UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

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

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Last April, Plaintiffs—UNC Chapel Hill students and other concerned individuals—were engaged in political activity protected by the First Amendment. On a grassy patch of a large, publicly accessible quad on UNC's campus, Plaintiffs and approximately two-hundred others participated in a nonviolent, nondisruptive encampment to communicate their view that the United States had been complicit in genocide.

In the early morning of April 30, 2024, while many protesters were still asleep, UNC administrators responded by deploying police to remove the encampment and arrest protestors for trespassing, including Plaintiffs Rogers, Newman, and Dames. During the arrests, Rogers suffered torn shoulder

cartilage after an officer took her cane away and threw her to the ground. Newman suffered a concussion. UNC officials then banned Plaintiffs Rogers, Newman, Dames, and Mohanarajah from campus indefinitely, without prior notice and hearing. Three months later, Defendant UNC Chief of Police Brian James—the same official who ordered the arrests—upheld the bans after a cursory hearing.

Some Plaintiffs faced criminal trespass charges, but those were dismissed. Even so, Dames, Rogers, and Newman remain indefinitely banned from UNC's campus, and Mohanarajah's access remains severely curtailed. These Plaintiffs now seek a preliminary injunction requiring Defendants to lift their bans from campus and refrain from banning them again without adequate process.

Plaintiffs will likely succeed on their First Amendment prior restraint claims. Any prior restraint on expression bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Here, Plaintiffs were engaged in political activity in a public forum and wish to continue doing so. Defendants have banned that activity. Now, Plaintiffs' only recourse is to seek reconsideration every two years from a single administrator, Defendant James, who has total discretion over the matter. This expansive sanction advances no legitimate state interest, and even if it did, it burdens far more constitutionally protected activity than necessary.

Plaintiffs will also likely succeed on their procedural due process claims. Holding a hearing *before* the government infringes on a constitutionally protected interest is "the root requirement of the Due Process Clause." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quotation marks omitted). Only exceptional circumstances will justify a *post*-deprivation process, and that process must adequately protect the individual interests at stake. Here, Plaintiffs have fundamental liberty interests in gathering and speaking in public forums. Yet Defendants banished Plaintiffs with no meaningful notice or hearing, and the post-deprivation hearing was a perfunctory sham—Defendants did not identify any witnesses or other evidence against Plaintiffs specifically except for their trespass citations. Defendant James invoked "other safety and security concerns" to justify his decisions, but never explained what those were. (Doc. 10, Verified Amended Complaint ¶ 234).

For these reasons and as detailed below, preliminary relief is appropriate.

FACTS

The University of North Carolina at Chapel Hill ("UNC") is the nation's oldest public university.[1] Its outdoor areas have long been accessible to the public. (*See* Doc. 10, Ex. A).

[1] *History and Traditions*, https://www.unc.edu/about/history-and-traditions/.

In the 1920s, UNC constructed new lecture halls, Wilson Library, and other buildings on campus to form a new quadrangle called Polk Place.[2] Polk Place is roughly twice the size of a football field and functions like a city park.[3] Since its creation, countless students and members of the public have gathered on Polk Place and other outdoor areas of campus to study and relax. Many have also gathered to engage in political speech. This tradition has included protests against the Vietnam War,[4] South African Apartheid,[5] and unfair labor practices.[6]

Outdoor areas like Polk Place do not require prior approval from UNC for use by members of the public. At the time of the events in this case, UNC's

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[2] The Carolina Story: A Virtual Museum of University History, *Polk Place*, https://museum.unc.edu/exhibits/show/architecture/polk-place---s-new-classroom-b.

[3] *See* THE DIGNITY OF RESTRAINT, *Historic Landscape Framework Plan*, at 10 (2008), https://facilities.unc.edu/wp-content/uploads/sites/256/2015/12/Historic-Landscape-Master-Plan.pdf.

[4] I Raise My Hand To Volunteer, *Part 4: Vietnam War Protests*, https://exhibits.lib.unc.edu/exhibits/show/protest/vietnam-essay.

[5] Nicholas Graham, *Timeline of 1980s Anti-Apartheid Activism at UNC*, For the Record, University Archives (May 15, 2017), https://blogs.lib.unc.edu/uarms/2017/05/15/timeline-of-1980s-anti-apartheid-activism-at-unc/.

[6] I Raised My Hand To Volunteer, *Part 3: The BSM and the Foodworkers' Strike*, https://exhibits.lib.unc.edu/exhibits/show/protest/foodworker-essay.

policy allowed anyone to continuously occupy outdoor spaces that did not have posted closure times.[7]

I. The Encampment Demonstration

Plaintiffs Mohanarajah and Shah are students at UNC.[8] 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. (Doc. 10 ¶¶ 12–16).

All Plaintiffs have been deeply concerned with ongoing violence against Palestinians in Gaza. Plaintiffs believe that this violence is deeply unjust and that the United States government has been complicit. (*Id.* ¶ 53).

In April 2024, in solidarity with like-minded people across the country who had been engaging in collective protest across college and university campuses, Plaintiffs and others joined a nonviolent, nondisruptive encampment demonstration on Polk Place. Plaintiffs did not organize or lead the encampment and had no authority over the conduct of other participants. (*Id.* ¶¶ 57–59).

The encampment consisted of approximately twenty-five camping tents on a patch of grass between Murphy and Gardener Halls. (*Id.* ¶¶ 58, 60). The

[7] *See* Policy on Demonstrative Events, https://tinyurl.com/wycmzdct.

[8] Plaintiff Shah was not banned from campus and is not seeking preliminary injunctive relief.

tents weren't just places for protestors to sleep, but a meaningful part of the demonstration as well. Much like encampments erected to protest the Vietnam War and the South African Apartheid, the erection of the tents was meant to communicate a message of solidarity with the Palestinian people—many of whom were forcibly displaced and, as a result, living in tents. (*Id.* ¶ 55).

During their time at the encampment, Plaintiffs and others participated in group prayer, art making, and listening and learning through teach-ins. There were approximately forty people who slept at the encampment. More people participated depending on the time of day. (*Id.* ¶¶ 64–65, 68).

Plaintiffs Mohanarajah, Rogers, and Shah were present at the encampment from April 26 until April 30. (*Id.* ¶¶ 99, 174, 203). Plaintiff Dames was present at the encampment from April 27 until April 30. (*Id.* ¶ 128). Plaintiff Newman was present at the encampment from April 28 until April 30. (*Id.* ¶ 150).

Plaintiffs and other protestors took care to avoid damaging the greenery and trees on Polk Place, ensured walkways were not blocked and remained accessible, and ensured the encampment did not disrupt regular UNC operations. At no point during the encampment did Plaintiffs or other participants vandalize or damage UNC property. Nor did Plaintiffs or other participants violate noise ordinances, obstruct non-participant students walking through Polk Place, or engage in disruptive conduct. (*Id.* ¶¶ 69–72).

II. Dispersal of the Encampment

On April 27, UNC administrators communicated to some encampment participants—but not Plaintiffs specifically—that the use of tents did not comply with the UNC policy requiring a permit for temporary structures. (*Id.* ¶¶ 87–89). UNC did not, however, explain that a lack of a permit meant Plaintiffs would face arrest or trespass from campus. Indeed, as UNC administrators acknowledged while discussing the encampment, UNC could have simply removed the tents. (Ex. 1, Decl. of Ivy Johnson, Attach. B, Christi Hurt Text Message).

But on April 30, at approximately 5:30 AM, UNC administrators hand-distributed a letter signed by Defendant Roberts, UNC's Chancellor, to some encampment participants. The letter demanded that encampment participants disperse by 6AM or face arrest. (Doc. 10, Ex. B, Dispersal Letter).

The letter alleged that the encampment threatened the safety of students, faculty, and staff, but provided no explanation. (*Id.*) The letter also alleged that some participants violated University policy by "trespassing into classroom buildings overnight" and "end[ing] [UNC's] attempts at constructive dialogue." (*Id.*) The letter did not state which participants entered buildings overnight, how it disrupted University operations, or how this alleged activity

damaged University property or was inconsistent with the normal use of University buildings. (*Id.*)

At 6:00 AM, law enforcement—including Defendants Lynch, Brown, Lee, and Wylie—at the order of Defendant James, began arresting participants who had not dispersed. (*See* Johnson Decl., Att. A). Many encampment participants, including Plaintiffs, were asleep or just getting up and had not yet received a 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). Although Plaintiff Mohanarajah was not criminally cited, she was detained for approximately thirty minutes before being released. (*Id.* ¶ 185).

III. Plaintiffs' Indefinite Trespass Ban and Suspension

That day, without any hearing, police indefinitely banned Mohanarajah, Dames, and Newman from all UNC property for all purposes other than emergency medical treatment at UNC hospitals. (*Id.* ¶¶ 143, 165, 186). Rogers received notice of her indefinite ban three days later. (*Id.* ¶ 118). Mohanarajah was also suspended from UNC through its Emergency Evaluation Action Committee ("EEAC") without a hearing or any process. (*Id.* ¶¶ 186). All banned

Plaintiffs received notice of their bans on the day the bans took effect. (*Id.* ¶¶ 118, 143, 165, 186).

Use of the EEAC in this circumstance was unusual. Under UNC policy, the EEAC addresses emergency situations that "require a faster response than the student judicial system's procedures can provide." These situations concern drugs, violence, and academic dishonesty.[9] The EEAC's letter to Mohanarajah informing her of her suspension relied on her "cit[ation] for 2nd degree trespassing," and failure to disperse. (*Id.* ¶ 190). But Plaintiff Mohanarajah was never criminally charged for second-degree trespass. (*Id.* ¶ 191).

IV. Appeal Hearing on Trespass Bans

Plaintiffs timely appealed their bans within ten days of their issuance. UNC did not schedule the appeal hearings until July 1, three months after the bans had taken effect. (Ex. 2, Decl. of Jaelyn Miller ¶ 4).

The "hearing" consisted of Defendant James—UNC's chief of police who had ordered dispersal of the encampment in the first place—meeting with Plaintiffs' counsel in a conference room with a University attorney on speaker phone. Before the hearing, Plaintiffs were not given any reason for their bans other than what was on the trespass notice forms. (*Id.* ¶ 5).

[9] Emergency Evaluation and Action Committee Policy and Proc., https://policies.unc.edu/TDClient/2833/Portal/KB/ArticleDet?ID=132459.

There didn't appear to be any written procedures governing Defendant James' consideration of evidence or decision-making. During the hearing, Defendant James did not explain why the bans were issued. He did not present any evidence. He did not ask any substantive questions or respond to any of Plaintiffs' arguments. Plaintiffs had no opportunity to examine adverse witnesses or otherwise challenge evidence against them. (*Id.* ¶¶ 5–9).

On August 12, Defendant James communicated via letters that he had upheld Plaintiffs' bans. The letters were virtually identical, and none referenced individualized facts or allegations concerning risks to student safety or University property. (*Id.* ¶¶ 10–11). The letters only stated that the bans were appropriate because tents were set up without a permit and because of "other safety and security concerns." (Doc. 10, Ex. H). Plaintiff Mohanarajah's letter also falsely indicated she had been criminally cited. (*Id.*, Ex. I).

V. Effects of Plaintiffs' Ongoing Banishment from UNC

Plaintiff Rogers, a Duke University professor, cannot pursue professional opportunities, such as attending academic or cultural events she would normally attend, on UNC's campus because of her campus ban. (*Id.* ¶ 246). Plaintiff Dames is an undergraduate student at Duke University and is eligible to attend classes at UNC but cannot do so because of her campus ban. (*Id.* ¶ 247). Plaintiff Newman is an organizer for Voices for Justice in Palestine and

is required to attend events in support of Palestinian lives and liberation, but cannot attend any on UNC's campus because of her ban. (*Id.* ¶ 248). And none of these Plaintiffs can step foot on UNC's campus to associate with others or to engage in political speech in a place historically known for political protest.

On November 5, 2024, Plaintiff Mohanarajah received a letter from the EEAC declaring her suspension had been lifted. (*Id.,* Ex. I). Until that point, she hadn't been able to re-enroll in classes and her graduation date was further delayed. (*Id.* ¶ 195). Defendant James communicated on December 6, 2024, that Mohanarajah must notify him and seek permission for campus-based activities, including classes, on a case-by-case basis. (*Id.* ¶ 197).

There are currently no online courses that would apply towards her major. (*Id.* ¶ 199). Upon reenrolling in classes, Mohanarajah wishes to seek routine medical care at UNC, attend classes in person, and engage in protected First Amendment activities without being subject to related case-by-case, discretionary decisions from Defendant James. (*Id.* ¶¶ 200, 245).

QUESTIONS PRESENTED

1. Are Plaintiffs likely to succeed on their First Amendment claims that UNC has imposed a prior restraint and excluded them from public forums?

2. Are Plaintiffs likely to succeed on their Fourteenth Amendment procedural due process claims?

3. Will Plaintiffs face irreparable harm absent preliminary injunctive relief?

4. Do the public interest and balance of equities favor preliminary relief?

5. Should this Court waive security ordinarily required under Rule 65(c)?

LEGAL STANDARD

Parties seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits of their claims, (2) they are likely to suffer irreparable harm without an injunction, (3) the balance of the hardships weighs in the party's favor, and (4) the injunction serves the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

ARGUMENT

I. Plaintiffs will likely succeed on their First Amendment claims that Defendants have imposed a restraint on expressive activity in public forums.

Prior restraints are "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (cleaned up). "Any system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). And "[u]nder long-established First Amendment law, governmental entities are strictly limited in their ability to regulate

private speech in public fora." *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019) (quotation marks omitted).

Legislative bans on conduct that incidentally restrict speech have faced a more "lenient" standard than other restraints on speech. *See United States v. O'Brien*, 381 U.S. 367 (1968). But when non-legislative trespass bans that restrict speech are issued by individual actors against individual speakers, the government must satisfy heightened scrutiny. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 752, 764 (1994); *McTernan v. City of York, PA*, 564 F.3d 636, 654–55 (3d Cir. 2009); *Huminksi v. Corsones*, 396 F.3d 53, 92 (2d Cir. 2005).

Here, Defendants have completely forbidden Plaintiffs from engaging in political expression anywhere on UNC's campus—including public forums such as Polk Place—for at least two years. Defendant James has sole discretion whether to lift the bans. Whether applying strict, heightened, or intermediate scrutiny, Defendants cannot justify such expansive burdens on First Amendment activity.

A. Defendants have imposed a prior restraint on Plaintiffs' protected activities.

Under the First Amendment, "the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs." *Borough of Duryea, Pa. v. Guarnieri*,

564 U.S. 379, 388 (2011). This includes the right to "associate with others in the 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). "The First Amendment affords the broadest protection to such political expression to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (cleaned up).

Here, Plaintiffs had assembled in a public square to demonstrate against United States foreign policy. (Doc. 10 ¶¶ 55, 56). This activity is at "the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quotation marks omitted); *see Bond v. Floyd,* 385 U.S. 116, 132 (1966) (speech on American foreign policy is protected).

Plaintiffs wish to continue speaking and demonstrating on this subject at UNC, but cannot until Defendant James permits it—which, at the earliest, will be a year from now. (*Id.* ¶ 230). Such unbridled discretion over First Amendment activity constitutes a prior restraint. *See City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 757 (1988).

B. Plaintiffs have the right to engage in expressive activity in public forums.

Cases involving the right to protest recognize three types of forums: "traditional public forums, non-public forums, and limited (or designated) public

forums. A traditional public forum, such as streets, sidewalks, and parks, requires the government to accommodate all speakers[.]" *Mote*, 423 F.3d at 443 (citations omitted). A limited or designated public forum "is one that is not traditionally public, but the government has purposefully opened to the public, or some segment of the public, for expressive activity. Once a limited or designated public forum is established the government cannot exclude entities of a similar character to those generally allowed." *Id.* (citations omitted).

Courts have generally held that large outdoor quads at public universities are, at minimum, designated or limited public forums. *See, e.g.*, *id.* at 444; *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006). In these cases, a restriction on protected speech "is subject to strict scrutiny if the government excludes a speaker who falls within the class to which a designated limited public forum is made generally available." *Mote*, 423 F.3d at 444 (cleaned up).

Here, Polk Place is a large outdoor quad in the middle of UNC's campus that is open to the public. University policy does not require that protestors reserve that space in advance; students and non-students alike may continuously occupy outdoor spaces, like Polk Place, that do not have posted closure times. (Doc. 10 ¶¶ 39–46). And UNC has a long history of students and non-students engaging in political protests in Polk Place and other outdoor areas of campus. (*Id.* ¶¶ 256–318).

Accordingly, strict scrutiny should apply because Plaintiffs belong to the class of people to which Polk Place and other outdoor areas of UNC's campus have traditionally been made available.

C. Defendants' complete ban on Plaintiffs' protected activity cannot survive strict, heightened, or intermediate scrutiny.

Strict scrutiny should apply because Defendants have restrained plaintiffs from engaging in First Amendment activity in a public forum. But even if the Court applies heightened or intermediate scrutiny, Plaintiffs are still likely to prevail.

i. Strict Scrutiny

The government "bears the burden of proving [the] constitutionality" of a prior restraint. *Cox v. City of Charleston*, 416 F.3d 281, 284 (4th Cir. 2005). A prior restraint must be narrowly tailored to serve a compelling government interest—a high bar that government defendants can rarely clear. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015). Moreover, the decision to impose the restraint cannot be "contingent upon the uncontrolled will of an official" who has total discretion over the matter. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151(1969) (cleaned up).

Here, Defendants may claim a compelling interest in preserving public safety generally, but indefinitely banning Plaintiffs from UNC's campus does not "actually advance [that] compelling interest." *Williams-Yulee*, 575 U.S. at

449. Plaintiffs protested peacefully and have not been convicted of any crime related to their demonstration. Defendants have never explained why Plaintiffs posed "other safety and security concerns," or even what those concerns were. (*See* Doc. 10, ¶¶ 126, 148, 171, 369). Such vague, unsupported allegations cannot justify significant burdens on First Amendment activity. *See, e.g.*, *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011) ("The State must specifically identify an actual problem in need of solving and the curtailment of free speech must be actually necessary to the solution." (cleaned up)); *NC RSOL v. Boone,* 402 F. Supp. 3d 240, 265 (M.D.N.C. 2019) (explaining that "general public safety concerns" could not save statute from First Amendment challenge).

At most, Defendant James alleged that Plaintiffs did not comply with a policy requiring University approval for their tents. (Doc. 10-8 at 1, 3, 5). But the encampment tents didn't belong to Plaintiffs, and Plaintiffs had no authority over the conduct of other protestors. (Doc. 10 ¶¶ 101, 130, 152, 180). And even if they did, Defendants have never explained why the presence of tents presented such a grave safety threat that deploying the police and issuing years-long campus bans was necessary.

Even if Defendants' actions advance a compelling interest, they still fail narrow tailoring because they have prohibited more speech than necessary. In response to an unpermitted tent, Defendants could have simply removed the

tent. (*See* Johnson Decl., Att. A). Defendants have never explained why they didn't try that commonsense solution or why it would not have sufficed here. *See Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) (explaining that "narrow tailoring requires the [government] to *prove* that it actually *tried* other methods to address the problem" before imposing a greater burden on speech).

Instead, Defendants immediately jumped to the most extreme sanction available: they had Plaintiffs arrested and forbade them from assembling or speaking *anywhere* on campus for at least two years—subject to the judgment of a single administrator who has no objective criteria by which to judge an appeal. (*See* Miller Decl. ¶ 8).

In sum, Defendants' disproportionate response to protected First Amendment activity does not advance a compelling interest and is not narrowly tailored.

ii. Heightened Scrutiny

When content-neutral, non-legislative government action—like an injunction or an order from law enforcement—burdens First Amendment activity, some courts apply heightened scrutiny. That is because such action does not "emanate from deliberative, democratic decisionmaking processes[,]" and it risks censorship of "discrete groups" that, unlike censorship imposed by legislation, is more likely to go unnoticed by the public. *McTernan*, 564 F.3d at 654–55.

This kind of restraint "will survive heightened scrutiny only if it 'burden[s] no more speech than necessary' to serve" an important government interest. *Id.* at 656 (quoting *Madsen*, 512 U.S. at 765). The Fourth Circuit has called this view "well-reasoned" but not definitively applied it. *Ross v. Early*, 746 F.3d 546, 553 (4th Cir. 2014).

In *McTernan*, police restricted the plaintiff's ability to stand in an alleyway where he would try to dissuade patients entering a Planned Parenthood from obtaining an abortion. 563 F.3d at 641. The court held that "a police directive, issued by officers in the field, poses risks similar to those presented by an injunction, warranting heightened scrutiny." *Id.* at 655. Applying that standard, the court reversed the grant of summary judgment to the defendants; the police order was not "necessarily . . . the least restrictive means of protecting public safety[,]" and the defendants' general interest in traffic safety was not "sufficiently defined[.]" *Id.* at 656.

Similarly, in *Huminski v. Corsones*, the Second Circuit considered a plaintiff who had been banned from courthouse property. 396 F.3d 53 (2d Cir. 2005). The court adopted a "more stringent application of First Amendment principles" because the trespass was issued by a single government actor. *Id.* (quoting *Madsen* 512 U.S. at 764). The Second Circuit explained that the government had created "a 'First–Amendment–Free Zone' for Huminski alone." *Id.* at 92. "Such broad restrictions are generally frowned upon even in

nonpublic forums." *Id*. at 93-94 (citing *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575 (1987)). Even though the restriction was content neutral and applied to a nonpublic forum, the court held that the expansive scope of the restriction violated the plaintiff's right to free expression. *Id.*

Here, assuming Defendants' actions are content neutral,[10] Defendant James has still forbidden Plaintiffs from assembling or saying anything, anywhere on UNC's campus, including public fora like Polk Place. As in *Huminski*, UNC has become a "First–Amendment–Free Zone" for Plaintiffs. As discussed above, this burdens far more speech than necessary to advance any interest in enforcing a tent policy, as Defendants could have simply removed the tents. And Defendants have never explained why they think Plaintiffs specifically present some kind of safety threat. Defendants therefore cannot satisfy heightened scrutiny.

iii. Intermediate Scrutiny

Under intermediate scrutiny, the government must show that a limitation on speech is "narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels for communication of the information." *Ross*, 746 F.3d at 555 (cleaned up). The government may not

[10] Plaintiffs do not concede this point. They have alleged that Defendants' actions were motivated by disapproval of the content of Plaintiffs' speech. (Doc. 10 ¶¶ 338, 350).

"burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Even under this somewhat more forgiving standard, Defendants cannot meet their burden. As discussed above, in response to an alleged violation of a temporary structures policy—with no specific allegations that Plaintiffs themselves threatened campus operations or safety—Defendants have imposed an extreme burden on Plaintiffs' First Amendment rights, restricting substantially more speech than necessary. *See Billups v. City of Charleston, S.C.,* 961 F.3d 673, 690 (4th Cir. 2020) (city failed intermediate scrutiny because it did not use "less intrusive tools readily available to it").

II. Plaintiffs will likely succeed on their procedural due process claim.

In most circumstances, the government must provide meaningful notice and opportunity to be heard *before* depriving someone of a constitutionally protected interest. Here, Defendants violated Plaintiffs' procedural due process rights by issuing indefinite bans from campus with no notice and no hearing at all.

The post-deprivation appeal hearing didn't fix that. On a procedural due process claim, courts balance (1) "the private interest" being deprived, (2) "the risk of an erroneous deprivation" of that interest, and (3) the "fiscal and

administrative burdens" posed by providing additional process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Plaintiffs have strong individual interests including accessing public property to engage in political activity. Banning Plaintiffs from campus without meaningful notice or any process at all, then upholding that deprivation in a perfunctory hearing, creates serious risks of erroneous deprivation of Plaintiffs' interests. And Defendants would face no meaningful burden in affording more robust process.

A. Plaintiffs' indefinite bans from UNC's campus implicate liberty and property interests.

Plaintiffs have a fundamental liberty interest, created by the First Amendment, in accessing "parks and other spaces open to the public" for the purpose of engaging in political activity. *Norris v. Asheville*, 1:23-CV-00103-MR-WCM, 2024 WL 1261206, at *6. (W.D.N.C. March 25, 2024) (citing *City of Chicago v. Morales*, 527 U.S. 41 (1999)). "[S]treets and parks . . . 'have immemorially been held in trust for the use of the public, and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1984) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

As discussed above, Polk Place is an open campus lawn fully accessible to the public that "possesses many of the characteristics of a public forum." *Widmar v. Vincent*. 454 U.S. 263, 267 n.5 (1981). Plaintiffs, like any other

member of the public, have a right to assemble and speak on that property and other outdoor parts of UNC's campus. *See Norris*, 2024 WL 1261206, at *6.

Plaintiff Mohanarajah also has a property interest in accessing campus as a student. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). There are currently no online classes that would apply to Plaintiff Mohanarajah's major and her banishment from campus continues to delay her ability to complete her degree. (Doc. 10 ¶ 199).

Moreover, Rogers and Newman have "property rights in continued employment" that are implicated by their indefinite bans from UNC. *Loudermill*, 470 U.S. at 539. Rogers cannot attend professional speaking obligations on campus in her role as a Professor at Duke University. (*Id.* ¶¶ 123–125). Newman cannot meet with and educate community members on campus in her role as an Organizer for Voices for Justice in Palestine. (*Id.* ¶ 168).

Accordingly, the first *Mathews* factor strongly favors Plaintiffs.

B. Defendants' lack of procedural safeguards creates a risk of Plaintiffs erroneously losing their protected interests.

To prevent erroneous deprivation, due process requires "notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1996) (citing *Loudermill*, 470 U.S. at 542). Defendants gave Plaintiffs minimal notice and no pre-deprivation process at all before banning them from campus. And the cursory post-deprivation hearing did not adequately account for

Plaintiffs' constitutionally protected interests.

i. Plaintiffs had no pre-deprivation process.

Generally, due process requires proper 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). The same principle applies in the university context. *See Brown v. Rectors & Visitors of the Univ. of Va.*, 361 F. App'x 531, 532 (4th Cir. 2010).

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). *See, e.g.*, *id.* at 926-27, 935 (suspension of police officer for drug charges); *Patel v. Midland Mem. Hosp. & Med. Cen.*, 298 F.3d 333, 340 (5th Cir. 2002) (suspension of a cardiologist whose "methods posed a danger to public safety"). But these "extraordinary situations" are the exception, not the rule. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993).

Here, Plaintiffs were indefinitely banned from campus with no notice of the pendency of the action and no opportunity to present their objections. (Doc. 10 ¶¶ 12–15). No exception to the pre-deprivation requirement applies—when

Plaintiffs' bans took effect, the encampment had been cleared, and Defendants have never alleged that Plaintiffs presented a specific safety threat. (*See id.* ¶ 92).

ii. Plaintiffs' post-deprivation hearings were inadequate.

The post-deprivation hearing provided by Defendants did not cure the lack of pre-deprivation process because (1) Plaintiffs didn't receive meaningful notice of the charges or evidence against them, (2) Plaintiffs had no meaningful opportunity to examine or contest the evidence against them, and (3) Defendant James, who had ordered dispersal of the encampment, was not a neutral decisionmaker.

Lack of Notice. Notice is one of the two "most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005). "[T]he risk of an erroneous deprivation is too high where an individual is not provided 'notice of the factual basis' for a material government finding." *Kirk v. Commissioner of Soc. Sec. Admin.*, 987 F.3d 314, 325 (4th Cir. 2021) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)).

For example, in *Rodgers v. Norfolk School Board*, the Fourth Circuit held that a post-deprivation appeal satisfied due process because, in conjunction with an adversarial hearing, the plaintiff had received a detailed explanation of the allegations and evidence against her, including the names of witnesses and a written report. 755 F.2d 59, 63-64 (4th Cir. 1985).

Here, Plaintiffs did not receive any notice of the charges against them beyond the trespass notices, which merely alleged a failure to disperse. Defendants did not provide Plaintiffs with names of witnesses, a report of UNC's findings, or any allegations that Plaintiffs themselves presented a threat to campus operations. (Ex. 2 ¶¶ 7–9).

Lack of Adversarial Hearing. The accused must also receive "an explanation of the evidence the authorities have and an opportunity to present [their] side of the story." *Goss*, 419 U.S. at 581. This must involve an opportunity for the accused to challenge the evidence against them, as "fairness 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).

The opportunity to examine adverse witnesses is a critical aspect of due process, especially where the sanctions are severe. As the Fourth Circuit recently explained, "[E]mbedded in the foundations of our adversarial system of justice" is the idea "that cross-examination is the greatest legal engine ever invented for the discovery of truth." *Doe v. University of North Carolina System*, No. 24-1301, 2025 WL 1006277, *7 (4th Cir. April 4, 2025) (cleaned up).

That case considered a post-deprivation hearing in a sexual misconduct case at UNC where the accused student had been expelled. Though the University had a significant interest in protecting student victims, the court held

that "cross-examination will materially assist in ensuring a meaningful hearing" and was required by the Fourteenth Amendment. *Id*. at *7; *see also Norris*, 2024 WL 1261206, at *6 (plaintiffs banned from public property were likely to succeed on procedural due process claim in part because they "were not permitted to ask questions or review the evidence against them" or "question the officials banning them on what the basis for their bans are").

Here, Plaintiffs had no opportunity to confront any witnesses, and the sanctions at issue are severe—Plaintiffs have indefinitely lost a fundamental constitutional right. These circumstances require more robust process than what Defendants provided.

Lack of Neutral Decisionmaker. "Th[e] requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The neutrality standard is an objective one, preserving "both the appearance and reality of fairness." *Id*. A post-deprivation appeal fails this requirement where the same individual presiding over the hearing also served as the "'one-man grand jury' out of which the [] charges arose." *In re Murchison*, 349 U.S. 133, 134 (1950) (hearing violated due process because the judge who brought contempt charges likely relied "on his own personal knowledge and impression" and "could not

be tested by adequate cross-examination").

Here, Plaintiffs' appeals were heard by Defendant James—the same person who ordered Plaintiffs' arrests in the first place. (Doc. 10 ¶ 90). Plaintiffs had no opportunity to cross-examine James or otherwise investigate the reasons for his actions. (Miller Decl. ¶ 9). In sum, because Defendant James served as witness, prosecutor, and judge, the appeals hearings at the very least lacked the appearance of a neutral, detached decisionmaker.

C. Plaintiffs' interests greatly outweigh any burden on Defendants in providing additional procedural safeguards.

That providing additional process "imposes some costs in time, effort, and expense . . . cannot outweigh the constitutional right" to a meaningful hearing. *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972). "While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process." *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

Here, the high risk to Plaintiffs of erroneously losing protected interests far outweighs any additional burden on Defendants in providing a minimally adequate hearing process.

III. The other preliminary injunction factors weigh in Plaintiffs' favor.

Plaintiffs will face irreparable harm without preliminary relief. Where "there is a likely constitutional violation, the irreparable harm factor is satisfied." *Leaders of a Beautiful Struggle v. Balti. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc).

Courts must also "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (internal citation omitted). This balance weighs strongly in Plaintiffs' favor—they face ongoing constitutional violations while Defendants have presented zero evidence suggesting that these individuals present real threats to campus operations or safety.

Finally, "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002).

IV. The Court should waive the bond requirement.

Federal Rule of Civil Procedure 65(c) provides that "a court may issue a preliminary injunction . . . only if the movant gives security," but "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby v. Delia*, 709 F.3d 307, 331-32 (4th Cir. 2013). This security requirement ensures the injured party is compensated for harms it may suffer because of an improper injunction. *Hoechst Diafoil Co. v. Nan Ya*

Plastics Corp., 174 F.3d 411, 421 n.3 (4th Cir. 1999). Defendants here face no risk of harm from allowing Plaintiffs back on campus. Waiver is therefore appropriate. In the alternative, Plaintiffs respectfully ask that the Court order only a nominal bond. *See id.*

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be granted.

Respectfully submitted, this the 24 day of April, 2025.

ACLU OF NORTH CAROLINA LEGAL FOUNDATION

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*_Notice of Special Appearance forthcoming_

CERTIFICATE OF SERVICE

I certify that on April 24, 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.

/s/ Ivy A. Johnson
Ivy A Johnson

Counsel for Plaintiffs

CERTIFICATE OF WORD COUNT

Pursuant to L.Cv.R. 7.3(d), I hereby certify that this brief has fewer than 6,250 words, as calculated by the word processing software used to prepare this brief.

/s/ Ivy A. Johnson
Ivy A. Johnson

Counsel for Plaintiffs

Exhibit 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

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

DECLARATION OF IVY JOHNSON

I, Ivy Johnson, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

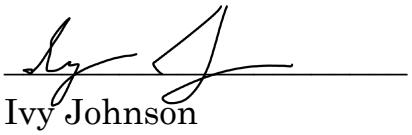
1. I am over the age of 18.

2. I submit this declaration based on my personal knowledge and involvement in the events described herein.

3. On July 30, 2024, I submitted a public records request to the University of North Carolina at Chapel Hill's Public Records Office. (Att. A, UNC Public Records Request).

4. On September 13, 2024, the Public Records Office released a series of documents responsive to this request. Copies of several of those documents are attached hereto as Attachments B, C, and D.

Executed this the 21 day of April, 2025.



Ivy Johnson

July 30, 2024

VIA ONLINE FORM SUBMISSION

University of North Carolina at Chapel Hill
Public Records Office
Campus Box #6205
Chapel Hill, NC 27599-9050
publicrecordsoffice@unc.edu
https://nextrequest.unc.edu

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
North Carolina

P.O. Box 28004
Raleigh, NC 27611
(919) 834-3466
acluofnc.org

Jefferson Parker
President

Chantal Stevens
Executive Director

Re: Public Records Act Request

We write on behalf of the American Civil Liberties Union of North Carolina Legal Foundation ("ACLU-NCLF"), a nonprofit organization dedicated to defending and preserving the constitutional rights of all North Carolinians, to request public records related to the University of North Carolina at Chapel Hill ("the University")'s response to student protest activities and the University's issuance of summary suspensions, described in more detail below.

We make this formal request under the North Carolina Public Records Law, N.C. Gen. Stat. § 132-1 *et seq*. This act must "be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions." *DTH Media Corp. v. Folt*, 374 N.C. 292, 300, 841 S.E.2d 251, 257–58 (2020).

Substance of Request. We request the following records and data (including, but not limited to, any electronic or paper documents, forms, recordings, meeting minutes, computer records, correspondence, or other documentary material, regardless of physical form or characteristics)

1. All records containing rules, regulations, practices, policies, procedures, training materials, directives, pertaining to temporary structures on any area that is University owned property, including Polk Place Quad, McCorkle Place Quad, areas surrounding the Dean Smith Center, and areas surrounding Kenan Memorial Stadium, that were created, circulated, or in effect from August 1, 2014 through the date of your search for documents related to this request.
2. All records containing rules, regulations, practices, policies, procedures, training materials, or directives concerning the University's response to demonstrations, protests, or civil unrest that were created, circulated, or in effect from August 1, 2014 through the date of your search, including any records related to

pro-Palestine protests that occurred in the Spring of 2024.

3. All records, communications, and documents drafted, created, circulated, or transmitted between University administration, UNC Board of Governors, UNC Board of Trustees, and UNC police related to protests, demonstrations, and/or events that occurred between April 1, 2024, through the date of your search for documents responsive to this request.
4. All records, communications, and documents pertaining to summary suspensions issued by the University's Emergency Evaluation and Action Committee in response to allegations related to a student's participation in a protest or demonstration, a student damaging University property, a student facing criminal charges, or a student engaging in a material disruption of University operations, including (1) copies of suspension letters; (2) documents and communications related to the evidence, reason or justification relied on for the issuance of a summary suspension; and (3) the number of summary suspensions issued by the Emergency Evaluation and Action Committee, for the time frame of August 1, 2014 through the date of your search for documents related to this request.
5. All records pertaining to appeals made or attempted to be made from students who were issued a summary suspension in response to allegations related to a student's participation in a protest or demonstration, a student damaging University property, a student facing criminal charges, or a student engaging in a material disruption of University operations,, including: (1) the written appeal; (2) appeal hearing transcripts and/or meeting minutes; and (3) the final written decision on the appeal, for the time frame of August 1, 2014 through the date of your search for documents related to this request.
6. All records, communications, and documents pertaining to instances where any individual or group, including non-student groups or non-student individuals, engaged in a protest, event, or demonstration in the open area referred to as Polk Place Quad or in the open area referred to as McCorkle Place Quad, for the time frame of August 1, 2014 through the date of your search for documents related to this request.
7. All communications between or among University administration, UNC Board of Governors, UNC Board of Trustees, and police pertaining to instances where any individual or group, including non-student groups or non-student individuals, engaged in a protest, demonstration, or group event, including any requests for law enforcement action or assistance made to law enforcement departments with no affiliation with the University, for the time frame of August 1, 2014 through the date of your search for documents related to this request.
8. All records containing rules, regulations, practices, policies,

procedures, training materials, or directives pertaining to the University's policies concerning community or public access to outdoor areas that are University owned property, including Polk Place Quad, McCorkle Place Quad, areas surrounding the Dean Smith Center, and areas surrounding Kenan Memorial Stadium, for the time frame of August 1, 2014 through the date of your search for documents related to this request.

9. All rules, regulations, practices, policies, procedures, training materials, or directives pertaining to the University's policies concerning protests, demonstrations, or group events organized by or involving individuals with no University affiliation for the time frame of August 1, 2014 through the date of your search for documents related to this request.

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
North Carolina

Justification for withholding. If you determine that some responsive documents are exempt from inspection under the Public Records Act, please provide a written explanation including a reference to the specific statutory exemption on which you rely.

Severability. Should you withhold some portions of the requested documents on the grounds that they are exempt from disclosure, please specify which exemptions, list any withheld records, and release any portions of the records for which you do not claim an exemption.

Fee waiver. ACLU-NCLF is a nonprofit public interest organization with limited resources, dedicated to the protection of civil rights and civil liberties. The public is the primary beneficiary of ACLU-NCLF's work to protect fundamental rights, whether by litigation, legislative advocacy, or publication. For these reasons, federal and state agencies, as well as courts, generally grant waivers of fees for ACLU-NCLF public records requests. The present request satisfies the statutory criteria for a fee waiver.

If you determine no waiver is appropriate, and if the proposed fee is greater than $50.00, we ask that you notify us prior to fulfilling the above requests.

Delivery. Please furnish all applicable records, preferably in an accessible electronic format, to Ivy Johnson at ijohnson@acluofnc.org and Daniel Siegel at dsiegel@acluofnc.org If you have questions, please contact me at ijohnson@acluofnc.org.

Timing. In accordance with the law, we ask that you respond to this request "as promptly as possible[.]" N.C. Gen. Stat. § 132-6(a). We look forward to your reply to this records request by August 15, 2024. If some of the requested records are available sooner than others, we ask that the records be produced on a rolling basis, beginning as soon as records are available until the request is fulfilled in its entirety.

Please do not hesitate to contact us to discuss the timeline and priorities for the requests as well as any questions you may have. Thank you for your prompt attention to this matter.

Sincerely,
/s/ Ivy Johnson
Staff Attorney
ijohnson@acluofnc.org

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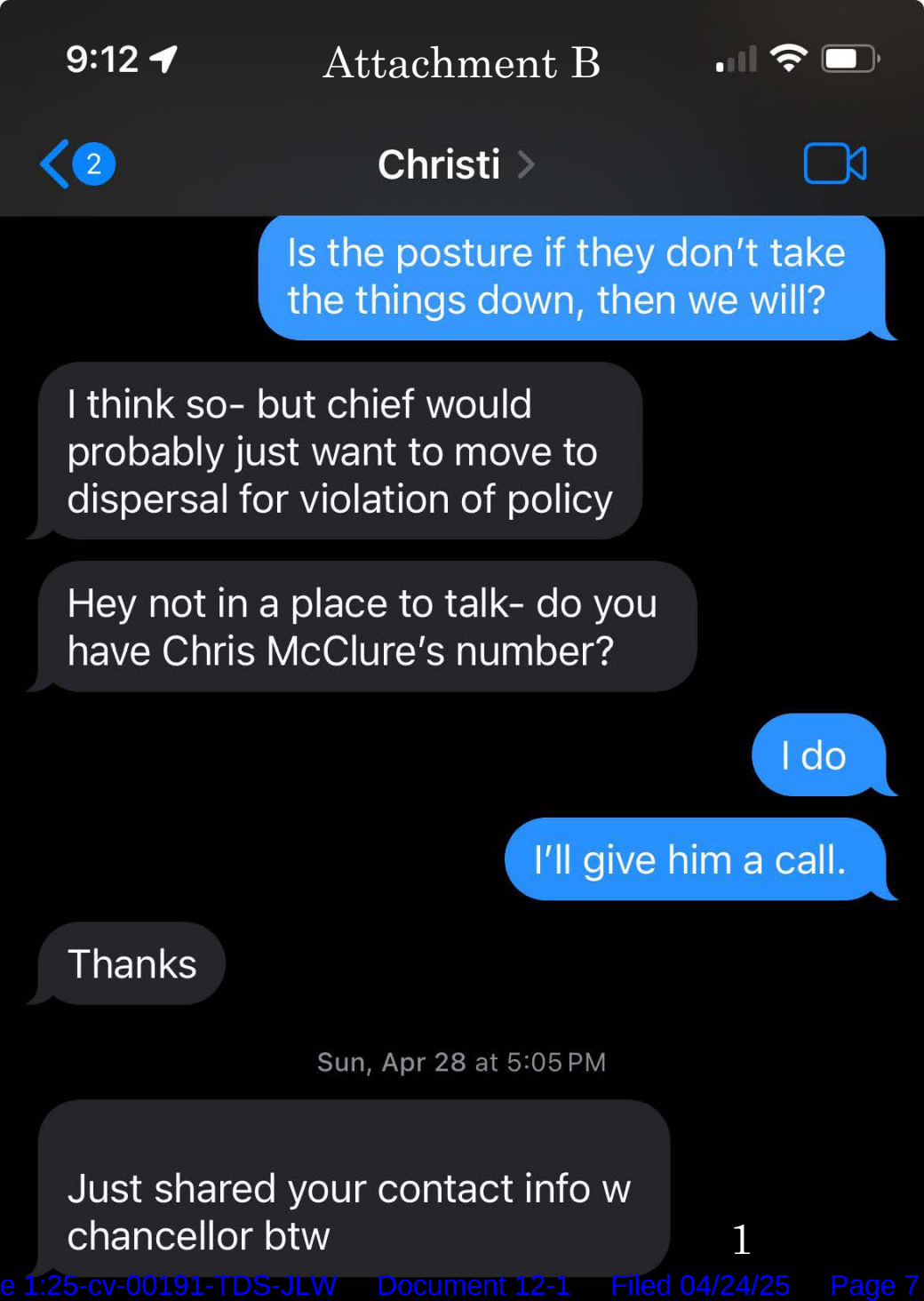
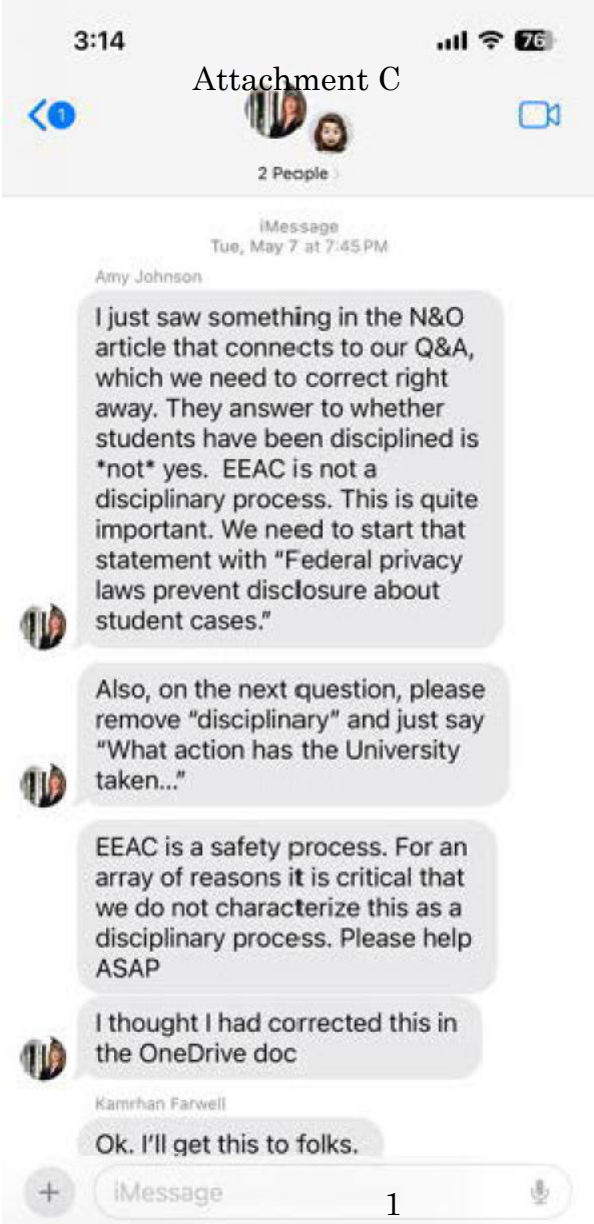
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
North Carolina


9:12
Attachment B
2
Christi
Is the posture if they don't take the things down, then we will?
I think so- but chief would probably just want to move to dispersal for violation of policy
Hey not in a place to talk- do you have Chris McClure's number?
I do
I'll give him a call.
Thanks
Sun, Apr 28 at 5:05 PM
Just shared your contact info w chancellor btw


3:14
76
2 People
iMessage
Tue, May 7 at 7:45 PM
Amy Johnson
I just saw something in the N&O article that connects to our Q&A, which we need to correct right away. They answer to whether students have been disciplined is *not* yes. EEAC is not a disciplinary process. This is quite important. We need to start that statement with "Federal privacy laws prevent disclosure about student cases."
Also, on the next question, please remove "disciplinary" and just say "What action has the University taken..."
EEAC is a safety process. For an array of reasons it is critical that we do not characterize this as a disciplinary process. Please help ASAP
I thought I had corrected this in the OneDrive doc
Kamrhan Farwell
Ok. I'll get this to folks.
iMessage

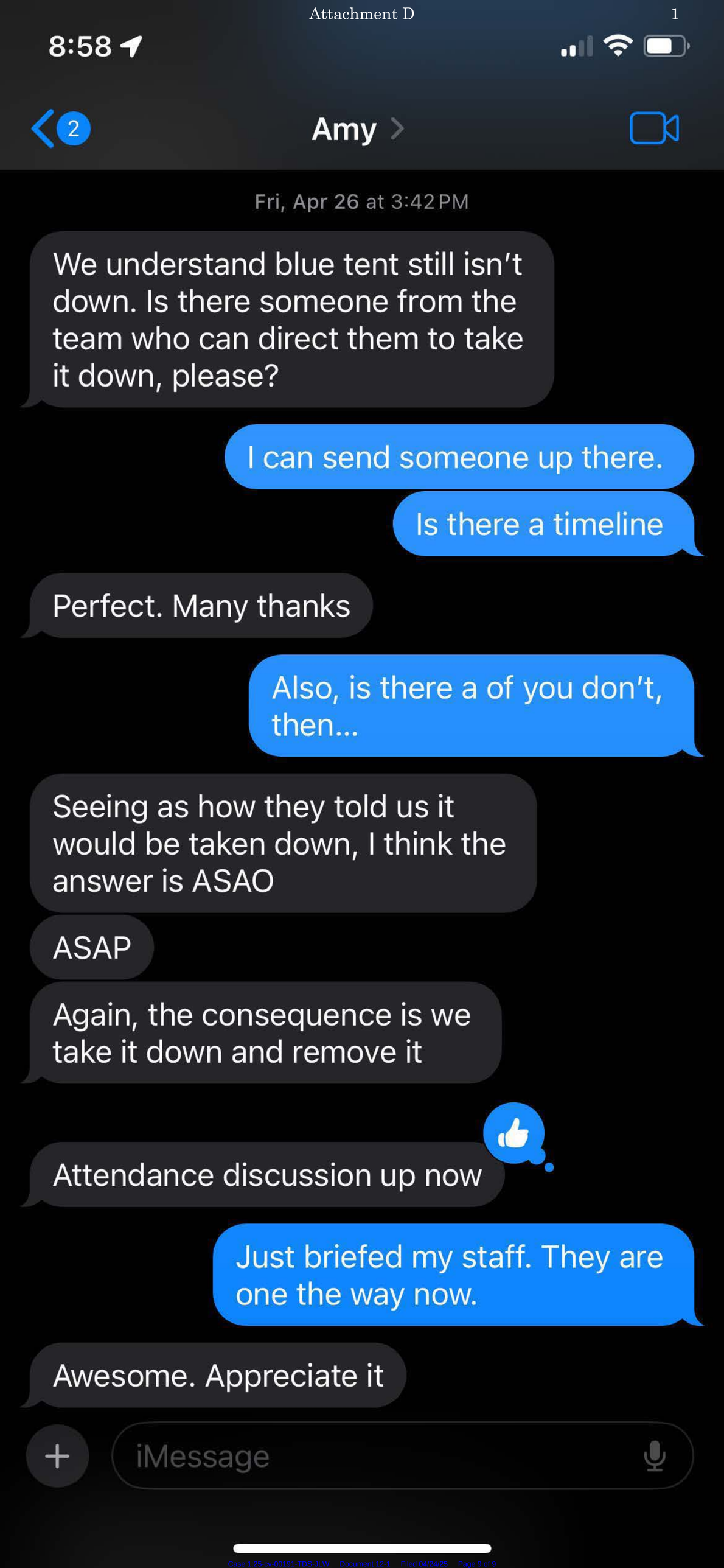

8:58
2
Amy
Fri, Apr 26 at 3:42 PM
We understand blue tent still isn't down. Is there someone from the team who can direct them to take it down, please?
I can send someone up there.
Is there a timeline
Perfect. Many thanks
Also, is there a of you don't, then...
Seeing as how they told us it would be taken down, I think the answer is ASAO
ASAP
Again, the consequence is we take it down and remove it
Attendance discussion up now
Just briefed my staff. They are one the way now.
Awesome. Appreciate it
iMessage

Exhibit 2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

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

DECLARATION OF JAELYN MILLER

I, Jaelyn Miller, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

1. I am 18 years or older and of sound body and mind.

2. I submit this declaration based on my personal knowledge and involvement in the events described herein.

3. I represented Plaintiffs Dames, Newman, Rogers, and Mohanarajah in their administrative appeals of their bans from UNC Chapel Hill's ("UNC") campus. I timely appealed Plaintiffs' trespass bans on their behalf within ten days of their issuance.

4. UNC did not schedule the appeal hearings until July 1, 2024—approximately three months after the bans had taken effect.

5. Before the hearing, I did not receive any evidence or other information that UNC intended to rely on in consideration of the appeals.

6. The hearing process was conducted by Defendant James. The hearing consisted solely of a meeting between myself and Defendant James in a University conference room. Kristen Simonsen Lewis, an attorney for UNC, participated remotely via conference call.

7. During the hearing, Chief James and Ms. Lewis provided no evidence, information, or allegations about the trespass bans.

8. To the best of my knowledge, Defendant James had complete discretion over the outcome of the appeals, and there were no written procedures or objective criteria guiding how Defendant James was required to review evidence or make a decision.

9. During the hearing, Defendant James did not provide any explanation for the issuance of the bans, nor did he ask any substantive questions or engage with the arguments I presented on behalf of the Plaintiffs.

10. On August 12, 2024, Defendant James issued letters upholding the indefinite trespass bans against each of the banned Plaintiffs. (*See* Doc. 10, Ex. H)

11. I do not have access to the letter upholding Plaintiff Dames' ban from campus. However, Chief James upheld the trespass bans for all banned

individuals, including Plaintiffs, citing the tent policy as well as unspecified safety and security concerns.

Executed this 23rd day of April, 2025.

Jaelyn Miller