IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:08-CV-00119

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

Plaintiffs contend that if their common-law tort claims against the City are dismissed on governmental immunity grounds, they are "*guarantee[d]* a state constitutional alternative" under *Craig v. New Hanover County*, 678 S.E.2d 351 (N.C. 2009). Opp. (Doc. No. 156) at 10 (emphasis added). But *Craig* provides no such "guarantee." On the contrary, just as with any other claim, a plaintiff must plead facts sufficient to meet the elements of the constitutional claim asserted—or face dismissal of that claim. Yet, Plaintiffs' claim lacks the most fundamental element of due-process (substantive *or* procedural): deprivation of a cognizable liberty or property interest. Because of that defect, *and* because their underlying allegations do not meet *Iqbal*'s requirements, *and* because adequate alternative remedies are available to them, their claim under Section 19 of the North Carolina Constitution must be dismissed.[1]

To state a Section 19 claim, Plaintiffs must allege a deprivation of a cognizable liberty or property interest. *See* Supp. Br. (Doc. No. 155) at 3-6. Plaintiffs have utterly failed to do so. Indeed, they do not even *attempt* to argue that they have been deprived of a cognizable liberty or property interest.[2] Instead, they simply list each of their common-law claims and suggest that, *ipso facto*, a Section 19 claim is automatically substituted for all of them. Opp. at 9-10. But that hardly suffices. Plaintiffs' state constitutional claim still must satisfy all the elements of Section 19, including alleging a cognizable liberty or property interest. *Craig* certainly does not hold otherwise. *See Collum v. Charlotte-Mecklenburg Bd. of Educ.*, No. 3:07-CV-534, 2010 WL 702462, at

[1] Moreover, Plaintiffs' Section 19 claim, as pleaded, provided no notice as to what theories might underlie it. The claim should be dismissed for that reason alone. *See, e.g.*, *Coakley v. Jaffe*, 49 F. Supp. 2d 615, 628 (S.D.N.Y. 1998) ("[Plaintiff's state constitutional claim] contains little more than the vague and conclusory allegation that 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 that complaint's "'shotgun pleading' . . . illustrates plaintiffs' utter disrespect for Rule 8").

[2] Plaintiffs notably omit any mention of the sole liberty deprivation on which they grounded their federal due process claims in prior briefing—the lost 2006 lacrosse season. *See* Pls.' Br. in Opp. (Doc. No. 95) at 37. Perhaps that is because it is now clearer than ever that playing lacrosse is not a cognizable liberty or property interest. *See 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); *see also* Supp. Br. at 5-6; City's Reply Br. (Doc. No. 109) at 13-16.

*3 (W.D.N.C. Feb. 23, 2010) (*Craig* provides only that plaintiffs be given the opportunity to "enter the courthouse doors and present their constitutional claim" but provides no shield against dismissal when that claim is defective as a matter of law). Section 19 is not simply a catch-all for all manner of perceived injustices. *See Rhyne v. K-Mart Corp*., 562 S.E.2d 82, 91 (N.C. Ct. App. 2002) (due process should not be "devalued through random use as a residual depository. . . [;] [d]ue process is not an endless drama encumbered only by the limits of our collective imagination").[3]

Moreover, despite Plaintiffs' naked assertion that due process is violated "when the government coerces witnesses to lie, manufactures evidence, and frames innocent parties for a crime that never took place," Opp. at 10, they do not dispute that such misdeeds are actionable only when a plaintiff is actually prosecuted. *See* City's Open. Br. (Doc. No. 73) at 26-29; City's Supp. Br. at 7; *Nguyen v. Burgerbusters, Inc*., 642 S.E.2d 502, 506-07 (N.C. Ct. App. 2007) (malicious prosecution claim not available where plaintiffs were not prosecuted).[4] Plaintiffs, of course, were never even arrested, let

[3] Moreover, each common-law claim that Plaintiffs suggest is automatically transmogrified into a constitutional claim is also deficient on its own merits, for reasons amply demonstrated in the City's prior briefs and in recent case law. *See* City's Open. Br. at 12-17, 34-36, 42-45; City's Reply Br. at 1-4, 12-13, 22-23; City's Mot. to Dismiss (Doc. No. 154) at 2 & n.1; *see also Franklin v. Yancey County*, No. 1:09-CV-199, 2010 WL 317804, at *5-6 (W.D.N.C. Jan. 19, 2010) (rejecting abuse of process claim because, while plaintiff alleged malice in procuring arrest warrant, plaintiff failed to allege improper subsequent use for collateral purposes); *id*. at *7 (rejecting negligent infliction claim because plaintiff "does not make any specific factual allegations as to his 'severe emotional distress' and relies entirely on conclusory statements").

[4] Courts "look to common law torts bearing similarity to the constitutional rights at issue and incorporate into those claims common law elements." *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000).

alone indicted, tried, and convicted. Thus, cases where the plaintiffs *were* prosecuted do not help these Plaintiffs one whit. *See* Opp. at 11-12 (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 from his job); *White v. Wright*, 150 Fed. App'x 193 (4th Cir. 2005) (plaintiff indicted and arrested).[5]

Plaintiffs also argue that Section 19 provides the basis for a state claim analogous to their federal Fourth Amendment claims. Opp. at 9. This argument fails for three independent reasons. First, Plaintiffs' Complaint provides no notice that their Section 19 claim is based on an allegedly unreasonable seizure. *See supra* n.1. Second, an unreasonable seizure claim is cognizable only under Section 20 of the North Carolina Constitution, not Section 19. *See State v. Carter*, 370 S.E.2d 553, 555 (N.C. 1998).[6] Third, Plaintiffs' unreasonable seizure claim under Section 19 fails for the same reasons

[5] Plaintiffs characterize the City as having argued that Section 19 "encompasses only claims analogous to federal *substantive-due-process* claims." Opp. at 9 (emphasis added). But the City clearly laid out the reasons that Plaintiffs' Section 19 claim is defective as a matter of *both* procedural *and* substantive due process. *See* Supp. Br. at 3-7.

[6] Perhaps recognizing this defect in their Section 19 claim, Plaintiffs in a footnote ask this Court for leave to amend their amended Complaint to add a Section 20 claim—before briefing is even completed on their current amended Complaint. If Plaintiffs ever do make a proper motion to amend their Complaint yet again, that motion should be denied. Plaintiffs have already thrown everything but the kitchen sink into their amended Complaint. They should not be allowed to toss in the sink as well, especially when that sink is as rusty and full of holes as their unreasonable seizure claim is. *See infra* at 4-5.

their federal Fourth Amendment claims fail, which the City fully explained in its prior briefs and which require no additional explanation here.[7]

Plaintiffs' Section 19 claim fails for an additional reason: it does not meet the pleading standards set out in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Plaintiffs do not dispute that *Iqbal* applies to their state constitution claim (Opp. at 12), but they fail to explain how their amended Complaint's factual allegations are even *consistent* with the Fourth Amendment and Section 19 claims they assert, let alone how they meet *Iqbal*'s *plausibility* requirement.[8] As the City has previously pointed out, *see* City's Iqbal Br. (Doc. No. 135) at 3-9, the amended Complaint is full of conclusory allegations that are not entitled to the presumption of truth and cannot be considered when determining the plausibility of their claim. *See Iqbal*, 129 S. Ct. at 1951-52. Plaintiffs do not even try to point to any factual allegations that support their Section 19 claim, instead merely asserting that the state Attorney General "excoriated Durham's investigation." Opp. at 13.

[7] With regard to Count 20, Plaintiffs had no reasonable expectation of privacy in the key card data, and FERPA does not supply one. *See* City's Open. Br. at 17-20; City's Reply Br. at 4-7. With regard to Count 21, the statute authorizing non-testimonial orders is constitutional. *See* City's Reply Br. at 7-9. In addition, City investigators had probable cause to believe a crime had occurred and reasonable suspicion that, if it did, Plaintiffs and their teammates were involved. *See* City's Open. Br. at 20-26; Reply Br. at 9-10. Moreover, any attempt to convert those defective *Fourth Amendment* claims back into a *due process* claim runs smack into *Albright v. Oliver*, 510 U.S. 266 (1994), which precludes such a gambit. *See* City's Open. Br. at 27-30.

[8] Plaintiffs' assertion that the City has argued that *Iqbal* imposes a "probability" rather than a "plausibility" requirement, Opp. at 12, is belied by the City's briefs. *See* City's Iqbal Br. at 2-4; Open. Br. at 9-11. This is another instance of Plaintiffs' erecting strawmen to knock down in order to divert the Court's attention from their inability to rebut the City's actual arguments concerning the defects in their Complaint.

But the issue, of course, is what factual allegations the amended Complaint makes that support Plaintiffs' claim, not what the Attorney General may or may not have said.

Even if Plaintiffs' Section 19 claim was not so glaringly deficient on the merits, it would still be precluded because Plaintiffs have adequate alternate remedies available to them. 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 4-8. But the courts have found 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.[9] More fundamentally, Plaintiffs

[9] Plaintiffs suggest that *Rousselo* is no longer good law because that court "found no merit" in the plaintiff's argument that he had no available remedy because sovereign immunity would "defeat any common law tort claim that he brought against the State." Opp. at 7. But as the Court made clear in the very next sentence, the court found no merit in that argument *because a remedy was available against another defendant*—in particular, a tort action against the officer in his *individual* capacity. 495 S.E.2d at 731. Indeed, the court appeared to assume that no common-law action could be brought against the State 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 id.* *Rousselo*'s reasoning is thus entirely consistent with *Craig*. Plaintiffs argue that *Glenn-Robinson* is distinguishable because there, "the plaintiff 'had not brought suit against the City for . . . state tort claims,'" while here, Plaintiffs "bring

ignore the fact that *Craig* did not even purport to address the issue of whether remedies against other defendants can constitute "adequate alternate remedies." Rather, *Craig* addressed only whether the availability of claims *which are subject to dismissal on sovereign immunity grounds* precludes direct constitutional claims. Because common-law claims may be brought (and have been brought) against individual defendants, those claims—even though deficient[10]—preclude a direct constitutional claim against the City.

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state-law tort and constitutional claims both against Durham's officers in their individual capacity and against Durham itself." Opp. at 7 n.5. But whether Plaintiffs *actually seek* alternate remedies has nothing to do with whether those remedies are "available" as a matter of law. *See, e.g., Stroud v. Harrison*, 508 S.E.2d 527, 531 (N.C. Ct. App. 1998).

Plaintiffs 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 7-8. But both did so in support of plain-vanilla propositions of state law that are unquestionably still accurate today. *See, e.g., Iglesias*, 539 F. Supp. 2d at 838 (citing *Craig*, among others, in support of the 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*—that common law claims barred by governmental immunity are still adequate alternate remedies. Plaintiffs attack *Alt v. Parker*, 435 S.E.2d 773, 779 (N.C. Ct. App. 1993), on the ground that it was *cited by* several pre-*Craig* cases. *See* Opp. at 7 n.5. But of course *Alt* was decided on grounds having nothing to do with the sovereign-immunity question at issue in *Craig*. As for *Seaton v. Owens*, No. 1:02CV00734, 2003 WL 22937693, at *8 (M.D.N.C. Dec. 8, 2003), Plaintiffs make no argument other than to note that it predates *Craig*. But nothing in that decision is inconsistent with *Craig*.

[10] It bears repeating that, as explained on numerous occasions throughout numerous briefs, Plaintiffs' individual capacity claims against City Defendants are riddled with defects that warrant dismissal of all of them. But even though those claims should be dismissed, they are still "available" within the meaning of North Carolina 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."); *Rousselo*, 495 S.E.2d at 731-32 (claim is "adequate" even though the plaintiff will have to demonstrate that defendant "acted with malice, corruption, or beyond the scope of his duty"); *Alt*, 435 S.E.2d at 779

Plaintiffs also try to make hay of the City's suggestion that they had available to them a claim against the State of North Carolina in state court. *See* Opp. at 2-3; *see also* City's Supp. Br. at 14 n.8. But this arises from Plaintiffs' own claim that Nifong was negligently supervised. *See, e.g.*, FAC ¶¶ 676-80. If that claim is to be taken seriously, it must be targeted at Nifong's employer, the State of North Carolina. The mere fact that Plaintiffs chose not to bring such a claim, *see* Opp. at 2-3, is of no moment. *See, e.g.*, *Stroud v. Harrison*, 508 S.E.2d 527, 531 (N.C. Ct. App. 1998) (dismissing Section 19 claim when state afforded adequate statutory remedy).[11]

Finally, Plaintiffs argue that their myriad federal claims do not count as alternate available remedies, citing *Corum* and *Copper v. Denlinger*, 688 S.E.2d 426 (N.C. 2010). *See* Opp. at 3-4. But neither of those cases addressed the issue of whether federal claims constitute adequate alternate remedies. Their references to the adequacy of alternate *state* law remedies thus prove nothing. Moreover, *Copper* highlights that, even after *Craig*, the full scope of available remedies must be considered. *See* 688 S.E.2d at 429 (finding

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(holding that plaintiff's claim for false imprisonment constituted adequate state-law remedy notwithstanding that "plaintiff's claim for false imprisonment is fatally deficient"). Thus, the City is hardly throwing the individual Defendants "under the bus," Opp. at 4, by pointing out this basic principle of North Carolina law.

[11] Plaintiffs assert that Nifong was the City's "hand-picked lead investigator," Opp. at 13, and that "Durham delegated control of its investigation to Nifong," Opp. at 3. Yet, they offer no factual allegations to support these conclusory assertions. The assertions are therefore entitled to no weight under *Iqbal*. Moreover, Plaintiffs' effort to make the City, rather than the State, responsible for Nifong is barred by North Carolina law. *See McMillian v. Monroe Co.*, 520 U.S. 781, 786 (1997) (whether official decision is attributable to state or local entity depends on "the definition of the official's functions under relevant state law"); *State v. Smith*, 607 S.E.2d 607, 625 (N.C. 2005) (State Legislature supervises District Attorney's exercise of authority); Open. Br. at 34-36.

that the availability of administrative remedies precludes a direct constitutional claim). In the absence of North Carolina court decisions rejecting federal claims as alternate remedies, it is entirely appropriate to consider cases from other jurisdictions on this precise issue as instructive, albeit not dispositive. *See* City's Supp. Br. at 14 n.8; *see also, e.g., Wahad v. FBI*, 994 F. Supp. 237, 240 (S.D.N.Y. 1998) ("[T]he existence of alternative damage remedies under Section 1983 obviates the need to imply a private right of action under the State Due Process Clause."); *Taylor v. Rhode Island*, 726 F. Supp. 895, 901 (D.R.I. 1989) (dismissing claim for damages under equal protection clause of Rhode Island State Constitution where plaintiff had alternative remedy under Title VII to address his employment grievance); *Coakley v. Jaffe*, 49 F. Supp. 2d 615, 629 (S.D.N.Y. 1999) (Section 1983 claim premised on unreasonable seizure is alternate remedy precluding claim under state constitution on same grounds). These cases also reflect the continuing vitality of the principle that a court must proceed with caution before recognizing direct claims under a state constitution. *See Corum v. Univ. of N.C.*, 413 S.E.2d 276, 291 (N.C. 1992); *see also Eastridge v. R.I. College*, 996 F. Supp. 161, 170 (D.R.I. 1998) ("When there is a request for the judicial creation of a supplemental damages remedy arising directly under a constitutional provision . . . a federal court should proceed with caution.") (citations omitted).

Plaintiffs' claim brought under the North Carolina Constitution must be dismissed.

This the 19th day of April, 2010.

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This the 19th day of April, 2010.

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