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,** **v.** **DUKE UNIVERSITY, *et al.*,** **Defendants.**	*EXPEDITED CONSIDERATION TO BE REQUESTED* **DEFENDANT CITY OF DURHAM'S BRIEF IN SUPPORT OF ITS MOTION TO DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION AS TO PLAINTIFFS' CLAIM UNDER THE NORTH CAROLINA CONSTITUTION (COUNT 41 OF SECOND AMENDED COMPLAINT)**

NOW COMES Defendant the City of Durham, North Carolina (the "City"), herein by and through its attorneys, and pursuant to 28 U.S.C. § 1367(c)(3), Rules 12(b)(1), 12(b)(6) and/or 12(c) of the Federal Rules of Civil Procedure, and Rule 7.2 of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina, submits this brief in support of its motion requesting that the Court decline to exercise supplemental jurisdiction as to Plaintiffs' claim against the City under the North Carolina Constitution, and to dismiss said claim and this action as against the City, without prejudice.

STATEMENT OF THE NATURE OF THE MATTER BEFORE THE COURT

After six years, and as a result of decisions by this Court and the Court of Appeals, and denial by the Supreme Court of Plaintiffs' petition for certiorari, all 15 individual City Defendants have been dismissed and the dozens of federal and state law claims asserted in 24 of Plaintiffs' 25 causes of action against the City and the City Defendants

have been dismissed. Now, out of Plaintiffs' 428-page, 1,388-paragraph, and 28-attachment second amended complaint, only one count survives as to the City. That count is Count 41, in which Plaintiffs allege the City violated their rights under the North Carolina Constitution. However, on May 20, 2014, this Court eliminated the sole remaining basis for its exercise of jurisdiction as to Count 41, when it dismissed all of the remaining federal claims asserted against other, non-City Defendants in this case. (See Order granting motions to dismiss and for judgment on the pleadings as to Duke Defendants and Linwood Wilson, May 20, 2014, Doc. 401.) With the dismissal of all remaining federal claims from this case on May 20, 2014, the City requests that this Court decline to exercise jurisdiction over Count 41, based on 28 U.S.C. § 1367(c)(3), which provides that, "The district courts may decline to exercise supplemental jurisdiction . . . [if] the district court has dismissed all claims over which it has original jurisdiction".

STATEMENT OF FACTS RELEVANT TO THE MOTION

Plaintiffs asserted multiple federal and state law claims in the 41 counts of their second amended complaint. The federal claims included claims against the City and 15 City personnel, and Plaintiffs alleged this Court had original jurisdiction as to those claims under 28 U.S.C. §§ 1331 and 1343 (federal question jurisdiction). (See, Second Amended Complaint, Doc. 136, ¶ 79) Plaintiffs asserted federal claims against several of the Duke Defendants, Linwood Wilson, and Michael Nifong, as to whom they likewise alleged that this Court had original jurisdiction under 28 U.S.C. §§ 1331 and 1343. (Doc. 136, ¶ 79)

Plaintiffs do not allege diversity of citizenship as a basis for jurisdiction.

With respect to their state law claims, Plaintiffs allege that those claims "are part of the same case and controversy that gives rise to Plaintiffs' federal law claims" and therefore this Court has supplemental jurisdiction over their state law claims pursuant to 28 U.S.C. § 1367(a). (Doc. 137, ¶ 80.) Thus, Plaintiffs allege that this Court has supplemental jurisdiction over Count 41 pursuant to 28 U.S.C. § 1367(a).

At every major decisional stage of this litigation, and throughout the six years and five months of this case, federal and state claims asserted by Plaintiffs have been eliminated from this case. This claims elimination process began with this Court's March 31, 2011 order on motions to dismiss entered (Doc. 186), and culminated with this Court's order granting motions to dismiss and for judgment on the pleadings entered on May 20, 2014, when this Court dismissed Plaintiffs' only remaining federal claims. (Doc. 401). As of May 20, 2014, this case now consists solely of state law claims.

As to the City, the only claim asserted against it is Count 41, and the City is the only Defendant against which Count 41 is asserted. Count 41 is still in a preliminary stage. Because this case was stayed as to the City beginning on June 9, 2011 (see Order granting motions to stay proceedings, Doc. 218), pending the City's and other Defendants' successful appeal to the United States Court of Appeals for the Fourth Circuit, no discovery has been conducted as to Count 41. Indeed, only limited proceedings have occurred as to Count 41, as follows:

On April 22, 2014, the City moved for judgment on the pleadings. (See Doc. 385.) The motion has been fully briefed (Docs. 386, 399, 400) and is ready for determination.

On May 6, 2014, the City moved to sever count 41 from the remainder of this action (Doc. 395). The City respectfully submits that severance is necessary to minimize risks of unfair prejudice and confusion, based on Watkins v. Hospitality Group Management, Inc., No. 1:02-CV-897, 2003 U.S. Dist. LEXIS 22291 (M.D.N.C. Dec. 1, 2003), and additional authorities cited in the City's brief in support of its motion to sever (Doc. 396).

On May 23, 2014, this Court conducted the initial pretrial conference and on May 27, 2014, entered the initial pretrial and scheduling order (Doc. 409). In the initial pretrial and scheduling order, this Court ordered the parties to make the initial disclosures required by Rule 26(a)(1)(A), by May 30, 2014, and the parties have made their disclosures.

As set forth above, by reason of the stay, no discovery whatsoever has been conducted by or obtained from the City with respect to Count 41. In fact, neither Plaintiffs nor the City were allowed to conduct any discovery until they were authorized to do so by this Court at the initial pretrial conference on May 23, 2014.[1]

[1] At the initial pretrial conference this Court expressly authorized the parties to begin discovery on the day of the conference. (See Doc. 409, p. 1: "Discovery will begin on the day of the hearing, May 23, 2014. . .")

ARGUMENT

BECAUSE ALL REMAINING FEDERAL CLAIMS WERE DISMISSED ON MAY 20, 2014, THIS COURT MAY NOW DECLINE TO EXERCISE JURISDICTION AS TO COUNT 41

I. UNDER 28 U.S.C. § 1367(c)(3), THIS COURT MAY DECLINE TO EXERCISE JURISDICTION AS TO COUNT 41.

Plaintiffs allege that, pursuant to 28 U.S.C. § 1367(a), this Court has supplemental jurisdiction over Count 41, a claim based on North Carolina law, because "Plaintiffs' claims arising under North Carolina law are part of the same case and controversy that give rise to Plaintiffs' federal law claims". (Second Amended Complaint, Doc. 136, ¶ 80.)

Section 1367(a) provides in relevant part as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). This Court has noted the "dramatic rhetoric and sweeping accusations against a 'Consortium' of 50 Defendants . . . [and] the sheer volume of the Second Amended Complaint", together with its "'mass of verbiage"'. (Doc. 186, p. 221.) And Judge Wilkinson commented on the "overreach" and "wholly indiscriminate nature" of Plaintiffs' allegations. Evans v. Chalmers, 703 F.3d 636, 660, 662, 663 (4th Cir. 2012), cert. denied, 134 S. Ct. 98 and 134 S. Ct. 617 (2013) (Wilkinson, J., concurring). Although camouflaged by the sweeping allegations, sheer volume, mass of verbiage,

overreach and indiscriminate nature of the 428-page 1,388-paragraph second amended complaint, it is at least arguable that Count 41 and the separate and distinct claims against the Duke Defendants for breach of contract, fraud, and obstruction of justice, do not derive from a "common nucleus of operative fact", as required for the exercise of supplemental jurisdiction under § 1367(a). See, Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc., 145 F.3d 660, 662 (4th Cir. 1998) ("The state and federal claims must derive from a common nucleus of operative fact."). After all, even though "Plaintiffs have sought to raise every experimental claim and to corral every conceivable defendant", 703 F.3d at 659 (Wilkinson, J., concurring), Plaintiffs attribute all of their claims to the investigation of the allegations of sexual assault.

With further regard to the question whether grounds for supplemental jurisdiction exist under § 1367(a), Plaintiffs have now provided some definition to Count 41, stating that it is based on the issuance and execution of the non-testimonial identification order on March 23, 2006 (the "NTO") and the issuance and execution of the search warrant for Ryan McFadyen's dorm room on March 27, 2006 (the "McFadyen search warrant"). (See initial pretrial and scheduling order, Doc. 409, pp. 1-2.) It may be that these grievances do not derive from a nucleus of operative fact that is common to the remaining claims against the Duke Defendants, and consequently, supplemental jurisdiction does not exist under § 1367(a). The remaining claims against the Duke Defendants for breach of contract, fraud, and obstruction of justice are separate and distinct from Count 41, and are not based on acts of the City or City personnel. (See Order, Doc. 401, p. 24 n.15.) Accordingly, the City does not concede that Plaintiffs have established that grounds for

supplemental jurisdiction continue to exist under § 1367(a). However, because the language of § 1367(c)(3) is straightforward and the underlying basis for its application—dismissal of all remaining claims as of May 20, 2014—is established without question, the argument herein focuses on § 1367(c)(3) and declination of supplemental jurisdiction when all federal claims have been dismissed.[2]

As § 1367(a) states, a federal district court shall have supplemental jurisdiction, except as provided in other statutes, including § 1367(c). Section 1367(c) contains four exceptions to supplemental jurisdiction, as follows:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
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> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

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[2] Because of the clarity with respect to the applicability of § 1367(c)(3) to this case, the City respectfully submits that, rather than embarking on the time consuming process of determining the status of Plaintiffs' remaining claims with respect to § 1367(a), which could require parsing the 428 pages and 1,388 paragraphs of the second amended complaint to assess whether there is, for purposes of § 1367(a), a common nucleus of operative fact between Count 41 and the breach of contract, fraud, and obstruction of justice claims against the Duke Defendants, as to which there could be substantial disagreement, the Court's and the parties' time are more productively devoted to the question whether supplemental jurisdiction should be declined under § 1367(c)(3). Of course, should the Court desire argument or briefing regarding § 1367(a), the City will be pleased to provide the same.

In the case sub judice, with all remaining federal claims—the claims over which this Court has original jurisdiction—having been dismissed on May 20, 2014, this Court "may decline to exercise supplemental jurisdiction" as to Count 41.

II. WHEN FEDERAL CLAIMS ARE DISMISSED, A COURT SHOULD USUALLY DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER REMAINING STATE LAW CLAIMS.

Numerous decisions hold that, once federal claims are dismissed, the ordinary course of action prescribed by § 1367(c)(3) is to decline to exercise supplemental jurisdiction over remaining state law claims. "[I]f the federal law claims are dismissed before trial . . . the state claims should be dismissed as well." Mercer v. Duke University, 32 F. Supp. 2d 836, 840 (M.D.N.C. 1998), quoting United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) (ellipsis in Mercer). See also, Ihekwu v. City of Durham, 129 F. Supp. 2d 870, 890 (M.D.N.C. 2000) ("[B]ecause the Court will grant Defendant's Motion for Summary Judgment as to Plaintiff's federal claims, the Court will not consider Defendant's Motion for Summary Judgment as to Plaintiff's remaining state law claims. Instead, pursuant to 28 U.S.C. § 1367(c)(3), the Court will decline to exercise supplemental jurisdiction over Plaintiff's state law claims and dismiss the state law claims without prejudice.); Beck v. City of Durham, 129 F. Supp. 2d 844, 855 (M.D.N.C. 2000) ("[B]ecause the Court will grant Defendants' Motions to Dismiss as to Plaintiff's federal claims, the Court will not consider Defendants' Motions to Dismiss as to Plaintiff's remaining state law claims. Instead, pursuant to 28 U.S.C. § 1367(c)(3), the Court will

decline to exercise supplemental jurisdiction over Plaintiff's state law claims, and dismiss the state law claims without prejudice.").

Mercer, Beck, and Ihekwu are all cases from this District, and all appear to reflect that,

> It is the general rule in this circuit that once federal claims have been finally resolved on pre-trial motion, the exercise of jurisdiction over supplemental state law claims should be declined.

Martin v. Mendoza, 230 F. Supp. 2d 665, 672 (D. Md. 2002), citing 28 U.S.C. § 1367(c)(3); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351 (1988); Taylor v. Waters, 81 F.3d 429, 437 (4th Cir.1996); Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir.1995). Accord, Waybright v. Frederick County, Md., 528 F.3d 199, 209 (4th Cir. 2008) ("With all its federal questions gone, there may be the authority to keep it in federal court under 28 U.S.C. §§ 1367(a) and 1441(c) (2000), but there is no good reason to do so."). See also, Gregory v. Otac, Inc., 247 F. Supp. 2d 764, 773 (D. Md. 2003) ("A majority of the courts which have considered the question have declined to exercise pendent jurisdiction over a state claim when the federal claims have been disposed of prior to a full trial on the merits.").

Likewise, noting that "[t]he Carnegie-Mellon Court did state, though, that when the single federal-law claim is eliminated at an 'early stage' of the litigation, the district court has 'a powerful reason to choose not to continue to exercise jurisdiction'", the Fifth Circuit has also stated that its "general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed." Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 585 (5th Cir. 1992), quoting Carnegie-Mellon, 484 U.S. at

351, and citing Wong v. Stripling, 881 F.2d 200, 204 (5th Cir. 1989). In affirming declination of supplemental jurisdiction over state law claims pursuant to § 1367(c)(3) following dismissal of federal claims, the Tenth Circuit stated,

> the district court's ruling comports with our general admonishment that district courts should dismiss state claims without prejudice after all federal claims have been dismissed, particularly when the federal claims are dismissed before trial, see Ball v. Renner, 54 F.3d 664, 669 (10th Cir.1995); Sawyer v. County of Creek, 908 F.2d 663, 668 (10th Cir.1990), a position supported by both Supreme Court precedent, see Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 & n.7, 108 S. Ct. 614, 98 L.Ed.2d 720 (1988); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966), and the federal statute granting district courts supplement[al] jurisdiction over state claims. See 28 U.S.C. § 1367(c)(3).

Board of County Comm'rs of Sweetwater v. Geringer, 297 F.3d 1108, 1116 n.6 (10th Cir. 2002). See also, Harris v. Falls, 920 F. Supp. 2d 1247, 1262 (N.D. Ala. 2013) (if federal claims dismissed before trial, Supreme Court strongly encourages or even requires dismissal of state claims); Zamora v. City of Belen, 383 F. Supp. 2d 1315, 1339 (D.N.M. 2005) (Supreme Court and Tenth Circuit have encouraged declination of supplemental jurisdiction of state law claims following dismissal of federal claims).

III. BASED ON THE CIRCUMSTANCES OF THIS CASE, THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER COUNT 41, SO THAT NORTH CAROLINA STATE COURTS CAN ADDRESS A MATTER OF NORTH CAROLINA LAW.

Several decisions declining to exercise supplemental jurisdiction over state law claims after dismissal of federal claims, or upholding such declination, have noted as an additional basis for declination, a reluctance to delve into novel, complex, or difficult questions of state law. As this District has commented, such reluctance is well-founded.

> The Supreme Court has cautioned that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). In light of those interests, the Court explicitly stated that "if the federal law claims are dismissed before trial . . . the state claims should be dismissed as well." Id.

Mercer, 32 F. Supp. 2d at 840.

In the present case, Plaintiffs contend in Count 41 that the issuance and execution of the NTO and the McFadyen search warrant violated their rights under the North Carolina Constitution. Plaintiffs' original complaint, filed December 18, 2007, did not include Count 41 and made no allegations that their North Carolina constitutional rights were violated. However, when the North Carolina Supreme Court issued its opinion in Craig v. New Hanover Bd. of Ed. on June 18, 2009, Plaintiffs sought and obtained leave to amend to add Count 41.

In seeking leave to amend, Plaintiffs asserted that Craig represents a change or new direction in North Carolina law. According to Plaintiffs,

> On June 18, 2009, the North Carolina Supreme Court addressed—for the first time—whether a plaintiff's direct cause of action under the North Carolina Constitution is subject to the judge-made immunities that defeat the plaintiff's common law claims.
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> . . .
>
> [P]rior to Craig, the [North Carolina] Court of Appeals held that constitutional claims did not arise under the facts presented here. See Craig v. New Hanover Bd. Of Deuc., [sic] 648 S.E.2d 923 (N.C. Ct. App. 2007). The North Carolina Supreme Court reversed the Court of Appeals, and it is on that basis that Plaintiffs seek now to amend the pleadings to explicitly assert their state constitutional claims.

(Plaintiffs' motion for leave to amend complaint, November 11, 2009, Doc. 130, pp. 5, 7.)

In Craig, a mentally disabled eighth grade student was sexually assaulted by another student while in school. 678 S.E.2d at 352, 353. Relying on provisions of the North Carolina Constitution that were applicable to public schools and the education of children, the plaintiff student, through his mother, alleged that the defendant school board and principal failed to protect him adequately from being sexually assaulted. Id.

Among the specific provisions of the North Carolina Constitution on which the plaintiff based his constitutional claim were Article I, § 15, which explicitly confers the "right to the privilege of education", and expressly imposes the "the duty . . . to guard . . . that right." N.C. Const. art. I, § 15; 678 S.E.2d at 352. Based on these provisions, the plaintiff alleged that he was deprived of an education free from harm and psychological abuse. 678 S.E.2d at 352. The North Carolina Supreme Court held that plaintiff could move forward based on his allegations stating "'colorable' claims directly under our State Constitution". Id. at 355.

As disclosed in their motion to amend, Plaintiffs have added and are attempting to advance a claim under the North Carolina Constitution, based on their assertion that Craig, which was decided during the pendency of this action, represented a change in North Carolina law. This change, according to Plaintiffs, supports the assertion of Count 41.

In a most novel, complex, and radical theory of liability, Plaintiffs attempt to lever Craig, which involved specific North Carolina constitutional provisions expressly imposing duties regarding public education, as the vehicle for asserting Count 41, a claim involving N.C. Gen. Stat. § 15A-273 (the North Carolina statute for non-testimonial

identification orders) and police investigative actions. The Court of Appeals expressly held that the issuance and execution of the NTO complied with state law, including § 15A-273. 703 F.3d at 649-52. "Because the corrected NTO affidavits would provide adequate support for a magistrate's authorization of the NTO, we cannot say that the false statements identified above were 'material.' Therefore, we reverse the district court's denial of defendants' motions to dismiss these § 1983 unlawful seizure claims." 703 F.3d at 652.

Nevertheless, without identifying any duty owed to them under the North Carolina Constitution that was not fulfilled, or any right they held under the North Carolina Constitution that was breached, Plaintiffs make the enigmatic assertion that the City is liable to them under the North Carolina Constitution because there is no other claim against the City that is available to them. Plaintiffs seem to think that, under Craig, if they cannot maintain a claim against the City under any other valid legal theory, the North Carolina Constitution provides the wild card that enables them to proceed.

If there is any doubt that the North Carolina Constitution does not impose liability simply because no other valid legal theory exists to support a claim, then the North Carolina State Courts should address the issue and resolve that doubt. The City respectfully submits there can be no such doubt, and that Craig makes clear there must be a colorable constitutional claim. Indeed, the North Carolina Supreme Court said it eight times in its seven-page opinion—an average of more than once on every page. See, 378 S.E.2d at 352, 354, 355, 356 (three times), 356 ("colorable constitutional injury"), and 357. Three of the court's last four words were "colorable constitutional claims":

> Accordingly, we reverse the Court of Appeals and affirm the trial court's denial of defendant's motion for summary judgment on plaintiff's direct **colorable constitutional claims**.
>
> REVERSED.

Id. at 357 (emphasis added).

By failing to identify any duty owed to them under the North Carolina Constitution that was not fulfilled, or any right they held under the North Carolina Constitution that was breached, Plaintiffs have failed to allege a colorable constitutional claim. By failing to describe how any such duty was not fulfilled or how such right was breached, Plaintiffs have failed to allege a colorable constitutional claim. By failing to name who did not fulfill such duty or who breached such right, Plaintiffs have failed to allege a colorable constitutional claim. By failing to explain how they were injured or damaged by the nonfulfillment of such duty or the breach of such right, Plaintiffs have failed to allege a colorable constitutional claim. In sum, Plaintiffs have failed to allege a duty, breach, proximate cause, and injury/damage.

In Craig, unlike the present case, the plaintiff specifically alleged a breach of a duty—to protect a public school student adequately from a sexual assault while in school—in violation of specific sections of the North Carolina Constitution, including Article I, § 15, which explicitly confers the "right to the privilege of education", and expressly imposes the "the duty . . . to guard . . . that right." N.C. Const. art. I, § 15; 678 S.E.2d at 352. As stated above, Count 41 fails to articulate a specific duty or right that was breached. Plaintiffs' reliance on Craig, especially given their failure to identify a specific duty or right, presents a novel and complex issue of North Carolina constitutional

law under Craig. Plaintiffs seek to transform the North Carolina Constitution into a bottomless fountain of state constitutional tort law, from which there is an endless flow of compensation for every grievance that is not otherwise legally cognizable. This issue should be presented to and decided by the North Carolina State Courts, because any such transformation, whether minor or significant, will require development and definition of its contours, a task better performed by the "surer-footed" North Carolina State Courts. See Gibbs, 383 U.S. at 726.

Moreover, in addition to the new dimension of North Carolina constitutional law Plaintiffs contend that Craig presents and the transformation of law that Plaintiffs seek through Craig, the nature of the claim Plaintiffs purport to advance in Count 41 also demonstrates its novelty and complexity. In this regard, Plaintiffs allege that the issuance and execution of the NTO and the McFadyen search warrant violated their rights under five sections of the North Carolina Constitution cited in Count 41: Article I, §§ 1, 14, 15, 19 and Article IX, § 1. (See Doc. 136, ¶ 1383.)

Of these five provisions, four of them are inapplicable to the facts/allegations of this case, esepecially the NTO and the McFadyen search warrant, as explained in the City's brief in support of its motion for judgment on the pleadings, and as demonstrated by the firmly established case law discussed therein. (See brief, Doc. 386, discussion of N.C. Const. Art. I, §§ 1, 14, 15, and Art. IX, § 1, appearing in parts II.A, II.B, and II.C, at pp. 5-8.) Although Plaintiffs have not conceded the inapplicability of these four provisions, they have not responded to the City's arguments that these provisions are inapposite. (See, Plaintiffs' opposition to motion for judgment on the pleadings, Doc.

399.) Indeed, there is no substantive discussion whatsoever regarding any of these four provisions anywhere in Plaintiffs' opposition to the City's motion for judgment on the pleadings. (Id.) Thus, the Court would not only have to adopt a novel principle of North Carolina constitutional law to hold the City liable under any of these provisions, it would have to adopt a novel principle that is not even being advocated by Plaintiffs.

The only remaining provision of the North Carolina Constitution on which Plaintiffs that Count 41 is based is Article 1, § 19. (Second Amended Complaint, Doc. 136, ¶ 1383.) However, established case law and the decisions in this case by this Court and the Court of Appeals, collectively, have held that the issuance and execution of the NTO and the McFadyen search warrant and the other actions of City personnel did not violate the Fourteenth Amendment, the Fourth Amendment, or any other provision of the United States Constitution. (See, Doc. 186, pp. 216-18 (dismissing all alleged violations of U.S. Constitution, except claims based on alleged violations with respect to NTO and McFadyen search warrant); 703 F.3d at 649-52, 652-55 (analyzing under Fourth Amendment standards Plaintiffs' 42 U.S.C. § 1983 search and seizure claims arising from NTO and McFadyen search warrant, and holding that those claims should be dismissed); see also City's reply brief, filed May 19, 2014, Doc. 400, at part II, pp. 3-6.) Consequently there can be no violation of the North Carolina Constitution, absent some novel and heretofore unrecognized theory of state constitutional law.

Numerous decisions emphasize the importance under § 1367(c)(3) of deferring to state courts on matters of state law upon dismissal of federal claims. In this District, the concept was recognized in Mercer, as follows:

> Mercer's claims for negligent misrepresentation and breach of contract involve complex state-law issues regarding the relationship between a university and its students. . . . Such issues are dependant [sic] upon the law of North Carolina and are better addressed by North Carolina courts rather than a federal court that has only supplemental jurisdiction over the claims pursuant to a now-dismissed federal claim. Therefore, this Court declines to exercise supplemental jurisdiction . . .

32 F. Supp. 2d at 840-41 (M.D.N.C. 2003) (dismissing state law claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3) following dismissal of federal claim).

Other federal courts have likewise deferred to state courts following dismissal of federal claims by declining to exercise supplemental jurisdiction. See, e.g., Harris v. Falls, supra, 920 F. Supp. 2d at 1262 ("Because the Alabama state courts are in the best position to interpret and apply the provisions of the Alabama Constitution and state-agent immunity, this court declines to exercise supplemental jurisdiction"); Zamora v. City of Belen, supra, 383 F. Supp. 2d at 1340 (state court is more appropriate forum to resolve whether actions constituted torts under New Mexico law).

In Whittaker v. County of Lawrence, 674 F. Supp. 2d 668 (W.D. Pa. 2009), jurisdiction over state constitutional claims was declined following dismissal of federal constitutional claims. According to the Western District of Pennsylvania,

> In Counts VI, VII, VIII and IX of the second amended complaint, the Plaintiffs assert claims under the Pennsylvania Constitution which mirror their claims under the United States Constitution. . . . These claims raise novel and complex issues of Pennsylvania law. 28 U.S.C. § 1367(c)(1). Moreover, the Court has already concluded that the Plaintiffs' federal constitutional claims must be dismissed. 28 U.S.C. § 1367(c)(3). Under these circumstances, it is appropriate for the Court to decline to exercise supplemental jurisdiction over the Plaintiffs' state constitutional claims. . . . If the Plaintiffs believe that they have valid claims under the Pennsylvania Constitution, they are free to pursue them in a Pennsylvania

> court. . . . Consequently, this Court need not entertain those claims, which would be more appropriately adjudicated by a Pennsylvania court.

674 F. Supp. 2d at 702. See also, Hone v. Cortland City School Dist., 985 F. Supp. 262, 273 (N.D.N.Y. 1997) ("[E]xercising supplemental jurisdiction over claims based on the New York Constitution "would violate fundamental principles of federalism and comity" because "New York State has a definite interest in determining whether its own laws comport with the New York Constitution." Accordingly, having determined that Plaintiff's federal claims should be dismissed, this Court chooses to exercise its discretion and dismiss the remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3).") (citations omitted).[3]

Another case with the same outcome under circumstances similar to the present case is Doe v. Lennox School Dist. No. 41-4, 329 F. Supp. 2d 1063 (D.S.D. 2003), in which state law claims were dismissed pursuant to § 1367(c)(3) after dismissal of the federal claims. Among the issues presented by the state claims that the federal court declined to consider was whether a duty existed that supported the state law tort claims:

> The parties disagree as to whether the Defendant Lennox School District owed Plaintiff Judy Doe a duty to protect her from the harm she suffered under the facts of this case. Whether a duty exists in a case of tort liability is a matter of law for the courts to determine. As there are no South Dakota state court decisions which address the duty to supervise in the factual

[3] In the present case, the Court of Appeals determined that the NTO was issued and executed in compliance with North Carolina law, N.C. Gen. Stat. § 15A-273. 703 F.3d at 649-52 (referenced in text at pp. 13, 16). To the extent Count 41 challenges the validity of § 15A-273 under the North Carolina Constitution, that is an issue for the North Carolina State Courts because, like the New York State Courts in Hone, the North Carolina State Courts have a definite interest in determining whether § 15A-273 comports with the North Carolina Constitution. Therefore, as in Hone, fundamental principles of federalism and comity warrant declination of supplemental jurisdiction.

> setting that is presented in this case, considerations of comity support allowing the South Dakota state courts to define the required extent of the duty to supervise in the case at hand.

329 F. Supp. 2d at 1070 (citations omitted). Likewise, the North Carolina State Courts should define the duty and explain what is a "colorable" claim under the North Carolina Constitution as contemplated by Craig.

CONCLUSION

With the last of the remaining federal claims dismissed on May 20, 2014, the trial of this case several months away, no discovery having been conducted but about to begin in earnest, and novel and complex issues of state law presented, this Court should decline to exercise supplemental jurisdiction as to Count 41, pursuant to 28 U.S.C. § 1367(c)(3), which provides that this Court "may decline to exercise supplemental jurisdiction . . . [if] the district court has dismissed all claims over which it has original jurisdiction".

WHEREFORE, Defendant the City of Durham, North Carolina prays that, as an alternative to dismissal as requested in its pending motion for judgment on the pleadings (Doc. 385), the Court decline to exercise supplemental jurisdiction as to Count 41, and dismiss Count 41, without prejudice.

Respectfully submitted, this the 5th day of June, 2014.

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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 5th day of June, 2014.

WILSON & RATLEDGE, PLLC

By: */s/ Reginald B. Gillespie, Jr.*

Reginald B. Gillespie, Jr.
North Carolina State Bar No. 10895