants were constitutionally proper. S*ee* City's Open. Br. (Doc. No. 62) at 8-15; City's Reply Br. (Doc. No. 107) at 1-7. Finally, Plaintiffs invite the Court to rummage through their Complaint to find "other 'tangible interests.'" Opp. at 5. They have employed this tactic before. *See* Pls.' Opp. Br. (Doc. No. 77) at 41 (inviting court to sift through Complaint in search of racial animus). It is incumbent on Plaintiffs to identify what cognizable liberty or property interest they were deprived of, not to send the Court on a scavenger hunt.

[4] Plaintiffs mischaracterize *Chavez v. Martinez*, 538 U.S. 760 (2003), as holding that "because Plaintiff was not charged or tried he could proceed with . . . a substantive

Plaintiffs' claims are also deficient for the independent reason that the Complaint, stripped of its conclusory allegations, does not plausibly suggest any behavior by any City Defendant that "shocks the conscience." *See* Supp. Br. at 7-8; *see also* Iqbal Br. at 5-14 (allegations of conspiracy and malice wholly conclusory and entitled to no weight). Moreover, despite Plaintiffs' naked assertion that due process is violated "when the government coerces witnesses to lie, manipulates or fabricates evidence, and frames innocent parties," Opp. at 8, they do not dispute that such misdeeds are actionable only when a plaintiff is actually prosecuted. *See* City's Open. Br. (Doc. No. 62) at 24-26. Plaintiffs, of course, were never even arrested, let alone indicted, tried, and convicted. Thus, cases where the plaintiffs *were* prosecuted do not help these Plaintiffs one whit.[5]

As for their Article I, Section 1 claim, Plaintiffs assert that it is an analogue to their federal privileges and immunities claim. *See* Opp. at 10-12. Yet Plaintiffs cannot point to a single authority interpreting the North Carolina Constitution as providing such a cause of action. In any event, Plaintiffs acknowledge that the federal and state standards would be the same. *See id.* Because Plaintiffs have clearly failed to state a claim under the federal privileges and immunities clause, *see* Open. Br. 29-31; Reply Br. at 13-14, their analogous state-law claim also fails.

---

due process claim." Opp. at 7. In fact, the Court in *Chavez* declined to resolve the due process claim and remanded the question to the lower court. *See* 538 U.S. at 779-80.

[5] *See* Opp. at 8-9 (citing *Limone v. Condon*, 372 F.3d 39, 43 (1st Cir. 2004) (Section 1983 plaintiffs had been arrested, tried, convicted, and imprisoned); *Moran v. Clarke*, 296 F.3d 638 (8th Cir. 2002) (plaintiff indicted, arrested, and fired); *White v. Wright*, 150 Fed. App'x 193 (4th Cir. 2005) (plaintiff indicted and arrested)).

With respect to their retaliation claim (Article I, Section 14), Plaintiffs lay out two new arguments. First, Plaintiffs argue that they were entitled not to talk to the investigators. *See* Opp. 13. No one disputes this. But it has nothing to do with the City's argument. Rather, the City has explained that the conduct at issue—cancellation of a meeting with police—is not *speech* protected by the *First Amendment.* *See* Supp. Br. at 13-14. Plaintiffs allege that their decision to cancel the meeting was entirely tactical. *See* SAC ¶¶ 407-11. They do not make any allegations plausibly suggesting any desire on their part to speak on a matter of public concern. *Cf. Hartman v. Board of Trustees of Comm'y College Dist. 508*, 4 F.3d 465, 471 (7th Cir. 1993) ("[E]ven if an issue is one of public concern in a general sense . . . still we must ask whether the speaker raised the issue because it is matter of public concern or whether, instead, the issue was raised to 'further some purely private interest.'") (citation omitted). Because the conduct at issue, while constitutionally protected, was not *public speech*, the claim fails on this basis alone.

Second, Plaintiffs attempt to address the City's causation argument—that is, that because the rape investigation in general, and the search for DNA evidence in particular, was underway prior to the postponement of the meeting, Plaintiffs cannot establish a causal link between that postponement and the subsequent investigatory steps. Supp. Br. at 14. Plaintiffs argue, in response, that "the investigation, conducted by Sgt. Shelton and others, was closed as unfounded for scores of reasons" and Sergeant Gottlieb "adopted the case and re-opened it solely to use it as a vehicle to express his malice." Opp. at 15. But the alleged reopening of the case has nothing to do with the alleged retaliation for

Plaintiffs' cancellation of the meeting. If anything, it actually contradicts Plaintiffs' retaliation claim: According to Plaintiffs' own timeline, the "reopening" of the investigation occurred on March 14, 2006, after the investigation was "closed as unfounded" earlier that day. *See* SAC ¶¶ 333-35. Thus, this "reopening" *could not have been* motivated by the postponement of the meeting, *since that meeting had not yet occurred* and would not take place for another week. SAC ¶¶ 405-11. Because the only alteration in the conduct of the investigation identified by Plaintiffs occurred long before the cancellation of the meeting, Plaintiffs' Complaint does not plausibly suggest retaliatory intent in any way. For these reasons and the others identified in the City's Supplemental Brief, this claim must be dismissed.[6]

As for their alleged right to education, Plaintiffs' brief does no more than incorporate the arguments it makes against Duke. *See* Opp. at 15. But Plaintiffs' arguments against Duke are totally unresponsive to one of the City's arguments: *i.e.*, that this claim cannot be brought against the City, "since any deprivation of a right to an

[6] Plaintiffs' other arguments are just as meritless. As to the requirement that retaliation has an adverse effect on the exercise of a First Amendment right, Supp. at 13, Plaintiffs simply argue that "it is absurd" to suggest there was no adverse effect here. Opp. at 14. But the absurdity is Plaintiffs': If the actions of the police were likely to cause persons of ordinary firmness to give in and cooperate with the police, presumably at least one member of the lacrosse team would have done so. Yet not a single one did, for obvious reasons: "A person of ordinary firmness, having already decided *not* to talk to police in the absence of counsel, would not then *change his mind* and talk to police voluntarily . . . ." Reply Br. at 13. As for whether the NTID and search warrants were supported by probable cause, Plaintiffs simply call it "nonsense" and refer to their other briefs. Opp. at 12-13. There is thus nothing for the City to add to its refutation of Plaintiffs' arguments in the City's earlier briefs. *See* Open. Br. at 8-15; Reply Br. at 1-7.

education was caused by Duke, not the City . . . . Thus, both 'state action' and the necessary causal link between the City's actions and the violation of a right to education are absent." Supp. Br. at 14. For this reason alone, the claim should be dismissed.

In any event, Plaintiffs' argument fails for many other reasons. Plaintiffs provide no authority for their contention that these constitutional provisions extend beyond the rights of public schoolchildren. Opp. at 15-17. That is because all the case law goes the other way. *See, e.g.*, *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997). Moreover, even with respect to public schoolchildren, no decision has recognized a private right of action for damages under the North Carolina Constitution. *See Frye*, 612 F. Supp. 2d at 705.

Finally, even if Plaintiffs' claims were not so glaringly deficient on the merits, they would still be precluded because Plaintiffs have adequate alternate remedies available to them. Supp. Br. at 15-17. Plaintiffs offer several responses. First, they argue that alternative remedies are "available" for these purposes only if they can be alleged against *the same defendant*. Opp. at 15-17. But the courts have uniformly held otherwise. *See, e.g.*, *Rousselo v. Starling*, 495 S.E.2d 725, 731 (N.C. Ct. App. 1998); *Cooper v. Brunswick County Bd. of Educ.*, No. 7:08-CV-48-BO, 2009 WL 1491447, at *4 (E.D.N.C. May 26, 2009); *Glenn-Robinson v. Acker*, 538 S.E.2d 601 (N.C. Ct. App. 2000); *Iglesias v. Wolford*, 539 F. Supp. 2d 831 (E.D.N.C. 2008); *Seaton v. Owens*, No. 1:02CV00734, 2003 WL 22937693, at *8 (M.D.N.C. Dec. 8, 2003).

Plaintiffs argue that all these decisions must be swept aside in light of *Craig v. New Hanover County Bd. of Educ.*, 678 S.E.2d 351 (N.C. 2009). But Plaintiffs'

argument depends on a clear distortion of the cases.[7] More fundamentally, Plaintiffs ignore the fact that *Craig* did not even purport to address whether remedies against other defendants can constitute "adequate alternate remedies."[8] Rather, *Craig* addressed only whether the availability of claims *that are subject to dismissal on sovereign immunity grounds* precludes direct constitutional claims. Because common-law claims may be

[7] Plaintiffs assert that these cases "were based upon the same reasoning the Supreme Court repudiated in *Craig*." Opp. at 16. This is not true. For example, in *Rousselo*, the court implicitly assumed that a common-law action against the state was not an "available" remedy because of its sovereign immunity (which *Craig* ultimately held), but found that the plaintiff still had an adequate alternate remedy because he could sue an individual defendant. *See* 495 S.E.2d at 731. *Rousselo*'s reasoning is thus entirely consistent with *Craig*. Plaintiffs then attempt to distinguish *Iglesias* and *Cooper* by noting that each cited to the court of appeals decision in *Craig*, which was reversed by the North Carolina Supreme Court. *See* Opp. at 16. But both did so in support of plain-vanilla propositions of state law that are unquestionably still accurate. *See, e.g.*, *Iglesias*, 539 F. Supp. 2d at 838 (citing *Craig* for proposition that "'[a] remedy is 'adequate' if it is an 'available, existing, applicable remedy'"); *Cooper*, 2009 WL 1491447, at *4 (same). Despite the implication suggested by Plaintiffs' gerrymandered parentheticals, neither case adopted, let alone discussed, the court of appeals' holding in *Craig*. Plaintiffs next attack *Alt v. Parker*, 435 S.E.2d 773, 779 (N.C. Ct. App. 1993), on the ground that it was *cited by* the court of appeals in *Craig*. *See* Opp. at 16. But of course *Alt* was decided on entirely different grounds. *See Craig v. New Hanover Cy. Bd. of Educ.*, 648 S.E.2d 923, 927 (N.C. Ct. App. 2007) (Bryant, J., concurring in part and dissenting in part). As for *Glenn-Robinson*, Plaintiffs merely note that it predates *Craig*, Opp. at 16, and Plaintiffs do not address *Seaton* at all. In any event, neither case is inconsistent with *Craig*.

[8] Nor did *Copper v. Denlinger*, 688 S.E.2d 426 (N.C. 2010), address this issue. Instead, *Copper* highlights that, even after *Craig*, the full scope of available remedies must be considered. *See id.* at 429 (finding that the availability of *administrative* remedies precludes a direct constitutional claim).

brought (and have been brought) against individual defendants, those claims—even though clearly deficient[9]—preclude a constitutional claim against the City.[10]

Plaintiffs' state constitutional claims must be dismissed.

This the 23rd day of April, 2010.

FAISON & GILLESPIE

By: /s/ Reginald B. Gillespie, Jr.
Reginald B. Gillespie, Jr.
North Carolina State Bar No. 10895
5517 Chapel Hill Boulevard, Suite 2000
Post Office Box 51729
Durham, North Carolina 27717-1729
Telephone: (919) 489-9001
Fax: (919) 489-5774
E-Mail: rgillespie@faison-gillespie.com

STEPTOE & JOHNSON LLP

By: /s/ Roger E. Warin
Roger E. Warin*
Michael A. Vatis*
Matthew J. Herrington*
John P. Nolan*
Leah M. Quadrino*
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 429-3000
Fax: (202) 429-3902
E-mail: rwarin@steptoe.com
*Motion for Special Appearance to be filed

Attorneys for Defendant City of Durham

[9] As explained numerous times, Plaintiffs' individual capacity claims against City Defendants are riddled with defects that warrant dismissal. But those claims are still "available" within the meaning of state law. *See, e.g.*, *Seaton*, 2003 WL 22937693, at *8 ("Despite the fact that [the officer] might be found to enjoy public officer immunity from the state law tort claims . . . [the plaintiff] is still considered . . . to have had adequate state remedies."); *Copper*, 688 S.E.2d at 428-29; *Craig*, 678 S.E.2d at 355-56.

[10] Plaintiffs offer no response regarding the other alternative remedies available to them, such as the availability of parallel claims under the federal constitution. *See* Supp. Br. at 17 n.14. Moreover, if they are serious about criticizing the supervision of Mike Nifong, then they should sue his employer, the State of North Carolina, in state court. *Id.*

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

The undersigned hereby certifies that, pursuant to Rule 5 of the Federal Rules of Civil Procedure and LR5.3 and LR5.4, MDNC, the foregoing pleading, motion, affidavit, notice, or other document/paper has been electronically filed with the Clerk of Court using the CM/ECF system, which system will automatically generate and send a Notice of Electronic Filing (NEF) to the undersigned filing user and registered users of record, and that the Court's electronic records show that each party to this action is represented by at least one registered user of record (or that the party is a registered user of record), to each of whom the NEF will be transmitted.

This the 23rd day of April, 2010.

FAISON & GILLESPIE

By: /s/ Reginald B. Gillespie, Jr.
Reginald B. Gillespie, Jr.
North Carolina State Bar No. 10895