UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

LAILA DAMES, et al., *Plaintiffs*, v. LEE ROBERTS, et al., *Defendants*.	No. 1:25-cv-191

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

In April 2024, Plaintiffs and other community members gathered on Polk Place—a large, publicly accessible quad on UNC's campus—to participate in a non-violent, non-disruptive encampment to communicate their view that the United States had been complicit in genocide.

In response, Defendants deployed police in the early hours of April 30 to forcibly clear the encampment and arrest participants for trespassing. Plaintiffs Dames, Rogers, and Newman were summarily issued indefinite bans from UNC's campus. Plaintiff Mohanarajah was also banned from campus and summarily suspended. All this happened with minimal notice and no prior hearing, and the appeal hearing that occurred three months later lacked basic

procedural protections—Plaintiffs didn't even learn of some of the allegations against them until *after* the hearing.

Plaintiffs allege these actions violate their rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution, Article I, Section 14 of the North Carolina Constitution, and North Carolina common law. Defendants have moved to dismiss Plaintiffs' claims except for their state constitutional claims. The motion should be denied.

FACTS

I. Polk Place

The University of North Carolina at Chapel Hill (UNC) is a public university. Much of its campus has long been accessible to the public. (*See* Doc. 10, Ex. A).

Polk Place is a large quad centrally located on UNC's campus. It is roughly twice the size of a football field and functions like a city park. (*Id.* ¶ 41). Polk Place serves as a gathering place for both students and members of the public to study, relax, and engage in political speech. (*Id.* ¶ 42).

Polk Place does not require prior approval for use by members of the public, and at the time of the events in this case, UNC's policy allowed anyone to continuously occupy outdoor spaces that did not have posted closure times. (*Id.* ¶ 45).

II. The Encampment

Plaintiff Rogers is a professor at Duke University. Plaintiff Dames is a student at Duke University. Plaintiff Newman was a student at Meredith College at the time of the events in this case. Plaintiff Mohanarajah is a student at UNC and was on a leave of absence at the time of the events in this case. (*Id.* 10 ¶¶ 15).

Plaintiffs believe the United States government has been complicit in the ongoing violence against Palestinians in Gaza. (*Id.* ¶¶ 102, 131, 153, 176). In April 2024, Plaintiffs and other concerned people joined a nonviolent, nondisruptive encampment demonstration on Polk Place. (*Id.* ¶¶ 57, 61–63). Plaintiffs did not organize or lead the encampment and had no authority over its participants. (*Id.* ¶ 59).

The encampment consisted of approximately twenty-five camping tents at its largest. (*Id.* ¶¶ 58, 60). The erection of the tents was intended to communicate a message of solidarity with the Palestinian people, many of whom have been forcibly displaced and are living in tents. (*Id.* ¶ 56). Another purpose of the encampment was for like-minded people to gather and participate in the exchange of ideas. (*Id.* ¶¶ 61–62).

All Plaintiffs were present at the encampment at the time of its forcible clearing in the early hours of the morning on April 30, 2024 and at various times in the preceding days. (*Id.* ¶¶ 99, 128, 150, 174).

Encampment participants, including Plaintiffs, took care to avoid damaging the greenery on Polk Place, ensured walkways remained accessible, and ensured the encampment did not disrupt regular UNC operations. At no point did Plaintiffs or other participants vandalize or damage UNC property, violate noise ordinances, obstruct non-participant students, or engage in disruptive conduct. (*Id.* ¶¶ 69–72).

III. Dispersal of the Encampment

On April 27, UNC administrators communicated to some encampment participants, but not Plaintiffs, that the use of tents violated UNC's policy regarding temporary structures. (*Id.* ¶¶ 87–88). These administrators did not explain that this violation meant Plaintiffs faced arrest or trespass from campus. (*Id.* ¶ 89). Indeed, in discussing potential recourse, UNC administrators acknowledged they could simply remove the tents. (*Id.*, Ex. D).

At 5:30 AM on April 30, when Plaintiffs and many others were still asleep or just waking up, at the direction of Defendant James, UNC administrators distributed a letter signed by Defendant Roberts to some participants, but not Plaintiffs. (Doc. 10 ¶¶ 81, 83, 90). The letter demanded participants disperse by 6:00 AM or face arrest. (*Id.*, Ex. B).

The letter alleged the encampment threatened the safety of students, faculty, and staff, but did not explain how. (*Id.*). The letter also alleged that

some participants violated University policy by "trespassing into classroom buildings overnight" but never specified who. (*Id.*)

At 6:00 AM, law enforcement—including Defendants Lynch, Brown, Lee, and Wylie—began arresting participants who had not dispersed. Many encampment participants, including Plaintiffs, had not received the dispersal letter. (Doc. 10, ¶¶ 90–91).

Plaintiffs Rogers, Dames, and Newman were arrested for criminal trespass. (*Id.* ¶¶ 116, 140, 162). Rogers, who uses a cane due to a disability, suffered a cartilage tear in her shoulder when Defendant Lee threw her to the ground after taking her cane away. (*Id.* ¶¶ 113–14). Plaintiff Dames suffered bruising around her wrists. (*Id.* ¶ 141). Although Plaintiff Mohanarajah was not criminally cited, she was detained for approximately thirty minutes before being released. (*Id.* ¶¶ 184–85).

IV. Plaintiffs' Indefinite Bans and Suspension

That same day, with on hearing, Plaintiffs Mohanarajah, Dames, and Newman were indefinitely banned from the entirety of UNC's campus for all purposes other than emergency medical treatment at UNC hospitals. (*Id.* ¶ 143, 165, 186), Plaintiff Rogers received notice of her indefinite ban three days later. (*Id.* ¶ 118). Despite not being enrolled, Plaintiff Mohanarajah was also suspended from UNC through its Emergency Evaluation Action Committee

("EEAC") without a hearing. (*Id.* ¶ 186). Plaintiffs received notice of their bans on the day the bans took effect. (*Id.* ¶¶ 118, 143, 165, 186).

The EEAC addresses emergency situations that "require a faster response than the student judicial system's procedures can provide." (*Id.* ¶ 47). These situations concern drugs, violence, and academic dishonesty. (*Id.*). Use of the EEAC here was unusual. (*Id.* ¶¶ 5–7). The EEAC's letter to Mohanarajah informing her of her suspension relied on her "cit[ation] for 2nd degree trespassing" and failure to disperse, but Plaintiff Mohanarajah was never criminally charged for second-degree trespass. (*Id.* ¶¶ 190–191).

V. Appeal Hearings

Plaintiffs timely appealed their bans within ten days of their issuance. (*Id.* ¶ 219). The "hearings" consisted of Defendant James' meeting with Plaintiffs' counsel. (*Id.* ¶ 222). Before the hearings, Plaintiffs were not given any reason for their bans other than a conclusory statement that they had failed to disperse. (*Id.* ¶¶ 223).

There did not appear to be any written procedures governing Defendant James' handling of the appeal. (*Id.* ¶ 227–29). During the hearing, he did not present any evidence, ask any substantive questions, respond to Plaintiffs' argument, or explain why the bans were issued. Plaintiffs had no opportunity to examine adverse witnesses or otherwise challenge the evidence against them. (*Id.* ¶¶ 223–26).

On August 12, more than three months after the initial trespass notices, Defendant James communicated to Plaintiffs via letters that he had upheld their bans. (*Id.* ¶¶ 231–32) The letters did not reference individualized facts or allegations concerning safety risks to students or University property. (*Id.* ¶¶ 230–34). They stated only that the bans were appropriate because Plaintiffs failed to disperse, tents were set up without a permit, and Defendants had "other safety and security concerns." (*Id.*, Ex. H). Plaintiff Mohanarajah's letter also falsely indicated she had been criminally cited. (*Id.*, Ex. I). This was the first time Plaintiffs learned any of the allegations concerning the tent permits and the unspecified "safety concerns." (Doc. 10 ¶ 369)

All criminal charges against Plaintiffs have been dismissed, but the campus bans remain active. (*Id.* ¶¶ 126, 148, 171). As a result, Plaintiff Rogers cannot pursue professional opportunities related to her employment as a professor at Duke University. (*Id.* ¶ 246). Plaintiff Newman is an organizer for Voices for Justice in Palestine and cannot attend events on UNC's campus related to her employment. (*Id.* ¶ 248). Neither these Plaintiffs nor Plaintiffs Dames and Mohanarajah can step foot on UNC's public campus to engage in protected First Amendment activity.

On November 5, 2024, Plaintiff Mohanarajah was informed her EEAC suspension had been lifted and she could re-enroll in classes. (*Id.*, Ex. I). On December 6, 2024, Defendant James communicated to Plaintiff Mohanarajah

that she must seek his permission for campus-based activities, including classes, on a case-by-case basis. (*Id.* ¶ 197). She was told there are currently no online courses that would apply to her major. (*Id.* ¶ 199).

VI. Other Protests on UNC's Campus

UNC has a long history of protest movements on campus. In the 1960s, students and non-students protested a speaker-ban law on McCorkle Place, students picketed outside Memorial Hall, and approximately four thousand students and community members gathered on Polk Place, outside Hill Hall, chanting loudly, while staff and faculty were working inside. (*Id.* ¶¶ 258–59, 266, 271–72), During one of these protests, fifteen students were arrested for blocking the entrance to Gardner Hall. (*Id.* ¶ 267). Most Vietnam War protests remained nonviolent, but red paint was splashed on some University buildings and some windowpanes were broken. (*Id.* ¶ 273). The are no publicly available reports indicating that any of those individuals received permanent bans from campus. (*Id.* ¶ 285).

In the 1980s, students and non-students protested South African apartheid by erecting an encampment on Polk Place. (*Id.* ¶ 286). UNC Chapel Hill police dismantled the encampment, but it was soon rebuilt with permission from the Chancellor. (*Id.* ¶ 287). Counter-protestors erected a "Berlin-type wall" in objection to the encampment. (*Id.* ¶ 288).

In 2009, several protests were staged against individual speakers invited to UNC's campus. (*Id.* ¶¶ 298, 303). A brick was thrown through a classroom window during one and a student was arrested multiple times. (*Id.* ¶¶ 300, 302–03). Other involved students faced Honor Court investigations (*Id.* ¶¶ 298–303). Despite multiple arrests and property damage, there are no publicly available reports that either this student or others were indefinitely banned from campus. (*Id.* ¶¶ 304–05).

From 2017-2018 there were numerous protests of the Confederate monument known as Silent Sam located on McCorkle Place. (*Id.* ¶ 306). One protest involved over 1,000 students and non-students. (*Id.* ¶ 307). An encampment was erected around the statue. (*Id.* ¶ 307–09). After approximately a week, the encampment was cleared by UNC Police. (*Id.* ¶ 310). No protestors were arrested at this time nor were participants dispersed from the encampment or issued indefinite campus bans. (*Id.* ¶¶ 306–11).

In 2019, a UNC graduate student defaced Silent Sam with their own blood. (*Id.* ¶ 312). That student was arrested and appeared before UNC's Honor Court to face disciplinary charges. (*Id.* ¶ 313). Despite multiple felony charges and multiple counts of property damage, this student was never summarily suspended through the EEAC process, nor were they issued an indefinite campus ban. (*Id.* ¶¶ 312–14).

In August 2018, protestors physically toppled the Silent Sam statue. (*Id.* ¶ 315). Seven non-students were arrested during the protest and three were arrested in connection with toppling the statue. (*Id.* ¶ 316–17). None of these individuals were summarily and indefinitely banned from UNC's campus. (*Id.* ¶¶ 318).

LEGAL STANDARDS

To withstand a motion to dismiss under 12(b)(1), plaintiffs must allege facts that, taken as true, establish federal jurisdiction. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

To withstand a Rule 12(b)(6) motion to dismiss, the court "must accept as true all of the factual allegations contained in the complaint. [The complaint] must contain sufficient facts to state a claim that is plausible on its face. Nevertheless, a complaint need only give the defendant fair notice of what the claim is and the grounds upon which it rests. Further, [a court must] draw all reasonable inferences in favor of the plaintiff." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (cleaned up).

To overcome qualified immunity at the motion to dismiss stage, a plaintiff must allege a violation of a federal right, and that the right was a "clearly established one of which a reasonable person would have known." *Ridpath v. Bd. of Governors Marshall Univ.* 447 F.3d 292, 307 (4th Cir. 2006).

ARGUMENT

I. Defendants are not entitled to sovereign immunity.

Defendants argue that sovereign immunity bars Plaintiffs' federal claims made against Defendants in their official capacities. That argument fails. Plaintiffs' claims brought under 42 U.S.C. § 1983 do not seek damages from Defendants in their official capacities; rather, they seek declaratory and injunctive relief to remedy ongoing constitutional violations.

When a "plaintiff is seeking injunctive relief, then the state official acting in an official capacity is a person under 42 U.S.C. § 1983, and official-capacity actions for prospective relief are not treated as actions against the State." *Jennings v. UNC*, 240 F. Supp. 2d 492, 499 (M.D.N.C. 2002) (cleaned up); *see also Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985) (citing *Ex parte Young*, 209 U.S. 123 (1908)). Rather, *Ex parte Young* authorizes "suits against state officers for prospective equitable relief from ongoing violations of federal law." *Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001).

Here, Defendants first argue that sovereign immunity bars claims made against UNC as an agency of the state. (Doc. 18 at 11–12). But Plaintiffs have not named UNC as a defendant. For their claims under § 1983, Plaintiffs only seek injunctive and declaratory relief against official-capacity defendants, and monetary relief only from those sued in their individual capacities. (*See* Doc. 10 ¶¶ 79–80).

Defendants further claim they are "entitled to sovereign immunity to the extent they are named in their official capacities" because Plaintiffs have not alleged an ongoing violation of federal law. (Doc. 18 at 12). Not so.

Plaintiffs allege active campus bans keeping them from the entirety of UNC's campus, and as discussed below, these bans infringe on Plaintiffs' First and Fourteenth Amendment rights. Courts routinely find that such restrictions give rise to valid claims for prospective relief under *Ex parte Young*. *See, e.g.*, *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4th Cir. 2001) (state official's continuing enforcement of statute satisfied *Young* exception).[1]

II. Plaintiffs plausibly allege a prior restraint because Defendants have restricted Plaintiffs' future expression, and a single official has unbridled discretion to lift that restriction.

Plaintiffs allege that they wish to engage in political expression, protected by the First Amendment, in public forums where they have a right to be. (Doc. 10 ¶¶ 125, 147, 170, 200). Plaintiffs further allege that Defendants

[1] To be clear, Plaintiffs *do* seek nominal damages against Defendants in their official capacities for violations of Article I, Section 14 of North Carolina Constitution. (Doc. 10 at 78). Plaintiffs may bring such claims when state law does not provide an adequate remedy for an alleged constitutional harm. *See Corum v. UNC,* 330 N.C. 761, 783 (1992) (plaintiff had "a direct cause of action under the State Constitution against [UNC official] in his official capacity for alleged violations of plaintiff's free speech rights"). Defendants have not moved to dismiss these claims.

have indefinitely excluded them from these forums, and that a single official has unbridled discretion to lift that exclusion. (*Id.* ¶ 229). Taking these allegations as true and drawing every reasonable inference in Plaintiffs' favor, Plaintiffs state a plausible claim that Defendants have imposed a prior restraint that is subject to strict scrutiny.

The First Amendment protects the right to speak and "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). "[I]nteractive communication concerning political change . . . is appropriately described as 'core political speech'" that warrants the broadest protection. *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

"A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs." *United States v. Frandsen*, 212 F.3d 1231, 1236–37 (11th Cir. 2000). Such restraints violate the First Amendment when government officials have "unbridled discretion in determining whether to allow protected speech," as this "presents an unacceptable risk of both indefinitely suppressing and chilling protected speech." *11126 Baltimore Blvd., Inc. v. Prince George's Cnty.*, 58 F.3d 988, 994 (4th Cir. 1995) (en banc), *abrogated on other grounds, City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).

Prior restraints do not have to be content-specific. A regulation of speech may violate the First Amendment "if, despite being content neutral, the scheme vests unbridled discretion in the decision-maker." *Reyes v. City of Lynchburg*, 300 F.3d 449, 454 (4th Cir. 2002). *See, e.g., Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1264 (11th Cir. 2004) (holding that an ordinance was a prior restraint "because the Sheriff must approve the fact of, if not the message of, the protest or demonstration before it occurs").

Here, Plaintiffs allege that they engaged in—and wish to continue engaging in—protest concerning United States foreign policy. (Doc. 10 ¶¶ 125, 147, 170, 200). The First Amendment protects that activity. *Bond v. Floyd*, 385 U.S. 116, 132 (1966); *Occupy Columbia v. Haley*, 738 F.3d 107, 122 (4th Cir. 2013). Moreover, an important part of Plaintiffs' expressive activity involves assembling with like-minded people in public forums—such as Polk Place—and communicating their message to the government and the public. (Doc. 10 ¶¶ 61–63).

Plaintiffs further allege that they have been banned from UNC's entire campus for at least two years, at which time they can petition Defendant James to lift the bans. (*Id.* ¶ 230 & Ex. G). University policy, however, doesn't provide any criteria for James to make this decision. (*Id.* ¶ 228). Defendants don't suggest otherwise. Therefore, a single government official has "unbridled and

absolute power to prohibit" political expression protected by the First Amendment. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969).

Taking these allegations as true and drawing all reasonable inferences in Plaintiffs' favor, Plaintiffs plausibly allege an unconstitutional prior restraint. And as discussed below, the face of the complaint does not show that Defendants can satisfy any potentially applicable level of scrutiny. Defendants' arguments to the contrary are not persuasive.

A. The campus bans prohibit Plaintiffs' future expression.

First, Defendants argue that the trespass bans are merely a punishment for past conduct, not a restraint on future expression. (Doc. 18 at 15–16). They rely principally on *Alexander v. United States*, where a criminal defendant was convicted and had to forfeit assets including an adult entertainment business. 509 U.S. 544, 548 (1993). The defendant agreed that the punishment was for "unprotected speech," but argued that the forfeiture prevented future protected expression. *Id.* at 549. The Court held that the forfeiture was not a prior restraint because it did "not *forbid* [the defendant] from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities." *Id.* at 550–51.

Here, Plaintiffs' expressive conduct involves assembling on UNC's campus to communicate a message to government and the public, and to associate with like-minded peers in a forum historically known for debate and activism.

(*See* Doc. 10 ¶¶ 5, 55, 61–63). Plaintiffs can't do any of that unless Defendant James allows it. Unlike *Alexander*, the bans have a concrete restriction on Plaintiffs' future political activity protected by the First amendment. *See Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (holding that "tenting and sleeping in the park . . . is symbolic conduct which is protected by the First Amendment" and prohibition on that conduct was a prior restraint).

Moreover, Defendants wrongly accuse Plaintiffs of having engaged in "criminal" conduct by failing to disperse. (Doc. 18 at 16, 19). Unlike the defendant in *Alexander*, Plaintiffs have not been convicted of anything related to the encampment. All charges were dismissed. Ms. Mohanarajah was never even arrested. (Doc. 10 ¶¶ 126, 148, 171, 191). And Plaintiffs do not allege that they knowingly failed to comply with a lawful dispersal order. Rather, they allege being taken by surprise in the early morning of April 30 when they were still asleep or just waking up, and that the dispersal order was not lawful. (*See id.* ¶¶ 90, 342).

B. Content-neutral state action that incidentally burdens speech must still satisfy heightened or intermediate scrutiny.

Defendants further argue that the trespass bans are viewpoint-neutral restrictions that only incidentally burden Plaintiffs' protected speech. (Doc. 18 at 15, 20). As discussed below, Plaintiffs plausibly allege that the trespass bans

are indeed viewpoint-based. But even accepting Defendants' framing, Plaintiffs still plausibly allege a restriction on protected speech that would require Defendants to satisfy heightened or intermediate scrutiny.[2]

Defendants rely on *Madsen v. Women's Health Center*, where an injunction prevented protestors from communicating their message within a certain distance of a public forum. 512 U.S. 753, 763 (1994). The injunction had an "incidental" effect on the protestors' message and was not "content or viewpoint based." *Id.* at 763. But the Court explained that injunctions, unlike a generally applicable law, "carry greater risks of censorship and discriminatory application . . . ." *Id.* at 764. Therefore, the Court applied a "more stringent application of general First Amendment principles in this context" because the "standard time, place, and manner analysis is not sufficiently rigorous." *Id.* at 765. "We

[2] Whether the campus bans better qualify as a prior restraint or another kind of restriction on speech is ultimately a "labeling dispute" that doesn't determine whether Defendants have complied with the First Amendment. *See McDonough v. Garcia*, 90 F.4th 1080, 1093 n.9 (11th Cir. 2024) (whether restriction was a prior restraint "amounts to a labeling dispute because prior restraint analysis already maps onto the tough standards that apply in traditional and designated public forums"), *vacated and remanded on other grounds,* 116 F.4th 1319 (11th Cir. 2024) (en banc); *MacDonald v. Safir*, 26 F. Supp. 2d 664, 671 (S.D.N.Y. 1998) (calling a regulation of speech "a 'prior restraint' or a 'time, place, and manner regulation' may be more a statement of the conclusion reached as to its validity than an analytical device to determine such validity").

must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.*

Courts have relied on *Madsen*'s reasoning when reviewing trespass bans from public property. In *Huminski v. Corsones*, the plaintiff was "indefinitely and virtually completely" banned from a nonpublic forum when officials "interpreted his behavior as a potential threat to personal safety, to court property, and to the orderly conduct of court business." 396 F.3d 53, 58, 87 (2d Cir. 2005). The Second Circuit explained that the government had created "a 'First–Amendment–Free Zone' for Huminski alone," *id.* at 92, and that "[s]uch broad restrictions are generally frowned upon even in nonpublic forums." *Id.* at 92–93 (citing *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987)). While the restriction was content-neutral, applied to a nonpublic forum, and addressed allegedly threatening conduct, the expansive scope of the restriction still rendered it unconstitutional. *Id. See also Bernstein v. Sims*, 643 F. Supp. 3d 578, 585 (E.D.N.C. 2022) (applying *Madsen*'s reasoning to a trespass ban from a limited public forum); *McTernan v. City of York*, 564 F.3d 636, 655 (3d Cir. 2009) (holding that "a police directive, issued by officers in the field, poses risks similar to those presented by an injunction, warranting heightened scrutiny").

The Fourth Circuit has acknowledged these cases but not definitively resolved whether heightened or intermediate scrutiny should apply to orders

from law enforcement that incidentally burden speech. *Ross v. Early*, 746 F.3d 546, 553 (4th Cir. 2014); *see also Lucero v. Early*, 873 F.3d 466 (4th Cir. 2017) (remanding for further consideration of content-neutrality question to determine level of scrutiny). Intermediate scrutiny requires that a restriction on speech "promote[] a substantial government interest that would be achieved less effectively absent the regulation and does not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 553–54 (quotation marks omitted).

Looking to Plaintiffs' allegations, Defendants cannot satisfy either standard. The Supreme Court has found it "obvious" that a complete ban on First Amendment activity "cannot be justified *even [in] a nonpublic forum* because no conceivable governmental interest would justify such an absolute prohibition of speech." *Jews for Jesus*, 482 U.S. at 575 (emphasis added). Here, banishing peaceful protestors—who have not incurred criminal penalties or pose any articulable, ongoing threat to public safety—does not advance any legitimate state interest.

Moreover, narrow tailoring requires the government "to *prove* that it actually *tried* other methods to address the problem" before imposing a greater burden on speech. *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015). If, for example, Defendants were truly worried about a violation of their tent policy, they could have simply confiscated the encampment's tents, none of which

belonged to Plaintiffs. (Doc. 10 ¶ 89). Instead, Defendants jumped to the far more extreme option of arrests and indefinite campus bans, which burden substantially more speech than necessary for enforcing university policies.

Accordingly, Plaintiffs plausibly allege an unconstitutional prior restraint on protected expression.

III. Plaintiffs plausibly allege viewpoint discrimination because Defendants imposed immediate, unusually harsh treatment during and immediately after the encampment.

To state a claim of viewpoint discrimination, a plaintiff must allege that (1) they were engaged in "constitutionally protected speech" and (2) the government restricted that "speech or even expressive conduct, because of [] the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (cleaned up). "[S]electing for disfavored treatment" some groups while allowing others to speak without such regulation amounts to "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitation." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

As discussed above, Plaintiffs allege engaging in protected expression. Plaintiffs further allege that being ordered to disperse and indefinitely banned from campus during and immediately after this expression was suspiciously harsh treatment relative to past protests. UNC has long history of protest movements on campus, including protests resulting in significant property

damage, that did not result in such harsh treatment. (Doc. 10 ¶¶ 256–318). This plausibly suggests Plaintiffs have been excluded from campus based on their viewpoints expressed.

A. Plaintiffs fall within the class of persons for whom Polk Place is open.

Defendants argue that UNC is a limited open forum and Plaintiffs are not "member[s] of the group that the forum was generally made available" and so any restrictions on speech must only be "viewpoint neutral and reasonable in light of the purpose of the forum." (Doc. 18 at 18) (quoting *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005)). Defendants are incorrect.

UNC has opened portions of its campus, including Polk Place, to the public and made those areas freely accessible to the community. (*See, e.g.*, Doc. 10, Ex. A). And "[o]nce a limited or designated public forum is established, the government can not exclude entities of a similar character to those generally allowed." *Mote*, 423 F.3d at 443. Universities cannot engage in "viewpoint discrimination, even when the limited public forum is one of [their] own creation." *Rosenberg*, 515 U.S. at 829.

"[W]hether a person is of a similar character to others permitted to speak in the forum depends on the purpose of the limited forum." *Mote*, 423 F.3d at 444. In *Mote*, the forums at issue required reservation and nonstudents had to be sponsored by someone affiliated with the university. *Id*. at 442. The

court held that the forums were not intended "to provide a venue for expression of public views that are not requested or sponsored by any member of the campus community." *Id.* at 444.

That is not true of Polk Place. Polk Place functions as a public park—it does not require prior reservation, and people who are not affiliated with UNC do not need an invitation or sponsorship. (Doc. 10 ¶ 43). UNC policy allows for continuous occupation of outdoor spaces without posted closure times, like Polk Place. (*Id.* ¶ 45). Therefore, Plaintiffs fall squarely within the class of persons for whom Polk Place has been opened.

Defendants next argue that because Plaintiffs violated university policies by knowingly failing to disperse, they have no right to access Polk Place. (Doc. 18 at 19). But Plaintiffs allege that they never received the written dispersal letter, nor were they told to disperse or face arrest. (Doc. 10 ¶¶ 81, 90). Moreover, Plaintiffs do not allege—and Defendants do not suggest—that they specifically ever presented any real safety concerns.

Defendants mainly rely on *Wood v. Arnold*, where the father of a student received a trespass order from his child's school after screaming profanity at the vice principal and making threatening posts on his social media account. 321 F. Supp. 3d 565, 572 (D. Md. 2018). The court found that because the trespass notice was "limited in duration" and the father had created a legitimate cause for concern, *Mote*'s external standard applied. *Id.* at 583.

But that is not the situation here. Neither Plaintiffs themselves nor other encampment participants engaged in any threatening behavior. Indeed, Plaintiffs allege they went to great lengths to maintain the peaceful nature of the encampment, and their campus bans are indefinite. (Doc. 10 ¶¶ 7, 69).

Because Plaintiffs fall squarely within the class of persons for whom Polk Place was opened, "an internal standard applies and the restriction is subject to strict scrutiny." *Mote*, 423 F.3d at 444. As discussed above, Defendants cannot satisfy intermediate or heightened scrutiny, and so they cannot satisfy strict scrutiny either.

Moreover, even if the Court agrees with Defendants that the restrictions must only be "viewpoint neutral and reasonable in light of the purpose of the forum," *Mote*, 423 F.3d at 444, Defendants' argument still fails for the reasons discussed above—a complete, indefinite ban on First Amendment activity will rarely if ever pass muster even in nonpublic forums, *see Jews for Jesus*, 482 U.S. at 575, and Plaintiffs do not allege anything that could justify such a ban.

Finally, Defendants argue that Plaintiffs have failed to show a "compelling need" to access UNC's campus. (Doc. 18 at 21). But Plaintiffs do not have to justify their exercise of a constitutional right; the *government* bears the burden of justifying a restriction on protected speech. *See, e.g.*, *Cox v. City of Charleston*, 416 F.3d 281, 284 (4th Cir. 2005). Defendants cannot do that based on the allegations here.

Accordingly, Plaintiffs plausibly allege viewpoint discrimination.

IV. Plaintiffs plausibly allege retaliation in violation of the First Amendment.

"A plaintiff seeking to recover for First Amendment retaliation must allege that (1) she engaged in protected First Amendment activity, (2) the defendants took some action that adversely affected her First Amendment rights, and (3) there was a causal relationship between her protected activity and the defendants' conduct." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005).

Defendants do not contest that Plaintiffs satisfy the first two elements. Plaintiffs also plausibly allege a causal link between their protected speech and Defendants' adverse action.

"There must be some degree of temporal proximity to suggest a causal connection." *Constantine*, 411 F.3d at 501; *see also Norris v. Asheville*, 721 F. Supp. 3d 404, 415–16 (W.D.N.C. March 4, 2024) (finding immediacy of adverse action sufficient to overcome motion to dismiss). Here, Plaintiffs were banned from UNC's campus immediately after the encampment was cleared, and many prior encampments and protests have occurred on campus without such a harsh reaction. (Doc. 10 ¶¶ 5–7).

Defendants argue Plaintiffs have failed to show their protected speech was the "but for" cause of the alleged retaliation. (Doc. 18 at 24). Defendants

rely on *Porter v. Bd. of Trs. Of N. Carolina State Univ.*, 72 F.4th 573 (4th Cir. 2023). There, a professor alleged he suffered adverse employment action almost ten months after expressing his frustration with the university. *Id.* at 584. The court explained that "the passage of time tends to negate the inference of causation and where a plaintiff rests his case on temporal proximity alone, the temporal proximity must be very close." *Id.* at 583 (cleaned up). Therefore, the delay between the protected activity and the adverse action failed establish a causal link. *Id.* at 584.

Defendants' argument is unpersuasive. This case is more like *Norris*, which found that both the immediacy with which park bans were issued, allegedly due to violating a littering ordinance, and that other littering violations had occurred without such a response, was sufficient to allege a retaliation claim. 721 F. Supp. 3d at 415–16. Here, not only were the trespass bans issued immediately, but Plaintiffs have pled the long history of other protest movements on UNC's campus that did not result in so harsh a reaction. Accordingly, Plaintiffs plausibly allege retaliation.

V. Plaintiffs plausibly allege procedural due process violations.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To establish a due process violation, "a plaintiff must show (1) that he has been

deprived of a cognizable liberty interest and (2) that such deprivation occurred without adequate procedural protections." *Norris*, 721 F. Supp. 3d at 413 (citing *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011)). Plaintiffs plausibly allege both.

A. Plaintiffs have liberty and property interests in accessing UNC's campus.

Plaintiffs have a First Amendment liberty interest in accessing "parks and other spaces open to the public" for the purpose of engaging in political activity. *Norris*, 721 F. Supp. 3d at 413–14) (citing *City of Chicago v. Morales*, 527 U.S. 41 (1999) (plurality opinion)). This includes Polk Place.

UNC has opened Polk Place to the public and made it freely accessible to the community. (*See, e.g.*, Doc. 10, Ex. A). Polk Place functions like a public park and does not require prior reservation or an invitation from someone affiliated with UNC. (*See id.* ¶ 43–44). And UNC policy allows for continuous occupation of outdoor spaces without posted closure times, including Polk Place. (*Id.* ¶ 45).

Defendants argue that *Morales* being a plurality opinion suggests the right to access public forums does not exist. (Doc. 18 at 26). Defendants also cite cases dealing with *substantive* due process, which is not at issue here. (*Id.*). But in the context of the First Amendment, the Supreme Court has long recognized that "use of the streets and public places has, from ancient times, been

a part of the . . . liberties of citizens." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). And once a limited public forum is opened, the state "is bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983).

Defendants also rely on *Souders v. Lucero*, 196 F.3d 1040 (9th Cir. 1999), to argue members of the public do not have constitutionally protected interests in accessing a university campus. (Doc. 18 at 26–27). There, the plaintiff was issued temporary and location-specific exclusion orders from campus based on unprotected conduct—violating an active no-stalking order against one student and stalking another. *Id.* at 1042–43. The court explained that any right "to be on campus must be balanced against the right of the University to exclude him" based on conduct. *Id.* at 1045.

Here, Plaintiffs were issued indefinite bans from the entirety of UNC's campus. As discussed above, Plaintiffs do not allege engaging in any unlawful, disruptive, or threatening conduct that could possibly justify a ban of this scope and duration. (Doc. 10 ¶¶ 69–72). Defendants have opened Polk Place and other portions of UNC's campus to Plaintiffs and members of the public. (*Id.*, Ex. A). Plaintiffs have a liberty interest in gathering there to engage in political expression.

Plaintiff Mohanarajah has also pled her property interest in a public education. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Defendants argue that

because Mohanarajah was on a leave of absence she does not have this property interest. (Doc. 18 at 27–28). But Plaintiff Mohanarajah was still subjected to the EEAC, which applies only to students. (Doc. 10 ¶ 47). She also continues to meet with her advisor. (*Id.* ¶ 198). Plaintiff Mohanarajah therefore plausibly alleges a property interest in obtaining a public education from UNC that her campus ban interferes with.

Finally, Plaintiffs Rogers and Newman plausibly allege that the campus bans interfere with their property interests in accessing campus for purposes of their paid employment. (*Id.* ¶¶ 13, 14). Defendants do not address these.

B. Plaintiffs were deprived of their liberty and property interests without sufficient process.

Due Process requires, at a minimum, notice, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and "some kind of hearing *before* the State deprives a person of liberty or property," *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). Plaintiffs received neither.

First, Plaintiffs only received notice of their trespass bans at the same time the bans took effect. (Doc. 10 ¶ 118, 143, 165, 190 & Ex. G). The notice could not have apprised Plaintiffs of the "pendency" of the bans, nor could Plaintiffs present their objections. Defendants concede UNC's policies require

"the right to review advance written notice of the charges," and "the right to review the evidence in support of the charges." (Doc. 17-2, Ex. B). But Plaintiffs receive neither.

Defendants also failed to afford Plaintiffs any pre-deprivation opportunity to be heard. There are only two exceptions to the pre-deprivation hearing requirement: "where a State must act quickly, or where it would be impractical to provide predeprivation process[.]" *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). But these "extraordinary situations" are the exception, not the rule. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). These exceptions do not apply here where Plaintiffs never presented a threat to student safety and the indefinite campus bans were issued after the encampment had been cleared. (Doc. 10 ¶¶ 3, 4).

Even if Defendants were justified in immediately imposing indefinite campus bans, the post-deprivation hearing was inadequate in at least three ways.

First, Defendants did not provide "notice of the factual basis for a material government finding" before or even during the hearing. *Kirk v. Commissioner of Soc. Sec. Admin.*, 987 F.3d 314, 325 (4th Cir. 2021) (cleaned up). The government must at least identify the evidence it relies on and the reasons for its decision. *See, e.g., Rodgers v. Norfolk School Board*, 755 F.2d 59, 63–64 (4th Cir. 1985). But Plaintiffs received none of this. The trespass notices contained

a conclusory statement they had failed to disperse. (*See, e.g.,* Doc. 10, Ex. G). And Plaintiffs only learned *after the hearing* that Defendants alleged violations of their tent policy and unspecified "other safety and security concerns." (*See id.* 10 ¶¶ 231–34).

Second, the hearing was not adversarial. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951); *see also Doe v. University of North Carolina System*, No. 24-1301, 2025 WL 1006277, *7 (4th Cir. April 4, 2025) (noting importance of adversarial system including cross-examination). The government must provide the accused "an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss*, 419 U.S. at 581. But a "one-sided determination of facts" is precisely what occurred here. At the appeal hearing, Defendant James didn't cite or present *any* evidence, nor did he ask any questions Plaintiffs' counsel. (Doc. 10 ¶ 223–27).

And third, the hearing was not presided over by a neutral decisionmaker. The trespass bans were issued at Defendant James' direction. (*See id.*, Ex. D). Any appeal of the trespass bans is an appeal of Defendant James' own decisions and fails to maintain the appearance of neutrality. *See In re Murchison*, 349 U.S. 133, 136 (1955).

Finally, providing Plaintiffs additional process would not have been too

burdensome. *See Mathews*, 424 U.S. at 335. Defendants do not disagree.

Accordingly, Plaintiffs plausibly allege procedural due process violations.

VI. Plaintiffs allege plausible Fourth Amendment claims.

Plaintiffs allege the Officer Defendants violated Plaintiffs' Fourth Amendment rights in two ways: making unlawful arrests and using excessive force during the arrests.

A. Unlawful Arrest

"[T]o determine whether an arrest was backed by probable cause, [courts] ask whether the facts known to the officer could make a prudent officer believe that the suspect's conduct satisfies the elements of a criminal violation." *Thurston v. Frye,* 99 F.4th 665, 674 (4th Cir. 2024); *see also Occupy Columbia*, 738 F.3d at 122 (denying motion to dismiss when plaintiffs alleged no probable cause justified their arrest for trespass on state grounds).

A person commits second-degree trespassing by remaining on the "premises of another after the person has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person." N.C.G.S. § 14–159.13(a)(1). Defendants argue Plaintiffs were made aware they were ordered to clear the encampment. (Doc. 18 at 33). That is incorrect.

Plaintiffs do not allege that they received reasonable notice to disperse from anyone authorized to issue such a notice. (Doc. 10 ¶ 374). Plaintiffs never received the 5:30 AM dispersal letter and had been asleep or just waking up when it was shared. (*Id.* ¶ 90). Until that point, UNC administrators had not indicated they intended to clear the encampment. (*Id.* ¶ 82). Furthermore, Plaintiffs' criminal charges were dismissed and another participant's trespass charge was dismissed because the judge found there was insufficient evidence to support the charge. (*Id.* ¶ 254).

Therefore, Plaintiffs Dames, Rogers, and Newman plausibly allege unlawful arrest.

B. Excessive Force

Plaintiffs Dames and Rogers were arrested with excessive force. Defendants argue the right to make an arrest "carries the right to use 'some degree of physical coercion.'" (Doc. 18 at 33 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). But as discussed above, Defendants did not have the right to arrest Plaintiffs.

When evaluating whether the force used in an arrest was excessive, courts consider "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

At the time of their arrests, Plaintiffs were engaged in non-disruptive, non-violent activity. (Doc. 10 ¶¶ 64–73). Plaintiff Rogers informed Defendants Lee and Lynch that she uses a cane and would not resist. (*Id.* ¶¶ 111–13). But Defendant Lee said "Fuck your cane," grabbed the cane, threw Rogers down, and dragged her across the ground. (*Id.* ¶ 113). As a result, Plaintiff Rogers suffered a torn superior labrum in her left shoulder. (*Id.* ¶ 114). This was not a "split-second decision" where an officer was confronting a potentially dangerous situation, but a gratuitous use of force against a compliant arrestee with a visible disability.

Plaintiff Rogers therefore plausibly alleges a Fourth Amendment violation. *See, e.g.*, *Hulett v. City of Syracuse*, 253 F. Supp. 3d 462, 493 (N.D.N.Y. 2017) (denying summary judgment where officer used force against plaintiff with visible disability who was not physically resisting). Defendants compare this case to *Kelly v. Solomon,* No. 3:17-cv-311-FDW, 2020 WL 247539 at *13 (W.D.N.C. Jan. 15, 2020), but that case involved a use of force after a violent incident in a prison resulted in a lockdown. The alleged facts here could not be more different.

As for Plaintiff Dames, she was also engaged in entirely peaceful activity leading up to her arrest, and alleges that Defendants lacked probable cause to arrest her. (Doc. 10 ¶¶ 64–73). Plaintiff Dames suffered bruising and lacerations on her wrists from the excessively tight handcuffs. (*Id.* ¶141). This can

constitute excessive force. *See, e.g. Parson v. Miles,* No. 4:17-CV-00708-RBH, 2020 WL 58287, at *6 (D.S.C. Jan. 6, 2020); *Bartley v. City of High Point,* 381 N.C. 287, 297 (2022); *Kopec v. Tate,* 361 F.3d 772, 777 (6th Cir. 2004).

VII. Defendants are not entitled to qualified immunity.

Qualified immunity protects government officials from personal liability for federal civil rights violations. *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006). This defense is not available if "(1) the allegations underlying the claim, if true, substantiate the violation of a federal statutory or constitutional right; and (2) this violation was of a clearly established right of which a reasonable person would have known." *Id.* (quotation marks omitted). Plaintiffs have the burden on the first question, and defendants have the burden on the second. *Stanton v. Elliot*, 25 F.4th 227, 233 (4th Cir. 2022).

Defendants seek qualified immunity from Plaintiffs' claims for damages under their First, Fourth, and Fourteenth Amendment claims. (Doc. 18 at 30–31). These arguments fail.

A. Granting qualified immunity now would be premature.

"Ordinarily, the question of qualified immunity should be decided at the summary judgment stage." *Willingham v. Crooke*, 412 F.3d 553, 558 (4th Cir. 2005). "[T]he defense faces a formidable hurdle and is usually not successful" on a 12(b)(6) motion. *Owens v. Baltimore City State's Att'ys Off.*, 767 F.3d 379,

396 (4th Cir. 2014) (quotation marks omitted). *See, e.g.*, *Norris*, 721 F. Supp. 3d at 417 (denying qualified immunity at motion-to-dismiss stage on free speech and procedural due process claims of journalists banned from public property).

Here, Defendants seek qualified immunity on a motion to dismiss. That alone makes their argument unlikely to succeed.

B. Plaintiffs allege violations of clearly established law.

"[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Courts "need not—and should not—assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense." *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019). Here, Defendants cannot carry their burden.

First, the doctrine of qualified immunity is rooted in protecting "those who must make split-second decisions from the realities of hindsight bias." *Id.* (quotation marks omitted). Defendants don't assert that to be the case here. The encampment had been in place for at least four days when Defendants executed a coordinated action involving multiple police departments. (Doc. 10 ¶¶ 75–76). Defendants also knew that several police departments declined to participate in the coordinated sweep of the protest due to concerns around the

legality of the proposed action. (*Id.* ¶¶ 79–80). And the appeal hearings occurred months later. (*Id.* ¶ 221).

Furthermore, case law further demonstrates why Defendants were on notice that their conduct was unlawful.

Prior Restraint. It has been clearly established for decades that the First Amendment protects speech criticizing United States foreign policy, *see Bond v. Floyd,* 385 U.S. 116, 132 (1966), and that government officials may not hold unbridled discretion to prohibit protected speech, *Shuttlesworth,* 394 U.S. at 150. That is precisely what Plaintiffs have alleged here.

Viewpoint discrimination. It has long been clearly established that "[c]ontent-based regulations are presumptively invalid." *R.A.V.*, 505 U.S. at 382 (reviewing cases). The Fourth Circuit has denied qualified immunity on a motion to dismiss a viewpoint discrimination claim, finding it "crystal clear that the First Amendment protects peaceful nondisruptive speech in an airport, and that such speech cannot be suppressed solely because the government disagrees with it." *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013). The law is equally clear that the First Amendment protects peaceful, nondisruptive speech on a university campus. *Occupy Columbia v. Haley*, 738 F.3d 107, 124 (4th Cir. 2013).

Retaliation. As with viewpoint discrimination, the right to engage in political speech without fear of retaliation has long been clearly established.

See, e.g., *Ridpath*, 447 F.3d at 318–19 (denying qualified immunity on retaliation claim against university officials); *Norris*, 721 F. Supp. 3d at 417 (same with trespass ban from public park).

Procedural Due Process. The liberty interest in accessing public property for First Amendment purposes has long been clearly established. *Hague v. Comm. for Indus. Org.,* 307 U.S. 496, 515–16 (1939). The "right to travel on the public streets [as] a fundamental segment of liberty" has been long recognized in North Carolina specifically, and restricting that right as it relates to the First Amendment "requires substantially more justification" than is otherwise required for state action. *State v. Dobbins*, 277 N.C. 484, 499 (1971).[3] And as discussed more above, the right to "an explanation of the evidence the authorities have and an opportunity [for the accused] to present their side of the story" before being deprived of a liberty or property interest has long been clearly established as well. *Goss*, 419 U.S. at 581.

Fourth Amendment. The rights to be free from unlawful arrest and excessive force are clearly established. *See Thurston*, 99 F.4th 665; *Graham*, 490 U.S. 386, 396 (1989). Being handcuffed can serve as a basis for an excessive

[3] To determine whether a right was clearly established, courts "first examine cases of controlling authority in this jurisdiction, that is decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." *Franklin v. City of Charlotte*, 64 F.4th 519, 534 (4th Cir. 2023) (cleaned up).

force claim. *See Parson*, 2020 WL 58287 at *8 (denying qualified immunity because there was a clearly established right to be free from excessively tight or forceful handcuffing."); *Bartley*, 381 N.C. at 297 (citing cases recognizing "that excessively tight or forceful handcuffing, particularly handcuffing that results in physical injury, constitutes excessive force.").

VIII. Plaintiffs have sufficiently pled their state law claims.

A. Battery

"The interest protected by the action for battery is freedom from intentional and unpermitted contact with one's person[.]" *Dickens v. Puryear*, 302 N.C. 437, 445 (1981). If an officer lacks probable cause to make an arrest, "any use of force becomes at least a technical assault and battery against plaintiff." *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 625 (2000).

Plaintiffs Rogers and Dames were arrested without probable cause and Officer Defendants made physical contact with their bodies without their permission. (Doc. 10 ¶¶ 373, 399–401). Defendants "acted wantonly, contrary to their duty, and with intent to injure Plaintiffs." (*Id.* ¶ 402). Defendant Lynch made physical contact with Rogers' person during her unlawful arrest. Defendant Lee intentionally kicked Plaintiff Rogers' cane out from under her and stated "Fuck your cane" before throwing her to the ground. (*Id.* ¶¶ 112–14). Such conduct suggests malicious intent to injure.

Plaintiff Dames was physically injured when Defendant Wylie made physical contact with her person during her unlawful arrest. (*Id.* ¶¶ 141, 399–402). Plaintiffs have alleged that Defendants acted wantonly and with malicious intent. *See, e.g., Wilcox v. City of Asheville,* 222 N.C. App. 285, 289 (2012).

In sum, Officer Defendants did not have probable cause to arrest Plaintiffs, and their intentional, unpermitted physical contact with Plaintiffs Dames and Rogers constitutes, at minimum, "a technical . . . battery against plaintiff[s]." *Glenn-Robinson,* 140 N.C. App. at 625.

B. Unlawful Arrest

"False imprisonment is the illegal restraint of a person against [their] will. A restraint is illegal if not lawful or consented to. A false arrest is an arrest without legal authority and is one means of committing false imprisonment." *Marlowe v. Piner*, 119 N.C. App. 125, 129 (1995) (cleaned up).

As discussed fully above in Section VI-A, Officer Defendants did not have probable cause to believe Plaintiffs committed any criminal offense, and no prudent officer would have believed probable cause existed for these arrests. Plaintiffs Rogers, Dames, and Newman have therefore sufficiently pled unlawful arrest.

C. Defendants are not entitled to public official immunity

Defendants argue they are entitled to public official immunity on Plaintiffs' battery and unlawful arrest claims. But public official immunity is "not

available for intentional torts." *Hines v. Johnson*, No. 1:19cv515, 2020 WL 1516397, at *17 (M.D.N.C. Mar. 30, 2020). An officer necessarily "acts with malice" when he does "that which a man of reasonable intelligence would know to be contrary to his duty." *Bailey v. Kennedy*, 349 F.3d 731, 742 (4th Cir. 2003) (quotation marks omitted). "If the conduct of the defendant was unjustifiable, and actually caused the injury complained of by the plaintiff, . . . , malice in law would be implied from such conduct." *Betts v. Jones*, 208 N.C. 410, 410 (1935).

Officer Defendants arrested Plaintiffs without probable cause and actually caused Plaintiffs' injuries. Defendants are therefore not entitled to public official immunity.

CONCLUSION

Defendants' motion to dismiss should be denied.

Respectfully submitted, this the 1st day of July, 2025.

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CERTIFICATE OF SERVICE

I certify that on July 1, 2025, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will effectuate service on all counsel of record.

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CERTIFICATE OF WORD COUNT

Pursuant to L.Cv.R. 7.3(d) and order of this court (Doc. 22), I hereby certify that this brief has fewer than 9,000 words, as calculated by the word processing software used to prepare this brief.

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