

3. On June 4, 2025, the North Carolina Court of Appeals issued a decision unanimously finding no error in the trespassing convictions of Plaintiffs Bliss and Coit. [Doc. 10].

4. Following the affirmation of the criminal convictions, Plaintiffs sought [Doc. 12] and received leave to amend their Complaint. Plaintiffs' Amended Complaint was filed with the Court on September 30, 2025. [Doc. 14].

5. The Amended Complaint sets forth claims pursuant to 42 U.S.C. 1983 and Article I, Section 14 of the North Carolina Constitution asserting that the Defendants retaliated against the Plaintiffs based on their speech and newsgathering activities, claims pursuant to 42 U.S.C. 1983 and Article I, Section 20 of the North Carolina Constitution asserting that the Defendants wrongfully seized Ms. Bliss' phone, and pursuant to the Privacy Protection Act of 1980. [Doc. 14].

FACTUAL ALLEGATIONS

In relevant part, the Plaintiffs assert that:

1. Beginning on December 19, 2021, persons began protesting in Aston Park, a City of Asheville-owned park, in an area occupied by a homeless encampment. [Doc. 14, ¶ 49].

2. On the evening of December 25, 2021, both Plaintiffs Bliss and Coit entered Aston Park before the park's closing time of 10 PM. [Doc. 14, ¶ 55].

3. After the park closure time of 10 PM, members of the Asheville Police Department began directing everyone present in the park to leave, including Plaintiffs Bliss and Coit. [Doc. 14, ¶¶ 3 and 62].

4. Plaintiffs Bliss and Coit did not leave the park as directed and, approximately half an hour later, they were both arrested. [Doc. 14, ¶ 76].

5. Plaintiff Bliss' phone was seized incident to her arrest. [Doc. 14, ¶ 84].
6. Plaintiffs Bliss and Coit were charged with second degree trespassing. [Doc. 14, ¶85].
7. Defendant Cooper applied for, and received a warrant to search Plaintiff Bliss' cell phone on January 19, 2022. [Doc. 14, ¶¶ 93 and 99].
8. Plaintiffs Bliss and Coit were tried and convicted of second-degree trespassing in the District Court division of Buncombe County on April 19, 2023. [Doc. 14, ¶115].
9. Plaintiffs Bliss and Coit appealed their convictions to Superior Court, and were tried and found guilty by a jury on June 15, 2023. [Doc. 14, ¶¶ 116 and 117].
10. The North Carolina Court of Appeals affirmed Plaintiffs Bliss and Coit's convictions on June 4, 2025. [Doc. 14, ¶ 120].
11. The Defendants filed their Motion to Dismiss with the Court on October 17, 2025. [Doc. 15]. .

STANDARD OF REVIEW

A plaintiff's complaint may be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted when it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (emphasis added) (internal citations omitted) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557). This standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id.

A Motion to Dismiss for lack of standing is analyzed as a Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). See Pitt County v. Hotels.com, L.P., 553 F.3d 308, 311 (4th Cir. 2009). Plaintiffs bear the burden of proving that subject matter jurisdiction exists. United States ex rel. Vuyyuru v. Jadhav, 555 F.3d 337, 347-48 (4th Cir. 2009). “The Court should grant a motion to dismiss for lack of subject matter jurisdiction only ‘if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.’” LaVallee v. MedCost Bens. Servs., No. 1:21-cv-00265-MR,, at *3 (W.D.N.C. Dec. 6, 2023) (quoting Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)).

I. Plaintiffs Fail to State a Claim for Retaliatory Arrest Under the First Amendment and Article I, Section 14 of the North Carolina Constitution¹.

Having been twice convicted of the criminal offenses that they allege the Defendants should not have charged them with, Plaintiffs Bliss and Coit cannot now assert that their arrests constituted retaliation for their protected speech. This is so both under the doctrine of collateral estoppel, and under the rule stated in Heck v. Humphrey. Further, Plaintiff Asheville Blade, LLC lacks standing to advance these categories of claims. Such claims also fail as Plaintiffs Bliss and Coit’s arrest under a content-neutral regulation on park closing hours in no way implicates their speech rights. Finally, Plaintiffs claims against the defendant officers in their individual capacities are barred by the doctrines of qualified immunity and public official immunity.

¹ While Defendants believe that all of the Plaintiffs’ claims brought pursuant to the North Carolina Constitution may be properly dismissed outright, they would further note that the Court may decline to pass on such claims if it finds the corresponding federal claims must be dismissed. See e.g. Ussery v. Freeman, No. 5:23-CV-219-BO-RJ,, at *14-15 (E.D.N.C. June 18, 2024) (“Because, as discussed below, dismissal of plaintiff’s federal claims is appropriate, the Court will decline to exercise jurisdiction over Count I insofar as it is premised on violations of the North Carolina Constitution.”) (Citing 28 U.S.C. § 1367(c) and Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995)).

a. Plaintiffs’ Retaliatory Arrest Claims are Barred by the Doctrine of Collateral Estoppel.

Questions of estoppel are relevant here insofar as “[f]ederal courts must give the same preclusive effect to a state court judgment as the forum that rendered the judgment would have given it under the Full Faith and Credit Act, 28 U.S.C. § 1738.” Megaro v. McCollum, 66 F.4th 151, 159 (4th Cir. 2023) (internal quotations omitted). What this means in the context of civil claims for constitutional injuries is that “the doctrines of res judicata and collateral estoppel apply to § 1983 actions, and federal courts must afford preclusive effect to issues which have been decided by state courts when the courts of that state would do so.” Gilliam v. Sealey, 932 F.3d 216, 231 (4th Cir. 2019) (internal quotations omitted). See also Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). Here, an examination of the findings reached by the North Carolina Court of Appeals in Plaintiffs Bliss and Coit’s criminal case leaves no doubt that their retaliatory arrest claims are barred as a matter of law.

In their criminal appeal, Plaintiffs Bliss and Coit were allowed to fully litigate the question of whether their First Amendment rights had been violated, with the North Carolina Court of Appeals summarizing the crux of the dispute as follows:

Defendants argue their speech—specifically, newsgathering—was protected by the First Amendment. The State, on the other hand, argues the First Amendment was not implicated because the Park Curfew regulates conduct, not speech. As a threshold matter, we consider whether Defendants' newsgathering was protected speech under the First Amendment, because "if it is not, we need go no further."

State v. Bliss, 915 S.E.2d 735, 2025 N.C. App. LEXIS 339 *6-7 (N.C. Ct. App. 2025) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 437 U.S. 788, 797, 105 S. Ct. 3439, 3446, 87 L. Ed. 2d 567, 576 (1985)). The Court of Appeals resolved this issue unambiguously, ruling that “[b]ecause the Park Curfew strictly regulates conduct, not speech, **Defendants’ First Amendment rights were not implicated in this case.**” Id. at *11 (emphasis added). Under

Megaro and Gilliam, the question for the Court is: what degree of preclusive effect should be given to the North Carolina Court of Appeals' conclusion that the First Amendment rights of Plaintiffs Bliss and Coit were not implicated, much less violated, by their convictions?

Fortunately, not only has the North Carolina Court of Appeals thoughtfully and fully explained the degree of preclusive effect that is warranted in matters like this, it actually did so in a case where a civil plaintiff sought “relief under 42 U.S.C. §§ 1981, 1983, and 1985 claiming that defendants violated his rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution and comparable rights under the North Carolina Constitution.” Burton v. City of Durham, 118 N.C. App. 676, 678, 457 S.E.2d 329, 331 (1995). In Burton, the North Carolina Court of Appeals explained that, like federal courts, North Carolina courts hold the findings of a criminal court to be binding in a related civil matter. Burton, 118 N.C. App. at 680, 457 S.E.2d at 332 (citing Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347, 349 (1990) and Allen v. McCurry, 449 U.S. 90, 103-05, 66 L. Ed. 2d 308, 318-20, 101 S. Ct. 411 (1980)). It further held that, like federal courts, North Carolina courts do not require a complete mutuality of parties in order for collateral estoppel to be asserted defensively. Id., (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327-28, 58 L. Ed. 2d 552, 560, 99 S. Ct. 645 (1979) and Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986)). Applying those principles, the North Carolina Court of Appeals held in Burton that a former criminal defendant, who had asserted in his criminal proceeding that a conviction would violate his First Amendment and corresponding North Carolina constitutional rights, was barred under the doctrine of collateral estoppel from bringing a civil suit premised on the assertion that his constitutional rights were violated. Id. at 682.²

² It should be noted that the Court in Burton, after initially explaining that the plaintiff brought claims pursuant to both the First Amendment *and* comparable provisions of the North Carolina Constitution, exclusively referred to the First Amendment for the remainder of the opinion. Burton, 679-685. Likewise, the Court of Appeals in Plaintiffs

Read alongside Burton- Megaro, Gilliam, and 28 U.S.C. § 1738 require that this Court applies collateral estoppel and gives preclusive effect to the holding of the North Carolina Court of Appeals in Plaintiff's Bliss and Coit's criminal matter. A review of that holding reveals that Plaintiffs Bliss and Coit had the opportunity to fully litigate their First Amendment arguments, down to the *minutiae* of jury instructions, Bliss at at *11-14, before the North Carolina Court of Appeals concluded that their First Amendment rights were neither implicated, nor violated, by their arrest and conviction. Against this backdrop, Plaintiffs' claims that their arrests constitute retaliation for protected speech and newsgathering activities must fail as a matter of law.

b. Plaintiffs Bliss and Coit's Section 1983 Retaliatory Arrest Claims are Barred under Heck v. Humphrey.

In addition to the collateral estoppel doctrine, Plaintiffs' Bliss and Coit's criminal convictions, and the affirmation thereof by the North Carolina Court of Appeals, also implicates the rule stated in Heck v. Humphrey. There, the United States Supreme Court explained that:

in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 2372 (1994). Here, Plaintiffs Bliss and Coit have affirmatively alleged that they were twice convicted of trespassing, and that those convictions were affirmed on appeal. [Doc. 14, ¶¶ 115-117]. Accordingly, the “Heck-bar” should

Bliss and Coit's criminal appeal referred solely to the First Amendment when affirming that the Plaintiffs' constitutional rights had not been violated. Bliss at *11. This is, in all likelihood, due to the fact that North Carolina Courts view “the guarantees in the state and federal constitutions to be parallel and has addressed them as if their protections were equivalent.” State v. Petersilie, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (doing exactly that in a protected speech case). That explanation seems most plausible as the outcomes in Burton (affirmation of the complete dismissal of the plaintiff's case) and Bliss (affirmation of the criminal convictions) are irreconcilable with the theory that the North Carolina Court of Appeals was willing to find that Article I, Section 14 of the North Carolina Constitution was more expansive than the First Amendment in either instance.

ordinarily mandate the dismissal of the Plaintiffs' First Amendment retaliation claims under Section 1983. See Nieves v. Bartlett, 587 U.S. 391, 393, 139 S. Ct. 1715, 1717, 204 L. Ed. 2d 1 (2019) (“The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim.”)

Given that the Plaintiffs did not abandon their First Amendment retaliatory arrest claim following the affirmation of their criminal convictions on appeal, it seems probable that they mistakenly believe their claims fit within a narrow exception that the Supreme Court spelled out in Nieves. Specifically, the Supreme Court held that “the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” Nieves, 587 U.S. at 407-, 139 S. Ct. at 1727. The allegations of the Amended Complaint disclose that First Amendment retaliatory arrest claims presented in this action do not come close to fitting within the Nieves exception to Heck.

The Plaintiffs in this matter attempt to fit their First Amendment retaliatory arrest claims within the Nieves exception by extracting from hours and hours of body-worn camera footage those statements that they believe demonstrate the Defendants bore them ill-will. [Doc. 14, ¶¶ 67-69]. The problem with this approach is that the Nieves Court expressly rejected the idea that the statements of any individual officers could supply the type of evidence needed to find that a plaintiff received disparate treatment, such that their retaliatory arrest claim could proceed post-conviction. Nieves, 587 U.S. at 407, 139 S. Ct. at 1727. Specifically, the Supreme Court stated of its approach in the course of creating the Nieves exception that “like a probable cause analysis, it provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard. Because this inquiry is

objective, the statements and motivations of the particular arresting officer are irrelevant at this stage.” Id. (internal quotation omitted). Under Nieves then, the Court should disregard any superfluous remarks the Plaintiffs claim were made in the course of their arrests, and focus exclusively on whether they have alleged facts sufficient to support a finding that they were charged with trespassing where others in the same situation were not.

Here, the Plaintiffs have affirmatively, and fatally, alleged that they were simply two among many individuals who were warned to vacate Aston Park after it closed for the day or risk arrest, [Doc. 14, ¶3], and who were arrested when they chose not to leave the park. [Doc. 14, ¶110]. They do not allege that a single person who was present in Aston Park on December 25, 2021, and who remained there past 10:00 PM after being directed to leave, was spared from arrest, or treated in any way differently from the Plaintiffs.³ By failing to allege any facts that would support the conclusion that the Plaintiffs were treated differently than anyone else who has ever knowingly violated the time restrictions applicable to Aston Park, and remained therein after being informed of those time restrictions, the Plaintiffs have pled themselves out of the Nieves exception to Heck.

c. Plaintiff Asheville Blade, LLC Lacks Standing to Assert Retaliatory Arrest Claims.

Confusingly, it appears that the Plaintiffs’ first and third causes of action, which assert that Plaintiffs Bliss and Coit were charged with trespassing in a retaliatory fashion based on how

³ What is more, the Amended Complaint actually discloses that, in April of 2021, Plaintiff Coit was present in Aston Park to photograph the Asheville Police Department’s efforts to enforce its ordinance prohibiting camping on City owned land. [Doc. 14, ¶ 44]. It further provides a link to the article in which Plaintiff Coit’s photographs appear, which demonstrated that the photos were taken during daytime hours, when the park is open to the public. [Doc. 14, ¶ 43]. Likewise, the Amended Complaint affirmatively discloses that both Bliss and Coit were present in Aston Park before 10 PM on the night of their arrest, and engaged in newsgathering activities without interference from any of the Defendants before the park closed. [Doc. 14, ¶ 55]. In short, not only do the factual allegations of the Amended Complaint affirmatively disclose that Plaintiffs Bliss and Coit were treated in exactly the same fashion as everyone else present in Aston Park on the night of December 25, 2021, they further disclose that the Defendants have a documented pattern of being disinterested in the Plaintiffs newsgathering activities, when such activities do not violate the law.

they exercised their speech and newsgathering rights, have also been asserted by their employer, the Asheville Blade, LLC. In order to have standing to assert a claim for a constitutional injury in federal court, a “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” Spokeo, Inc. v. Robins, 578 U.S. 330, 338, 136 S. Ct. 1540, 1547 (2016). The closest that Plaintiff Asheville Blade comes to identifying an “injury in fact” is to claim that, because Plaintiffs Bliss and Coit were unavailable for work during the time it took for them to be twice convicted of trespassing, and have those convictions affirmed on appeal, the Asheville Blade received less productivity from its employees. [Doc. 14, ¶182]. That is a far cry from what courts typically find to “constitute a sufficiently discrete injury” to give rise to Article III standing. Nat'l Fed'n of the Blind v. United States Dep't of Educ., 407 F. Supp. 3d 524, 531 (D. Md. 2019). It is not hyperbole to say that, were this theory of “injury in fact” sufficient to satisfy standing requirements, any employer would theoretically be able to piggyback on the wrongful arrest claims of its employees. Because Plaintiff Asheville Blade, LLC has failed to allege that it suffered an injury in fact, this claim should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

The Asheville Blade’s attempt to join in asserting these claims is further problematic given what the Supreme Court has described as the “prudential” limitation on federal courts’ jurisdiction, under which “federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.” Singleton v. Wulff, 428 U.S. 106, 113, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). “To overcome the prudential limitation on third-party standing, a plaintiff must demonstrate: (1) an injury-in-fact; (2) a close relationship between herself and the person whose right she seeks to

assert; and (3) a hindrance to the third party's ability to protect his or her own interests.” Freilich v. Upper Chesapeake Health, 313 F.3d 205, 215 (4th Cir. 2002). Here, Plaintiffs Bliss and Coit have brought the self-same claims that their employer apparently seeks to join, which strongly suggests there is no hindrance to their ability to protect their own interests.

While this question does not appear to have been explored at any length by federal courts within the Fourth Circuit, extrajudicial case law makes it abundantly clear that the employer/employee relationship is not typically one that can give rise to third-party standing. See N.Y. State Vegetable Growers Ass'n v. James, No. 23-CV-1044 (JLS), at *5-6 (W.D.N.Y. Feb. 21, 2024). In James, the District Court for the Western District of New York helpfully compiled a number of cases rejecting employers’ attempts to claim third-party standing on behalf of their employees, and summarized them as follows:

Numerous courts have concluded that the employer-employee relationship does not meet the requirements for third-party standing. See, e.g., Rover Pipeline LLC v. Zwick, 2022 U.S. App. LEXIS 33144, 2022 WL 17336502, at *3-*5 (6th Cir. Nov. 30, 2022) (assuming, without deciding, that employer had a sufficiently close relationship with employees, but holding that the employer "point[ed] to no affirmative obstacle preventing workers from suing on their own behalf"); Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 810 (11th Cir. 1993) (noting that, "[i]n cases allowing third-party standing, the relationship between the party asserting the right and the third party has been characterized by a strong identity of interests[,] which is absent in an employer/employee relationship," and that "the employee/employer relationship [was] not such that the employer would be nearly as effective a proponent as the employees"); Fire Equip. Mfrs. Ass'n, Inc. v. Marshall, 679 F.2d 679, 681 (7th Cir. 1982) (court did "not believe that manufacturers or trade associations [were] the most effective advocate of employee interests" regarding an OSHA rule).

Id. Moreover, at least one circuit court has found third-party standing to be unavailable in an instance of a retaliatory arrest in violation of First Amendment rights. Navarro v. City of S. Gate, 81 F. App'x 192, 197 (9th Cir. 2003).

In Navarro, the Ninth Circuit considered a First Amendment retaliation claim brought by an employee who was arrested during a raid on his employer, which he claimed was motivated

by the nature of his employer's business: nude dancing. *Id.* at 196. In rejecting the plaintiffs entitlement to third-party standing, the Ninth Circuit explained, “[i]t is beyond dispute that Navarro's arrest without probable cause constitutes an injury in fact that resulted from a violation of his employer's First Amendment rights. Nor do we doubt Navarro and his employer maintain a sufficiently close relationship to permit third-party standing. However, Navarro is unable to demonstrate any hindrance to his employer's ability to vindicate his own rights.” *Id.* at 197. Accordingly, the body of federal case law interpreting third-party standing suggests that the Asheville Blade, LLC, lacks such standing to advance retaliation claims pursuant to the First Amendment and Article I, Section 14 of the North Carolina Constitution, because its employees, Bliss and Coit, are able to pursue those claims on their own.

d. Plaintiffs First Amendment Claims are Nonviable Insofar as their Speech and Newsgathering Rights were Not Implicated in their Arrest.

As set forth in the preceding three subsections, there are doctrinal bars that should obviate the need for this Court to delve into the merits of the Plaintiffs' speech-related claims. Notwithstanding the foregoing, dismissal would further remain proper as the facts alleged in the Amended Complaint disclose that the Plaintiffs' speech rights were not implicated by Plaintiffs Bliss and Coits' arrests. This is so because the enforcement of content neutral time, place, and manner regulations may be enforced against members of the press. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S. Ct. 2513, 2518 (1991) (“generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”) While the Plaintiffs undoubtedly would prefer it to be otherwise, the existing body of First Amendment jurisprudence does not provide journalists with a unilateral right to ignore generally applicable criminal laws because of their form of employment. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999).

Again, and in view of the holding in Plaintiffs Bliss and Coit’s criminal matter, there should be no need to relitigate the question of whether the Plaintiffs’ speech rights were violated. But if this Court decides to reach that question, Food Lion and Cohen disclose that the application of content-neutral time, place, and manner regulations, such as park closing hours, to journalists in no way offends their speech protections. The Defendants accordingly request that these claims be dismissed insofar as their speech rights were not implicated by their arrest for trespassing, which is fatal to their retaliation claims. Cornelius, 437 U.S. at 797, 105 S. Ct. at 3446.

e. Plaintiffs Retaliatory Arrest Claims Against the Individual Capacity Defendants are Barred By the Doctrines of Qualified Immunity and Public Official Immunity.

While the Defendants respectfully contend the Plaintiffs’ retaliatory arrest claims must be dismissed in their entirety for the reasons stated above, they must, at a minimum, be dismissed against the individual capacity defendants under the doctrines of qualified immunity and public official immunity. On Plaintiffs’ Section 1983 claims for retaliatory arrest, qualified immunity “shields government officials from liability for civil damages, provided that their conduct does not violate clearly established statutory or constitutional rights within the knowledge of a reasonable person.” Meyers v. Baltimore Cty., Md., 713 F.3d 723, 731 (4th Cir. 2013). On Plaintiffs’ retaliatory arrest claims under Article I, Section 14 of the North Carolina Constitution, public official immunity bars such claims against the Defendants in their individual capacities unless their actions were “(1) outside the scope of official authority, (2) done with malice, or (3) corrupt.” Bartley v. City of High Point, 381 N.C. 287, 294, 873 S.E.2d 525, 533 (2022) (internal quotations omitted).

Although the Plaintiffs may hope to use this case as a vehicle to seek reversal of Cohen and Food Lion, *supra*, as they are permitted to do under Rule 11(b)(2) of the Federal Rules of Civil Procedure, they may not simultaneously bring individual capacity claims against the

Defendant officers. See Carroll v. Carman, 574 U.S. 13, 16, 135 S. Ct. 348, 350 (2014) (“A government official sued under §1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right **that was clearly established at the time of the challenged conduct.**”) (Emphasis added). Phrased differently- were the Plaintiffs to convince the Supreme Court to accept an expansive new rule of law, under which reporters may enter onto any property, at any time, without being subject to the enforcement of otherwise applicable trespassing laws, the Defendant officers would still be entitled to the protections of qualified immunity, as that was not the state of the law on the night of December 25, 2021. See Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 468 (4th Cir. 2013) (“Because government officials cannot ‘reasonably be expected to anticipate subsequent legal developments,’ the right must have been clearly established at the time an official engaged in a challenged action.”) (Quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)). Accordingly, Plaintiffs’ Section 1983 claims against the individually named Defendants must be dismissed given the application of qualified immunity.

Public official immunity, which applies to the Plaintiffs’ state constitutional claims, goes a step further, requiring that a plaintiff be able to demonstrate that a public official not only violated their constitutional rights, but did so corruptly or out of malice, before they may be sued individually. See Campbell v. Anderson, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003) (“Defendant Anderson as a police officer is a public official who enjoys absolute immunity from personal liability for discretionary acts done without corruption or malice.”) As explained by the North Carolina Supreme Court, “absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party

challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence.” Leete v. Cty. of Warren, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995) (internal citations and quotations omitted). Here, the Plaintiffs have not even alleged that the individual Defendants acted with malice or corruption, much less alleged facts that would support such a conclusion. Plaintiffs’ claims pursuant to Article I, Section 14 of the North Carolina Constitution, against Defendants in their individual capacity, are therefore barred by the doctrine of public official immunity.

II. Plaintiffs Fail to State a Claim for Wrongful Seizure Under the Fourth Amendment and Article I, Section 20 of the North Carolina Constitution.

In the Amended Complaint’s second and fourth causes of action, Plaintiff Bliss asserts that the seizure of her cell-phone in conjunction with her arrest violated her rights under both the Fourth Amendment, and Article I, Section 20 of the North Carolina Constitution. These claims should be dismissed insofar as the Amended Complaint discloses an explanation for the purported delay in securing a search warrant. At a minimum, however, the Fourth Amendment claims must be dismissed as to the officer Defendants in their individual capacity under the doctrine of qualified immunity, and the corresponding state law claims must be dismissed under the doctrine of public official immunity.

a. The Amended Complaint Discloses Facts Establishing that Any Delay in Securing the Subject Warrant was Justified.

The boundaries of when and how a cell-phone may be seized and searched are now exceedingly well defined. Where, as here, a cell-phone is in the immediate possession of an arrestee, it may properly be seized incident to their arrest. United States v. Murphy, 552 F.3d 405, 410 (4th Cir. 2009). Before the cell-phone itself may be searched, however, law-enforcement must obtain a warrant. See Riley v. California, 573 U.S. 373, 401, 134 S. Ct.

2473, 2493 (2014) (“Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.”) Finally, law enforcement officers may not provide false information, or act with reckless disregard for the truth, when they apply for a warrant. Miller v. Prince George's Cty., 475 F.3d 621, 627 (4th Cir. 2007).⁴ Here, the Amended Complaint expressly discloses that Defendant Cooper sought and obtained a search warrant before the subject phone was ever searched, [Doc. 14, ¶93], and it never alleges that Defendant Cooper lied or acted with deliberate disregard for the truth in applying for the search warrant, which was issued on January 19, 2022. [Doc. 14, ¶ 99].

Because the Amended Complaint affirmatively discloses that the Defendants complied with the Fourth Amendment’s requirements, as defined by Murphy, Riley, and Miller supra, it seems probable that Plaintiff Bliss’ unlawful seizure claim is predicated on the theory that the Defendants delayed overly long before seeking the issuance of a search warrant. See United States v. Pratt, 915 F.3d 266, 272 (4th Cir. 2019) (“The constitutional question is whether the extended seizure of Pratt's phone was reasonable. A seizure that is lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests.”) (Internal quotations omitted). In describing how an overly long delay between a lawful seizure of electronics, and the application for a warrant to search the

⁴ While it is true “that the language of Article 1, Section 20 of the Constitution of North Carolina differs markedly from the language of the Fourth Amendment to the Constitution of the United States,” the North Carolina Supreme Court has consciously opted to adopt the same tests that the United States Supreme Court uses to analyze wrongful search and seizure questions. See State v. Arrington, 311 N.C. 633, 643, 319 S.E.2d 254, 261 (1984) (“we find compelling the reasoning of the Supreme Court of the United States in adopting the totality of circumstances test of Gates and Upton for determining whether probable cause exists for issuance of a search warrant.”) Indeed, North Carolina courts expressly follow the lead of the federal courts when it comes to the reasonableness of searches and seizures of cell-phones, as set forth in Riley. See e.g. State v. Duran-Rivas, 294 N.C. App. 603, 611, 904 S.E.2d 171, 178 (2024). Undersigned counsel has located no cases interpreting Article I, Section 20 of the North Carolina Constitution that suggest Plaintiffs claims under that constitutional provision should be subject to a different standard than their claims pursuant to the Fourth Amendment.

same, may render a seizure unreasonable, the Fourth Circuit in Pratt reviewed a trio of cases from the Eleventh Circuit, where delays of 45 and 25⁵ days were found to be reasonable, but a delay of 21 days was found to be unreasonable. Id. (citing United States v. Vallimont, 378 F. App'x 972, 975-76 (11th Cir. 2010), United States v. Laist, 702 F.3d 608, 616-17 (11th Cir. 2012), and United States v. Mitchell, 565 F.3d 1347 (11th Cir. 2009), respectively). What these examples demonstrate is that there is no hard and fast rule as to when a delay in securing a warrant to search electronics becomes unreasonable. Instead, courts must “balance the government's interest in the seizure against the individual's possessory interest in the object seized,” in order to determine reasonableness.” Pratt, 915 F.3d 271.

Admittedly, when called upon to determine the reasonableness of a delay in seeking a warrant, some factual discovery will typically need to occur before a district court can conduct its reasonableness analysis. Here, however, Plaintiff Bliss has affirmatively alleged facts that have routinely been found to justify a delay in applying for a warrant. Specifically, Plaintiff Bliss alleges not only that the seizure occurred during the height of the holiday season in 2021, but that she was specifically told by the Defendants that the delay in releasing her phone was occasioned by the holidays. [Doc. 14, 90]. This explanation for a delayed warrant application is recognized as one that can render the delay “justified” for purposes of a Fourth Amendment Analysis. See United States v. Martin, 157 F.3d 46, 54 (2d Cir. 1998) (“the eleven day delay included two weekends and the Christmas holiday, which could explain the difficulty in promptly obtaining the warrant.”) This type of explanation, which has been accepted as valid by federal courts in comparable instances, suggests that the “reasonableness” inquiry should be resolved in favor of the Defendants. See United States v. Burgard, 675 F.3d 1029, 1033 (7th Cir. 2012) (“When

⁵ Coincidentally, it appears that delays of 24-25 days have been found to be reasonable by multiple circuit courts. See also United States v. Bragg, 44 F.4th 1067, 1073 (8th Cir. 2022).

police neglect to seek a warrant *without any good explanation for that delay*, it appears that the state is indifferent to searching the item and the intrusion on an individual's possessory interest is less likely to be justifiable.”) (Emphasis added). Because the Plaintiffs have taken the peculiar step of calling to the Court’s attention facts that justify the delay in securing a warrant, the Defendants respectfully request that the wrongful seizure claims be dismissed for failure to state a claim upon which relief may be granted.

b. Plaintiff Bliss’ Wrongful Seizure Claims Against the Individual Capacity Defendants are Barred By the Doctrines of Qualified Immunity and Public Official Immunity.

As previously discussed in relation to the Plaintiff’s retaliatory arrest claims, the doctrines of qualified immunity and public official immunity are implicated by the Plaintiffs claims brought under Section 1983 and the North Carolina Constitution, respectively. Under the qualified immunity test discussed above, “[t]he law is clearly established if the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” West v. Murphy, 771 F.3d 209, 213 (4th Cir. 2014) (internal quotations omitted). This means that “existing precedent must have placed the statutory or constitutional question beyond debate.” Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011).

Here, there are certain bright-line rules regarding the seizing of phones and the obtaining of search warrants, as set forth in Murphy, Riley, and Miller supra. What there is not is existing precedent that renders it “beyond debate” that a twenty-five day delay in obtaining a warrant violates someone's Fourth Amendment rights. See Pratt, 915 F.3d at 272. The Fourth Circuit in Pratt, perhaps deliberately, selected cases on justified versus unjustified delays in obtaining warrants where delays of 25 and 45 days were found to be reasonable (Id. at 272, citing Laist and Vallimont), and one where a 21 day delay was found to be unreasonable. Id. (citing Mitchell, 565

F.3d 1347). Plaintiff Bliss does not allege the Defendants violated any of the clearly established rules from Murphy, Riley, or Miller; she solely contends that the twenty-five day delay was unjustified. While the Defendants believe the explanations for the delay noted above render it inherently reasonable, at a minimum the claims against Defendants in their individual capacities must be dismissed under the doctrine of qualified immunity given the stark degree of ambiguity in the case law governing warrant delays.

Finally, the Amended Complaint again stops short of even claiming that the delay in obtaining a search warrant was motivated by malice or corruption, much less alleging facts that would support such an assertion. Under the public official immunity doctrine set forth in Leete and Campbell, and discussed above, Plaintiff Bliss' claim pursuant to Article I, Section 20 of the North Carolina Constitution must be dismissed.

III. Plaintiffs Fail to State a Claim Pursuant 42 U.S.C. § 2000aa.

In their fifth and sixth claims, Plaintiffs Bliss and the Asheville Blade, LLC, assert that the seizure of the cell phone, discussed above, violates the Privacy Protection Act of 1980, 42 USC § 2000aa *et seq.* (the "PPA"). This claim must fail generally insofar as it is barred by the "suspect exception" to the PPA. 42 U.S.C. § 2000aa(a)(1).

While the PPA has been discussed relatively infrequently during its 45 years of existence, the Fourth Circuit has been remarkably clear in explaining why such a claim must fail in the instant case. See Sennett v. United States, 667 F.3d 531, 535-36 (4th Cir. 2012). In Sennett, the Fourth Circuit explained that the PPA "carves out various exceptions to the prohibition against searches and seizures of materials intended for public dissemination" including "the so-called 'suspect exception,' under which the police can avoid the constraints of the [PPA] when the person possessing the materials is a criminal suspect, rather than an innocent third party."

Sennett, 667 F.3d at 535 (internal quotations omitted). Indeed, the PPA itself is unambiguous on this point, providing that “this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” 42 U.S.C. § 2000aa(a)(1). What is more, at least one federal circuit court has held that materials “relate” to the crime of trespassing, when they depict evidence of said trespassing. S.H.A.R.K. v. Metro Parks Serving Summit Cty., 499 F.3d 553, 566-67 (6th Cir. 2007).

Notwithstanding the self-evident application of the suspect exception to the present case, Plaintiffs appear to believe that the Defendants were obliged to notify them of their intent to seek a warrant for the subject cell phone. Likely because that interpretation is directly contradicted by the plain language of 42 U.S.C. § 2000aa(a)(1), this interpretation of the PPA has not been explored at any significant length by federal courts. The Western District of Missouri appears to be one of the few, if not the only court, that has had occasion to reject this interpretation. See DePugh v. Sutton, 917 F. Supp. 690 (W.D. Mo. 1996). In DePugh, the District Court for the Western District of Missouri rejected the self-same argument advanced by the Plaintiffs here, explaining:

“the plain language of the statute defies plaintiff’s argument. The P.P.A. clearly allows the government to depart from the requirements of the Act in those instances in which the person suspected of a crime is in possession of documents related to the crime. This interpretation is also in keeping with the purpose of the P.P.A. as enunciated in its legislative history.”

DePugh, 917 F. Supp. at 696. For that reason, the DePugh court concluded that “under the suspect exception, defendants were clearly within the confines of the law to seek and obtain a search warrant rather than complying with the rigors of the P.P.A.” DePugh, 917 F. Supp. at 697.

Applied here, where the images and/or videos contained on the cell phone at issue depicted Plaintiff Bliss' trespassing, the PPA has no application given the suspect exception. As such, these claims should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

IV. Plaintiffs Have Not Stated Claims Pursuant to *Monell v. Department of Social Services*.

While the Supreme Court made clear that “[f]or purposes of Section 1983, a municipality is considered a ‘person’ and thus is subject to suit... a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.” Hunter v. Town of Mocksville, 897 F.3d 538, 553-54 (4th Cir. 2018) (internal quotations and citations omitted). The Fourth Circuit has explained that these type of “Monell” claims may “arise in four ways: (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that manifests deliberate indifference to the rights of citizens; or (4) through a practice that is so persistent and widespread as to constitute a custom or usage with the force of law.” Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003). Here, it is clear that the Plaintiffs seek to assert their retaliatory arrest claim against the City of Asheville via a Monell claim [Doc. 14, ¶¶ 163-164], but it also seems as though they wish to assert such a claim in conjunction with their PPA claim. [Doc. 14 ¶¶ 208-215]. No such Monell claims are viable against the City, under the facts pled in the Amended Complaint.

a. Plaintiffs' Monell Claims Fail for Want of a Predicate Constitutional Violation.

Both the Supreme Court and the Fourth Circuit have clearly explained that, in the absence of a viable claim against law enforcement officers for the abridgment of a constitutional right, a plaintiff necessarily also lacks a claim against their employer. See e.g. Wilson v. Flynn,

429 F.3d 465, 469 n.* (4th Cir. 2005) (“The lack of a constitutional violation also disposes of Wilson’s claim against the Town of Ayden.”) (Citing Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986)). As set forth above, the Plaintiffs’ retaliatory arrest claims are barred by the doctrine of collateral estoppel, the rule stated in Heck v. Humphrey, and the simple fact that journalists are not permitted to simply ignore generally applicable trespassing laws at will. See Cohen, 501 U.S. at 669, 111 S. Ct. at 2518; Food Lion, Inc., 194 F.3d at 522. Accordingly, their Monell claims against the City of Asheville must necessarily fail under Wilson and Heller.

b. Plaintiffs’ Have Failed to Allege Sufficient Facts in Support of Their Monell Claim for Retaliatory Arrest.

Of the four types of Monell claims discussed in Lytle, *supra*, it appears the Plaintiffs hope to fit within the “failure to train” category. [Doc. 14, ¶¶ 163-164]. Such claims are, in the words of the Supreme Court, the “most tenuous” of all the Monell categories. Connick v. Thompson, 563 U.S. 51, 61, 131 S. Ct. 1350, 1359 (2011). This is so because, were courts to simply assume any wrongful act by law enforcement is attributable to a lack of training, they would effectively nullify the general rule that Section 1983 claims may not be brought against municipalities under a theory of *respondeat superior*. See S.Y. v. Sampson Cty. Bd. of Educ., 755 F. Supp. 3d 930, 948 (E.D.N.C. 2024) (“in order to avoid imposing respondeat superior liability on municipalities, a section 1983 plaintiff must plausibly allege that ‘a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.’”) (Quoting Bd. of the Cty. Comm’rs v. Brown, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392 (1997)). This stringent standard is why “[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference.” Connick, 563 U.S. at 62, 131 S. Ct. at 1360 (2011) (internal quotation

omitted). Absent such a pattern, a plaintiff must be able to demonstrate “singular deprivations of more obvious rights.” Brown v. Mitchell, 308 F. Supp. 2d 682, 706 (E.D. Va. 2004).

Here, there is no pattern of constitutional violations alleged. Plaintiffs do allege that other reporters have been arrested within the City of Asheville in the past, noting an instance in 2016 where a reporter was arrested for blocking the entrance to a police station [Doc. 14, ¶33], and that Plaintiff Coit was arrested for obstructing traffic in 2020. [Doc. 14, ¶35]. However the only way this amounts to a pattern of *constitutional violations* is if one assumes that members of the press are immune from arrest when they violate generally applicable criminal laws. Because, as discussed in Cohen and Food Lion, that is an incorrect premise, no pattern of constitutional violations is present, and the Plaintiffs’ Monell claim must fail.

Likewise, there can be no singular deprivation of an obvious right sufficient to justify a failure-to-train claim without a pattern of constitutional violations where, as here, the Defendant officers acted well within the bounds of applicable law. The Fourth Circuit has expressly held that journalists may be arrested for trespassing without impinging upon their First Amendment rights. Food Lion, Inc., 194 F.3d at 522. While the Plaintiffs may hope to challenge that principle, they cannot assert that the Defendants, in enforcing a generally applicable trespassing law, so singularly transgressed upon the Plaintiffs rights that a Monell claim may be maintained.

c. Plaintiffs’ Putative Monell Claim Under the PPA is Inconsistent with the Act’s Plain Language.

Plaintiffs Bliss and the Asheville Blade have, in their Sixth Claim, asserted what they label a claim for “Failure to Train Leading to Violations of the Privacy Protection Act.” [Doc. 14 ¶¶ 208-215]. While the language of “failure to train” seems to suggest this is intended to operate as a Monell claim, such a claim is entirely inconsistent with the plain language of the PPA. First, the PPA *only* allows for claims to be asserted against municipalities. 42 U.S.C. § 2000aa-6(a)(1).

In this way, there is no need to plead a “failure to train,” as the prohibition on *respondeat superior* claims under Section 1983 does not apply to the PPA. What is more, the Act itself is phrased nearly in terms of strict liability, providing simply that “it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.” 42 U.S.C.S. § 2000aa. Accordingly, deficient training would have no relevance to Plaintiffs’ PPA claim, much less give rise to a distinct claim under that Act. For those reasons, in addition to the applicability of the suspect exception, Plaintiffs’ claims regarding alleged failure to train under the PPA should be dismissed.

CONCLUSION

Based upon the foregoing, the Defendants respectfully request that the Court dismiss the Plaintiffs’ Amended Complaint in its entirety.

Respectfully submitted this the 17th day of October, 2025.

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CERTIFICATION RE: ARTIFICIAL INTELLIGENCE

No artificial intelligence was employed in doing the research for the preparation of this document, with the exception of such artificial intelligence embedded in the standard on-line legal research sources Westlaw and Lexis. Every statement and every citation to an authority contained in this document has been checked by an attorney in this case as to the accuracy of the proposition for which it is offered, and the citation to authority provided.

This the 17th day of October, 2025,

s/ Eric P. Edgerton
Eric P. Edgerton

CERTIFICATE OF SERVICE

This is to certify that the foregoing Memorandum of Law has been duly served by electronic filing via the Electronic Filing System to all counsel of record.

This the 17th day of October, 2025,

s/ Eric P. Edgerton
Eric P. Edgerton