No. 280PA22 FIFTEEN-A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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KODY H. KINSLEY, in his official capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff-Appellant, v. ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC., 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER,	<u>From Alamance County</u>

Defendants-Appellees.

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BRIEF OF *AMICUS CURIAE* ACLU OF NORTH CAROLINA LEGAL FOUNDATION

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Plaintiff-Appellant,

v.

ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC., 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER,

Defendant-Appellees.

From Alamance County

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BRIEF OF *AMICUS CURIAE* ACLU OF NORTH CAROLINA LEGAL FOUNDATION[1]

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[1] No person or entity other than amicus curiae, their members, or counsel wrote this brief or contributed money for its preparation.

INTRODUCTION

The freedom to speak without risking retaliatory enforcement is "one of the principal characteristics by which we distinguish a free nation." *Houston v. Hill*, 482 U.S. 451, 463 (1987). "If the state could use [] laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).

This appeal calls on this Court to secure North Carolinians' rights to meaningfully criticize and demand accountability from their government. The question here is not whether the defendants-appellees (collectively, "Ace") will ultimately prevail on the merits of their selective enforcement counterclaims, but whether they have sufficiently pled allegations, in accordance with North Carolina's liberal notice pleading standard, to survive a motion to dismiss.

In answering this question, this Court should articulate a standard for selective enforcement claims under Article I, Sections 14 and 19 of our constitution that ensures meaningful accountability when state officials

abuse their power. Where a claimant has pled facts indicating that a state official's enforcement decision was substantially motivated by protected speech (or by other impermissible considerations like the claimant's faith or race), a selective enforcement claim should survive a motion to dismiss.

North Carolina courts already apply this "substantially motivated" standard in other factual contexts where individuals allege that a state official has retaliated against them based on protected speech. But current selective enforcement doctrine uniquely mandates that claimants show they were "singled out" for enforcement for "bad faith or invidious" reasons. There is no basis for treating selective enforcement claims differently than any other retaliation claims. The "singled out" standard imposes a standard that is more rigid than the federal First Amendment standard, undermines government accountability, and illogically forecloses consideration of other, highly relevant evidence of retaliatory intent.

Here, Ace has pled facts sufficient to meet the "substantially motivated" standard, and their selective enforcement claims should survive a motion to dismiss.

ARGUMENT

I. A selective enforcement claim should survive a motion to dismiss where the claimant alleges that the enforcement was substantially motivated by the claimant's protected speech or status.

This Court has long understood that "vindictiveness for the exercise of a constitutional right . . . penalizes the exercise of that right and 'may unconstitutionally deter a [person's] exercise of the right[.]'" *State v. Schalow*, 379 N.C. 639, 644, 866 S.E.2d 417, 420 (2021) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969)). Nonetheless, selective enforcement claims face burdensome standards of pleading and proof that too often allow government officials to retaliate against politically unpopular speakers with impunity.

To vigorously safeguard North Carolinians' constitutional rights, this Court should apply the standard for First Amendment retaliation claims established by Justice Rehnquist's opinion in *Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977) and adopted by North Carolina courts to assess state constitutional and statutory retaliation claims. *See, e.g., Newberne v. Department of Crime Control and Public Safety*, 359 N.C. 782, 618 S.E.2d 201 (2005); *Lenzer v. Flaherty*, 106 N.C. App. 496, 509, 418 S.E.2d 276, 284 (1992). Under this

standard, the court determines (1) whether an enforcement decision against the claimant was substantially motivated by the claimant's constitutionally protected speech, and (2) if so, whether the government would have made the same decision in the absence of the protected speech. *Newberne*, 359 N.C. at 791-92, 618 S.E.2d at 208.

A. The "singled out" standard conflicts with other precedent.

This Court's current standard for selective enforcement, applied by the Court of Appeals below, requires a plaintiff to prove that they were both "singled out" for enforcement and that the enforcing officer acted with "invidious [or] bad faith." *See Kinsley v. Ace Speedway Racing, Ltd.*, 284 N.C. App. 665, 677, 877 S.E.2d 64, 63 (2022) (citing *State v. Howard*, 78 N.C. App. 262, 266–67, 337 S.E.2d 598, 601–02 (1985)). With its emphasis on both "singling out" and "invidious or bad faith," the 1985 *Howard* standard relied on by the Court of Appeals is arguably less protective of constitutional rights than even the current, controversial federal standard for retaliatory arrest established in 2019.[2] This

[2] *See Nieves*, 139 S. Ct. at 1727 (probable cause for enforcement will generally defeat a First Amendment claim for retaliatory enforcement unless the plaintiff "presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same

disparity is impermissible under this Court's precedent, which requires that state constitutional provisions provide at least the same level of protection as federal counterparts. *See, e.g., State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103-04 (1998); *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988).

1. *The "singled out" standard illogically departs from standards applied in other retaliation precedents.*

The "singled out" standard for selective enforcement claims is illogical and inconsistent with other First Amendment and Section 14 jurisprudence. In no other context must a claimant show that a

sort of protected speech had not been."); *see also id.* at 1734-35, 1737 (concurring and dissenting opinions critiquing this standard). *Nieves* created a narrow exception to the probable cause requirement where officers "have probable cause to make arrests but typically exercise their discretion not to do so," typically for minor offenses like jaywalking. 139 S. Ct. at 1727. Here, the punishment for a violation of an executive order issued pursuant to N.C.G.S. §§ 166A-19.30-19.31, is a class 2 misdemeanor. N.C. G.S. § 14-288.20A. By issuing an abatement order, the DHHS Secretary arguably departed from an ordinary enforcement approach. The State may contend that an abatement order was the most effective means of enforcement and not aimed at retaliating against Ace's speech. But that is a question appropriately resolved on summary judgment or, depending on the evidence, before the ultimate factfinder. *See, e.g., Bandy v. A Perfect Fit for You, Inc.*, 379 N.C. 1, 11, 864 S.E.2d 221, 229-30 (2021).

government official retaliated against them because of their speech *and* that they were "singled out" among other comparably situated speakers.

In other contexts, retaliation claimants may demonstrate in various ways that the government took adverse action against them because of their protected speech. *See, e.g., Mt. Healthy*, 429 U.S. at 283 n. 1, 287 (teacher met initial "substantially motivated" burden by pointing to memo that cited the teacher's public discussion of school policy as a reason for denying him rehire); *Harper v. Hall*, 886 S.E.2d 393, 442 (N.C. 2023) (section 14 right to free speech is violated when "retaliation motivated by the contents of an individual's speech would deter a person of reasonable firmness from engaging in speech or association"); *Swain v. Efland*, 145 N.C. App. 383, 387, 550 S.E.2d 530, 534 (2001) (evidence in support of retaliatory discharge may be circumstantial); *see also Nieves*, 139 S. Ct. at 1733 (Gorsuch, J., concurring in part and dissenting in part) (observing that while comparator evidence may be helpful to show selective enforcement, other "equally clear evidence," such as officials' direct admissions of retaliatory purpose, may suffice); *id.* at 1739 (Sotomayor, J., dissenting) (collecting cases where the U.S. Supreme

Court deemed decisionmakers' statements of intent "highly relevant evidence" of unconstitutional motive).

Indeed, North Carolina courts have already applied *Mt. Healthy's* "substantially motivated" test to assess government retaliation against speakers in other contexts. *See Newberne*, 359 N.C. at 791, 618 S.E.2d at 208 (applying *Mt. Healthy* test to claim under Whistleblower Act); *Lenzer,* 106 N.C. App. at 509, 418 S.E.2d at 284 (speech-based retaliation claim by government employee under federal and state constitutions); *see also Swain*, 145 N.C. App. at 386-87, 550 S.E.2d at 533-34 (considering whether plaintiff had presented sufficient evidence to show his discharge was substantially motivated by protected statements to the press).

2. *The "singled out" standard undermines fundamental constitutional rights.*

The "singled out" approach insufficiently protects individual constitutional rights, putting claimants at an often-insurmountable disadvantage against the state. "The point of [a first amendment] claim . . . . is to guard against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*." *Nieves*, 139 S. Ct. at 1731 (Gorsuch, J., concurring in part, dissenting in part) (emphases in original).

As Justice Gorsuch observed, "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."[3] *Id.* at 1731. Yet the retaliatory enforcement claimant bears a "heavy burden" that is nearly impossible to satisfy in practice and allows government officials who willfully violate the constitution to evade accountability time and time again. *Howard*, 78 N.C. App. at 268, 337 S.E.2d at 602.[4] Because unconstitutional enforcement decisions are seldom subject to scrutiny, state officials have been accorded virtually unlimited discretion to arrest

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[3] This is especially apparent in the context of this case. Throughout the COVID-19 pandemic, Governor Cooper issued a series of executive orders prohibiting conduct that at any other time would have been legal. When the government broadly prohibits previously ordinary or benign conduct, making everyone a potential lawbreaker, the government has created a situation that is susceptible to selective enforcement. *See Nieves*, 139 S. Ct. 1730 (Gorsuch, J., concurring in part, dissenting in part).

[4] *See also* Cynthia Lee, *Probable Cause With Teeth,* 88 GEO. WASH. L. REV. 269, 280 (2020) (Supreme Court has ruled for the government on almost every retaliatory enforcement claim); David Owens, *Singled Out. A Problem in Enforcement?*, COATES' CANONS NC LOCAL GOVERNMENT LAW, UNC School of Government (April 13, 2010), (discussing how selective enforcement is only available in "extreme instances," leaving many targeted individuals without recourse); Karl S. Coplan, *Rethinking Selective Enforcement in the First Amendment Context*, 86 COLUM. L. REV. 144 (1984).

and prosecute their critics – or as alleged here, to shut down their critics' livelihoods.

3. *The State's prosecutorial discretion arguments are inapposite.*

The stated purpose of the "singled-out" test is to show "deference to the need for prosecutorial discretion." *State v. Rogers*, 68 N.C. App. 358, 368, 315 S.E.2d 492, 501 (1984). As the Court of Appeals recognized below, however, such deference must not shield unconstitutional decision-making from scrutiny. *See Kinsley*, 285 N.C. App. at 677, 877 S.E.2d at 63. Justifications for selective enforcement decisions, such as deterrence, likelihood of conviction, and cost-saving, are not constitutional loopholes. *See* Karl S. Coplan, *Rethinking Selective Enforcement in the First Amendment Context*, 86 COLUM. L. REV. 144, 173-74 (1984) (noting that there are more effective methods to deter lawbreaking than to punish individuals who vocally criticize the law).

Moreover, this case does not involve a claim against an independent prosecutor, but a counterclaim against an appointed executive department secretary who acts as the enforcement arm for the governor. *See* N.C.G.S. §§ 143B-4, 143B-9. In *Hartman v. Moore*, relied upon by the State (State Br. at 55-57), the plaintiff alleged that a prosecutor and

postal inspectors "had engineered his criminal prosecution in retaliation for criticism of the Postal Service, thus violating the First Amendment." 547 U.S. 250, 254 (2006). The U.S. Supreme Court held that a plaintiff must plead and prove an absence of probable cause to sustain a retaliatory prosecution claim. *Id.* at 263. Otherwise, the Court reasoned, a causal link between the actions of the inspectors in recommending an allegedly retaliatory prosecution and the independent decision-making of the prosecutor would be too uncertain. *Id.*

The Court made clear in *Hartman*, however, that such extra requirements do not extend to "ordinary retaliation claims, where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action." *Id.* at 259-60; *see also Nieves*, 139 S. Ct. at 1733 (Gorsuch, J., concurring in part and dissenting in part).

This distinction is pertinent here. Because then-DHHS Secretary Cohen could not disregard Governor Cooper's directives regarding enforcement of his order, this situation is more like a retaliatory arrest claim than a retaliatory prosecution claim, militating against prosecutorial deference. As alleged by Ace, Governor Cooper desired to punish Ace for publicly criticizing his executive order and for that reason

directed Secretary Cohen (who served at the governor's pleasure, *see* N.C.G.S. § 143B-9(a)) to seek an abatement order, eliminating the causation issue discussed in *Hartman*.

This Court's continued adherence to the "singled out" requirement in selective enforcement cases like Ace's would lead to an untenable result: Selective enforcement claimants in cases that do not involve prosecutorial discretion are afforded even less protection under the state constitution than the federal constitution. This disparity between the state and federal constitutions violates the bedrock principle that the guarantees set forth in our Declaration of Rights afford at least the same, if not greater, protections than its federal counterparts. *See Carter*, 322 N.C. at 713, 370 S.E.2d at 555 ("[W]e have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.").

The "singled out" requirement is inconsistent with other First Amendment and Section 14 precedent, undermines North Carolinians' constitutional rights, and is inapposite where, as here, the authority of

the government decision-maker and direct enforcer are merged. As such, there is "no legitimate basis for engrafting" it onto a selective enforcement claim under our state constitution. *Nieves*, 139 S. Ct. at 1732 (Gorsuch, J., concurring in part, dissenting in part).

B. This Court should instead consider whether the enforcement decision was substantially motivated by the claimant's constitutionally protected expression.

To ensure more vigorous protection of North Carolinians' constitutional rights, this Court should adopt the practical approach applied by Justice Rehnquist in his opinion in *Mt. Healthy* and discussed by concurring and dissenting Justices in in *Nieves*. [5] Rather than require a litigant prove they were "singled out," this Court should determine

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[5] For a number of years, federal courts were divided on whether to apply the *Mt. Healthy* or *Hartman* standard in retaliatory enforcement cases that did not involve the conduct of independent prosecutors. *See* John Koerner, Note, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 758 (2009) (noting "numerous circuit splits" on First Amendment retaliatory arrest claims). In *Nieves*, the U.S. Supreme Court largely—although not completely—adopted *Hartman*'s more rigid approach, thus giving a wider berth to government overreach. In interpreting Section 14, this Court can instead adopt the *Mt. Healthy* standard to more vigorously protect the fundamental Section 14 right to freedom of speech "which has been cherished in this State since long before the adoption of the Fourteenth Amendment to the Unites States Constitution." *State v. Wiggins*, 272 N.C. 147, 157, 158 S.E.2d 37, 45 (1967).

whether the claimant has shown the retaliation (or another impermissible factor, such the claimant's faith or race[6]) was a "'substantial' or, to put it into other words, that it was a 'motivating' factor in the [enforcement decision]." *Mt. Healthy*, 429 U.S. at 287. The government would then have an opportunity to justify its actions, including presenting evidence that, absent retaliatory motive, it would have taken the same action against the claimant.[7] *See id.* at 285-86; *Newberne*, 359 N.C. at 791, 6128 S.E.2d at 208 ("when the [state actor] claims to have had a good reason for taking the adverse action but the [plaintiff] has direct evidence of a retaliatory motive, a plaintiff may seek

[6] *See, e.g., Texas v. Lesage*, 528 U.S. 18, 20 (1999) (applying *Mt. Healthy* test to enforcement decision based on race).

[7] The State may present evidence, for example, that Ace's announced intent to violate the governor's order, coupled with actual violations of the order, was the but-for cause of Secretary Cohen's abatement efforts. If so, such grounds might be a legitimate motive for enforcement. *See Wayte v. United States,* 470 U.S. 598, 610 (1985) (men who vocally announced their intent not to register for the draft, did not register, and were later prosecuted "in effect selected themselves after being reported and warned by the Government"); *see also Reichle v. Howards*, 566 U.S. 658, 668 (2012); *State v. Davis*, 96 N.C. App. 545, 550, 386 S.E.2d 742, 745 (1989). However, if Ace has sufficiently plead facts indicating that the State's intent to suppress or punish criticism of Governor Cooper's executive order substantially motivated Secretary Cohen's abatement action, the trial court is not required to take the State's bare assertion of legitimate motive at face value.

to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken." (quotations omitted)).

By allowing a government official to defend against a retaliatory enforcement claim with a showing that they would have taken the same adverse action regardless of retaliatory motive, the *Mt. Healthy* standard is designed not to "place a [person] in a better position as a result of the exercise of constitutionally protected conduct." 429 U.S. at 285; *see also* *Wayte v. United States*, 470 U.S. 598, 614 (1985). This approach safeguards North Carolinians' fundamental rights while balancing the State's interest in legitimate enforcement activities. Our courts should be trusted to apply the "substantial motivation" standard "commonsensically and with sensitivity to the competing arguments[.]" *Nieves*, 139 S. Ct. at 1734 (Gorsuch, J., concurring in part, dissenting in part).

As the Court of Appeals correctly noted below, at issue is "the use of overwhelming power by the State against the individual liberties of its citizens and how that use of power may be challenged." *Kinsley*, 284 N.C. App. at 667, 877 S.E.2d at 57. A "substantially motivated" standard

recognizes that the State's interest in enforcing its laws does not grant it free rein to trample individuals' constitutional rights.

II. Whatever selective enforcement test this Court uses, North Carolina's liberal notice pleading standards apply.

Whichever standard this Court adopts for selective enforcement claims, any N.C. R. Civ. P. 12(b)(6) motion to dismiss must be evaluated against the liberal notice pleading standards set out in the Rules of Civil Procedure. As the Court of Appeals correctly observed below, our state rules of civil procedure require only notice pleading, not detailed, fact intensive narratives. *Kinsley*, 284 N.C. App. at 679-80, 877 S.E.2d at 64-65. Yet the State persists in insisting that Ace's claims not only meet the illogical and onerous "singled out" standard, but also provide a detailed narrative of how the "singling out" unfolded. State Br. 60-63.

This is not how notice pleading works. Pleading pursuant to N.C. R. Civ. P. 8 "was intended to liberalize pleading requirements by adopting the concept of 'notice pleading,' thereby abolishing the more strict requirements of 'fact pleading.'" *Smith v. N.C. Farm Mut. Ins. Co.*, 84 N.C. App. 120, 123, 351 S.E.2d 774, 776 (1987) (quoting *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)). "This notice pleading has replaced the use of 'magic' words and allows for a less exacting standard,

so long as the defendant is properly advised of the charge against him or her." *State v, Dale*, 245 N.C. App. 497, 504, 783 S.E.2d 222, 227 (2016).

"It is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.'" *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615, 821 S.E.2d 729, 736-37 (2018) (quotation omitted). "The complaint must be liberally construed, and [a] court should not dismiss the complaint unless it appears *beyond a doubt* that the plaintiff could not prove *any* set of facts to support his claim which would entitle him to relief." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 (2004) (emphasis added) (quotation omitted). And "[w]hen analyzing a 12(b)(6) motion, the court . . . is concerned with the law of the claim, not the accuracy of the facts that support [the] motion." *Acosta v. Byrum*, 180 N.C. App. 562, 567, 638 S.E.2d 246, 250 (2006).

This Court need not determine "the accuracy of the facts" at this stage of the proceedings. Rather, this Court must merely determine

whether Ace Speedway has sufficiently pled facts that would entitle them to relief under *some* theory of law. If a complaint has provided basic notice of the facts supporting a claim, the defendant is not entitled to immediate dismissal and must rely on other legal procedures, such as discovery, to prepare a defense. *Smith*, 84 N.C. App. at 123-24, 351 S.E.2d at 776.

A. Once a claimant has plead that the government's enforcement was substantially motivated by unlawful motive the selective enforcement claim should survive a motion to dismiss.

If a selective enforcement claimant has adequately plead facts indicating that the State's enforcement activities were substantially motivated by an unconstitutional motive, their claim should survive a motion to dismiss.

In subsequent discovery, summary judgment, or trial proceedings, the State will have ample opportunity to dispute retaliatory motive, present any legitimate reasons for its enforcement action, and explain why it would have taken the same enforcement action even absent retaliatory motive. *See, e.g.*, *Newberne*, 359 N.C. at 791-93, 618 S.E.2d at

208-09 (discussing evidentiary requirements for prima facie case and burden shifting analysis).[8]

Whatever standard is applied, the Court of Appeals below correctly observed that selective enforcement claims generally involve fact-bound issues that are not suitable for resolution at the pleading stage. *See Kinsley*, 284 N.C. App. at 679-80, 877 S.E.2d at 64-65. Prior to full discovery, litigants are rarely able to plead facts demonstrating they were "singled out" or treated differently than similarly situated individuals for enforcement purposes. *See Nieves*, 139. S. Ct. at 1733-34 (Gorsuch, J., concurring in part, dissenting in part) ("[C]omparative data about similarly situated individuals may be less readily available[.]"). Public records law shields "[r]ecords of criminal investigations conducted by

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[8] In the First Amendment context, the "causation question requires the resolution of facts more appropriately dealt with at the summary judgment stage or at trial." *Rudd v. City of Norton Shores, Michigan*, 977 F.3d 503, 517 (6th Cir. 2020) (quotation omitted). Free speech claims "require [courts] to examine the content, form, and context of that speech, as revealed by the whole record." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quotation omitted); *see also State v. Taylor*, 379 N.C. 589, 608, 866 S.E.2d 749, 755 (2021) ("In cases raising First Amendment issues[,] an appellate court has an obligation to make an independent examination of the *whole record* in order to make sure the judgment does not constitute a forbidden intrusion on the field of free expression." (emphasis added) (quotation omitted)).

public law enforcement agencies" from access, cutting off a potential pre-trial source for comparator data or information about officials' motives. N.C.G.S. § 132-1.4.

Similarly, because the *Howard* standard for retaliatory enforcement requires a showing of "bad faith" or "invidious intent" to suppress someone's speech, the claimant is generally required to plead a level of intent – far more heightened than "substantially motivated" – that is often difficult to assert at the initial pleading stage.

The practical barriers to successfully pleading, much less proving, a retaliatory enforcement claim under the current *Howard* standard subjects North Carolinians to the biases and political whims of state officials, and chills them from exercising their Section 14 rights to speak out against executive edicts that they believe to be unjust. But whatever standard is applied, a selective enforcement claim must be evaluated under Rule 8's liberal notice pleading standard and cannot be dismissed unless there is no scenario under which the claimant can prove facts supporting the claim.

B. Application of the "singled out" standard at the pleading stage is not necessary to protect government interests.

The free speech rights established by the First Amendment and Section 14 "serve[] as a bulwark against governmental action which threatens the robust exchange of ideas that is 'the indispensable condition of nearly every other form of freedom.'" *State v. Taylor*, 379 N.C. 589, 597, 866 S.E.2d 740, 748 (2021) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)). The State's insistence that the "singled out" standard be applied to Ace's claims at the pleading stage undermines this bulwark and weakens government transparency and accountability.

Contrary to the State's dire predictions of open floodgates,[9] (State Br. at 56-57), the *Mt. Healthy* standard protects the State against specious claims of retaliation by requiring litigants to plead facts showing the retaliation for protected speech was a *substantially* motivating factor in the enforcement action. 429 U.S. at 286. The framework of the test "is

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[9] The State's concerns also do not reflect the facts of this case. As discussed in Section I.A.3 *supra*, Ace's claims do not involve forging a speculative causal link between the animus of an investigating or arresting government official and the decisions made by an independent prosecutor. Where, as here, the official with the alleged animus controls the enforcement process, shielding the official's decision from scrutiny does not serve any legitimate interest in independent prosecutorial discretion.

one which [] protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Id.* at 287.

Merely invoking section 14 or 19 will not automatically entitle a litigant to discovery on their claims— a claimant will have to assert "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C. R. Civ. P. 8(a)(1).

The State complains of "considerable burdens" it might face should more selective enforcement claims proceed to discovery. *See* State Br. at 56-57. But, trial judges have ample means to direct litigation and limit discovery to avoid excessive interference with official duties. *See Crawford-El v. Britton*, 523 U.S. 574, 597-601 (1998) (describing courts' options to ensure that "officials are not subjected to unnecessary and burdensome discovery or trial proceedings.").

And, with respect to every "pleading, motion, or other paper," a claimant's attorney must comply with Rule 11(a)'s dictate "that to the best of [the attorney's] knowledge, information, and belief formed after

reasonable inquiry it is well grounded in fact . . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." N.C. R. Civ. P. 11(a). Litigation without a basis in fact, pursued solely for the purposes of waging a political vendetta or gumming up the machinery of government, can be discouraged through the tools available to government and non-governmental litigants alike: dismissal, summary judgment, and motions for sanctions (if appropriate).

CONCLUSION

This Court should hold that a selective enforcement claim survives a motion to dismiss when the plaintiff has sufficiently plead that the enforcement decision was substantially motivated by the plaintiff's constitutional protected expression. Under our liberal notice pleading standards, Ace's counterclaims meet this threshold. This Court should affirm the lower court's denial of the State's motion to dismiss Ace's selective enforcement claims, and remand Ace's claims to the trial court for further proceedings.

Respectfully submitted, this the 2nd day of June, 2023.

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