IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE BLADE, LLC, ET AL.,
Plaintiffs,

v.

CITY OF ASHEVILLE, ET AL.,
Defendants.

Case No. 1:24-cv-00307
MR-WCM

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

INTRODUCTION AND BACKGROUND

On Christmas night 2021, *Asheville Blade* ("*The Blade*") journalists Matilda Bliss and Veronica Coit were reporting on the clearing of an encampment of homeless people and protestors from Aston Park when Asheville Police Department (APD) officers arrested them for trespassing. Am. Compl., Doc. 14 ¶ 2-4. Bliss and Coit had a history of reporting on and criticizing APD in *The Blade*, a local publication known for its sharp criticism of city officials. *Id.* ¶¶ 1, 12, 121, 149. The APD officers knew that Bliss and Coit were reporters; Bliss wore a prominent *Blade*-issued press badge; and both Bliss and Coit informed APD officers that they were working journalists. *Id.* ¶¶ 58-61, 65, 71-75, 78. APD officers also discussed the fact that Bliss and Coit were recording police activities and chose to arrest Bliss and Coit first "since they're videotaping." *Id.* ¶¶ 67-69.

Bliss's and Coit's arrests were a rare departure from the APD's usually hands-off approach to people who remained in city parks after evening curfew. *Id.* ¶¶ 109-114. Notably, APD declined to arrest or even threaten to arrest at least one trespasser who was also present in the park that evening past curfew, but who was not engaged in reporting, recording, or protesting. *Id.* ¶ 110. Plaintiffs Bliss's and Coit's arrests punished them and their employer, Plaintiff *Asheville Blade*, for their recording and reporting on police

activities. *Id.* ¶ 155. APD officer comments on the scene demonstrate Defendants' awareness that Plaintiffs were engaged in First Amendment-protected activity and evince Defendants' motivation to arrest Bliss and Coit *because* they were recording and reporting on police activities. *Id.* ¶¶ 67-69.

After Bliss was released on December 26, 2021, APD kept her phone—which contained journalistic work product and recordings intended for use by *The Blade*—without a warrant and without any meaningful explanation. *Id.* ¶¶ 85-90. On January 19, 2022, after repeated attempts by Bliss and her counsel to recover the phone, the APD finally applied for a search warrant. *Id.* ¶¶ 88-93. In the warrant application, APD claimed they sought Bliss's phone because APD had "uncovered" a conspiracy of people who had "communicated extensively," planning an "art party" that would create negative "optics of evicting camps around Christmas … " *Id.* ¶ 93. The application asserted that Bliss's social media indicated "extensive links to anarchist extremist groups," and had referenced a "community art build" to take place on December 21. *Id.* ¶ 94. Notably, the warrant application did not allege that Bliss herself engaged in any criminal activity and entirely omitted the fact that Bliss was a journalist reporting on the protest when she was arrested. *Id.* ¶ 97.

All three Plaintiffs suffered injury because of APD's actions. *Id.* ¶¶ 108, 123-24, 131, 133-44, 157.

These and other facts alleged in Plaintiffs' First Amended Complaint support claims for violations of the First and Fourth Amendments, Article I, Sections 14 and 20 of the North Carolina constitution, and the Privacy Protection Act of 1980 (42 U.S.C. §§ 2000aa-1—2000aa-7). Defendants' motion to dismiss should be denied in full.

STANDARDS OF REVIEW

In reviewing a motion to dismiss, the court accepts the plaintiff's factual allegations as true and draws all reasonable inferences in the plaintiff's favor. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (cleaned up). A motion under Rule 12(b)(6) tests the sufficiency of a complaint but will not "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses;" these are left to the discovery process. *Id.* Under Rule 12(b)(1), a party may assert that a court lacks subject matter jurisdiction over a plaintiff's complaint by challenging the plaintiff's standing. *See, e.g.*, *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005). When a defendant facially challenges standing, the plaintiff "is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration," meaning a court must accept all factual allegations in the complaint as true. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009).

Defendants contend that Plaintiffs' claims against individual officers asserted in Claims One and Two are barred by qualified immunity. Qualified immunity shields officials from liability when they make "a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). To overcome qualified immunity at the motion to dismiss stage, a plaintiff must allege: (1) facts indicating a violation of a constitutional right and (2) that the right was clearly established such that a reasonable official would have known they were violating that right. *Smith v. Gilchrist*, 749 F.3d 302, 308 (4th Cir. 2014). Qualified immunity is a fact-specific inquiry and is rarely suitable for resolution on a motion to dismiss. *Tobey v. Jones*, 706 F.3d 379, 389 (4th Cir. 2013).

ARGUMENT

I. Plaintiffs plausibly allege that APD did not arrest similarly situated individuals, thereby stating claims for retaliatory arrest in Claims One and Three.

Plaintiffs' claims for retaliatory arrest under the First Amendment and Article I, Section 14 of the state constitution (Claims One and Three, respectively) are not precluded by their criminal convictions, because Plaintiffs have pleaded objective evidence that they were treated differently from similarly situated individuals not engaged in the same expressive activity. *Gonzalez v. Trevino*, 602 U.S. 653, 655 (2024); *see also Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 428-29, 904 S.E.2d 720, 729 (2024) (plaintiff sufficiently pleaded a retaliatory enforcement claim where he alleged that the state targeted his business because he criticized state officials, while "similarly situated businesses faced no consequences for the same violations").

A. Plaintiffs plausibly allege all elements of a retaliatory arrest claim.

The First Amendment protects "not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). To state a First Amendment or Section 14 retaliation claim,[1] plaintiffs must allege that (1) they engaged in protected activity, (2) the defendant took some action that adversely affected the plaintiffs' First Amendment (or Section 14) rights, and (3) there was a causal relationship between

[1] North Carolina courts interpreting Section 14 are not bound by First Amendment precedent. *Norris v. City of Asheville*, 721 F. Supp. 3d 404, 418 (W.D.N.C. 2024). However, North Carolina courts have generally applied rubrics used by the Supreme Court and Fourth Circuit in First Amendment cases to analyze Section 14 retaliation claims. *See, e.g.*, *Warren v. New Hanover Cnty. Bd. of Educ.*, 104 N.C. App. 522, 525-27, 410 S.E.2d 232, 234-35 (1991).

plaintiffs' protected activity and defendant's conduct. *Bhattacharya v. Murray*, 93 F.4th 675, 687-88 (4th Cir. 2024). Plaintiffs have alleged all required elements.

First, Plaintiffs allege they were recording and reporting on police action in a public park. Doc. 14 ¶¶ 2, 25. This is indisputably protected activity. *See Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 681 (4th Cir. 2023) (First Amendment protects public filming "particularly when the information involves matters of public interest like police encounters."); *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated").

Second, the "threat of an arrest is likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights." *Nazario v. Gutierrez*, 103 F.4th 213, 237 (4th Cir. 2024) (cleaned up). Defendants' arrests of Bliss and Coit were plainly adverse and likely to deter a person of ordinary firmness from recording and criticizing the police.

Third, Plaintiffs sufficiently allege a causal link between Plaintiffs' reporting on police activity and their subsequent arrests. Ordinarily, a plaintiff bringing a retaliatory arrest claim under the First Amendment must allege lack of probable cause for their arrest, except in circumstances when "officers have probable cause to make arrests, but typically exercise their discretion not to do so." *See Nieves v. Bartlett*, 587 U.S. 391, 406 (2019).[2] Therefore, probable cause does not bar Plaintiffs' claim if they allege "objective evidence" that Bliss and Coit were arrested when "similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* at 407.

[2] Counsel found no North Carolina state cases holding that Section 14 retaliatory arrest claims must assert lack of probable cause for the arrest. State constitutional claims for retaliatory arrest were asserted in a pre-*Nieves* case cited by Defendants, but the court in that case only reviewed the plaintiff's First Amendment claim. The state constitutional claims were "abandoned" on appeal. *See Burton v. City of Durham*, 118 N.C. App. 676, 680-82, 685, 457 S.E.2d 329, 331-33, 335 (1995).

Recently, the Supreme Court clarified that the burden for pleading the "objective evidence" described in *Nieves* should not be rigidly construed. In *Gonzalez*, the Court vacated the Fifth Circuit's dismissal of the plaintiff's retaliatory arrest claim, because "the demand for virtually identical and identifiable comparators goes too far . . . The only express limit we placed on the sort of evidence a plaintiff may present for [the *Nieves* exception] is that it must be objective[.]" 602 U.S. at 658.

Plaintiffs sufficiently allege objective evidence that, by arresting them for misdemeanor trespassing when they stayed in Aston Park 30 minutes after the start of evening curfew, *see* Doc. 14 ¶¶ 55, 76, APD treated them differently from "similarly situated individuals not engaged in the same sort of protected speech[.]" *Nieves*, 587 U.S. at 407. In the decade preceding December 25, 2021, only seven individuals were charged with trespassing for remaining in the park within an hour after the evening curfew. Doc. 14 ¶ 109. And APD routinely declines to enforce the curfew against individuals present in Aston Park in the early morning hours before the curfew ends. *Id.* ¶ 111.

Defendants erroneously contend that Plaintiffs "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." Mot. to Dismiss, Doc. 15-1 at 9. On the contrary: Plaintiffs allege that, on the same evening, APD officers stopped a man walking through the park. Doc. 14 ¶ 110. When APD told him the park was closed, he said he was going to buy beer. *Id.* APD allowed him to continue walking in the park and neither threatened nor charged him with trespass. *Id.*

Other allegations further support Plaintiffs' retaliatory arrest claims. Plaintiffs allege that City leadership and several officers present at Aston Park were acutely aware

of growing public outcry over the APD's conduct towards the homeless and protestors, and that Plaintiffs published similarly critical views. *Id.* ¶¶ 28-31, 43-48. Defendants' argument that Plaintiffs Bliss and Coit were treated like other similarly situated individuals is belied by APD officers' stated reason for arresting them first—"they're videotaping"—captured on bodycam footage. *Id.* ¶¶ 67-68. Plaintiffs also allege that arrests of journalists in North Carolina are very rare. Since 2017, only nine journalists have been arrested while on the job in North Carolina; two of these arrests were of Coit; and one was of Bliss. *Id.* ¶¶ 34, 112-13. Bliss and Coit's December 25 arrests represent the only occasions since 2017 when journalists have been arrested for trespassing in North Carolina. *Id.* ¶ 114.

Defendants argue that the curfew enforced against Plaintiffs is a generally applicable time, place, and manner restriction on park use, thus Plaintiffs have no retaliatory arrest claim. Doc. 15-1 at 12. This is incorrect. A content-neutral regulation that otherwise may be lawful is inconsistent with the First Amendment when, as in this case, it was selectively enforced to discriminate against and "suppress[] those [views] that are not favored." *United States v. Crowthers*, 456 F.2d 1074, 1078 (4th Cir. 1972). At the pleading stage, Plaintiffs have sufficiently alleged that the curfew ordinance was not applied in a content- and viewpoint-neutral fashion but instead used to punish Plaintiffs for recording and reporting on APD activities.

B. Collateral estoppel does not bar Plaintiffs' retaliatory arrest claims.

Defendants erroneously contend that the North Carolina Court of Appeals' unpublished decision in *State v. Bliss* collaterally estops Plaintiffs Bliss's and Coit's[3] First Amendment claims. Doc. 15-1 at 5. In *Bliss*, the court held that the park curfew ordinance is a neutral time, place, and manner restriction that "strictly regulates conduct, not speech," and therefore the First Amendment did not provide a defense to second-degree trespass charges. *State v. Bliss*, No. COA24-92, 915 S.E.2d 735, 2025 WL 1576187 at *7 (N.C. Ct. App. 2025) (unpublished table decision). This holding addresses a fundamentally different issue from the one presented here: whether the enforcement of the curfew against Plaintiffs was motivated by a desire to retaliate against them for recording and reporting on police activities.

Collateral estoppel requires the issue in question to be "identical to an issue actually litigated and necessary to the judgment" in the prior proceeding. *Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011); *see also Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006). The criminal proceeding against Bliss and Coit for second degree trespass did not, and could not have, "actually litigated" the separate question of retaliatory arrest. The jury was not required to determine whether Bliss's and Coit's arrests were retaliatory to find them guilty. *See* N.C. GEN. STAT. § 14-159.13 (elements of second-degree trespass). And Plaintiffs were explicitly denied the opportunity to press their First Amendment argument before the jury. *See Bliss*, 2025 WL

[3] Defendants appear to argue that all Plaintiffs' retaliatory arrest claims are estopped by Bliss's and Coit's convictions. But *The Blade* was never accused or convicted of any crime, and it was not, and could not, be a party in Bliss and Coit's state court criminal proceedings. Under these circumstances, it did not actually litigate or have any opportunity to litigate the issues underlying its First Amendment claims in state court. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006).

1576187, at *2. Accordingly, Bliss and Coit did not actually litigate their retaliation claims at their trespassing trial. As *Nieves* and *Gonzalez* make clear, the existence of probable cause for an arrest does not resolve the question of whether that arrest violated the First Amendment because it was retaliatory.

Defendants' reliance on a 30-year-old case, *Burton v. City of Durham*, 118 N.C. App. 676, 457 S.E.2d 329 (1995), is misplaced. *Burton*'s holding that probable cause is a bar to retaliatory arrest claims has been abrogated by *Nieves*. Because the question of retaliatory arrest was not actually litigated in Bliss's and Coit's state court proceedings, their retaliatory arrest claim is not estopped.

C. Plaintiffs' retaliatory arrest claims are not barred by qualified or public official immunity.

The individual Defendants' qualified immunity defense fails because Plaintiffs allege violations of two clearly established First Amendment rights: (1) the right of individuals to criticize public officials without being retaliated against by law enforcement; and (2) the right of bystanders to record police activity. Plaintiffs need not point to precedent involving highly similar facts to defeat qualified immunity. "[A] right may be clearly established if 'a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct in question.'" *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 543 (4th Cir. 2017) (cleaned up). A right may also be clearly established by a "consensus of persuasive authority from other jurisdictions." *Sharpe*, 59 F.4th at 683. Plaintiffs satisfy both of these standards.

First, the Supreme Court has long held that arresting an individual because of her speech violates the First Amendment. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006). The Fourth Circuit has also spoken clearly on this issue, denying qualified

immunity in 2001 to law enforcement officers who searched an individual's home because of his speech: "It is well established that a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right . . . This holds true even when the act of the public official, absent the retaliatory motive, would otherwise have been proper." *Trulock v. Freeh*, 275 F.3d 391, 405-06 (4th Cir. 2001) (cleaned up).

Second, the Fourth Circuit recently explained that while a car passenger's First Amendment right to livestream video of *his own* traffic stop was not clearly established at the time of his arrest, the right of bystanders to record police activity was. *Sharpe*, 59 F.4th at 683-84 (citing pre-2021 cases). All other circuits to consider the issue have held that bystanders have a right to record police activity. *See Chestnut v. Wallace*, 947 F.3d 1085, 1090-91 (8th Cir. 2020) (citing cases from the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits); *see also McBride v. Vill. of Michiana*, 100 F.3d 457, 460 (6th Cir. 1996) (denying qualified immunity to official who retaliated against a journalist: "Simply because no government official has heretofore deemed it acceptable to retaliate against and threaten a reporter for relating the activities of a local governmental body does not mean that the right of a member of the press to be free from such retaliation has not been 'clearly established.'") (abrogation on other grounds recognized by *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 724 n.3 (6th Cir. 2010)). Together, these cases comprise a "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999). A reasonable officer in December 2021 would have known that they could not target individuals for arrest because those individuals were critical of the police department or engaged in filming and reporting on police activity.

Finally, Defendants' arguments about individual public official immunity for state constitutional claims are irrelevant, because Plaintiffs' claims under the North Carolina Constitution are asserted only against the City. *See* Doc. 14 ¶¶ 173, 184.

D. *The Blade* has Article III Standing.

The Blade has organizational standing to bring claims One, Three, Five, and Six[4] based on its own injuries. *See People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, 843 F. App'x 493, 495 (4th Cir. 2021) (an organization can "assert standing in its own right to seek judicial relief for injury to itself") (citation omitted). To establish standing at this stage, *The Blade* need only plausibly allege "(1) injury in fact; (2) sufficient causal connection between the injury and the conduct complained of; and (3) likelihood the injury will be redressed by a favorable decision."[5] *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207 (4th Cir. 2017). An injury in fact is "an invasion of a legally protected interest that is concrete and particularized[,]" and "not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (cleaned up). In First Amendment cases, the injury in fact requirement is analyzed with "leniency." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013).

Here, *The Blade* sufficiently alleges an injury in fact based on its constitutional and statutory rights as a news organization to gather and disseminate news and to publish its viewpoints. The Fourth Circuit has recognized a "legally protected interest" in the "right to gather news, which derives from the First Amendment." *Overbey v. Mayor of Balt.*, 930 F.3d 215, 227 (4th Cir. 2019). Newsgathering rights are also protected by Article I,

[4] Defendants challenge only *The Blade's* standing to assert Claims One and Three. *See* Doc. 15-1 at 9, 12.

[5] Defendants do not dispute causation or redressability.

Section 14 of the North Carolina Constitution. *The Blade* had a concrete, cognizable interest in newsgathering that was injured when half of its reporting staff was retaliatorily arrested—especially given that these arrests occurred while Bliss and Coit were actively reporting for *The Blade*. Plaintiffs allege that the arrests were motivated by these reporting activities on behalf of *The Blade*, as well as *The Blade's* history of criticizing APD conduct. Doc. 14 ¶¶ 147, 149-51. The arrests of Bliss and Coit impaired *The Blade*'s core organizational interest in reporting on policing and other matters involving public officials. *Id.* ¶¶ 1, 12, 121, 124-131.

Further, the arrests of Bliss and Coit, seizure of their reporting equipment, and the City's failure to train APD officers on journalists' protections under the First Amendment and PPA injured *The Blade* by impairing its newsgathering efforts and causing economic loss. *The Blade* lost reporting opportunities because its reporters spent time defending themselves from retaliatory criminal charges rather than reporting the news. *Id.* ¶ 130. By arresting Bliss and Coit *first* on December 25, APD officers curtailed *The Blade's* ability to report on the very police activities that Bliss and Coit were trying to cover. *Id.* ¶ 124. *The Blade* suffered tangible economic harm resulting from Bliss's and Coit's retaliatory arrests, including reduced donations and subscription revenue because of its constrained ability to report on local news, and hazard pay to Bliss and Coit due to their arrests. *Id.* ¶¶ 131-32. "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017) (citation omitted).

Defendants' reliance on the Ninth Circuit's decision in *Navarro v. City of South Gate* is misplaced. Doc. 15-1 at 11-12. In *Navarro*, the plaintiff was "unable to demonstrate any hindrance to his employer's ability to vindicate his own rights." 81 F. App'x 192, 197 (9th Cir. 2003). Here, *The Blade* asserts standing based on its own injuries, not the

injuries of Bliss and Coit, and *Navarro*'s third-party standing analysis does not apply. *See Overbey*, 930 F.3d at 227 n.11 (finding "no merit in the City's argument that [a local news website] lacks prudential standing"). Defendants' reliance on out-of-circuit case law to argue that "the employer/employee relationship is not typically one that can give rise to third party standing" is similarly inapposite because *The Blade* asserts organizational standing, not third-party standing. Doc. 15-1 at 11.

The Blade's allegations that the Defendants' actions directly interfered with its First Amendment rights to gather and report news, resulting in economic harm, amply satisfy Article III's requirement of an injury in fact.[6]

II. Plaintiff Bliss sufficiently pleaded in Claims Two and Four that Defendants' prolonged warrantless seizure of her phone violated the Fourth Amendment and North Carolina Constitution.

A. Defendants violated the Fourth Amendment and North Carolina Constitution by holding Bliss's phone for 25 days without seeking a warrant.

Plaintiff Bliss plausibly asserts (in Claims Two and Four, respectively) that the warrantless 25-day seizure of Bliss's phone by Defendants M. Stapanowich, Cooper, Ziegler, and DeGrave violated the Fourth Amendment and Article I, Section 20 of the North Carolina constitution.

While police officers may search and seize physical property incident to arrest, the Fourth Amendment requires a warrant and probable cause to search a seized cell phone.[7] *Riley v. California*, 573 U.S. 373, 401 (2014). Officers must apply for a warrant to search

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[6] *The Blade* also plausibly alleges a reasonable likelihood of future injury, establishing standing for declaratory and injunctive relief. *See* Doc. 14 ¶¶ 30-36, 48, 121, 152.

[7] North Carolina courts follow the principles set forth in *Riley* when evaluating the search and seizure of a cell phone. *See, e.g.*, *State v. Duran-Rivas*, 294 N.C. App. 603, 611, 904 S.E.2d 171, 178 (2024). Plaintiffs agree with Defendants that the claims under Article I, Section 20 of the North Carolina Constitution are subject to the same standard under the Fourth Amendment. Doc. 15-1 at 16 n.4.

a cell phone within a reasonable time unless the government has a "persuasive justification for the delay." *United States v. Pratt*, 915 F.3d 266, 272 (4th Cir. 2019).

To determine if a warrantless seizure of a phone violated the Fourth Amendment, courts weigh the government's interest in the property against the individual's interest. *Id.* at 271. "[I]f the individual's interest outweighs the government's, an extended seizure may be unreasonable." *Id.* In *Pratt*, police officers unreasonably seized the defendant's cell phone for 31 days before applying for a warrant, and the only explanation for the delay was that the defendant committed crimes in two jurisdictions and "agents had to decide where to seek a warrant." *Id. at* 272. The Fourth Circuit rejected these reasons, finding the agents "failed to exercise diligence by spending a whole month debating where to get a warrant." *Id.*; *see also United States v. Smith*, 967 F.3d 198, 207 (2d Cir. 2020) ("[I]f the police have probable cause to seize an item in the first place, there is little reason to suppose why they cannot promptly articulate that probable cause in the form of an application to a judge for a search warrant.").

Here, balancing Bliss's interest against the government's shows that Defendants M. Stapanowich, Cooper, Ziegler, and DeGrave ("the Phone Defendants") violated the Fourth Amendment and Article I, Section 20. APD officials initially stated they would keep the phone "until the holidays passed." Doc. 14 ¶ 90. Bliss repeatedly asserted a possessory interest in her phone during the 25-day seizure, including after the holidays had long passed. *Id.* ¶ 88. On January 14, more than three weeks after her arrest and two weeks after the holidays ended, Bliss's attorney emailed the District Attorney, identified Bliss as a reporter, and requested that her property be returned. *Id.* ¶¶ 91-92. Five days later (still holding Bliss's phone), Defendant Cooper finally applied for a warrant. *Id.* ¶ 93.

Defendants assert the holidays rendered the delay "inherently reasonable." Doc. 15-1 at 19. This conclusory explanation is at odds with the fact-intensive inquiry required by *Pratt*. Even if a short delay due to holidays was reasonable, *United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998), cited by Defendants, does not stand for the blanket proposition that any delay in applying for a warrant can be justified by a vague reference to holidays. The *Martin* court found an 11-day delay reasonable, because that time included two weekends and the Christmas holiday. In this case, the holiday ended *18 days before* a warrant was sought.[8] Moreover, the vague invocation of the holidays as an excuse underscores that the police did not urgently need the information on Bliss's phone. Nor did the underlying investigation—focused on alleged littering by protestors in Aston Park—involve a threat to public safety or such gravity and complexity that it justified a prolonged warrantless seizure.[9] *See, e.g.*, *United States v. Mitchell*, 565 F.3d 1347, 1351 (11th Cir. 2009) (when an officer left town for training without seeking a warrant beforehand, a 21-day seizure of a computer— even in connection with a child pornography investigation— was unreasonable).

Defendants' holiday justification is both insufficient and at odds with the fact-intensive analysis required by the Fourth Amendment. Even Defendants acknowledge

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[8] Additionally, *Martin* did not rest solely on a holiday delay but on the defendant's diminished property interest in stolen airplane parts that he voluntarily sent through the mail. 157 F.3d at 54. Bliss did not voluntarily relinquish control over her phone, and it was kept twice as long as the property in *Martin*.

[9] Additionally, Defendant Cooper drafted and applied for the warrant on the same day APD obtained the search warrant. Doc. 14 ¶¶ 93, 99. There is no evidence of any drafts exchanged, rounds of edits made, or debate among officers about the need to search Bliss's phone. *Cf. United States v. Laist*, 702 F.3d 608, 617 (11th Cir. 2012) (in a "complex" child pornography investigation, officers were diligent where they created a warrant draft ten days after seizing the property and then exchanged subsequent drafts with a supervising officer over the next two weeks).

that "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." Doc. 15-1. at 17. Because Plaintiff Bliss plausibly alleges that the Phone Defendants violated the Fourth Amendment and state constitution by holding her cell phone for a prolonged and unreasonable period of time without applying for a warrant, Defendants' motion to dismiss must be denied.

B. Defendants are not entitled to qualified immunity on Claim Two.

The Phone Defendants posit that they are entitled to qualified immunity from Bliss's Fourth Amendment claim because "there is no[] [] existing precedent that renders it 'beyond debate' that a twenty-five day delay in obtaining a warrant violates someone's Fourth Amendment rights." Doc. 15-1 at 18. Plaintiff need not prove that the *exact* conduct has been held unlawful. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (test is whether "in the light of pre-existing law the unlawfulness [is] apparent," not whether "the very action in question has previously been held unlawful"); *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019) ("We should not assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense . . . government officials can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two.") (cleaned up).

Pratt, decided in 2019, put officers on notice that the prolonged retention of a cell phone without a reasonable basis for failing to seek a warrant violates the Fourth Amendment. *See* 915 F.3d at 272-73. Plaintiff Bliss plausibly alleges that, despite her repeated efforts to secure the return of her phone, officers held the phone for 25 days with no warrant and no explanation other than invoking the holidays. Doc. 14 ¶ 170. The facts

alleged further show that the Phone Defendants did not seek a warrant until Bliss's attorney elevated the issue to the District Attorney's office. *Id.* ¶¶ 91-92.

Defendants argue that they are entitled to qualified immunity due to the "stark degree of ambiguity in the case law governing warrant delays." Doc. 15-1 at 19. This interpretation of qualified immunity would preclude all warrant delay claims except when the *exact* time delay at issue had previously been held unlawful. The Fourth Circuit has rejected that approach. *See, e.g.*, *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018) ("Clearly established law encompasses not only specifically adjudicated rights, but also those [rights] manifestly included within more general applications of the core constitutional principles invoked.") (citations omitted); *Hunter v. Town of Mocksville*, 789 F.3d 389, 401 (4th Cir. 2015) ("[T]he nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity.") (citation omitted).

Pratt directs that courts must balance the interest of the phone's owner against the government's interest in investigating crime to determine whether a prolonged warrantless seizure is reasonable. Plaintiff pleaded facts showing that this analysis weighs in favor of Bliss's possessory interest and against Defendants' holiday excuse. Therefore, Plaintiff Bliss has adequately pleaded that the Phone Defendants violated Bliss's clearly established rights. At minimum, Bliss should be able to conduct discovery on the reasonableness of Defendants' reasons for retaining the phone.

III. Plaintiffs plausibly allege that Defendants violated the PPA.

Plaintiffs Bliss and *The Blade* plausibly allege in Claim Five that the City of Asheville ("the City"), through APD officers M. Stapanowich, Cooper, Ziegler, and DeGrave, unlawfully searched and seized Bliss's work product in direct violation of the PPA. Doc. 14 ¶¶ 109-206.

The PPA makes it unlawful for officers to search or seize "work product" or "documentary" materials possessed by someone reasonably believed to have a purpose to disseminate information to the public—*i.e.*, a journalist—except in narrow, enumerated circumstances. 42 U.S.C. § 2000aa(a)–(b). Under the PPA, a plaintiff may sue any governmental unit "for violations of this chapter by their officers [] while acting within the scope or under color of their office or employment." *Id.* § 2000aa-6(a)(1).

Congress enacted the PPA specifically to protect journalistic work product and documentary materials, in response to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). In *Zurcher*, no one associated with *The Daily* was suspected of any crime, but police obtained a warrant to search the newsroom for unpublished photos that could be used to identify and prosecute violent demonstrators who injured officers. *Id.* at 550-51. The Supreme Court held that neither the First nor Fourth Amendments prohibited this search of a third party's premises, even where the third party was a newspaper. *Id.* at 554. In response, Congress enacted the PPA to protect the reporting materials of third-party journalists, abrogating *Zurcher*. Elizabeth B. Uzelac, Note, *Reviving the Privacy Protection Act of 1980*, 107 Nw. U.L. Rev. 1437, 1443, 1450, 1459 (2015) (summarizing legislative history).

To state a claim under the PPA, plaintiffs must allege that a government officer or employee searched or seized the work product or documentary materials of a person

reasonably believed to have a purpose to disseminate that work product or material as news. 42 U.S.C. § 2000aa(a)–(b). Here, Plaintiffs allege that Bliss's phone contained her notes and recordings of APD's clearing of Aston Park, which she gathered in her capacity as a reporter for *The Blade,* for the purpose of publishing news about APD. Doc. 14 ¶¶ 52-61. These are "work product" and "documentary" materials protected by the PPA. 42 U.S.C. § 2000aa-7(a)–(b). Bliss's repeated statements to APD officers identifying herself as a working journalist, along with her large and visible press badge, Doc. 14 ¶¶ 58-61, 73, placed Defendants on notice that she possessed the notes, photos, and videos on her phone "for the purposes of communicating such materials to the public" through her subsequent reporting for *The Blade*. 42 U.S.C. § 2000aa-7(b). Plaintiffs also allege that APD officers seized and held the phone for 25 days without a warrant. Doc. 14 ¶¶ 87-90. Then, the APD sought a warrant to search the phone to investigate crimes committed by third parties. *Id.* at ¶¶ 93-101. Despite Bliss's repeated attempts to reclaim it, her phone was held for a total of 74 days. These allegations easily state a claim for unauthorized "search for or seizure of" protected work product and documentary materials under the PPA. 42 U.S.C. § 2000aa.

The City argues the "suspect exception" to the PPA permitted police to search for and seize materials protected by the PPA. But the suspect exception only applies when 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), (b)(1).

Here, Plaintiffs plausibly allege the materials on Bliss's phone were not "related" to Bliss's alleged commission of second-degree trespassing. Defendant Cooper's affidavit in support of the warrant application focused on a purported conspiracy to *protest and*

litter, not Bliss's trespass. *See* Doc. 14 ¶¶ 93-94. Nothing in the search warrant indicated that Bliss participated in littering, nor that she had done anything related to the Aston Park protest other than post about it on social media. *Id.* ¶ 96. Critically, the warrant application did not identify Bliss as a journalist or indicate the PPA was implicated by the seizure of Bliss's phone. *Id.* ¶ 97.

Bliss's phone contained videos, photos, and notes on the protest, which the APD wanted to search to investigate third parties for felony littering. *Id* ¶¶ 93-97. The PPA was enacted specifically to prevent the police from using journalistic work product and documentary materials to investigate the crimes of others. In *Garcia v. Montgomery County*, the court denied a motion to dismiss a plaintiff's PPA claim where the plaintiff-journalist—who was charged with disorderly conduct while he was recording the arrests of individuals charged with alcohol offenses — was not participating in alleged crimes of the arrestees. Civ. No. JFM-12-3592, 2013 WL 4539394, at *7 (D. Md. Aug. 23, 2013). Similarly, Bliss was on the scene observing and recording police interactions with protestors; she was not participating in the protest. Doc. 14 ¶¶ 16-81, 58-61. Thus, Plaintiffs have plausibly alleged that Bliss was not "committing the criminal offense to which the materials relate." 42 U.S.C. §§ 2000aa(a)(1), (b)(1). APD's commandeering of Bliss's phone violated the PPA, which protects Bliss's work product and documentary materials—even if her phone might provide evidence of other people breaking the law.

Defendants' invocation of *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 567 (6th Cir. 2007), and *Sennett v. United States*, 667 F.3d 531, 536-37 (4th Cir. 2012), does not change the analysis. In both of those cases, police searched journalists' cameras to find evidence that the journalists themselves committed suspected crimes. Here, APD sought the materials on Bliss's phone to assist in investigating *the crimes of*

third parties. Defendants now say Bliss's phone contained evidence of her trespass. But the allegations in the warrant application focus exclusively on the third-party protestors' actions, not Bliss's trespass.[10] Doc. 14 ¶¶ 93–97, 99. And Defendants' newly minted argument that the phone was essential evidence of Bliss's trespass is pretextual at best. APD already had evidence of Bliss's trespass *through their own body camera footage and eyewitness officer testimony*. *Id.* ¶¶ 59, 66-67, 82, 115–16.

Bliss's phone contained protected work product and documentary materials. Its warrantless seizure, prolonged retention, and search strike at the core of what the PPA is meant to protect. Because the suspect exception does not apply, Defendants' motion to dismiss must be denied.[11]

IV. Plaintiffs plausibly allege that the City is liable for failure to train officers on First Amendment rights and the Privacy Protection Act.

As asserted in Claim One, the City of Asheville is liable under § 1983 for violating Plaintiffs' rights to be free from retaliatory arrest based on their speech and newsgathering activity. The City's liability arises from its failure to train the APD on the rights of the press and other bystanders recording police activity, and specifically, the obligation of APD officers not to exercise their arrest power in a retaliatory manner. For

[10] To the extent Bliss was specifically mentioned in the warrant, it was based on her purported association with "anarchist extremist groups," as revealed by "a review of Bliss's social media." Doc. 14 ¶ 94. Posting on social media and associating with political groups are protected under the First Amendment. *See Packingham v. North Carolina,* 582 U.S. 98, 104-05 (2017) (use of social media entitled to First Amendment protection)*; NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) (freedom of association is a fundamental right protected by the First Amendment).

[11] Plaintiffs agree with Defendants that, in these circumstances, the PPA did not require that Bliss be given an opportunity to contest the warrant. *See* 42 U.S.C. § 2000aa(c) (addressing notice requirement for a warrant in the context of non-compliance with a subpoena).

the same reasons, the City also is liable for its failure to train the APD on the rights of the press guaranteed by the PPA, as stated in Claim Six.

To state a claim against a municipality under § 1983, a plaintiff must establish that the constitutional violations were caused by the municipality's policies or customs. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). A plaintiff can establish the requisite "policy" for *Monell* liability through a failure to train if it "reflects a 'deliberate' or 'conscious' choice" to not train. *City of Canton v. Harris*, 489 U.S. 378, 389-90 (1989) (deliberate indifference is shown if "the need for more or different training is so obvious, and the inadequacy [in training is] so likely to result in the violation of constitutional rights"). Training policy deficiencies can include (1) "express authorizations of specific unconstitutional conduct," (2) "tacit authorizations" of such unconstitutional conduct, and (3) failures to adequately "prohibit or discourage readily foreseeable conduct in light of known exigencies of police duty." *Spell v. McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987). Plaintiffs also must allege a causal link between the lack of training and the constitutional violations. *Id.* at 1388.

Here, Plaintiffs specifically allege that "retaliatory enforcement was a predictable result of the City of Asheville's failure to train APD officers on the appropriate treatment of journalists engaged in newsgathering." Doc. 14 ¶ 147. The City is responsible for creating and implementing APD policies and training APD personnel. *Id.* ¶¶ 15, 103-04. In recent years, the City and APD have come under "increased media scrutiny" for APD's treatment of protesters and the homeless population. *Id.* ¶ 28. As a result, APD's treatment of reporters has worsened, and interactions between APD and the press have escalated. *Id.* ¶¶ 32-40. Arrests of journalists are exceedingly rare, yet APD has arrested reporters at least four times since 2016, and three of those arrests involved reporters for

The Blade, a publication well-known for its criticism of APD. *Id.* ¶¶ 15, 32, 43, 113. The City knew the situation called for training to avoid foreseeable constitutional violations by APD officers against reporters but failed to implement training. *Id.* ¶¶ 28-46, 104. And the City lacks a policy addressing the rights of journalists to gather news about police. *Id.* ¶ 162. These allegations show that the violation of Plaintiffs' rights was a "highly predictable" or "patently obvious" consequence of the municipality's failure to train APD officers on the rights of journalists. *Connick v. Thompson*, 563 U.S. 51, 64 (2011).

These problems were compounded by City officials' tacit approval of police retaliation against reporters. Both City Manager Debra Campbell and then-APD Chief David Zack "expressed their approval of the APD's arrests of Bliss and Coit" after the fact.[12] Doc. 14 ¶¶ 104-06. Zack stated, "Maybe, it was the journalists who were the problem," *id.* ¶ 105, and Campbell "spoke in support of [the] arrests and claimed that police have discretion to decide who is a journalist and who is not," *id.* ¶ 106. Where "authorized policymakers approve a subordinate's decision and the basis for it," their "ratification [is] chargeable to the municipality because their decision is final." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *see also Love–Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004) (official must have been "aware of the constitutional violation and either participated in, or otherwise condoned, it"). This approval of unconstitutional conduct heightens the risk of future violations if appropriate training is not implemented.

Additionally, Defendants likely possess evidence that shows the arrests were a predictable consequence of the lack of training. Plaintiffs are entitled to discovery on this

[12] At all relevant times, Campbell and Zack were the policymakers for the City on matters related to policing. Doc. 14 ¶ 15; N.C. GEN. STAT. § 160A-285; Asheville, North Carolina, Code of Ordinances, pt. I, subpt. A, art. III, § 24; pt. II, art. I, ch. 13, § 13-1.

issue. *See Washington v. Baltimore Police Dep't*, 457 F. Supp. 3d 520, 533 (D. Md. 2020) ("oftentimes a plaintiff lacks specific details regarding the municipal actor's internal policies and training procedures before discovery") (cleaned up). Because Plaintiffs have alleged that the violation of Plaintiffs' rights was a likely result of the City's failure to train and that City policymakers have openly approved of police targeting journalists for arrest, Defendants' motion to dismiss the *Monell* failure-to-train claims should be denied.

The City is also liable under the PPA for its failure to train officers on the statutory rights of journalists. Under the PPA, municipalities are liable for the conduct of their employees. *See Garcia*, 2013 WL 4539394, at *7 (the PPA "plainly holds governmental entities liable for acts of their officers and employees under color of office"). Plaintiffs seek relief on that basis in Claim Five of the Amended Complaint. Claim Six pleads a separate violation by the City, which hinges not on employee conduct but on the City's failure to train its employees on statutory protections for journalist work product.

To plausibly state a failure to train claim under the PPA, Plaintiffs must allege a causal connection between Defendants' conduct and the statutory violation. *Morse v. Regents of the Univ. of Cal.*, 821 F. Supp. 2d 1112, 1121 (N.D. Cal. 2011). In *Morse*, the district court held that the PPA "impose[s] liability in a manner that parallels Section 1983," and because the plaintiff plausibly alleged that the defendant's "failure to screen, train, and supervise relates specifically to the statutory provisions of the PPA," the court denied the motion to dismiss. *Id.*

This same analysis applies here. The City's deliberate indifference to training APD officers on journalists' rights creates municipal liability under the PPA, similar to a *Monell* claim under § 1983. Plaintiffs specifically allege that the City is "responsible for ensuring that city agencies comply with the law, including the PPA," and "[t]he City is ultimately

responsible for the operations, practices, and customs of APD." Doc. 14 ¶ 208. The APD "does not have a policy that defines journalist, member of the press or news media representative," and APD did not have "any policy training officers about the rights of reporters under the PPA." *Id.* ¶ 210. Thus, the City's failure to properly train APD officers with respect to the PPA's protections, which Plaintiffs allege caused the violation of Bliss's and *The Blade*'s rights under the PPA, *id.* ¶ 213, are a basis for liability under the PPA.

Importantly, *The Blade* had previously criticized APD's treatment of homeless residents and protesters, and the City knew or should have known that any clash between officers and *Blade* reporters risked PPA violations and unconstitutional retaliation. *Id.* ¶¶ 28-48. Yet, the City had no policy safeguarding journalists and no training on preventing the seizure of reporter's devices. *Id.* ¶¶ 206–07, 212–13. This is precisely the kind of "known or obvious risk" of statutory violations that gives rise to municipal liability. *See Connick*, 563 U.S. at 61 (municipal decision reflects deliberate indifference when policymakers disregard a known risk that a violation of a statutory or constitutional right will follow). APD officers' violation of Bliss's and *The Blade*'s rights under the PPA was the predictable outcome of the City's deliberate indifference to training APD officers on statutory protections for journalists. Doc. 14 ¶¶ 213-14. As a result, Bliss and *The Blade* experienced the precise harm the PPA is designed to prevent. *Id.* ¶¶ 124–132.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss in full.

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Respectfully submitted,

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AI CERTIFICATION

I hereby certify the following:

1. 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, Lexis, FastCase, and Bloomberg.

2. Every statement and every citation to an authority contained in this document has been checked by an attorney in this case and/or paralegal working at his/her discretion as to the accuracy of the proposition for which it is offered, and the citation to authority provided.

This the 10th day of November 2025

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 10, 2025, the foregoing Plaintiffs' Response to Defendants' Motion to Dismiss First Amended Complaint was filed electronically with the Clerk of the United States District Court for the Western District of North Carolina using the CM/ECF system which will send notification of this filing and an electronic copy of the same to all counsel of record registered with the CM/ECF system.

This is the 10th day of November 2025.

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