No.

In the Supreme Court of the United States

DAVID F. EVANS; COLLIN FINNERTY;
READE SELIGMANN, PETITIONERS

v.

CITY OF DURHAM, NORTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether police officers who conspire with a prosecutor to fabricate evidence for subsequent use are immune from liability as a matter of law by virtue of the conspiring prosecutor's decision to use the evidence.

PARTIES TO THE PROCEEDING

Petitioners are David F. Evans; Collin Finnerty; and Reade Seligmann. Respondents are the City of Durham, North Carolina; David Addison; Patrick Baker; Steven W. Chalmers; Beverly Council; Mark Gottlieb; Benjamin Himan; Ronald Hodge; Jeff Lamb; Michael Ripberger; and Lee Russ.

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David F. Evans, Collin Finnerty, and Reade Seligmann respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-58a) is reported at 703 F.3d 636. The opinion of the district court (App., *infra*, 59a-159a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2012. On March 11, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 17, 2013, and on April 8, 2013, he further extended the time to and includ-

ing May 16, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In *Pottawattamie County* v. *McGhee*, 129 S. Ct. 2002 (2009), this Court granted certiorari to decide whether a prosecutor who conspires with police officers to fabricate evidence is immune from liability by virtue of the prosecutor's subsequent use of the fabricated evidence. After oral argument, the case settled before the Court could issue a decision. See 130 S. Ct. 1047 (2010).

The question presented in this case is the flip side of the same coin: namely, whether *police officers* who conspire with a prosecutor to fabricate evidence are immune from liability by virtue of the conspiring prosecutor's subsequent use of the fabricated evidence. If anything, the question here is an easier one than in *Pottawattamie County*: there, the United States took the position that, although a prosecutor who conspires with police officers could not be held liable based on principles of absolute immunity, police officers could be held liable for "[a] conspiracy between officer and prosecutor" by analogy to the common-law tort of malicious prosecution through procurement of criminal proceedings. U.S. Br. at 25 n.6, *Pottawattamie County*, *supra* (No. 08-1065). At oral argument, a majority of the Court made statements suggesting that the government's view on officer liability was the correct one. See Oral Arg. Tr. at 7, *Pottawattamie County*, *supra* (Scalia, J.); *id.* at 8 (Kennedy, J.); *id.* at 9 (Ginsburg, J.); *id.* at 10-11 (Sotomayor, J.); *id.* at 14-15 (Stevens, J.).

In the decision under review, the Fourth Circuit nevertheless held that police officers who conspired with a prosecutor to fabricate evidence were immune from liability by virtue of the conspiring prosecutor's use of the

fabricated evidence, which the court treated as a superseding cause that broke the causal chain. That holding deepens a conflict among the courts of appeals concerning whether intervening prosecutorial action immunizes investigating officers from liability in a Section 1983 action. It also implicates a separate circuit conflict on the logically antecedent question whether the fabrication of evidence, standing alone, violates the targeted individual's constitutional rights. And the Fourth Circuit's decision is erroneous both under this Court's cases and under well-established principles of tort and conspiracy law. For all of those reasons, this case warrants the Court's review, and the petition for certiorari should be granted.

A. Background

This case needs little introduction; it arises from one of the most notorious episodes of police and prosecutorial misconduct in recent American history. Petitioners, three Duke University students who were members of the men's lacrosse team, were arrested and falsely accused of rape in what has come to be known simply as the "Duke lacrosse case."

It is undisputed that petitioners' arrests resulted from what the district court described as "significant abuses of government power": most notably, by Durham County district attorney Michael Nifong and City of Durham police officers Mark Gottlieb and Benjamin Himan, who conducted the investigation. The abuses included the fabrication of evidence and other intentional misconduct that resulted in petitioners' arrests on sensationalized charges of rape and related offenses. Those charges turned out to be false: after taking over the prosecution, the North Carolina Attorney General

dropped all of the charges, stating that petitioners were innocent. App., *infra*, 8a-15a, 61a-74a, 157a.

What follows are the pertinent allegations from the operative version of petitioners' complaint. In the years since the conduct at issue, however, those allegations have been amply corroborated by police records, court files, videotaped interviews, and numerous subsequent investigations (including the North Carolina Attorney General's investigation, a state-court criminal-contempt proceeding, and respondent Nifong's disbarment proceeding). C.A. App. 399, 493-496.

1. On the evening of March 13, 2006, City of Durham police officers first encountered Crystal Mangum in the parking lot of a grocery store after another woman, Kim Pittman, had unsuccessfully attempted to remove Mangum from her car. Mangum and Pittman had just come from a party attended by certain members of the Duke men's lacrosse team. Mangum was belligerent and appeared to be intoxicated. When the officers arrived at the scene, Mangum pretended to be unconscious; an officer took Mangum to a mental-health clinic, where she was to be held for observation. Upon arriving there, Mangum alleged that she had been raped. Mangum was then transported to the Duke Medical Center for a sexual-assault examination. There, she recanted her rape claim to Sergeant John Shelton, the first officer who had encountered her. App., *infra*, 8a, 62a-63a; C.A. App. 408-411.

Over the next two days, Mangum provided wildly inconsistent and patently implausible statements concerning the circumstances of the alleged rape to Durham police officers and to personnel at the Duke Medical Center. At various times, Mangum claimed to have been raped by as few as three and as many as twenty different men; that she had been performing as a dancer at a

bachelor's party and that one of the alleged rapists was the groom; and that her assailants were named "Adam, Brett, and Matt." The rape examination produced no evidence to corroborate Mangum's allegations. The police officers who first responded were convinced that Mangum's rape claim was a hoax; the investigator initially assigned to the case concluded that there was no evidence to proceed with a criminal investigation and that the case should therefore be closed. App., *infra*, 8a-9a, 63a-64a; C.A. App. 412-413, 415-417.

2. Rather than closing the case, however, the City of Durham Police Department reassigned the investigation to respondent Gottlieb, an officer with a known history of malicious prosecution, false arrest, excessive use of force, fabrication of evidence, and filing of false police reports directed against students at Duke University. In fact, Gottlieb had previously been reassigned from the neighborhood around Duke University where the party took place, precisely because of his prior misconduct and apparent hostility toward Duke students. Respondent Himan, a brand-new investigator, was assigned to assist Gottlieb. App., *infra*, 9a, 64a-65a; C.A. App. 419-420.

Gottlieb and Himan were informed of the inconsistencies in Mangum's account and of the initial conclusions of the officers who first responded to the scene. During Gottlieb's and Himan's initial interview with Mangum on March 16, Mangum continued to contradict herself and provided physical descriptions of the alleged attackers that did not match petitioners. During that interview (and in a subsequent written statement), Mangum offered inconsistent accounts of the alleged attack, on issues such as (1) what sexual acts the assailants had allegedly performed; (2) who the "bachelor" was; (3) whether "Adam," "Brett," and "Matt" were actual names or aliases; and (4) whether Pittman was an aider and

abettor, a passive witness, or herself a victim of the alleged rape. App., *infra*, 9a, 65a-66a; C.A. App. 415-416, 422, 424-425.

During this period, Mangum was shown six photo arrays containing pictures of some 36 Duke lacrosse players, including petitioners Evans and Seligmann. Not only did Mangum fail to identify any player as one of her purported attackers, but she claimed she recognized a player from the party who, as it turned out, was not even there. Gottlieb and Himan later learned that Mangum had previously alleged that she had been the victim of another purported gang rape by three men—an allegation that the police had declined to pursue. App., *infra*, 9a-10a, 65a-66a; C.A. App. 422-423, 426.

Himan also spoke with Pittman, who told him that Mangum's rape allegations were a "crock" and that "there was no opportunity for the alleged assault to have occurred." Upon hearing this, Gottlieb instructed Himan to bring Pittman to the station and to arrest her on an outstanding warrant unless she recanted her statement that Mangum was lying. App., *infra*, 10a, 66a; C.A. App. 420-421.

When Gottlieb and Himan obtained and executed a search warrant for the house where the party had occurred, the residents (including petitioner Evans) fully cooperated with the police. The residents voluntarily submitted to lengthy interviews at the station, giving consistent accounts of the events of the party. They also voluntarily provided DNA and hair samples to personnel at Duke Medical Center; submitted to "Sexual Assault Suspect Kits"; and offered to take lie-detector tests. The Duke medical personnel who examined the residents found no evidence to support Mangum's allegations. App., *infra*, 9a-10a, 66a; C.A. App. 427-428.

3. On Friday, March 24, the City of Durham Police Department delegated authority over the investigation to respondent Nifong, who then was interim Durham County district attorney and engaged in a hotly contested campaign for the permanent position. Gottlieb's and Himan's supervisor, Jeff Lamb, instructed them to take directions from Nifong, rather than through the usual chain of command at the police department, but to continue to provide status reports to their superiors. App., *infra*, 11a, 67a; C.A. App. 430-432.

On Monday, March 27, Gottlieb and Himan briefed Nifong on the case. Recognizing the weakness of the case, Nifong declared: "You know, we're f****d." Nifong nevertheless made extensive public statements supporting Mangum's claims, telling the press that Mangum had been brutally raped by members of the Duke lacrosse team in a racially motivated attack and that members of the team were obstructing the investigation. Those false statements inflamed the Durham community. The public outcry and demands for arrests were so forceful that, on March 29, Durham police supervisors met with Gottlieb and Himan and ordered them to expedite the identifications and arrests of Duke lacrosse players. App., *infra*, 11a, 67a; C.A. App. 433-439, 449.

By no later than March 30, the crime laboratory at the State Bureau of Investigation (SBI) reported that its forensic analysis of Mangum's rape kit had found no evidence of "fibers, foreign hairs, blood, semen, sperm, or other forensic evidence supporting Mangum's allegations." App., *infra*, 12a, 68a; C.A. App. 439.

4. Despite the definitive results of the forensic analysis, Nifong, Gottlieb, and Himan persisted with the investigation. In the course of doing so, they engaged in

intentional and egregious misconduct in at least two notable respects.

First, notwithstanding the fact that Mangum had repeatedly been unable to identify any of her purported attackers from photo arrays, Nifong, Gottlieb, and Himan proceeded to design a new photo array, consisting solely of photographs of all of the white members of the Duke lacrosse team, so that Mangum could not fail to identify three players as her alleged assailants. Gottlieb and Himan showed Mangum the new photo array on April 4. In so doing, they told her that every photograph she would be shown was of an individual who had attended the party. Unsurprisingly, that procedure was contrary to official policy concerning how photo arrays were to be conducted. Mangum then picked petitioners from the photo array, thereby contradicting her previous descriptions and statements. App., *infra*, 13a, 69a; C.A. App. 450-457.

Second, Nifong obtained a judicial order to transfer Mangum's rape kit from the SBI to DNA Security, Inc. (DSI), a private laboratory, for additional testing. DSI had more sensitive DNA-testing capabilities than the SBI, and it identified DNA from at least four different men. None of them, however, was a Duke lacrosse player. That analysis thus excluded petitioners, and every other member of the team, with "100% certainty." DSI presented the results of the analysis to Nifong, Gottlieb, and Himan on April 10. Nifong, Gottlieb, and Himan thereafter conspired with DSI's president and laboratory director to conceal those exculpatory results. In a series of meetings, Nifong, Gottlieb, Himan, and DSI personnel agreed to fabricate a final report that would omit the exculpatory facts, including the facts that no DNA from a Duke lacrosse player was found on the items in the rape kit and that DNA from at least four other men

was identified. The group also agreed that there would be no report or notes memorializing their discussions. App., *infra*, 13a, 70a; C.A. App. 418, 458-459, 461-462, 467-468.

5. On April 17, 2006, Nifong sought and obtained indictments against petitioners Finnerty and Seligmann for first-degree rape, sexual assault, and kidnapping. Both Gottlieb and Himan testified before the grand jury. The complaint alleges that Nifong, Gottlieb, and Himan agreed to mislead the grand jury as to the nature of the evidence concerning Finnerty and Seligmann and not to reveal the evidence of their innocence. App., *infra*, 13a-14a, 71a; C.A. App. 463-465.

On May 15, 2006, Nifong sought and obtained a further indictment against petitioner Evans for the same offenses. Nifong used the fabricated DSI report to cause the indictment to be returned. As with the prior indictments, Nifong, Gottlieb, and Himan agreed to mislead the grand jury as to the evidence concerning Evans and not reveal the evidence of Evans's innocence. App., *infra*, 13a-14a, 72a; C.A. App. 472.

After the indictments were returned, petitioners were arrested and briefly detained; Nifong, Gottlieb, and Himan thereafter engaged in further misconduct in order to conceal their earlier actions and to justify the continued prosecution of petitioners. When a cabdriver provided a statement confirming that he had picked up Seligmann before the time of the purported attack, Nifong and Himan investigated and then arrested the driver in an effort to coerce him to recant his statement. Gottlieb and Himan also attempted to intimidate other players by entering their dormitories without warrants and forcing them to submit to interviews, even though they knew that the players were represented by counsel. In addition, Nifong, Gottlieb, and Himan attempted to

intimidate and discredit Sergeant Shelton, the officer who reported Mangum's initial recantation, by subjecting him to threats of disciplinary action. App., *infra*, 13a-14a, 72a; C.A. App. 473-478.

In addition, after defense filings revealed numerous inconsistencies in Mangum's accounts, Gottlieb created an after-the-fact "report" of his purported activities in the investigation, which he entitled "Supplemental Case Notes." That report included Gottlieb's March 16 interview with Mangum, even though Gottlieb had not taken contemporaneous notes of that interview. Gottlieb fabricated a new version of Mangum's statements in an effort to cover up the inconsistencies in her actual statements. App., *infra*, 73a; C.A. App. 478-479.

The conspiracy began to unravel when, at a pretrial hearing, DSI's laboratory director revealed the true results of the DNA testing and admitted that he had cooperated in preparing a "deliberately incomplete DNA report." Undeterred, Nifong directed another investigator to interview Mangum again and encourage her to tailor her story to the now-revealed absence of petitioners' DNA on the items in the rape kit. Again, however, Mangum recanted her rape allegations. Nifong then dropped the rape charge against petitioners, but maintained the sexual-assault and kidnapping charges. App., *infra*, 14a, 73a-74a; C.A. App. 490-493.

6. After ethics complaints were filed against Nifong based on his conduct of the investigation and prosecution, Nifong recused himself from the prosecution and referred the cases to the North Carolina Attorney General. The Attorney General then conducted a comprehensive investigation, reviewing all of the evidence and soliciting information from petitioners. At the end of the investigation, the Attorney General dropped all of the charges, stating that petitioners were innocent. In his

report, the Attorney General concluded that "these cases were the result of a tragic rush to accuse and a failure to verify serious allegations" and that "a lot of people need to apologize" for the mistreatment of petitioners. App., *infra*, 14a-15a, 74a; C.A. App. 493-495.

B. Procedural History

1. After the dismissal of the charges against them, petitioners filed a civil action in the United States District Court for the Middle District of North Carolina against respondents and others, including the City of Durham, Nifong, Gottlieb, and Himan. Petitioners asserted claims under 42 U.S.C. 1983 for violations of their Fourth and Fourteenth Amendment rights, as well as claims for violations of North Carolina law. App., *infra*, 74a-75a.

Defendants moved for dismissal of some of the claims against them, and for summary judgment on others. As is relevant here, respondents Gottlieb and Himan moved to dismiss petitioners' federal constitutional claims on the ground that they were immune from suit. The district court granted defendants' motions in part and denied them in part. App., *infra*, 59a-159a. As is relevant here, the district court denied Gottlieb's and Himan's motion to dismiss petitioners' federal constitutional claims. *Id.* at 79a-101a.

The district court reasoned that, "where officers deliberately or recklessly supply false or misleading evidence to support a grand jury indictment as alleged in the present case, or deliberately omit material information knowing that it would negate probable cause, the officers may be liable under § 1983 for violation of an individual's Fourth Amendment rights." App., *infra*, 90a. The court proceeded to reject Gottlieb's and Himan's contention that they "cannot be liable for [petitioners']

claims because they turned over all of the relevant evidence and information to Nifong." *Id.* at 99a. The court noted that petitioners had alleged not only that Gottlieb and Himan had failed to turn over evidence, but that Gottlieb and Himan had "actually acted with Nifong to deliberately create the false and misleading evidence." *Ibid.*[1]

2. Respondents appealed, and the appeal was consolidated with appeals in other civil litigation brought by other lacrosse players who were not indicted. The court of appeals affirmed in part, dismissed in part, reversed in part, and remanded for further proceedings. App., *infra*, 1a-41a. As is relevant here, the court of appeals reversed the district court's denial of Gottlieb's and Himan's motion to dismiss the federal constitutional claims. *Id.* at 16a-22a.

The court of appeals accepted Gottlieb's and Himan's contention that they were entitled to qualified immunity because "an independent intervening act—*i.e.*, [p]rosecutor Nifong's decision to seek the indictments—caused the seizures." App., *infra*, 18a. The court observed that, with constitutional torts as with common-law ones, "subsequent acts of independent decision-makers * * * may constitute intervening superseding causes that break the causal chain between a defendant-officer's misconduct and a plaintiff's unlawful seizure." *Ibid.* The court acknowledged that "police officers may be held to

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[1] The district court permitted petitioners' federal constitutional claims to go forward against Nifong, as well as Gottlieb and Himan. App., *infra*, 101a. Nifong did not file an appeal from the district court's order and is therefore not a party to proceedings before this Court.

have caused the seizure and remain liable to a wrongfully indicted defendant," but stated that such liability would attach only where there was "evidence that [the officers] misled or pressured the prosecution." *Id.* at 19a (internal quotation marks and citation omitted). Applying that standard to petitioners' claims, the court of appeals determined that respondents could not be held liable because, even if petitioners had plausibly alleged that Gottlieb and Himan had acted maliciously, they had not sufficiently alleged that they misled Nifong or pressured him to seek the indictments. *Id.* at 20a-21a & 37a n.16.

The court of appeals reasoned that "it seems contrary to the very purpose of qualified immunity to extend personal liability to police officers who have assertedly conspired with, but neither misled nor unduly pressured, an independent prosecutor." App., *infra*, 21a. The court expressed concern that "[a]llowing [Section] 1983 claims against police officers to proceed on allegations of such a 'conspiracy' would in virtually every case render the officers' qualified immunity from suit effectively lost * * * and make discovery the rule, rather than the exception." *Ibid.* (internal quotation marks and citation omitted). Accordingly, the court held that "an alleged officer-prosecutor conspiracy does not alter the rule that a prosecutor's independent decision to seek an indictment breaks the causal chain unless the officer has misled or unduly pressured the prosecutor." *Ibid.*[2]

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[2] Based on its conclusion that the federal constitutional claims against Gottlieb and Himan should be dismissed, the court of appeals concluded that petitioners' claims against the City of Durham under *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), and their claims of supervisory liability against other officials, should also be dismissed. App., *infra*, 31a-33a.

3. Judge Wilkinson concurred. App., *infra*, 42a-53a. As is relevant here, he explained that, in his view, "[petitioners'] theory of conspiracy * * * would inhibit the exchange of information among police and prosecutors that takes place every day." *Id.* at 48a. "[T]he mere fact that public officials meet to discuss a high-profile criminal case," he continued, "is far more often indicative of a desire to foster communication and cooperation than an insidious conspiracy to violate the Constitution." *Id.* at 48a-49a.

4. Judge Gregory concurred in relevant part, dissenting as to the court's disposition of certain state-law claims not at issue here. App., *infra*, 54a-58a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Deepens Conflicts Among The Courts Of Appeals Concerning The Circumstances Under Which Police Officers May Be Liable Despite A Prosecutor's Intervening Action

1. To begin with, the Fourth Circuit's decision in this case deepens a conflict among the courts of appeals regarding the proper standard for determining whether a prosecutor's intervening action serves as a superseding cause that insulates police officers from liability for investigative misconduct. That conflict, moreover, has been expressly recognized by several courts of appeals and commentators. In the words of one court of appeals, "there is a great deal of tension in the caselaw about when official conduct counts as an intervening cause." *Hector* v. *Watt*, 235 F.3d 154, 161 (3d Cir. 2001). As another court of appeals has noted, courts have taken "alternative approaches" in "considering whether the deprivation of a plaintiff's liberty is the legally cognizable result of a government officer's misconduct," with "tension" between the approach that "the intervening exer-

cise of independent judgment will break a causal chain" and the alternative approach that "defendants in [S]ection 1983 cases are liable for consequences caused by reasonably foreseeable intervening forces." *Zahrey* v. *Coffey*, 221 F.3d 342, 349, 351 (2d Cir. 2000) (internal quotation marks and citation omitted).[3]

a. In contrast to the Fourth Circuit in the decision below, the Second and Sixth Circuits have held that police officers may be liable for the "natural consequence" or "reasonably foreseeable result" of their investigative misconduct, despite a prosecutor's subsequent action that contributes to the injury.

In *Gregory* v. *City of Louisville*, 444 F.3d 725 (2006), cert. denied, 549 U.S. 1114 (2007), the Sixth Circuit rejected precisely the sort of argument that the Fourth Circuit accepted here. The plaintiff in that case brought a Section 1983 action against the investigating police officers after DNA testing exonerated him of the rape and burglary for which he had been convicted. *Id.* at 735-737. As is relevant here, the plaintiff alleged that one of the officers had "used an unduly suggestive show-up procedure in getting [a witness] to identify [the] [p]laintiff," in violation of his constitutional rights. *Id.* at 745. The officer responded that any constitutional violation "was a result of the prosecutor's choice to use the show-up identification at trial[] and not the direct result of [the officer's] use of the show-up in the first instance." *Ibid.*

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[3] See also Joel Flaxman, *Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations at Trial*, 105 Mich. L. Rev. 1551, 1552 (2007) (noting circuit conflict); Jacob Paul Goldstein, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 Colum. L. Rev. 643, 644 (2006) (same).

The Sixth Circuit rejected the officer's causation argument. "It is * * * true," the court noted, "that the prosecution's use of the identification at trial is a necessary intervening act for injury to occur and liability for any party to attach." 444 F.3d at 747. "It is not true, however, that the prosecutor's discretion to control the state's case at trial is such an intervening act to excuse [the officer] from the 'natural consequences' of his actions and therefore any tort liability." *Ibid.* That was so, according to the Sixth Circuit, because, "[i]n constitutional-tort cases, 'a man [is] responsible for the natural consequences of his actions.'" *Ibid.* (second alteration in original) (quoting *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961)). The Sixth Circuit explained that it was that principle that "led the Supreme Court * * * to hold that the issuance of an arrest warrant will not shield the police officer who applied for the warrant from liability for false arrest if 'a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should have applied for the warrant.'" *Ibid.* (alteration in original) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 345 (1986)). According to the Sixth Circuit, the Supreme Court's reasoning was "directly applicable here," and "[t]he prosecutor's decision to use the identification" therefore "d[id] not shield [the officer] from liability if he reasonably should have known that use of the identification would lead to a violation of [the] [p]laintiff's right to a fair trial." *Ibid.*[4]

[4] An earlier Sixth Circuit decision had used similar reasoning in holding that officers could be liable for violating an individual's Fifth Amendment privilege against self-incrimination. *McKinley* v. *City of Mansfield*, 404 F.3d 418, 438-439 (6th Cir. 2005), cert. denied, 546 U.S. 1098 (2006).

In *Zahrey*, the Second Circuit addressed the analogous circumstance of a prosecutor who was alleged to have fabricated evidence and later to have introduced that evidence at trial. As noted above, the Second Circuit began by noting that other courts have taken "alternative approaches" in "considering whether the deprivation of a plaintiff's liberty is the legally cognizable result of a government officer's misconduct." 221 F.3d at 349-350; see pp. 14-15, *supra*.[5] After canvassing the cases, the court adopted a test of "reasonable foreseeability," explaining that, "[i]f, as alleged, [the prosecutor] fabricated evidence in his investigative role, it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that [the plaintiff] would be indicted and arrested." 221 F.3d at 353-354.

Accordingly, the Second Circuit concluded that "[t]he complaint adequately alleges that the deprivation of [the plaintiff's] liberty was the legally cognizable result of [the prosecutor's] alleged misconduct in fabricating evidence." 221 F.3d at 354; see *Michaels* v. *McGrath*, 531 U.S. 1118, 1119 (2001) (Thomas, J., dissenting from denial of certiorari) (noting that, at least as to misconduct involving prosecutors, the Second Circuit's approach in

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[5] In a subsequent decision, the Third Circuit cited the discussion in *Zahrey* for the propositions that "there is a great deal of tension in the caselaw about when official conduct counts as an intervening cause" and that "the cases on intervening causes are legion and difficult to reconcile." *Hector*, 235 F.3d at 161. The Third Circuit ultimately left open the question whether "a [Section] 1983 plaintiff who was the victim of fabricated evidence can * * * sue for damages incurred after a prosecutor's decision to indict." *Ibid.*

Zahrey is "very likely correct").[6] There can be no dispute that petitioners would have prevailed under the standards of the Second and Sixth Circuits, because petitioners' indictments and ensuing arrests were obviously the "natural consequence" or "reasonably foreseeable result" of the alleged conspiracy to fabricate evidence.[7]

b. Also in contrast to the Fourth Circuit in the decision below, the Ninth Circuit has applied a presumption that a prosecutorial action following investigative misconduct serves as a superseding cause—a presumption, however, that may be rebutted by a plaintiff's showing that, *inter alia*, the officers "act[ed] maliciously or with reckless disregard for the rights of an arrested person." *Beck* v. *City of Upland*, 527 F.3d 853, 862 (2008) (citation omitted; alteration in original).

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[6] The Fourth Circuit treated the Second Circuit's discussion of the "reasonable foreseeability" test as dictum, App., *infra*, 21a n.5, but that is plainly incorrect. Nor does the Second Circuit's subsequent opinion in *Wray* v. *City of New York*, 490 F.3d 189 (2007), "step back" from the reasoning in *Zahrey*, as the Fourth Circuit suggested. App., *infra*, 21a n.5. In *Wray*, the Second Circuit recited the "reasonable foreseeability" test from *Zahrey*, but ultimately determined that the admission of a suggestive identification at trial was not the "reasonably foreseeable consequence[]" of the officer's actions. 490 F.3d at 195.

[7] Although the First Circuit has not directly addressed the issue, it has strongly suggested that it would follow the approach of the Second and Sixth Circuits. In a decision the Second Circuit cited in *Zahrey*, the First Circuit explained that, in the Section 1983 context, "[a] negligent defendant will not be relieved of liability by an intervening cause that was reasonably foreseeable, even if the intervening force may have directly caused the harm." *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 561 (1989) (internal quotation marks and citation omitted); see *Zahrey*, 221 F.3d at 351.

The Ninth Circuit explained that, under its approach, a court would presume that "the prosecutor filing [a criminal] complaint exercised independent judgment in determining that probable cause for an accused's arrest exist[ed], thereby breaking the chain of causation between an arrest and prosecution and immunizing investigating officers * * * from damages suffered after the complaint was filed." 527 F.3d at 862 (alterations in original; internal quotation marks and citation omitted). At the same time, the Ninth Circuit recognized that a plaintiff may rebut the presumption in a variety of ways, including by demonstrating that the officers "act[ed] maliciously or with reckless disregard for the rights of an arrested person," *ibid.* (alteration in original; citation omitted); that "the prosecutor was pressured by police or was given false information," *ibid.*; or that the officers "otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings," *id.* at 862-863 (citation omitted). Once the plaintiff has rebutted the presumption in one of those ways, the defendant bears the ultimate burden of demonstrating that the prosecutorial decision was independent of the alleged police wrongdoing. *Id.* at 863. Because petitioners in this case sufficiently alleged that the indictments and ensuing arrests were among the aims of the conspiracy, they would have prevailed under the standard of the Ninth Circuit as well.

c. Like the Fourth Circuit in the decision below, the Fifth, Seventh, and Eleventh Circuits have held that a prosecutor's intervening action breaks the causal chain absent evidence that the officers misled or pressured the prosecutor. Even under the standards of those courts, however, petitioners would have prevailed on the allegations in this case.

The Eleventh Circuit has explained that "[t]he intervening acts of the prosecutor, grand jury, judge and jury—*assuming that these court officials acted without malice that caused them to abuse their powers*—each break the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure by the defendant policemen." *Barts* v. *Joyner*, 865 F.2d 1187, 1195 (emphasis added), cert. denied, 493 U.S. 831 (1989). To the extent that the Eleventh Circuit recognized an exception to the superseding-cause principle for cases in which officials acted with malice, petitioners readily made sufficient allegations to trigger that exception, because they specifically alleged that the prosecutor, Nifong, acted with malice by participating in a conspiracy to fabricate evidence for use in obtaining petitioners' indictments and ensuing arrests.

Similarly, the Fifth Circuit has acknowledged an exception to the superseding-cause principle where "it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant." *Hand* v. *Gary*, 838 F.2d 1420, 1428 (1988). Here, petitioners made detailed allegations that Nifong's prosecutorial deliberations were tainted by his participation in the investigative conspiracy with Gottlieb and Himan—allegations that, under the Fifth Circuit's standard, would be sufficient to subject Gottlieb and Himan to liability.

Finally, the Seventh Circuit has recognized that "[t]he causal link between a police officer's fabrication and the victim's injury may be broken if that police officer tells a prosecuting attorney before trial about the fabrication." *Whitlock* v. *Brueggemann*, 682 F.3d 567, 583 (2012), cert. denied, 133 S. Ct. 981 (2013). But the court defined a superseding cause that breaks the causal chain as "something culpable that intervenes * * *,

some action of a third party that makes the plaintiff's injury an unforeseeable consequence of the defendant's [misconduct]." *Id.* at 584 (ellipsis in original; emphasis, internal quotation marks, and citation omitted). As noted above, petitioners' indictments and ensuing arrests were obviously a foreseeable consequence of the alleged conspiracy to fabricate evidence; indeed, they were objectives of that conspiracy. *Ibid.*; see p. 18, *supra*.

In sum, the courts of appeals are deeply divided on the appropriate standard for determining whether a prosecutor's intervening action serves as a superseding cause that insulates police officers from liability for investigative misconduct. The Fourth Circuit's standard directly conflicts with the standards adopted by at least three other courts of appeals. And the Fourth Circuit went further even than the three other courts of appeals that have applied similar standards when it held that a prosecutor's intervening action breaks the causal chain without recognizing an exception for cases where, as here, the injury was the foreseeable result of misconduct in which the prosecutor was an active participant. This Court should grant review to resolve the conflict in the courts of appeals' "alternative approaches." *Zahrey*, 221 F.3d at 349-350.

2. In addition to deepening a circuit conflict regarding the appropriate standard for determining whether a prosecutor's intervening action serves as a superseding cause, the Fourth Circuit implicitly took sides in another circuit conflict, on an issue that stands as a logical antecedent to the causation issue: *viz.*, whether the fabrication of evidence at the investigation stage, standing alone, gives rise to a constitutional violation cognizable in a Section 1983 action. By holding that Nifong's decision to seek the indictments broke the chain of causation as to the officers' investigative misconduct, the Fourth Circuit

effectively held that the investigative misconduct, without more, would be insufficient to make out a constitutional violation. Had it been otherwise, Nifong's subsequent use of the fruits of the misconduct could not have broken the chain of causation, but would at most have been relevant to establishing damages on the claim.

The issue of whether the fabrication of evidence at the investigation stage gives rise to a constitutional violation is a familiar one. This Court reserved the issue in *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 272 (1993), and it was within the scope of the question on which the Court granted review in *Pottawattamie County*. See Pet. at i (presenting the question whether "procuring false testimony during [a] criminal investigation" violates the targeted individual's right to due process). In the merits briefs in *Pottawattamie County*, moreover, the parties addressed the issue at some length. Compare, *e.g.*, Pet. Br. at 25-28 (asserting that "[t]his Court has never suggested that the act of procuring false testimony is a stand-alone constitutional tort"), and U.S. Br. at 14-18 (contending that, until the decision of the Eighth Circuit in that case, lower courts had "broadly agree[d] that fabrication of evidence, standing alone, does not violate any constitutional right of a criminal defendant"), with Resp. Br. at 24-27 (arguing that the "[i]ntentional fabrication of evidence to frame a citizen violates the Due Process Clause, regardless of whether it results in a conviction").

a. At least two courts of appeals have squarely held that the fabrication of evidence before trial gives rise to a constitutional violation. Most obviously, in *Pottawattamie County* itself, the Eighth Circuit held that a prosecutor who "violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges" may be held liable in a Section 1983 action. *McGhee* v. *Potta-*

wattamie County, 547 F.3d 922, 933 (8th Cir. 2008). As the United States explained in its merits brief in this Court, that statement "suggests that [the Eighth Circuit] found a violation of Section 1983 based solely on [the defendants'] pre-trial conduct." U.S. Br. at 14.

Even before the Eighth Circuit's decision in *Pottawattamie County*, moreover, the First Circuit had described the proposition that there is a constitutional right "not to be framed by the government" as "easy pickings." *Limone* v. *Condon*, 372 F.3d 39, 44 (2004). The court explained that, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Id.* at 44-45. "Actions taken in contravention of this prohibition," the court continued, "necessarily violate due process (indeed, we are unsure what due process entails if not protection against deliberate framing under color of official sanction)." *Id.* at 45.[8]

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[8] In an earlier case, the First Circuit had stated that, "[f]or purposes of recovering damages at least, we do not see how the existence of a false police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws." *Landrigan* v. *City of Warwick*, 628 F.2d 736, 744 (1980). As a preliminary matter, that statement is hard to reconcile with this Court's decision in *Carey* v. *Piphus*, 435 U.S. 247 (1978), which held that a Section 1983 plaintiff may recover nominal damages for a due-process violation. See *id.* at 266-267. But in any event, in *Limone*, the First Circuit seemingly attached significance to the fact that the officers were alleged not simply to have fabricated evidence, but to have done so *for the specific purpose of framing particular individuals*. See 372 F.3d at 44-45. Because petitioners have alleged that Gottlieb and Himan fabricated evidence in order to frame them, the First Circuit's reasoning in *Limone* is on point here.

b. By contrast, in *Zahrey*, the Second Circuit took the position that "[t]he manufacture of false evidence, in and of itself, * * * does not impair anyone's liberty, and therefore does not impair anyone's constitutional right." 221 F.3d at 348 (internal quotation marks omitted). Indeed, it was for that reason that the Second Circuit proceeded to address the causation question discussed above: namely, whether the plaintiff's post-indictment detention was the "reasonably foreseeable" result of the fabrication of evidence. See pp. 16-18, *supra*.[9]

In the decision below, the Fourth Circuit effectively aligned itself with the Second Circuit on the issue of whether the fabrication of evidence gives rise to a constitutional violation—and thus deepened the preexisting conflict with the First and Eighth Circuits. That logically antecedent issue is important in its own right, and, as in *Pottawattamie County*, provides an additional justification for granting review.

B. The Decision Below Is Erroneous

The Fourth Circuit erred in holding that police officers who conspire with a prosecutor to fabricate evidence are immune from liability as a matter of law by virtue of the conspiring prosecutor's subsequent use of the fabricated evidence. That error warrants this Court's review and correction.

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[9] In a similar vein, the Third and Seventh Circuits have held that, where officers coerce testimony from a *third party*, a defendant does not suffer a constitutional violation until the testimony is presented at trial. See *Michaels* v. *New Jersey*, 222 F.3d 118, 122-123 (3d Cir.), cert. denied, 531 U.S. 1118 (2001); *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995).

1. As a preliminary matter, the Fourth Circuit erred by failing to recognize that the fabrication of evidence to frame an individual for a crime is itself a constitutional violation for which Section 1983 provides a remedy. See, *e.g.*, *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam). As one court has explained, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Limone*, 372 F.3d at 44-45. To the extent that the fabrication of evidence does not ultimately result in subsequent use, that may be relevant to the amount of damages, but not to the existence of a constitutional violation. See *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978).

2. Even assuming, *arguendo*, that use is a prerequisite for a constitutional claim based on the fabrication of evidence, the Fourth Circuit's decision cannot be reconciled with this Court's decisions on causation in the context of constitutional torts. Most notably, in *Malley*, the Court considered a Section 1983 claim alleging that a police officer had violated the plaintiffs' Fourth Amendment rights by applying for arrest warrants that were not supported by probable cause. 475 U.S. at 345. The district court dismissed the claims, holding that the magistrate's decision to issue the warrants broke the causal chain between the officer's deficient warrant applications and the subsequent arrests. *Id.* at 338-339. As relevant here, the Court rejected the district court's reasoning on causation—even though there was no evidence that the police officer had misled or pressured the magistrate who issued the warrant. *Id.* at 344 n.7. "It should be clear," the Court reasoned, "that the [d]istrict [c]ourt's 'no causation' rationale in this case is inconsistent with [the Court's] interpretation of [Section] 1983," which

"makes a man responsible for the natural consequences of his actions." *Ibid.* (quoting *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961)). The Court went on to note that "[t]he officer * * * cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.* at 346 n.9.

Similarly, in *Dennis* v. *Sparks*, 449 U.S. 24 (1980), the plaintiffs alleged that a state judge and private parties had conspired to have the judge enjoin the production of minerals in exchange for a bribe. *Id.* at 25-26. Although the private-party defendant does not appear to have framed the argument explicitly in terms of causation, he argued that the judge's absolute immunity for issuing the injunction should absolve him from liability as well. *Id.* at 29. This Court unanimously disagreed, holding that the judge's immunity from suit did not bar litigation against private parties (or shield the judge from testifying in those proceedings about his own conduct). *Id.* at 30-31. Even though the conspiracy culminated in the judge's issuance of an injunction, and even though the judge was not misled or pressured into doing so but was instead alleged to have participated in the conspiracy, the Court carefully analyzed the potential liability of the private parties and whether the judge could testify about his own conduct—without which the allegedly invalid injunction could not have issued. *Id.* at 27-32. If the subsequent action of the judge had given rise to immunity for the private co-conspirators who had sought it, the Court's discussion of those issues would have been entirely academic.

3. Well-established principles of tort and conspiracy law confirm that a prosecutorial action undertaken as part of a conspiracy to fabricate evidence with investigating officers does not absolve the officers of liability for their improper investigative acts in furtherance of the

conspiracy. This Court has repeatedly noted that those common-law principles guide its consideration of questions concerning the scope of liability under Section 1983. See, *e.g.*, *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994); *Malley*, 475 U.S. at 342.

a. Under traditional tort principles, "[t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which [his] conduct has been a substantial factor in bringing about," and thus does not break the chain of causation between the original action and the injury. Restatement (Second) of Torts § 443 (1965); see *id.* § 442B (explaining that the intervening action of a third party breaks the chain of causation as to the original action only where "the harm is intentionally caused by a third person and is not within the scope of the risk created by the [original] actor's conduct"). In discussing the relevant Restatement provisions, moreover, then-Judge Scalia explained that the comments to those provisions "note that 'tortious or criminal acts may in themselves be foreseeable, and so within the scope of the created risk, in which case the actor may still be liable for the harm.'" *Beattie* v. *United States*, 756 F.2d 91, 104 n.17 (D.C. Cir. 1984) (quoting Restatement (Second) of Torts § 442B cmt. c).

The leading treatise on tort law has put the same point in only slightly different terms, stating that a defendant may be negligent "[i]f the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances." W. Page Keeton et al., *Prosser and Keeton on Torts* § 44, at 303 (5th ed. 1984). As a result, "the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which the de-

fendant has subjected the plaintiff has indeed come to pass." *Ibid.* And the treatise notes that lower courts "are quite generally agreed that intervening causes which fall fairly in this category will not supersede the defendant's responsibility." *Id.* at 303-304.

As discussed above, there can be no dispute that petitioners in this case would prevail under a standard that focuses on the foreseeability of the claimed injury, because petitioners' indictments and ensuing arrests were obviously the "natural consequence" or "reasonably foreseeable result" of the alleged conspiracy to fabricate evidence—a conspiracy that involved the very prosecutor who brought about petitioners' injuries. See p. 18, *supra*. The Fourth Circuit erred by applying a more stringent causation standard and determining that the officers were immune from suit under that standard.[10]

b. The common law of conspiracy bolsters the conclusion that the intervening prosecutorial action here cannot break the causal chain and immunize the officers from liability for their misconduct. A member of a conspiracy is liable for injuries that could be "reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton* v. *United States*, 328 U.S. 640, 648 (1946). For example, in *United States* v. *Spinney*, 795 F.2d 1410 (1986), the Ninth Circuit considered whether the actions of a co-conspirator constituted

[10] The Fourth Circuit erred for the additional reason that Nifong's decision to seek the indictments cannot serve as an superseding cause as to Gottlieb's and Himan's wrongful acts *after the indictments*—such as the intimidation of the cabdriver and Sergeant Shelton, and Gottlieb's fabrication of the "Supplemental Case Notes." See pp. 9-10, *supra*. Nifong's earlier decision to seek the indictments obviously cannot break the causal chain as to those subsequent actions.

a superseding cause for which the defendant could not be held liable. *Id.* at 1416. According to the defendant, he and his co-conspirator intended only to "scare" the victim, but things "got out of hand" and the co-conspirator shot and killed the victim. *Id.* at 1413. The Ninth Circuit held that the defendant was nevertheless liable for the actions of the co-conspirator because the victim's death was an "entirely foreseeable" result of the conspiracy. *Id.* at 1416. Cases arising in the conspiracy context therefore support the application of a standard that focuses on the foreseeability of the claimed injury.

4. In light of the foregoing, it is unsurprising that the United States has previously acknowledged that an officer who conspires with a prosecutor to fabricate evidence may be held liable despite the prosecutor's subsequent decision to use the fabricated evidence. In *Pottawattamie County*, the United States contended that the prosecutor who conspired to fabricate the evidence could not be held liable based on the prosecutor's absolute immunity. But the United States also acknowledged that an officer could be held liable under Section 1983 for "[a] conspiracy between officer and prosecutor" by analogy to the common-law tort of malicious prosecution. U.S. Br. at 25 n.6. As noted above, at oral argument, a majority of the Court made statements suggesting that the government's view on officer liability was the correct one. See p. 2, *supra*.

5. In reaching a contrary decision, the Fourth Circuit heavily relied on the concern that recognizing liability in the circumstances presented here would open the floodgates to similar claims that officers conspired with prosecutors "render[ing] the officers' qualified immunity from suit effectively lost and mak[ing] discovery the rule, rather than the exception." App., *infra*, 21a (internal quotation marks and citation omitted); see *id.* at 48a

(Wilkinson, J., concurring) (stating that he "could not agree more" with the court's concern).

As an initial matter, it bears emphasizing that this case involves remarkably detailed and well-supported allegations about exceptionally egregious misconduct: the operative version of the complaint alleges in painstaking detail, over nearly 150 pages, the fabrication of evidence and other intentional misconduct in which the officers and prosecutor engaged over the course of the investigation. One would hope that there are few, if any, cases in the pipeline even remotely similar to this one.

But setting that aside, any concern that a decision in petitioners' favor would open the floodgates to similar claims is unfounded. As an initial matter, discovery will not be the "rule" under petitioners' proposed standard, because implausible claims will be weeded out under the strict pleading standard adopted by this Court in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and reaffirmed in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). Where a plaintiff does nothing more than make " 'naked assertion[s]' devoid of 'further factual enhancement,' " the claim will rightly be dismissed. *Iqbal*, 556 U.S. at 678 (alteration in original) (quoting *Twombly*, 550 U.S. at 557). And in assessing whether a plaintiff's allegations are plausible, a court will naturally take into account the relative rarity of misconduct involving a conspiracy between officers and prosecutors.

In addition, officers will retain the ability to invoke the protections of qualified immunity where the complaint fails to allege a violation of a clearly established right. This Court has traditionally viewed the doctrine of qualified immunity as providing officers sufficient protection against meritless claims, while leaving open the possibility of liability for "the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S.

at 341. An officer may invoke the defense of qualified immunity in a motion to dismiss—and, if the motion is denied, may take an immediate appeal. See *Iqbal*, 556 U.S. at 684-686.

Relying on the continued availability of qualified immunity, this Court has consistently declined the invitation to insulate officials entirely from liability in the face of similar "floodgates" arguments. For example, in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the Court refused to accord absolute immunity to the Attorney General despite the government's contention that such immunity was necessary to enable him to perform his duties. *Id.* at 523. The Court acknowledged "the importance of [the Attorney General's] activities to the safety of our Nation and its democratic system of government," but it rejected "the notion that restraints [by means of litigation] are completely unnecessary." *Ibid.* The Court emphasized the availability of qualified immunity, noting that "the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints." *Id.* at 524. The Court concluded that it "d[id] not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law." *Ibid.*

Similarly, in *Malley*, the defendant officer argued that, "[b]ecause police officers are on the 'front line' and often are even more likely to arouse emotions and to erupt into retaliatory litigation than the decisions of those other public officers[,] * * * police officers require the protection offered by absolute immunity to allow them to deal fearlessly with the public pressures and emotions and to meet the public trust reposed in them." Pet. Br. at 25, *Malley*, *supra* (No. 84-1586). The Court was not "moved" by that argument, explaining that the

doctrine of qualified immunity is "specifically designed to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." 475 U.S. at 341 (internal quotation marks and citation omitted).

In a variety of contexts, therefore, this Court has determined that "floodgates" concerns supply an insufficient justification for immunizing officials entirely from liability. The Fourth Circuit's decision in this case rested on a contrary premise. This Court should grant review and reverse that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2013

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1436

DAVID F. EVANS; COLLIN FINNERTY; READE SELIGMANN, Plaintiffs–Appellees,

v.

STEVEN W. CHALMERS; BEVERLY COUNCIL; RONALD HODGE; JEFF LAMB; MICHAEL RIPBERGER; LEE RUSS; PATRICK BAKER, Defendants–Appellants,

and

CITY OF DURHAM, NORTH CAROLINA; MARK GOTTLIEB; BENJAMIN HIMAN; DAVID ADDISON; MICHAEL NIFONG; LINWOOD WILSON; STEPHEN MIHAICH; DNA SECURITY, INCORPORATED; RICHARD CLARK; BRIAN MEEHAN, Defendants.

No. 11-1438

DAVID F. EVANS; COLLIN FINNERTY; READE SELIGMANN, Plaintiffs–Appellees,

v.

CITY OF DURHAM, NORTH CAROLINA; MARK GOTTLIEB; BENJAMIN HIMAN; DAVID ADDISON, Defendants–Appellants,

and

MICHAEL NIFONG; LINWOOD WILSON; STEVEN W. CHALMERS; BEVERLY COUNCIL; RONALD HODGE; JEFF LAMB; STEPHEN MIHAICH; MICHAEL RIPBERGER; LEE RUSS; DNA SECURITY, INCORPORATED; RICHARD CLARK; BRIAN MEEHAN; PATRICK BAKER,
Defendants.

No. 11-1453

EDWARD CARRINGTON; CASEY J. CARROLL; MICHAEL P. CATALINO; GALE CATALINO; THOMAS V. CLUTE; KEVIN COLEMAN; JOSHUA R. COVELESKI; EDWARD J. CROTTY; EDWARD S. DOUGLAS; KYLE DOWD; PATRICIA DOWN; DANIEL FLANNERY; RICHARD GIBBS FOGARTY; ZACHARY GREER; IRENE GREER; ERIK S. HENKELMAN; JOHN E. JENNISON; BEN KOESTERER; MARK KOESTERER; JOYCE KOESTERER; FRED KROM; PETER J. LAMADE; ADAM LANGLEY; CHRISTOPHER LOFTUS; DANIEL LOFTUS; BARBARA LOFTUS; ANTHONY MCDEVITT; GLENN NICK; O'HARA; DANIEL OPPEDISANO; SAM PAYTON; JOHN BRADLEY ROSS; KENNETH SAUER, III; STEVE SCHOEFFEL; ROBERT SCHROEDER; DEVON SHERWOOD; DANIEL THEODORIDIS; BRET THOMPSON; CHRISTOPHER TKAC; TRACY TKAC; JOHN WALSH, JR.; MICHAEL WARD; ROBERT WELLINGTON, IV; WILLIAM WOLCOTT; MICHAEL YOUNG,
Plaintiffs–Appellees,

v.

PATRICK BAKER; STEVEN CHALMERS; RONALD HODGE; LEE RUSS; BEVERLY COUNCIL; JEFF LAMB; MICHAEL RIPBERGER,
Defendants–Appellants,

and

DUKE UNIVERSITY; DUKE UNIVERSITY HEALTH SYSTEMS, INCORPORATED; RICHARD BRODHEAD; PETER LANGE; LARRY MONETA; JOHN BURNESS; TALLMAN TRASK; SUZANNE WASIOLEK; MATTHEW DRUMMOND; AARON GRAVES; ROBERT DEAN; TARA LEVICY; THERESA ARICO; J. WESLEY COVINGTON; KAT HENDRICKS; VICTOR DZAU; CITY OF DURHAM; LINWOOD WILSON; MARK GOTTLIEB; BENJAMIN HIMAN; STEPHEN MIHAICH; DAVID ADDISON; MARSHA COVINGTON, EXECUTRIX OF THE ESTATE OF JOHN WESLEY COVINGTON,
Defendants.

No. 11-1458

RYAN MCFADYEN; MATTHEW WILSON; BRECK ARCHER, Plaintiffs–Appellees,

v.

PATRICK BAKER; STEVEN CHALMERS; RONALD HODGE; LEE RUSS; BEVERLY COUNCIL; JEFF LAMB; MICHAEL RIPBERGER;
Defendants–Appellants,

and

DUKE UNIVERSITY; DUKE UNIVERSITY PO-

LICE DEPARTMENT; AARON GRAVES; ROBERT DEAN; LEILA HUMPHRIES; PHYLLIS COOPER; WILLIAM F. GARBER, III; JAMES SCHWAB; JOSEPH FLEMING; JEFFREY O. BEST; GRAY N. SMITH; GREG STOTSENBERG; ROBERT K. STEEL; RICHARD H. BRODHEAD, PH. D.; PETER LANGE, PH. D.; TALLMAN TRASK, III, PH. D.; JOHN BURNESS; LARRY MONETA, ED. D.; DUKE UNIVERSITY HEALTH SYSTEMS, INCORPORATED; PRIVATE DIAGNOSTIC CLINIC, PLLC; JULIE MANLY, MD; THERESA ARICO, R. N.; TARA LEVICY, R. N.; THE CITY OF DURHAM, NORTH CAROLINA; MICHAEL NIFONG; STEPHEN MIHAICH; EDWARD SARVIS; LAIRD EVANS; JAMES T. SOUKUP; KAMMIE MICHAEL; DAVID ADDISON; MARK D. GOTTLIEB; BENJAMIN W. HIMAN; LINWOOD WILSON; RICHARD D. CLAYTON; DNA SECURITY INCORPORATED; RICHARD CLARK; BRIAN MEEHAN, PH. D.; VICTOR J. DZAU, MD; ALLISON HALTON; KEMEL DAWKINS; SUZANNE WASIOLEK; STEPHEN BRYAN; MATTHEW DRUMMOND; DUKE POLICE DEFENDANTS, Defendants.

No. 11-1460

RYAN MCFADYEN; MATTHEW WILSON; BRECK ARCHER, Plaintiffs–Appellees,

v.

THE CITY OF DURHAM, NORTH CAROLINA; DAVID ADDISON; MARK GOTTLIEB; BENJAMIN HIMAN, Defendants–Appellants,

and

DUKE UNIVERSITY; DUKE UNIVERSITY POLICE DEPARTMENT; AARON GRAVES; ROBERT DEAN; LEILA HUMPHRIES; PHYLLIS COOPER; WILLIAM F. GARBER, III; JAMES SCHWAB; JOSEPH FLEMING; JEFFREY O. BEST; GARY N. SMITH; GREG STOTSENBERG; ROBERT K. STEEL; RICHARD H. BRODHEAD, PH. D.; PETER LANGE, PH.D.; TALLMAN TRASK, III, PH. D.; JOHN BURNESS; LARRY MONETA, ED. D.; DUKE UNIVERSITY HEALTH SYSTEMS, INCORPORATED; PRIVATE DIAGNOSTIC CLINIC, PLLC; JULIE MANLY, MD; THERESA ARICO, R.N.; TARA LEVICY, R.N.; MICHAEL NIFONG; STEPHEN MIHAICH; EDWARD SARVIS; LAIRD EVANS; JAMES T. SOUKUP; KAMMIE MICHAEL; LINWOOD WILSON; RICHARD D. CLAYTON; DNA SECURITY, INCORPORATED; RICHARD CLARK; BRIAN MEEHAN, PH.D.; VICTOR J. DZAU, MD; ALLISON HALTON; KEMEL DAWKINS; SUZANNE WASIOLEK; STEPHEN BRYAN; MATTHEW DRUMMOND; DUKE POLICE DEFENDANTS; PATRICK BAKER; STEVEN W. CHALMERS; RONALD HODGE; LEE RUSS; BEVERLY COUNCIL; JEFF LAMB; MICHAEL RIPBERGER, Defendants.

No. 11-1465

EDWARD CARRINGTON; CASEY J. CARROLL; MICHAEL P. CATALINO; GALE CATALINO; THOMAS V. CLUTE; KEVIN COLEMAN; JOSHUA R. COVELESKI; EDWARD J. CROTTY; EDWARD S. DOUGLAS; KYLE DOWD; PATRICIA DOWD;

DANIEL FLANNERY; RICHARD GIBBS FOGARTY; ZACHARY GREER; IRENE GREER; ERIK S. HENKELMAN; STEVEN W. HENKELMAN; JOHN E. JENNISON; BEN KOESTERER; MARK KOESTERER; JOYCE KOESTERER; FRED KROM; PETER J. LAMADE; ADAM LANGLEY; CHRISTOPHER LOFTUS; DANIEL LOFTUS; BARBARA LOFTUS; ANTHONY MCDEVITT; GLENN NICK; NICHOLAS O'HARA; LYNNDA O'HARA; DANIEL OPPEDISANO; SAM PAYTON; JOHN BRADLEY ROSS; KENNETH SAUER, III; STEVE SCHOEFFEL; ROBERT SCHROEDER; DEVON SHERWOOD; DANIEL THEODORIDIS; BRET THOMPSON; CHRISTOPHER TKAC; TRACY TKAC; JOHN WALSH, JR.; MICHAEL WARD; ROBERT WELLINGTON, IV; WILLIAM WOLCOTT; MICHAEL YOUNG,
Plaintiffs–Appellees,

v.

CITY OF DURHAM; MARK GOTTLIEB; BENJAMIN HIMAN; DAVID ADDISON,
Defendants–Appellants,

and

PATRICK BAKER; STEVEN CHALMERS; RONALD HODGE; LEE RUSS; BEVERLY COUNCIL; JEFF LAMB; MICHAEL RIPBERGER; DUKE UNIVERSITY; DUKE UNIVERSITY HEALTH SYSTEMS, INCORPORATED; RICHARD BRODHEAD; PETER LANGE; LARRY MONETA; JOHN BURNESS; TALLMAN TRASK; SUZANNE WASIOLEK; MATTHEW DRUMMOND; AARON GRAVES; ROBERT DEAN; TARA LEVICY; THERESA ARICO; J. WESLEY COVINGTON; KATE HENDRICKS;

VICTOR J. DZAU; LINWOOD WILSON; STEPHEN MIHAICH; MARSHA COVINGTON, EXECUTRIX OF THE ESTATE OF JOHN WESLEY COVINGTON,
Defendants.

Argued: September 18, 2012
Decided: December 17, 2012

Before WILKINSON, MOTZ, and GREGORY, Circuit Judges.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

These appeals arise from allegations that the City of Durham and its officials mishandled false rape charges made against members of the 2005–2006 Duke University lacrosse team. The City and its officials asserted various immunities from suit and on that basis moved to dismiss, or for summary judgment, as to all claims alleged against them. The district court granted those motions in part and denied them in part. The City and its officials appeal. There is no cross-appeal. For the reasons that follow, we affirm in part, dismiss in part, reverse in part, and remand for further proceedings.

I.

Three groups of plaintiffs brought these cases. We set forth the relevant facts as alleged in their amended complaints. Although the complaints are not identical, they differ only minimally. We note all relevant differences.

A.

According to the amended complaints, on the evening of March 13–14, 2006, many members of the Duke lacrosse team attended a party at the Durham, North Carolina home of team co-captains David Evans, Daniel Flannery, and Matthew Zash. One of the hosts had hired two exotic dancers, Crystal Mangum and Kim Pittman, to perform at the party. Mangum (who appeared to be intoxicated) and Pittman performed only briefly from midnight to 12:04. Approximately forty minutes later, the two women left the party together in Pittman's car.

After leaving the party, Mangum became belligerent and accused Pittman of stealing her money. Pittman pulled into a grocery store parking lot and asked a nearby security guard for assistance in removing Mangum from her car. After the guard determined that Mangum in fact was intoxicated, he called Durham police. When Sergeant John Shelton arrived at the scene, Mangum feigned unconsciousness. Sergeant Shelton instructed another officer to take Mangum to the Durham Access Center, an outpatient mental health clinic with a mandatory twenty-four hour observation period for involuntarily admitted patients. During her intake interview, Mangum asserted that she had been raped by nodding "yes" to the question "Were you raped?" Because of her allegation, Mangum was transported to the Duke Medical Center for a sexual assault examination.

At the Duke Medical Center, Sergeant Shelton questioned Mangum regarding her rape allegations. Mangum then denied being raped, but contended that someone had stolen her money. Soon after this recantation, Mangum told another officer she had been raped by as many as five men after performing at a bachelor party. Over the course of that night and the next few days, Mangum provided multiple, vastly inconsistent versions

of her rape to medical personnel and police officers. Her accounts differed not only as to how many men had raped her (ranging from three to twenty), but also as to how they raped her (orally, vaginally, or anally).

Nurses at the Duke Medical Center performed a rape kit examination to document physical evidence of sexual assault. Some plaintiffs allege that Nurse Tara Levicy interviewed Mangum, who told the nurse that three white men—named Adam, Bret, and Matt—had raped her orally, vaginally, and anally, had not worn condoms, and had ejaculated in her mouth, vagina, and anus. A doctor performed a pelvic examination on Mangum and noted only one abnormality—diffuse edema of the vaginal walls—which Nurse Levicy then recorded on a sexual assault examination report.

Officer B.S. Jones, who was initially assigned to investigate Mangum's allegations, believed that no evidence supported proceeding with a criminal investigation. Nonetheless, during the next two days (March 15–16), the case was reassigned to Officers Mark Gottlieb and Benjamin Himan. When Officers Gottlieb and Himan interviewed Mangum for the first time on March 16, Mangum told them that she was raped by three white men—Adam, Bret, and Matt—and provided physical descriptions of the attackers. Later that day, based on her descriptions, Durham Police administered a photo array to Mangum limited to pictures of twenty-four white members of the Duke lacrosse team. Mangum did not identify any of the men in the photographs as her attackers, though she did identify men who she believed had attended the party.

On the same day, March 16, Officers Gottlieb and Himan executed a search warrant for the site of the March 13–14 party. The three residents—Evans, Flannery, and Zash—complied with the execution of the

search warrant, consented to lengthy police interviews, submitted to physical inspections for signs of rape, and provided DNA and hair samples.

Four days later, on Monday, March 20, Officer Himan interviewed Mangum's fellow dancer, Pittman, who asserted that Mangum's rape allegations were a "crock" and that there had been no opportunity for an assault to have occurred out of Pittman's presence at the party. On March 22, Officers Gottlieb and Himan used an outstanding arrest warrant and the threat of revocation of probation to induce Pittman to recant her initial statement calling the rape allegations a "crock," and to create a fictional window of opportunity in her story when the rape could have been committed. In the meantime, Durham Police arranged a second photo array of members of the Duke lacrosse team. Once again, Mangum could not identify any attacker.

During this same time period, Officer Gottlieb served a subpoena on Nurse Levicy to obtain the Medical Center's sexual assault examination report. Some plaintiffs allege that Nurse Levicy previously had indicated to Officer Gottlieb that the examination of Mangum had revealed "signs consistent with sexual assault," but had refused to turn over the report without a subpoena. Once Officer Gottlieb returned with the subpoena, Nurse Levicy misled Gottlieb about the extent of the evidence of sexual assault, claiming that the examination had also revealed physical evidence of "blunt force trauma" and other symptoms "consistent with the victim's statement."

Two days later, on Thursday, March 23, Officers Gottlieb and Himan, using Nurse Levicy's corroborating statements, obtained court approval for a non-testimonial order ("NTO"). The NTO required the forty-six white lacrosse team members to provide DNA samples, sit for photographs, and submit to examination for

injuries consistent with struggle during a sexual assault. The police offered two affidavits in support of the NTO—one to establish probable cause that a crime had been committed, the other to establish reasonable grounds that the subjects might have committed the crime. The NTO affidavits explained that "[t]he DNA evidence requested will immediately rule out any innocent persons, and show conclusive evidence as to who the suspect(s) are in the alleged violent attack upon this victim." The team members fully complied with the NTO.

B.

The next day, Friday, March 24 (ten days after the alleged rape), District Attorney Michael Nifong took over the investigation. Durham Police Commander Jeff Lamb instructed Officers Gottlieb and Himan to take direction in the rape investigation from Nifong.

On Monday morning, March 27, Officers Gottlieb and Himan briefed Nifong on the case. At this briefing, the officers detailed the exculpatory evidence, including contradictions in Mangum's allegations and the negative results of the photo arrays. Recognizing the weakness of the case, Nifong responded, "You know, we're f*cked."

Nonetheless, the investigation continued. Later that morning, Officer Gottlieb obtained from a confidential source an email that a lacrosse team member, Ryan McFadyen, had sent to his teammates only hours after the party at which the rape assertedly occurred. The email stated:

> tomorrow night . . . ive decided to have some strippers over to edens 2c. all are welcome.. however there will be no nudity. i plan on killing the bitches as soon as they walk in and proceeding to cut their skin off while cumming in my duke issue spandex. . . . 41

McFadyen's dormitory address was Edens 2C, and his lacrosse jersey number was 41. Officers Gottlieb and Himan added the text of the email to the information from the NTO affidavits and applied for and executed a search warrant on McFadyen's dorm room, adding to the list of suspected crimes "conspiracy to commit murder."

Meanwhile, on March 24 and 25, Durham police spokesperson Corporal David Addison made a series of public statements regarding the case. On March 24, Corporal Addison told local and national reporters that the investigation had produced "really, really strong physical evidence" of rape. In explaining the scope of the NTO, Corporal Addison told one reporter: "You are looking at one victim brutally raped. If that was someone else's daughter, child, I don't think 46 [suspects] would be a large enough number to figure out exactly who did it." The next day, Corporal Addison stated: "We're asking someone from the lacrosse team to step forward. We will be relentless in finding out who committed this crime."

By March 28, the State Bureau of Investigation had concluded its examination of evidence from Mangum's rape kit and the DNA collected from the plaintiffs under the NTO. By March 29, the State Bureau of Investigation had notified Nifong of the results: the state examination revealed *no* DNA from anyone in Mangum's rape kit or her clothing. Nevertheless, Nifong sought a second, more sensitive DNA analysis at a private laboratory, DNA Security, Inc. On April 5, Nifong obtained a judicial order to transfer the rape kit and NTO evidence to the private laboratory.

Meanwhile, the day before, on April 4, Officer Gottlieb administered a third photo array to Mangum. This photo array contained pictures of all forty-six white members of the Duke lacrosse team; the police officers

informed Mangum that they had reason to believe everyone pictured had been at the party. During this photo array, Mangum identified three team members as her attackers—David Evans with 90% certainty, Collin Finnerty with 100% certainty, and Reade Seligmann with 100% certainty.

From April 7 through April 10, the private laboratory analyzed the rape kit and NTO evidence. On April 10, employees from the private laboratory met with Nifong and Officers Gottlieb and Himan to report the results of the analyses. Although the private laboratory found that several men contributed DNA to the items in Mangum's rape kit, the analyses excluded with 100% certainty every member of the Duke lacrosse team as a potential contributor of that DNA. Knowing that the private laboratory's results would prevent an indictment, neither Nifong nor the officers disclosed the results to the players or their attorneys. However, the state laboratory's initial report—finding no DNA from anyone in Mangum's rape kit—was released to the public later that day.

Notwithstanding two negative DNA analyses, Mangum's inconsistent testimony, and Pittman's initial repudiation of Mangum's allegations, Nifong continued pursuing the case. On April 17, Nifong sought and successfully obtained indictments against Collin Finnerty and Reade Seligmann for first-degree rape, first-degree sex offense, and kidnapping. On May 12, Nifong provided a report detailing the private laboratory's DNA results to counsel for Finnerty and Seligmann. However, the report excluded the fact that the private laboratory had conclusively eliminated every member of the Duke lacrosse team as a potential contributor of the DNA found in the rape kit. Nifong, along with Officers Gottlieb and Himan, had worked with the private laboratory to ensure that the report remained ambiguous and misleading on

this point. On May 15, based partly on the private laboratory's misleading report, Nifong sought and obtained an indictment against David Evans for first-degree rape, first-degree sexual offense, and kidnapping.

Over the next few months, Nifong intentionally misrepresented and misstated material facts to opposing counsel and the state trial judge regarding the private laboratory's DNA report. On September 22, the state judge issued an order requiring Nifong to provide the indicted lacrosse players with the complete files and underlying data from both the State and private laboratory analyses. After complying with the order, Nifong denied prior knowledge that the private laboratory test had ruled out all lacrosse team members as contributors of DNA in Mangum's rape kit. However, on December 15, employees from the private laboratory admitted to conspiring with Nifong to obfuscate the results of its DNA analyses.

On December 21, in an interview with a Durham police officer, Mangum recanted her rape allegation for the first time since the night of the alleged rape. Mangum, however, still maintained that she had been assaulted. Nifong dismissed the charges of first degree rape, but continued the prosecutions of the sexual assault and kidnapping charges.

The North Carolina State Bar subsequently filed an ethics complaint against Nifong based on his conduct in the Mangum rape investigation. On January 12, 2007, Nifong recused himself from the criminal cases arising from Mangum's allegations. On April 11, after a thorough, independent review, the Attorney General of North Carolina, noting the inconsistency in Mangum's statements, Mangum's suspect credibility, and the DNA reports demonstrating no rape by the indicted men, dismissed the remaining charges against Evans, Finnerty,

and Seligmann. On June 16, Nifong was disbarred for his conduct during the Mangum investigation and prosecution.

C.

Based on the above facts, Evans, Seligmann, and Finnerty (collectively the "Evans plaintiffs"), Ryan McFadyen, Matthew Wilson, and Breck Archer (collectively the "McFadyen plaintiffs"), and thirty-eight other members of the 2005–2006 Duke University lacrosse team (collectively the "Carrington plaintiffs") filed three separate complaints in the Middle District of North Carolina alleging a myriad of claims against many defendants, including the City of Durham and city officials, particularly certain police officers.[1]

The individual police officers moved to dismiss all claims against them. They asserted qualified immunity from the federal claims and official immunity from the state claims. The City and its supervisory officials moved to dismiss the federal claims pled against them, arguing that those claims failed because the allegations against the officers failed. The City moved for summary judgment on the state common-law claims, asserting governmental immunity, and moved to dismiss the state constitutional claims. The district court granted these motions in part and denied them in part.

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[1] We note that one or more of the three complaints also allege claims against the private laboratory, Duke University, and Duke employees, among others. None of these defendants asserted any immunity from suit, and thus none could file appeals from the district court's interlocutory rulings. All three complaints additionally allege numerous claims against the prosecutor, Michael Nifong. The district court held that Nifong did not enjoy qualified immunity from the claims alleged against him for his investigatory actions. Because Nifong did not note an appeal of that ruling, it is not before us.

The police officers, supervisory officials, and City appeal; no plaintiff cross-appeals. We have consolidated the three cases on appeal. We address first the federal and then the state claims asserted in the three amended complaints.

II.

We have jurisdiction over the officers' interlocutory appeals from the district court's judgment denying their motions to dismiss the federal claims against them because the officers assert qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). "We review de novo the denial of a motion to dismiss based on qualified immunity, accepting as true the facts alleged in the complaint and viewing them in the light most favorable to the plaintiff." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006).

Qualified immunity protects government officials from suit for damages when their conduct does not violate a "clearly established" constitutional right. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To escape dismissal of a complaint on qualified immunity grounds, a plaintiff must (1) allege a violation of a right (2) that is clearly established at the time of the violation. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Although we may address immunity without ruling on the existence of a right, *see id.* at 236, if a plaintiff fails to allege that an official has violated any right, the official "is hardly in need of any immunity and the analysis ends right then and there," *Abney v. Coe*, 493 F.3d 412, 415 (4th Cir. 2007).

With these principles in mind, we turn to the federal claims at issue here.

A.

The Evans plaintiffs allege a § 1983 malicious prosecution claim against Officers Gottlieb and Himan.[2] The district court denied the officers' motions to dismiss this claim, reasoning that the plaintiffs stated such a claim by alleging they "were arrested pursuant to an indictment that was obtained by the intentional or reckless creation of false or misleading evidence used before the grand jury that was necessary to a finding of probable cause, or the deliberate or reckless omission of material information that officials knew would negate probable cause." *Evans v. City of Durham*, No. 1:07CV739, slip op. at 29–30 (M.D.N.C. Mar. 31, 2011).

A "malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort." *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000). To state such a claim, a

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[2] Based on the same facts, the Evans plaintiffs also allege a Fourteenth Amendment substantive due process claim against Officers Gottlieb and Himan. The district court, noting the "unsettled legal doctrines" surrounding due process claims based on asserted pretrial fabrication of evidence, nonetheless denied the officers' motions to dismiss this claim. In doing so, the court erred. The Due Process Clause does not constitute a catch-all provision that provides a remedy whenever a state actor causes harm. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). Rather, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (internal quotation marks omitted); *see also id.* at 286–91 (Souter, J., concurring). Because the Fourth Amendment provides "an explicit textual source" for § 1983 malicious prosecution claims, the Fourteenth Amendment provides no alternative basis for those claims.

plaintiff must allege that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor. *See Durham v. Horner*, 690 F.3d 183, 188 (4th Cir. 2012).

For purposes of this appeal, the officers do not contend that the Evans plaintiffs have failed to allege illegal seizures (*i.e.*, the indictments) or that criminal proceedings failed to terminate in the plaintiffs' favor (*i.e.*, the dismissal of the indictments). The officers do maintain, however, that they escape liability for the assertedly illegal seizures because they did not *cause* them. Rather, they contend, an independent intervening act of another—*i.e.*, Prosecutor Nifong's decisions to seek the indictments—caused the seizures.[3]

Of course, constitutional torts, like their common law brethren, require a demonstration of both but-for and proximate causation. *See Murray v. Earle*, 405 F.3d 278, 289–90 (5th Cir. 2005); *Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999). Accordingly, subsequent acts of independent decision-makers (*e.g.*, prosecutors, grand juries, and judges) may constitute intervening superseding causes that break the causal chain between a defendant-officer's misconduct and a plaintiff's unlawful seizure. *See Zahrey v. Coffey*, 221 F.3d 342, 351 (2d Cir. 2000). Such "intervening acts of other participants in the criminal justice system" insulate a police officer from liability. *Id.*; *see also Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 2972 (2011); *Wray v. City of New York*, 490 F.3d 189, 195

[3] In addition to contending that Nifong's decisions to seek the indictments constitute intervening acts shielding them from liability, Officers Gottlieb and Himan contend that the grand jury's decisions to indict constitute similar intervening acts. Given our holding as to Nifong, we need not and do not reach this contention.

(2d Cir. 2007); *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989); *Smiddy v. Varney*, 665 F.2d 261, 266–68 (9th Cir. 1981), *overruled on other grounds by Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008); *Rhodes v. Smithers*, 939 F. Supp. 1256, 1274 (S.D. W. Va. 1995), *aff'd*, No. 95–2837, 1996 WL 420471 (4th Cir. July 29, 1996) (unpublished).

However, even when, as here, a prosecutor retains all discretion to seek an indictment,[4] police officers may be held to have caused the seizure and remain liable to a wrongfully indicted defendant under certain circumstances. In particular, officers may be liable when they have lied to or misled the prosecutor, *see, e.g., Sykes v. Anderson*, 625 F.3d 294, 317 (6th Cir. 2010); *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988); *Borunda v. Richmond*, 885 F.2d 1384, 1390 (9th Cir. 1988); failed to disclose exculpatory evidence to the prosecutor, *see, e.g., Dominguez v. Hendley*, 545 F.3d 585, 590 (7th Cir. 2008); *Sanders v. English*, 950 F.2d 1152, 1159–60 (5th Cir. 1992); or unduly pressured the prosecutor to seek the indictment, *cf. Beck*, 527 F.3d at 870.

Stated differently, a police officer is not liable for a plaintiff's unlawful seizure following indictment "in the absence of evidence that [the officer] misled or pressured the prosecution." *Wray*, 490 F.3d at 195; *see also Snider v. Lee*, 584 F.3d 193, 206 (4th Cir. 2009) (Stamp, J., concurring) ("A law enforcement officer who presents all relevant probable cause evidence to a prosecutor . . . is insulated from a malicious prosecution claim where such intermediary makes an independent decision . . . unless

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[4] In North Carolina, state district attorneys, like Nifong, have the sole discretion to decide whether to prosecute. *See State v. Ward*, 354 N.C. 231, 555 S.E.2d 251, 260 (2001) (citing N.C. Const. Art. IV § 18(1)).

the officer [1] concealed or misrepresented facts or [2] brought such undue pressure to bear on the intermediary that the intermediary's independent judgment was overborne."); *Hand v. Gary,* 838 F.2d 1420, 1428 (5th Cir. 1988) ("An independent intermediary breaks the chain of causation unless it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant.").

The Evans plaintiffs do not allege that Officers Gottlieb and Himan misled or misinformed Nifong. Indeed, the Evans plaintiffs expressly allege that, from the outset, the officers candidly briefed Nifong as to the startling weaknesses in the case by "detail[ing] the extraordinary evidence of innocence and the fatal defects in Mangum's claims" and "convey[ing] to Nifong that Mangum was not credible." The Evans plaintiffs nonetheless insist that the officers remain liable because they "misrepresented, withheld, or falsified evidence" that ultimately *influenced the grand jury.* This argument fails because acts of *either* the prosecutor *or* the grand jury may break the causal chain. *Cf. Cuadra,* 626 F.3d at 813; *Barts,* 865 F.2d at 1195. In other words, if the independent act of a prosecutor breaks the causal chain, the fact that the prosecutor misled the grand jury does not render police officers liable.

Alternatively, the Evans plaintiffs maintain that Officers Gottlieb and Himan conspired with Nifong to fabricate and conceal evidence from the grand jury and thus somehow unduly pressured Nifong to seek the indictment. The allegations in their complaint significantly undercut this argument. For the Evans plaintiffs ground their entire case on allegations that Nifong desired to exploit the "high-profile, racially-charged rape allegation for *his personal* political gain." They further allege that from his very first meeting with the officers, Nifong not-

ed the lack of exculpatory evidence: "we're f*cked." Tellingly, the Evans plaintiffs do not assert that Officers Gottlieb and Himan responded by pressuring Nifong to pursue the case. Rather, they allege that the officers continued the investigation at Nifong's instruction, and that, when Nifong sought to indict the Evans plaintiffs, Officer Himan frankly responded, "With what?" No matter how generously read, these allegations do not allege that Officers Gottlieb and Himan pressured Nifong to seek an indictment.

Moreover, it seems contrary to the very purpose of qualified immunity to extend personal liability to police officers who have assertedly conspired with, but neither misled nor unduly pressured, an independent prosecutor. Police officers and prosecutors often work together to establish probable cause and seek indictments; such collaboration could always be characterized as a "conspiracy." Allowing § 1983 claims against police officers to proceed on allegations of such a "conspiracy" would in virtually every case render the officers' qualified immunity from suit "effectively lost," *Mitchell*, 472 U.S. at 526, and make discovery the rule, rather than the exception, *see Anderson v. Creighton*, 483 U.S. 635, 639–40 & n. 2, (1987).

Thus, we hold today that an alleged officer-prosecutor conspiracy does not alter the rule that a prosecutor's independent decision to seek an indictment breaks the causal chain unless the officer has misled or unduly pressured the prosecutor.[5] Because the Evans

[5] Twelve years ago, the Second Circuit questioned in dicta why "reasonable foreseeability" would not suffice to preserve the causal chain between a police officer's actions and an unlawful seizure by way of indictment. *See Zahrey*, 221 F.3d at 351–52. However, no other court has pursued this suggestion and more recently the Second Circuit itself has stepped back from that broad dicta. *See*

plaintiffs do not allege that Officers Gottlieb and Himan either misled or pressured Nifong to seek their indictments, we reverse the district court's denial of the officers' motions to dismiss the Evans plaintiffs' § 1983 malicious prosecution claims against them.

B.

Both the McFadyen and Carrington plaintiffs allege § 1983 claims against Officers Gottlieb and Himan based on the officers' asserted unlawful seizures of evidence pursuant to a state non-testimonial order ("NTO"). Plaintiffs acknowledge that in seizing physical evidence from them, the officers acted pursuant to a state NTO, but claim that those seizures nonetheless violate the Fourth Amendment because the NTO flowed from the officers' assertedly dishonest supporting affidavits. The district court agreed and so denied the officers' motions to dismiss these claims.

The North Carolina NTO statute requires "probable cause to believe that a felony offense . . . has been committed;" "reasonable grounds to suspect that the person named or described in the affidavit committed the offense;" and "[t]hat the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense." N.C. Gen. Stat. § 15A–273(1)–(3).[6]

Wray, 490 F.3d at 195. As explained in text above, we believe good reasons counsel against following the approach suggested in the *Zahrey* dicta.

[6] Plaintiffs also challenge the constitutionality of the North Carolina NTO statute, contending that it authorizes searches and seizures of blood and DNA without probable cause. The district court correctly noted the uncertainty as to whether North Carolina courts would interpret the state NTO statute "as authorizing a search and

Franks v. Delaware, 438 U.S. 154 (1978), guides our analysis as to whether asserted material false statements and omissions in the NTO supporting affidavits offered by Officers Gottlieb and Himan state a constitutional claim. *See also Miller v. Prince George's Cnty.*, 475 F.3d 621, 627 (4th Cir. 2007) (extending *Franks* to § 1983 claims). *Franks* provides a two-prong test. First, plaintiffs must allege that defendants "knowingly and intentionally or with a reckless disregard for the truth" either made false statements in their affidavits or omitted facts from those affidavits, thus rendering the affidavits misleading. *See Franks,* 438 U.S. at 155–56; *Miller*, 475 F.3d at 627. Second, plaintiffs must demonstrate that those "false statements or omissions [are] 'material,' that is, 'necessary to'" a neutral and disinterested magistrate's authorization of the search. *Miller*, 475 F.3d at 628

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seizure . . . on less than a full showing of probable cause" and whether "such an interpretation would render the state NTO statutes unconstitutional." *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 925 (M.D.N.C. 2011); *see also State v. Grooms*, 353 N.C. 50, 540 S.E.2d 713, 728 (2000). Nonetheless, the district court refused to hold that the officers' qualified immunity barred this claim. Given this uncertainty, we cannot conclude that clearly established law mandated "a full showing of probable cause" or that the state NTO statute would be held unconstitutional without such a showing. Accordingly, we must reverse the district court's refusal to dismiss this constitutional challenge to the state NTO statute on qualified immunity grounds. However, it is clear that seizures pursuant to the NTO statute are "no less subject to the constraints of the Fourth Amendment," and that the Constitution requires some evidentiary showing, even if not "probable cause in the traditional sense," for the collection of DNA evidence pursuant to an NTO. *See Davis v. Mississippi*, 394 U.S. 721, 727 (1969); *see also Hayes v. Florida*, 470 U.S. 811, 816–17 (1985). On its face, the state NTO statute requires such an evidentiary showing. *See* N.C. Gen. Stat. § 15A–273(1)–(3). We address in text plaintiffs' arguments that NTO affidavits failed to provide the evidentiary showing required in the NTO statute.

(quoting *Franks*, 438 U.S. at 155–56). We take up each prong in turn.

1.

a.

In their complaints, both the McFadyen and Carrington plaintiffs allege that Officers Gottlieb and Himan deliberately falsified their NTO affidavits by wrongly declaring that: (1) Mangum had claimed she lost painted fingernails in a struggle with her attackers, and police recovered fingernails during their search of the house where the party (and alleged rape) occurred; (2) the lacrosse team members used aliases before and during the party to conceal their identities from Mangum and Pittman; and (3) the team members attempted to conceal their university and team affiliations from Mangum and Pittman during the party. In addition, the McFadyen plaintiffs maintain that the officers deliberately falsified the affidavits by declaring that at one point during the party a male attendee, holding a broomstick in the air, told Mangum and Pittman "I'm going to shove this up you." No record evidence lends any support for these four statements; accordingly, they clearly satisfy the first *Franks* prong as deliberate falsehoods.

We note that on appeal, plaintiffs vigorously contend that the officers' reliance in the NTO affidavits on Nurse Levicy's corroborating statements constitutes another deliberately false statement under *Franks*. But the plaintiffs' amended complaints belie this contention.

The *McFadyen* complaint does not even mention the nurse's statements when detailing the false statements in the NTO affidavits. While the *Carrington* complaint does allege that the portions of the affidavits based on the nurse's statements were false, it does not allege that the officers knew of the falsity when applying for the

NTO, or acted with reckless disregard for the truth in relying on the nurse's statements. Of course, the truthfulness of a *witness* statement is irrelevant as to whether *affiants'* statements were truthful. *See Franks,* 438 U.S. at 171. And that the officers may have learned of the falsehood of the nurse's statements after the NTO issued does not defeat their reliance on the information when applying for the NTO. *See Unus v. Kane,* 565 F.3d 103, 125 (4th Cir. 2009). Moreover, although the Carrington plaintiffs allege that at some point Nurse Levicy and Officers Gottlieb and Himan conspired to prolong the investigation, they do not allege when that conspiracy began. Indeed their complaint suggests that the officers initially believed Nurse Levicy's statements.

For these reasons, we cannot agree that the officers' reliance on the nurse's corroborating statements constituted a deliberate falsehood under *Franks.* Rather, only the four misstatements actually pled in the McFadyen plaintiffs' complaint (three of which are also pled in the Carrington plaintiffs' complaint) satisfy the first *Franks* prong.[7]

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[7] On appeal, plaintiffs insist that we look to their complaints as a whole to determine whether Officers Gottlieb and Himan alleged numerous other assertedly false statements in the NTO affidavits. We reject plaintiffs' suggestion that defendants—and courts—should scour several-hundred page complaints to discover which affidavit statements plaintiffs allege are fabricated or misleading. A complaint must specify the facts plaintiffs allege defendants falsified or omitted. Contrary to plaintiffs' arguments, general allegations that "every material fact" in the affidavits was fabricated do not suffice. *See Franks*, 438 U.S. at 171 ("[Plaintiffs] should point out specifically the portion of the warrant affidavit that is claimed to be false.").

b.

In addition, the McFadyen plaintiffs allege that Officers Gottlieb and Himan's *omission* from the NTO affidavits of the fact that in the first photo array Mangum "ruled out as plausible suspects" several team members also satisfies the first *Franks* prong. We disagree. Affiants are not required to include every piece of exculpatory information in affidavits. *See, e.g., Simmons v. Poe,* 47 F.3d 1370, 1384 (4th Cir. 1995) (finding affiant's omission of facts inconsistent with a suspect's guilt from an affidavit "was not an attempt to mislead the magistrate" under *Franks*); *United States v. Colkley,* 899 F.2d 297, 299–301 (4th Cir. 1990) (holding affiant's omission of the fact that six eyewitnesses failed to identify a criminal suspect in a photo array did not satisfy the first *Franks* prong absent evidence that the affiant possessed "the requisite intent to mislead"). As in *Simmons* and *Colkley,* nothing in the omission alleged by the McFadyen plaintiffs plausibly suggests an intent to deceive or recklessness, and thus the asserted omission does not satisfy the first *Franks* prong.

2.

Because the plaintiffs have sufficiently pled that Officers Gottlieb and Himan deliberately made four false statements in the NTO supporting affidavits, we proceed to *Franks*' materiality prong. To state a *Franks* claim, false statements must be "material, that is, necessary to the neutral and disinterested magistrate's" authorization of the search. *Miller,* 475 F.3d at 628 (internal quotation marks omitted); *see also Franks,* 438 U.S. at 171; *Colkley,* 899 F.2d at 301. To determine materiality, we "excise the offending inaccuracies . . . and then determine whether or not the corrected warrant affidavit would" provide adequate grounds for the search. *Miller,* 475 F.3d at 628 (internal quotation marks omitted).

In correcting the supporting affidavits, we remove the false statements regarding the broomstick, Mangum's fingernails, and the suggestions that team members attempted to hide their identities, school, and team affiliations. Even so, the corrected affidavits clearly contain sufficient factual bases to establish both probable cause that a rape was committed and "reasonable grounds" that the named persons committed the rape, as required under the NTO statute.

As corrected, the affidavits: (1) describe Mangum's allegation that, after dancing at the party, three white males "forcefully held her legs and arms and raped and sexually assaulted her anally, vaginally, and orally"; (2) include the fact that police found some of Mangum's belongings during their search of the house where the alleged rape was committed; and (3) contain Nurse Levicy's corroborating statement that "the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally." A rape allegation, paired with corroborating medical evidence, undoubtedly establishes probable cause that a rape was committed. *Cf. Torchinsky v. Siwinski,* 942 F.2d 257, 262 (4th Cir. 1991).

The corrected affidavits also state "reasonable grounds" for belief that the named persons committed the rape. The corrected affidavits state Mangum's allegations of gang-rape by three white men at the party; that the team captains had identified all but five of the white team members named in the NTO as being present at the party; that "no strangers . . . showed up to the event"; and that—because there were so many attendees—all white members of the lacrosse team were listed under the NTO because "they were all aware of the party and could have been present." These facts might not demonstrate probable cause, but certainly

meet the NTO "reasonable grounds" standard. For these facts state more than an "unparticularized suspicion" that the parties named in the NTO may have raped Mangum. *See State v. Pearson*, 356 N.C. 22, 566 S.E.2d 50, 54 (2002) (stating that "reasonable grounds" requires only "a minimal amount of objective justification, something more than an 'unparticularized suspicion or hunch,'" and is a "significantly lower" standard than probable cause).

Because the corrected NTO affidavits would provide adequate support for a magistrate's authorization of the NTO, we cannot say that the false statements identified above were "material." Therefore, we reverse the district court's denial of defendants' motions to dismiss these § 1983 unlawful seizure claims.

C.

Plaintiff Ryan McFadyen individually alleges a § 1983 claim against Officers Gottlieb and Himan for the assertedly unlawful search and seizure of his apartment and car pursuant to a search warrant.[8] McFadyen alleges that the officers made material false statements and omissions in the search warrant application. The district court denied the officers' motions to dismiss this claim, relying on its reasoning with respect to the NTO claims. Because McFadyen alleges that Officers Gottlieb and Himan made false statements or omissions material to the issuance of the search warrant, we again analyze the claim under *Franks*.

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[8] To the extent that McFadyen's co-plaintiffs, Matthew Wilson and Breck Archer, also attempt to bring this claim, we hold that they lack standing to do so. *See United States v. Gray*, 491 F.3d 138, 144 (4th Cir. 2007).

1.

The affidavit supporting the search warrant mirrors those supporting the NTO with the following two additions. First, the officers added that during the party "[t]he players . . . used numbers when calling for one and another across the room[,] again to hide their identities." Second, the officers added the contents of the email McFadyen sent to his teammates and the assertion by Officer Gottlieb that he received the email from a confidential source. McFadyen contends that both of these statements, like the four statements discussed above in the NTO affidavits, constitute knowing false statements under the first *Franks* prong. We agree with respect to the first statement, as the record lends it no support.

But we disagree as to the second statement, which contains the email. McFadyen argues that, because the affidavit indicates that the email was provided by a "confidential source," but does not articulate any facts relating to the reliability of the source, we must strike the email from the affidavit before addressing *Franks*' materiality prong. Assuming, without deciding, that this would be the appropriate manner to handle such admittedly truthful, yet perhaps inadequately verified, information under *Franks,* we nonetheless find McFadyen's argument meritless.

Florida v. J.L., 529 U.S. 266 (2000), on which McFadyen heavily relies, in fact provides him little support. *J.L.* holds that police officers must offer evidence other than an anonymous tip to support a *Terry* stop-and-frisk. *Id.* at 268. In this case, the email itself supplies evidence in addition to the anonymous tip. For the email sent from McFadyen's Duke email account and signed with his jersey number contains sufficient indicia of reliability to support its inclusion in the search warrant application. *See United States v. Perkins,* 363 F.3d 317, 325

(4th Cir. 2004) ("The central point in those [anonymous tip] cases is that courts must ensure, one way or the other, that an anonymous informant's tip was sufficiently reliable."). Accordingly, we do not strike McFadyen's email from the warrant affidavit.

2.

Because McFadyen sufficiently pled that Officers Gottlieb and Himan made five false statements in the search warrant affidavit (four from the NTO affidavits and the additional statement as to the players' use of jersey numbers to hide their identities), we proceed to *Franks*' materiality prong to "determine whether or not the 'corrected' warrant affidavit would establish probable cause." *Miller,* 475 F.3d at 628 (internal quotation marks omitted).

"Probable cause exists when there is a fair probability that . . . evidence of a crime will be found in a particular place." *United States v. Grubbs,* 547 U.S. 90, 95 (2006) (internal quotation marks omitted). We conclude that the corrected affidavit establishes probable cause to search McFadyen's dorm room.[9]

As corrected, the affidavit still contains significant evidence that a rape was committed, most notably Mangum's allegations and Nurse Levicy's corroborating statement that "the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally." Further, the affidavit contains McFadyen's email, which specifically identified his apartment as the location of a planned murder of exotic dancers.

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[9] The search warrant also authorized the search of McFadyen's car. On appeal, McFadyen maintains that a search of his car violated the Constitution. This argument fails because in his complaint McFadyen never alleges that police actually searched his car.

Even crediting McFadyen's allegation that his email spoofed the novel and film, *American Psycho,* a reasonable officer could have—and given the circumstances here, should have—taken seriously the email's disturbing contents. McFadyen's email, sent only hours after the alleged rape of an exotic dancer, specifically contemplated other brutally violent behavior toward exotic dancers. The email's temporal proximity and substantive similarity to the rape allegations provide more than a fair probability that evidence relating to the rape would be found in McFadyen's apartment.[10]

McFadyen's argument that the affidavit fails to establish a nexus between his apartment and the asserted crimes also fails. That none of the crimes stemming from Mangum's allegations were alleged to have occurred in McFadyen's apartment is irrelevant. Instead, the probable cause inquiry focuses on whether the affidavit demonstrates a "fair probability" that evidence *relating to* the crimes alleged would be found in McFadyen's apartment. *See Unus,* 565 F.3d at 125 n. 25; *see also Grubbs,* 547 U.S. at 95. Based on the content of McFadyen's email, there is no question that the corrected affidavit meets this standard.

Because the corrected affidavit would provide adequate support for a magistrate's finding of probable cause, we cannot say that the false statements in the affidavit were "material" under the second *Franks* prong. Therefore, we reverse the district court's denial of de-

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[10] McFadyen contends that the fact that the search warrant was executed nearly two weeks after he sent the email renders its information stale. While this may be true for the "conspiracy to commit murder" crime, the email certainly provided non-stale probable cause for the other crimes listed in the warrant application—sexual assault and kidnapping.

fendants' motions to dismiss McFadyen's individual § 1983 unlawful search and seizure claim.

D.

Based on the above § 1983 claims, all three sets of plaintiffs allege derivative claims of supervisory liability against City supervisory officials and of liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), against the City itself.[11] Further, plaintiffs allege "stigma-plus" due process claims under *Paul v. Davis*, 424 U.S. 693 (1976), against various officials who had made public statements about the investigation. The district court denied the City and its officials' motions to dismiss these claims.

All of these claims require a predicate constitutional violation to proceed. For "supervisors and municipalities cannot be liable under § 1983 without some predicate 'constitutional injury at the hands of the individual [state] officer,' at least in suits for damages." *Waybright v. Frederick Cnty.*, 528 F.3d 199, 203 (4th Cir. 2008) (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)). Similarly, a plaintiff bringing a "stigma-plus" claim under *Paul* must allege both a stigmatic statement and a "state action that 'distinctly altered or extinguished'" his legal status. *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 315 (4th Cir. 2012) (quoting *Paul*, 424 U.S. at 711). Because we hold that all plaintiffs failed

[11] We recognize that because cities do not possess qualified immunity from § 1983 claims, *Owen v. City of Independence*, 445 U.S. 622, 638 (1980), we do not have appellate jurisdiction under the collateral order doctrine to hear the City's appeal of the Monell claims. However, because our determinations of the individual officers' qualified immunities fully resolve the issue of the City's Monell liability, we exercise pendent appellate jurisdiction over these claims. *See Altman v. City of High Point*, 330 F.3d 194, 207 n. 10 (4th Cir. 2003).

to state predicate § 1983 claims against the individual officers, we must also hold that all plaintiffs have failed to state supervisory liability, *Monell* liability, and "stigma-plus" claims.[12] Thus, we reverse the district court's denial of the defendants' motions to dismiss these derivative claims.

III.

Having resolved the City and officials' appeals of the district court's denial of their motions to dismiss the federal claims asserted against them, we turn to their appeals of the district court's denial of their motions for summary judgment or to dismiss the state law claims. Federal jurisdiction over the Evans and Carrington state law claims rests on diversity of citizenship. Although the McFadyen plaintiffs only pled federal question jurisdiction, a federal court has pendent jurisdiction over their state law claims. 28 U.S.C. § 1367. Similarly, we have appellate jurisdiction under the collateral order doctrine to review a district court's denial of those claims to which the defendants assert immunities "from suit." *Gray–Hopkins v. Prince George's Cnty.*, 309 F.3d 224, 231 (4th Cir. 2002); *see also Moore v. Evans*, 124 N.C. App. 35, 476 S.E. 2d 415, 420 (1996).

A.

All three sets of plaintiffs allege state common-law tort claims against the City. The City moved for summary judgment as to these claims on the ground of governmental immunity from suit. The district court denied the motion.

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[12] The parties dispute whether a Fourth Amendment violation constitutes a cognizable "plus" under *Paul*. Given that we hold that plaintiffs failed to state Fourth Amendment claims, we need not and do not reach this question.

Clearly, North Carolina municipalities enjoy governmental immunity from state common-law tort claims arising out of their performance of governmental, as opposed to proprietary, functions. *Patrick v. Wake Cnty. Dep't of Human Servs.*, 188 N.C. App. 592, 655 S.E. 2d 920, 923 (2008). Just as clearly, the provision of police services constitutes a governmental function protected by governmental immunity. *Arrington v. Martinez*, 716 S.E.2d 410, 414 (N.C. Ct. App. 2011).

All plaintiffs maintain, however, that the City has waived its governmental immunity by purchasing liability insurance pursuant to N.C. Gen. Stat. § 160A–485(a). Well-established North Carolina law holds that courts may not lightly infer a waiver of immunity. *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 299 S.E. 2d 618, 627 (1983). Indeed, "[i]mmunity is waived only to the extent that the city or town is indemnified by the insurance contract from liability for the acts alleged." *Combs v. Town of Belhaven*, 106 N.C. App. 71, 415 S.E. 2d 91, 92 (1992). All plaintiffs argue that a genuine dispute of material fact exists as to whether the City waived its governmental immunity by purchasing liability insurance.[13]

Plaintiffs first contend that the City's purchase of two liability insurance policies from the Insurance Company of the State of Pennsylvania ("ICOP") waived its governmental immunity. But a "governmental immunity en-

[13] Plaintiffs briefly argue the City's conflicting statements regarding its insurance coverage, along with its arbitration with one of its insurers over the policy coverage, bars the grant of summary judgment. However, because "[t]he meaning of language used in an insurance contract is a question of law for the Court," *Daniel v. City of Morganton*, 125 N.C. App. 47, 479 S.E.2d 263, 267 (1997), the City's opinions and the existence and outcome of the arbitration proceedings are irrelevant to the purely legal question of whether the City waived its governmental immunity by purchasing liability insurance.

dorsement" present in both ICOP policies establishes that the City did not waive its governmental immunity. The endorsement states:

> [T]his policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses is [sic] asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

The endorsement is clear and none of the plaintiffs' arguments undermine its clarity. Indeed, the endorsement is materially indistinguishable from similar provisions that North Carolina courts have held do preserve governmental immunity. *See Owen v. Haywood Cnty.*, 205 N.C. App. 456, 697 S.E.2d 357, 359–60, *review denied,* 364 N.C. 615, 705 S.E.2d 361 (2010); *Estate of Earley ex rel. Earley v. Haywood Cnty. Dep't of Soc. Servs.*, 204 N.C. App. 338, 694 S.E.2d 405, 409 (2010); *Patrick*, 655 S.E.2d at 923–24. Thus, we must hold that the City did not waive its governmental immunity through the ICOP policies.

Nor do the plaintiffs' contentions that the City waived its governmental immunity by purchasing an insurance policy from Everest Insurance Company fare any better. For none of the plaintiffs' claims implicate the policy period covered by the Everest policy. That policy explicitly provides coverage for "occurrences" or "wrongful acts" for the policy period of April 1, 2007 to April 1, 2008. Plaintiffs do not allege any "occurrences" or "wrongful acts" during the Everest policy's temporal scope.[14] Accordingly, the Everest policy does not apply to

[14] Although the Evans and McFadyen plaintiffs allege an ongoing

their claims and cannot function as a waiver of governmental immunity. *See Patrick*, 655 S.E.2d at 923.

Finally, the McFadyen plaintiffs argue that the City waived its governmental immunity by participating in a local government risk pool or creating a funded reserve under N.C. Gen. Stat. § 160A–485(a). Neither argument is persuasive. The asserted local government risk pool that the McFadyen plaintiffs identify is actually a contract for the provision of liability claims adjusting services, not a contract for the provision of liability coverage itself. Further, because the City repealed its funded reserve on June 18, 2007, the funded reserve does not waive the City's governmental immunity in these cases.[15]

In short, no genuine dispute as to any material fact exists as to whether the City waived its governmental immunity from state common-law tort claims; it clearly did not. Accordingly, we reverse the district court's deni-

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conspiracy among several defendants until April 11, 2007, the last specific "occurrence" or "wrongful act" they allege occurred in December 2006. A plaintiff cannot defeat governmental immunity by alleging an ongoing conspiracy without any specific factual pleadings of a covered action during the policy period.

[15] Of course, all plaintiffs' tort claims against the City rest on conduct that occurred before the City repealed its funded reserve. However, when creating the funded reserve in 2004, "[t]he City reserve[d] the right to modify or terminate th[e] policy at any time, and to have any such modification or termination apply to any claim not paid or for which there has not yet been a final decision of a court of competent jurisdiction." Because the City repealed its funded reserve policy before a final decision in any of these cases—indeed, before plaintiffs even filed their original complaints—the City has not waived its governmental immunity as to these claims through its prior funded reserve. Moreover, because the City has not waived its governmental immunity, we need not reach the issue of whether the public duty doctrine immunizes the City from plaintiffs' negligence-based tort claims.

al of the City's motion for summary judgment as to these claims.

B.

The plaintiffs also allege state common-law tort claims against various Durham police officers, to which the officers asserted official immunity. In North Carolina, official immunity protects public officials performing discretionary acts under color of authority from suit in their individual capacity. *See Moore,* 476 S.E.2d at 421. Plaintiffs may avoid dismissal of such claims on official immunity grounds simply by pleading that an official's tortious actions were "malicious, corrupt or outside the scope of [his] official duties." *Id.* Notwithstanding the officers' vigorous appellate arguments to the contrary, as the district court explained, the plaintiffs sufficiently *pled* malicious conduct by the officers.[16] Thus, we need only consider whether the alleged conduct fails as a matter of law to constitute a tortious act under North Carolina law.

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[16] The partial dissent contends that there is an "obvious alternative explanation" for the officers' allegedly malicious acts. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (internal quotation marks omitted). Maybe so if each act were viewed in isolation. But, in applying *Iqbal*, we are to "draw on [our] judicial experience and common sense" to determine whether plaintiffs' well-pleaded, non-conclusory allegations collectively nudge the issue of malice "across the line from conceivable to plausible." *Id.* at 679–80. As outlined in the dissent itself, plaintiffs allege many wrongful acts by the officers. Taken together, the officers' multiple alleged acts certainly present plausible claims of malice. Of course, plaintiffs ultimately bear the burden of proving these allegations, and the district court may determine prior to trial that they have failed to offer evidence of a triable issue of fact as to the officers' allegedly malicious conduct.

1.

The Evans plaintiffs allege that Officers Addison, Gottlieb, and Himan engaged in the tort of malicious prosecution by concealing material evidence, manufacturing false evidence, and intimidating witnesses. The district court denied the officers' motion to dismiss this claim on official immunity grounds, finding the plaintiffs properly pled the elements of a state malicious prosecution claim—causation of a criminal proceeding, without probable cause and with malice, which terminates in the plaintiff's favor. *See Williams v. Kuppenheimer Mfg. Co.,* 105 N.C. App. 198, 412 S.E.2d 897, 899 (1992). On appeal, the officers urge us to hold—as we do in the § 1983 context—that Prosecutor Nifong's decision to seek indictments against the Evans plaintiffs broke the causal chain between their acts and the indictments.

Certainly, no North Carolina court has adopted the attenuated view of causation espoused by the plaintiffs; but North Carolina courts have generally held causation can be established by allegations that the defendant "instituted, procured, or participated in" a criminal proceeding. *See Moore v. City of Creedmoor,* 120 N.C. App. 27, 460 S.E.2d 899, 906 (1995), *aff'd in part, rev'd in part on other grounds,* 345 N.C. 356, 481 S.E.2d 14 (1997); *see also Becker v. Pierce,* 168 N.C. App. 671, 608 S.E.2d 825, 829 (2005). Given this language, we cannot hold that the district court erred in finding that the Evans plaintiffs pled a state-law malicious prosecution claim as to Officers Gottlieb and Himan. However, plaintiffs fail to allege any conduct by Officer Addison that plausibly could be construed as "institut[ing], procur[ing], or participat[ing]" in a criminal proceeding. Accordingly, we must affirm the court's denial of Officers Gottlieb and Himan's motions to dismiss this claim, and reverse the court's denial of Officer Addison's motion to dismiss this claim.

2.

All three sets of plaintiffs allege state common-law obstruction of justice claims against Officers Gottlieb and Himan, based on the officers' asserted fabrication and concealment of evidence and witness tampering. The McFadyen plaintiffs also allege a state common-law obstruction of justice claim against the officers' supervisor, Commander Jeff Lamb, based on his asserted concealment of evidence and witness tampering.

All three officers argue that, in North Carolina, criminal suspects (like the plaintiffs) cannot allege a common-law obstruction of justice claim against police officers based on how the officers conducted a criminal investigation. Although logic would seem to compel this conclusion, the district court denied the defendants' motions to dismiss, explaining it could not "rule out the possibility that a claim could exist for common law obstruction of justice for creation of false evidence or destruction of evidence for the purpose of impeding the justice system, even if the conduct occurred as part of a criminal investigation." *McFadyen v. Duke Univ.,* 786 F. Supp. 2d 887, 975 (M.D.N.C. 2011). We cannot affirm. Even though North Carolina courts have interpreted common-law obstruction of justice to include fabrication of evidence, *Henry v. Deen,* 310 N.C. 75, 310 S.E.2d 326, 334 (1984), and destruction of evidence, *Grant v. High Point Reg'l Health Sys.,* 184 N.C. App. 250, 645 S.E.2d 851, 855 (2007), we have not found—and plaintiffs have not offered—any case from any jurisdiction recognizing a common-law obstruction of justice claim against a police officer for his actions relating to a criminal proceeding.

Thus, in forecasting whether North Carolina would recognize such an action, *see Wilson v. Ford Motor Co.,* 656 F.2d 960, 960 (4th Cir. 1981), we must conclude that although such a holding may be a remote "possibility," it

is not a reality. Accordingly, we reverse the district court's denial of the officers' motions to dismiss this claim.

C.

Finally, the City asks us to exercise pendent appellate jurisdiction over the district court's denial of the City's motions to dismiss all three sets of plaintiffs' state constitutional claims.

Because governmental immunity does not shield North Carolina municipalities from claims alleged under the state constitution, *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351, 354 (2009), the district court's denial of the City's motion to dismiss is a non-final order, not appealable under the collateral order doctrine. Nonetheless, the City urges us to exercise pendent appellate jurisdiction over these claims because, it argues, the issue of governmental immunity is relevant to the existence of a state constitutional claim, and because the state constitutional standards are the same as those applicable to plaintiffs' § 1983 claims.

As we have previously noted, "[p]endent appellate jurisdiction is an exception of limited and narrow application driven by considerations of need, rather than of efficiency." *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006). Our exercise of pendent appellate jurisdiction "is proper only when an issue is (1) inextricably intertwined with the decision of the lower court to deny qualified immunity or (2) consideration of the additional issue is necessary to ensure meaningful review of the qualified immunity question." *Bellotte v. Edwards*, 629 F.3d 415, 427 (4th Cir. 2011) (internal quotation marks omitted). In this case, neither rationale is present. Our review of the issues of qualified, official, and governmental immunity in these appeals did not require any evalua-

tion of the state constitutional claims. Indeed, the state constitutional claims, although "sharing certain wholesale commonalities" with the immunity issues, "nevertheless present quite distinct factual and legal issues at the retail level"—in particular, what constitutes an "adequate remedy at state law" under *Craig*. *Id.*

We therefore decline to exercise pendent appellate jurisdiction over the state constitutional claims. Instead, we dismiss for lack of jurisdiction the City's appeal of the district court's denial of the City's motions to dismiss these claims.

IV.

To recapitulate, we hold as follows. We reverse the district court's denial of all defendants' motions to dismiss the federal claims alleged against them. We reverse the court's denial of the City's motion for summary judgment as to the state common-law claims alleged against it. We affirm the court's denial of Officers Gottlieb and Himan's motions to dismiss the state common-law malicious prosecution claims alleged against them. We reverse the court's denial of the officers' motions to dismiss all other state common-law claims. We dismiss for lack of appellate jurisdiction the City's appeal of the state constitutional claims alleged against it. Finally, we remand the cases for further proceedings consistent with this opinion.

AFFIRMED IN PART, DISMISSED IN PART, REVERSED IN PART, AND REMANDED.

WILKINSON, Circuit Judge, concurring:

I concur fully in Judge Motz's fine opinion. It demonstrates well the central flaws in the plaintiffs' contentions.

A few additional observations may underscore the overblown nature of this case. Plaintiffs have sought to raise every experimental claim and to corral every conceivable defendant. The result is a case on the far limbs of law and one destined, were it to succeed in whole, to spread damage in all directions.

I.

Although I appreciate the able and well-intentioned efforts of the attorneys in this matter, there is something disquieting about the sweeping scope and number of claims brought by the various plaintiff groups (twenty-three counts in the *Evans* complaint, thirty-two in *Carrington*, and forty in *McFadyen*), as well as the glacial pace at which this litigation has proceeded (we are now nearly six years removed from the dismissal of the last charges against the three Duke lacrosse players). With all of these overwrought claims disputed over years of complex litigation, this matter has taken on an unfortunate life of its own. A few examples of the pitfalls in plaintiffs' most inventive claims illustrate my concerns with allowing them to proceed.

A.

To take one example, the complaints lodge a Fourteenth Amendment "due process stigma-plus" claim against Corporal David Addison, the Durham Police spokesman. In seeking to hold Addison liable for allegedly defamatory statements, the complaints fly in the face of the Supreme Court's admonition that the Due Process Clause is not to be converted into "a font of tort law to be superimposed upon whatever systems may already be

administered by the states." *Paul v. Davis,* 424 U.S. 693, 701 (1976). Yet plaintiffs seek that result and then some, attempting to hold a police spokesman liable for general statements that reference no individual and are therefore not even actionable under traditional defamation law. *See* Restatement (Second) of Torts § 564A (1977) ("One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if, (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.").

Moreover, the plaintiffs' position would expose spokespersons (who are often given limited information by their superiors on a need-to-know basis) to the threat of monetary damages for expressing a departmental position in the most general of terms. Think of the implications of such a rule for public spokespersons of all sorts, from the press secretary for the Department of State to the spokesperson for a local school board. The threat posed by litigation of this kind would cause such officials to clam up, and the criminal justice system—not to mention government generally—would become less transparent than it already is.

The plaintiffs' "stigma-plus" claim against Addison suffers from another shortcoming. Even if Addison's general statements could somehow be considered defamatory with respect to the various individual plaintiffs, the complaints fail to plausibly allege that any of his statements *caused* the indictments of Evans, Finnerty, and Seligmann, much less the issuance of the NTO or *McFadyen* search warrant. *See Johnson v. Morris,* 903 F.2d 996, 999 (4th Cir. 1990) ("[F]or a liberty interest to have been implicated, some damage to [plaintiff's] em-

ployment status must have *resulted from* publication of the reasons for his demotion." (emphasis added)); *see also Rehberg v. Paulk*, 611 F.3d 828, 853 (11th Cir. 2010) (dismissing a stigma-plus claim where the complaint did not allege that the defendant's media statements "caused" the plaintiff's indictments and arrest), *aff'd on other grounds*, 132 S. Ct. 1497 (2012).

Indeed, it is difficult to imagine how the public statements of a spokesperson about the status of a rape investigation could be causally related to a police investigator's decision to seek evidence or a prosecutor's decision to pursue an indictment. The *Evans* plaintiffs argue that a causal connection may be inferred from their allegation that Addison's statements were "intended to inflame the Durham community and grand jury pool against the plaintiffs." But such an intent, even if taken as true, is far too removed from the prosecutor's decision to indict and the investigators' decision to seek the NTO to justify imposition of monetary liability on the basis of a defamation claim that is dubious enough under common law and that the Supreme Court was deeply reluctant to constitutionalize in the first place.

B.

A second example of the complaints' overreach lies not so much in the nature of the claims as in the identity of the defendants. The plaintiffs have sued not just the police investigators, but also a number of Durham city officials such as the City Manager, Chief of Police, and various members of the police chain of command. Plaintiffs seek monetary damages from these so-called "supervisory defendants" under a theory of supervisory liability. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), however, the Supreme Court issued several cautionary holdings with respect to such liability—lessons that plaintiffs have utterly failed to heed.

To begin with, the Supreme Court explained in *Iqbal* that "a supervisor's mere knowledge" that his subordinates are engaged in unconstitutional conduct is insufficient to give rise to liability; instead, a supervisor can be held liable only for "his or her own misconduct." *Id.* at 677. Yet the complaints in this case repeatedly allege that the so-called supervisory defendants violated plaintiffs' constitutional rights on the theory that they "knew or should have known" about their subordinates' conduct. This directly contradicts *Iqbal*'s holding that such allegations, standing alone, cannot give rise to supervisory liability.

Moreover, the *Iqbal* Court explained that in order to state a claim for supervisory liability, "a plaintiff must plead that *each* [supervisory] defendant, through the official's *own individual actions,* has violated the Constitution." *Id.* at 676 (emphases added); *see also Robbins v. Oklahoma,* 519 F.3d 1242, 1250, 1252–53 (10th Cir. 2008) (dismissing supervisory liability claim where complaint failed to "isolate the allegedly unconstitutional acts of each defendant"). The plaintiffs here, however, have roped in a number of Durham city officials without pleading any allegedly improper *individual* actions. For example, apart from general references to name, rank, and place in the chain of command, the *Evans* complaint does not contain so much as a single individualized allegation against named defendants Beverly Council and Lee Russ. The *Carrington* complaint likewise fails to make particularized allegations against Council, Russ, and Michael Ripberger. The absence of individualized allegations is all the more remarkable in light of the otherwise exhaustive nature of the complaints: combined, the three complaints weigh in at a staggering eight hundred-plus pages.

The plaintiffs argue that the absence of specific allegations with respect to each individual supervisor is of no consequence given that they have used the term "supervisory defendants" as shorthand to allege the collective actions and state of mind for all of the named supervisors. Requiring repetition of the names of specific defendants within the context of each factual allegation, we are told, would be "pointless and inefficient." This contention sorely misses the mark. The purpose of requiring a plaintiff to identify how "*each* [supervisory] defendant, through the official's *own individual actions,* has violated the Constitution," *Iqbal,* 556 U.S. at 676 (emphases added), is not to erect some formalistic rule that a complaint must mention each defendant by name some particular number of times. The requirement is instead designed to ensure that the serious burdens of defending against this sort of lawsuit are visited upon a departmental supervisor only when the complaint "plausibly suggest[s]" that the supervisor engaged in "his or her *own* misconduct." *Id.* at 681, 677 (emphasis added).

That showing is demonstrably absent here. In addition to the complaints' failure to identify specific misconduct on the part of certain individual defendants, there are numerous problems with the individualized allegations that are actually made. For instance, both the *Carrington* and *McFadyen* complaints discuss at length a meeting occurring on or around March 29, 2006, allegedly attended by specific supervisory defendants (Patrick Baker and Steven Chalmers in the *Carrington* complaint; Baker, Russ, and Ronald Hodge in the *McFadyen* complaint) where the prosecutor and investigators allegedly agreed or were instructed to expedite the case against the Duke players despite mounting evidence of their innocence. But that meeting has no logical relevance to the supposed Fourth Amendment violations of which these plaintiffs complain because it occurred days

after the preparation of the allegedly false NTO and *McFadyen* search warrant applications. In other words, to use the language of *Iqbal*, the plaintiffs' allegations regarding this meeting do not "plausibly give rise to an entitlement to relief." *Id.* at 679.

At bottom, then, the problem with the supervisory liability claims here is that, like those at issue in *Iqbal*, they fail to cross "the line from conceivable to plausible." *Id.* at 680. As in *Iqbal*, the plaintiffs' allegations here *could* be "consistent with" a scenario in which the supervisory officials somehow participated in their subordinates' allegedly unconstitutional conduct. *Id.* at 678. But the "obvious alternative explanation," *id.* at 682, for the supervisors' conduct in assigning the case to certain investigators and attending meetings where the case was discussed is that they wanted to facilitate the investigation, stay abreast of recent developments, and bring the case to closure on a reasonable timeline. That, after all, is their job.

In short, the complaints here are wholly indiscriminate. They seek to sweep in everyone and everything, heedless of any actual indications of individual malfeasance that would justify the personal burdens that litigation can impose. What *Iqbal* condemned, the complaints assay. What is more, the complaints' sweeping allegations mirror the sweeping nature of the wrongs of which plaintiffs complain. It is, of course, the purpose of civil litigation to rectify, but not in a manner that duplicates the very evils that prompted plaintiffs to file suit.

C.

The damage that the plaintiffs' theory of the case would inflict upon the criminal justice system is evident in a related sense as well. The plaintiffs seek to hold the investigating officers and their supervisors liable by re-

peatedly asserting notions of conspiracy, suggesting that the defendants colluded to investigate and prosecute the Duke players despite the evidence of their innocence. The upshot of such a theory, however, would be that whenever police officers, their superiors, and prosecutors communicate regarding an investigation into certain suspects, that very act of communication would expose them to a risk of monetary liability should the suspects ultimately be exonerated. The plaintiffs' theory of conspiracy, in other words, would inhibit the exchange of information among police and prosecutors that takes place every day. Thus, I could not agree more with Judge Motz's statement that to allow § 1983 claims "to proceed on allegations of such a 'conspiracy' would in virtually every case render the officers' qualified immunity from suit 'effectively lost' and make discovery the rule, rather than the exception." *Ante* at 649.

The improvidence of subjecting law enforcement officers to such wide-ranging liability is supported by Supreme Court precedent in the analogous context of intraenterprise antitrust conspiracy doctrine. As with the present case, that doctrine involves civil damages actions against related parties (for instance, a parent corporation and its wholly owned subsidiary) on the theory that wrongful conduct may be inferred from their intraorganizational communications. In *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 777 (1984), however, the Court held that such parties cannot be held liable for "conspiring with each other" under Section 1 of the Sherman Act, 15 U.S.C. § 1. The Court recognized that coordination among various actors within a company is often "necessary if a business enterprise is to [operate] effectively," but that such coordination might be discouraged if intraenterprise conspiracy liability were permitted. *Id.* at 769–71. That same concern animates our decision here. Moreover, *Copperweld* noted that "[c]oordi-

nation within a firm" is frequently the hallmark of a business's commonplace desire to increase its effectiveness, and not necessarily a sign of some "effort to stifle competition." *Id.* at 769. That caution rings true here as well, where the mere fact that public officials meet to discuss a high-profile criminal case is far more often indicative of a desire to foster communication and cooperation than an insidious conspiracy to violate the Constitution.

D.

A final example of the overreach infecting this case lies in the *Carrington* and *McFadyen* plaintiffs' attempts under *Franks v. Delaware*, 438 U.S. 154 (1978), to hold officers monetarily liable for seeking from the state courts a non-testimonial order and a search warrant for standard investigatory purposes.

Although *Franks* held that a warrant so grounded in falsehoods as to effectively eliminate its "support[ ] by Oath or affirmation" could give rise to a Fourth Amendment violation, *id.* at 164–65, the Supreme Court stressed the importance of applying this rule so as not to vitiate the warrant process so instrumental to the personal privacy protected by our Bill of Rights. Indeed, in part because of concerns with the holding's potential effects on the incentives of police, the Court emphasized that "the rule announced today has a limited scope." *Id.* at 165–67. And since *Franks*, the Court itself has never elucidated the standards for evaluating the veracity of affidavits supporting warrants. *See* Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 Suffolk U. L. Rev. 445, 446 (2008).

In this area, therefore, we must heed the Supreme Court's often communicated goal of preserving the warrant requirement. As one treatise explains:

> The Supreme Court has long expressed a strong preference for the use of arrest warrants and search warrants. Resort to the warrant process, the Court has declared, is to be preferred because it "interposes an orderly procedure" involving "judicial impartiality," *United States v. Jeffers,* 342 U.S. 48, 51 (1951), whereby "a neutral and detached magistrate," *Johnson v. United States,* 333 U.S. 10, 14 (1948), can make "informed and deliberate determinations," *Aguilar v. Texas,* 378 U.S. 108, 110 (1964), on the issue of probable cause. To leave such decisions to the police is to allow "hurried actions," *id.* at 110–11, by those "engaged in the often competitive enterprise of ferreting out crime," *Johnson,* 333 U.S. at 14.

Wayne R. LaFave, 2 *Search and Seizure* § 3.1(c) (4th ed. 2004). Because of this overarching concern, the Supreme Court has instructed lower courts to eschew rulings that would discourage resort to judicial process and instead incentivize the invocation of exceptions to the warrant requirement. As the Court declared in determining whether a warrant was supported by probable cause:

> If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search. In

> addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.

Illinois v. Gates, 462 U.S. 213, 236 (1983) (internal quotation marks omitted). This court has specifically acknowledged this admonition in declining to interpret the *Franks* rule in an overbroad manner. *See United States v. Colkley,* 899 F.2d 297, 303 (4th Cir. 1990).

Moreover, the concern with establishing perverse incentives to circumvent the warrant process is all the more critical where an officer faces, as here, personal pecuniary loss in a civil claim for damages—as opposed to the exclusion of evidence in a criminal matter. In this regard, it bears note that *Franks* itself was an exclusionary rule case, and the Supreme Court has never provided guidance on whether and how the *Franks* rule should be implemented in the context of § 1983 claims. *See* Gard, *supra,* at 446 ("Th[e] absence of guidance [from the Supreme Court] for lower courts [with respect to the *Franks* rule generally] is especially acute because *Franks* predates both the Supreme Court's revolutionary reinterpretation of the Fourth Amendment and the development of most modern civil rights law."). Though this court has previously allowed such claims to proceed, *see Miller v. Prince George's Cnty.,* 475 F.3d 621, 627 (4th Cir. 2007), we must step cautiously in light of the Supreme Court's lack of direction in this area and its steadfast commitment to preserving the warrant requirement generally.

Plaintiff McFadyen's *Franks* challenge to the search warrant for his room and car in connection with his utterly tasteless—indeed, ominous—e-mail stands on the shakiest of grounds. The potential for inflicting tremendous damage to the criminal justice system by punishing officers for pursuing a court-ordered NTO would be compounded by penalizing them for attempting to investigate what initially (and understandably) appeared to be an entirely credible threat to perpetrate a gruesome murder. To hold policemen liable for damages for a search even when they request and possess a warrant, even when they have uncovered an e-mail explicitly vowing to kill certain people out of apparent contempt for their class, and even where that e-mail identifies the exact location of the slaying would be outrageous.

The argument offered in the *McFadyen* complaint—that the investigators should have somehow realized that the e-mail was meant to be a joke or parody—is a theory that could succeed only in Never Never Land, a theory that takes no account of the real and brutal rampages by disturbed individuals on college campuses and elsewhere in recent years. As it turned out, the e-mail was a highly vulgarized expression of fancy. But we cannot ascribe instant clairvoyance to those charged with protecting the community—and who must be simultaneously encouraged to seek judicial sanction in doing so.

II.

It cannot be emphasized too often that the plaintiffs in this case were innocent of any criminal wrongdoing. Their behavior in many instances was boorish, but it was in no way illegal based on any evidence before us. The problem is that the immunities and rules of pleading at issue here exist to protect the larger good of discretionary judgment in the service of public purposes—and to prevent defendant officials who are innocent of any

wrongdoing from being swept up by baseless accusations in unrestrained complaints. The infirmities of the pleadings portended what was sure to become an extended fishing expedition, the broader implications of which could hardly be confined to these particular actions.

Hard cases can and do make bad law, and the costs of these ones—outside of the limited claim we have allowed to proceed—are much too steep. The plaintiffs seek to thrust the prospect of monetary liability and burdensome discovery into every meeting between supervisor and subordinate within a police department, every internal communication between police officer and prosecutor, every statement by a police spokesperson, and every effort to invoke judicial process in furtherance of a police investigation. Allowing these claims to proceed would let litigation loose in such a fashion as to impair the ability of the criminal justice system to do its job.

In sum, we run the risk here of replicating in civil litigation the very maladies that plaintiffs complain infected the criminal process to which they were subjected. That is to say, individuals would be pulled into the coercive proceedings of courts when they have no business being there. To prolong the overextension of legal process that has been attempted here would portend a sorry end to a sorry saga.

It is for this reason that I join the majority opinion in dismissing the complaints in large part, but preserving the state malicious prosecution claim against Gottlieb and Himan asserted by the *Evans* plaintiffs. The *Evans* plaintiffs were the only ones to raise a malicious prosecution claim under North Carolina law, and they were the only ones indicted. Given that the elements of the federal and North Carolina claims appear to differ, I agree with the court that the *Evans* plaintiffs have pled the state malicious prosecution claim with sufficient specificity to

survive a motion to dismiss under the *Iqbal* standards governing even state claims brought in federal court. The *Evans* plaintiffs are the ones who have suffered the most harm, and their claim is the one most plausibly grounded in North Carolina law. That single claim with its two discrete defendants is where the case before us essentially stands now, and where it should have focused long, long ago.

GREGORY, Circuit Judge, concurring in part and dissenting in part:

I concur in part in Judge Motz's opinion, which I believe does a very fine job disposing of most of the issues in these cases. However, I dissent from Parts III–B and III–B.1. Unlike the majority, I would dismiss all state common law claims against all individual defendants based on the North Carolina doctrine of official immunity. I cannot agree that the complaints sufficiently allege malicious conduct such that the claims are not barred. Because the majority disposes of the bulk of state common law claims on other grounds, allowing only the Evans plaintiffs' malicious prosecution claims against Gottlieb and Himan to proceed, I focus my partial dissent on the inadequacies of those claims.

The North Carolina doctrine of official immunity protects public officials from personal liability for discretionary acts performed in the course of their official duties, so long as the officers acted without malice or corruption. *Collins v. N. Carolina Parole Comm'n*, 344 N.C. 179, 473 S.E.2d 1, 3 (1996). Thus, a police officer is protected from personal liability for investigative conduct unless the plaintiffs "allege and prove that the defendant's acts were malicious or corrupt." *Schlossberg v. Goins*, 141 N.C. App. 436, 540 S.E.2d 49, 56 (2000) (citing *Jones v. Kearns*, 120 N.C. App. 301, 462 S.E.2d 245, 248 (1995)). "A defendant acts with malice when he wantonly

does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *In re Grad v. Kaasa*, 312 N.C. 310, 321 S.E.2d 888, 890 (1984) (citing *Givens v. Sellars*, 273 N.C. 44, 159 S.E.2d 530 (1968)). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.* at 890–91 (citing *Givens*, 273 N.C. at 50, 159 S.E.2d 530).

Because the plaintiffs chose to bring suit in federal court, the sufficiency of their allegations must be judged against the pleading standard articulated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Under that standard, a complaint's "bare assertions" of malicious conduct are not entitled to the assumption of truth. *See Iqbal*, 556 U.S. at 680–81. Rather, the complaint must plausibly suggest malicious conduct by alleging "sufficient factual matter" to draw a "reasonable inference" of malice. *Id.* at 678. Although the plausibility requirement is not a probability requirement, *id.*, where there is an "obvious alternative explanation" for the conduct alleged, malice may not plausibly be inferred, *id.* at 682 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007)).

The majority does not explain why the complaint plausibly alleges Gottlieb and Himan acted maliciously, but instead merely says it is so. I cannot agree. Stripping the complaint of its conclusory allegations, it does not plausibly suggest the officers acted "wantonly," in a way that reasonable officers "would know to be contrary to [their] duty," for the purpose of framing the plaintiffs. *In re Grad*, 321 S.E.2d at 890. On the contrary, the "obvious alternative explanation" for the officers' conduct is that they were acting as reasonable, though not perfect, po-

lice officers would to investigate Mangum's rape allegations, which they did not know to be false.

To begin, the complaint alleges that Gottlieb and Himan diligently investigated a case assigned to them by their supervisors, not that they sought to frame the plaintiffs. Consistent with their official duties, the officers interviewed Mangum, interviewed Pittman, interviewed Duke lacrosse players, obtained a search warrant and an NTO, collected DNA evidence, and turned over the full results of their investigation to prosecutor Nifong, candidly briefing him on the case. The complaints also allege that the officers continued the investigation under the direction of Nifong and their police department supervisors. Far from plausibly suggesting the officers acted maliciously to frame the plaintiffs, the "obvious alternative explanation" for their conduct is that they were doing their job and investigating a case assigned to them, in collaboration with the prosecutor.

The plaintiffs make much of Mangum's inconsistent accounts of the alleged attack and Pittman's initial denial, alleging on this basis that the detectives knew Mangum was lying and proceeded with the investigation with the intent of framing Duke lacrosse players. This is simply implausible. Mangum told numerous people, on numerous occasions, that she was raped. Although the details of her accusations shifted, she was known to have been intoxicated on the night of the alleged assault. Further, as the other two complaints make clear, a nurse at Duke Medical Center informed officer Gottlieb that Mangum's examination had revealed evidence "consistent with sexual assault." And an email sent by one of the lacrosse players just hours after the alleged attack stated that, "after tonight's show," the author planned to have strippers over again and to murder them. Given the facts alleged in the three consolidated cases, it is implau-

sible to infer that Gottlieb and Himan knew Mangum was lying and therefore acted maliciously to frame the lacrosse players. The fact that an alleged rape victim changes the details of her story does not mean she is lying, nor does a witness's initial denial always correspond with the truth. Police officers owe a duty to the public to take seriously and investigate allegations of rape—a duty that cannot and should not be dismissed on such flimsy grounds.

Nor can the plaintiffs rest their allegations of malice on the officers' supposed witness tampering, use of suggestive photo arrays, or fabrication of false DNA evidence. As for the allegations of witness tampering, the complaint alleges that the officers threatened to enforce an outstanding warrant against Pittman if she did not recant her earlier statement that Mangum was lying. But leveraging an outstanding warrant against a recalcitrant witness is hardly beyond the pale of police investigative techniques. Given that this occurred *after* Mangum told police she had been raped and Gottlieb was informed that medical evidence corroborated her accusations, the obvious alternative explanation is that Gottlieb and Himan were trying to persuade Pittman to tell the truth, not to frame the plaintiffs.

As for the suggestive photo arrays, the complaint does allege that the procedures violated police department policy. However, the obvious explanation for the officers' conduct is that the police officers were attempting to identify a suspect to further investigate Mangum's claims, which they did not know were false. Although their photo array techniques were not perfect, a mere deviation from departmental policy, by itself, does not plausibly suggest they acted "wantonly" for the purpose of framing the plaintiffs.

Finally, although the complaint alleges that Gottlieb and Himan were present during the meetings in which Nifong and DNA laboratory personnel decided to withhold potentially exculpatory DNA information, these meetings took place hardly a month into the investigation, before indictments had even been secured. Neither the Constitution nor any law I am aware of requires police officers to disclose potentially exculpatory information at this early stage—either to the grand jury or to suspects—and I do not believe a reasonable police officer would believe such a duty exists. The officers' failure to do something they were under no obligation to do does not plausibly suggest malice.

Although in retrospect it may be clear to some that Mangum's accusations were baseless, the complaint does not plausibly allege Gottlieb and Himan knew this to be the case, particularly in light of the corroborating medical information they possessed. Rather, their investigative conduct leading to the plaintiffs' indictments, though not perfect, is consistent with the conduct of reasonable police officers assigned a rape case. If a complaint of this kind can proceed, I fear that every rape case where a victim has given inconsistent accounts and a witness has changed her statement could subject investigating police officers to personal liability. I do not believe the North Carolina doctrine of official immunity or federal pleading standards can be circumvented so easily, and I fear this Court has done a disservice to both by denying Gottlieb and Himan official immunity.

For these reasons, I dissent from Parts III–B and III.B.1 of the majority opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

1:07CV739

DAVID F. EVANS, et al., Plaintiffs,

v.

THE CITY OF DURHAM, NORTH CAROLINA, et al., Defendants.

March 31, 2011

MEMORANDUM OPINION

JAMES A. BEATY, JR., District Judge.

This matter is before the Court on multiple Motions to Dismiss filed by the various Defendants in this matter. This case involves 23 claims set out in a 153–page Second Amended Complaint [Doc. # 116] by Plaintiffs David F. Evans ("Evans"), Collin Finnerty ("Finnerty"), and Reade Seligmann ("Seligmann"), all of whom are former undergraduate students at Duke University and former members of the 2006 Duke men's lacrosse team, against Defendants The City of Durham ("the City"), District Attorney Michael B. Nifong ("Nifong"), Durham Police Detective Mark Gottlieb ("Gottlieb"), Durham Police Department Investigator Benjamin Himan ("Himan"), Durham Police Department Spokesperson David Addi-

son ("Addison"), District Attorney's Office Investigator Linwood Wilson ("Wilson"), Durham City Manager Patrick Baker ("Baker"), Durham Chief of Police Steven W. Chalmers ("Chalmers"), Durham Police Uniform Patrol Bureau Commander Beverly Council ("Council"), Deputy Chief of Police Ronald Hodge ("Hodge"), Durham Police District Two Uniform Patrol Commander Jeff Lamb ("Lamb"), Durham Police Department Lieutenant Michael Ripberger ("Ripberger"), Executive Officer to the Chief of Police Lee Russ ("Russ"), DNA Security, Inc. ("DSI"), DSI President Richard Clark ("Clark"), and DSI Lab Director Brian Meehan ("Meehan").

Defendants have collectively filed multiple Motions to Dismiss, specifically, a Motion to Dismiss by Defendant Wilson [Doc. # 119], a Motion to Dismiss by Defendant Meehan [Doc. # 126], a Motion to Dismiss by Defendants DSI and Clark [Doc. # 123], a Motion to Dismiss by Defendants Chalmers, Council, Hodge, Baker, Lamb, Ripberger, and Russ [Doc. # 124], a Motion to Dismiss by Defendant Himan [Doc. # 125], a Motion to Dismiss by Defendant Gottlieb [Doc. # 120], a Motion to Dismiss by Defendant Addison [Doc. # 121], and a Motion to Dismiss by the City [Doc. # 127]. In addition, although the claims against Defendant Michael Nifong were initially stayed when he filed for bankruptcy protection, Defendant Nifong has been added back to this case and has filed his own Motion to Dismiss [Doc. # 117]. Defendants previously filed various Motions to Dismiss with respect to Plaintiffs' prior Amended Complaint, but those Motions to Dismiss were rendered moot by the filing of Plaintiffs' Second Amended Complaint on February 18, 2010. In their present Motions to Dismiss the parties have incorporated the prior briefing filed in connection with the original Motions to Dismiss and, as appropriate, have added additional briefing with respect to new matters raised in the Second Amended Complaint.

The new Motions to Dismiss with respect to the Second Amended Complaint were referred to the Court for determination on May 4, 2010, and are addressed in this Memorandum Opinion.[1]

I. FACTUAL BACKGROUND

This case arises out of the investigation and ultimate indictment, arrest, and prosecution of Plaintiffs Evans, Finnerty, and Seligmann on charges of rape, sexual assault, and kidnapping. The prosecution of Plaintiffs was ultimately turned over to the North Carolina State Attorney General, who dismissed the charges and announced that Plaintiffs were in fact innocent of the charges. Plaintiffs subsequently filed the present suit. Because this matter is before the Court on Motions to Dismiss prior to any discovery, the Court must take as true all of the facts as set out in Plaintiffs' Second Amended Complaint.

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[1] The Court notes that some of the issues raised in the Motions to Dismiss in the present case are similar to certain of the issues raised in two other cases in this District that have been identified by the parties and the Clerk's Office as "related" to the present case: *McFadyen, et al. v. Duke University, et al.* (1:07CV953) and *Carrington, et al. v. Duke University, et al.* (1:08CV119). Those cases also involve multiple Motions to Dismiss for which briefing has now been completed and which have been referred to the Court for consideration. Orders and Opinions are being entered in those cases contemporaneously with the present Order and Opinion in this case. These cases have not been formally consolidated, and are still proceeding as separate cases, although some consolidation of discovery may be appropriate in light of the overlapping issues raised. In addition, given the overlapping legal issues, much of the analysis presented in the three Opinions in these cases is the same. The Court restates the analysis in each case, however, so that each Opinion can stand alone.

Based on the facts set out in the Second Amended Complaint, the underlying events in this matter began on March 13, 2006. At that time, Plaintiffs Evans, Finnerty, and Seligmann were undergraduate students at Duke University and were members of the men's lacrosse team. On the evening of March 13, 2006, some members of the lacrosse team attended a party at the off-campus home of Plaintiff Evans at 610 N. Buchanan Avenue, where exotic dancers Crystal Mangum and Kim Pittman attempted a short performance. Plaintiffs allege that Mangum was under the influence of drugs or alcohol before, during, and after the performance. Mangum and Pittman subsequently left the party in Pittman's car. Plaintiffs allege that Mangum became belligerent and accused Pittman of stealing her purse and money. Pittman drove to a Kroger grocery store parking lot and tried to remove Mangum from her car. Pittman asked for help from a security guard, who concluded that Mangum was intoxicated and called 911. Durham Police Department Sergeant John Shelton responded to the scene. Pittman told Sergeant Shelton that Mangum was intoxicated. Sergeant Shelton attempted to rouse Mangum and determined that Mangum was pretending to be unconscious. Sergeant Shelton removed Mangum from Pittman's car and directed officers to take Mangum to a local mental health clinic, Durham ACCESS, for observation. At the intake interview at Durham ACCESS, Mangum alleged that she had been raped at the party at 610 North Buchanan Avenue. Officers then transported her to Duke Medical Center for a rape exam. (Second Am. Compl. ¶ 37–48).

Sergeant Shelton came to Duke Medical Center to interview Mangum. Plaintiffs allege that during the interview, Mangum told Shelton she was a professional stripper, that she had been hired to perform with Pittman at 610 N. Buchanan, that an altercation broke out between

Pittman and some of the audience, and that she and Pittman had then left the party. Plaintiffs allege that during this interview, Mangum denied that she had been forced to engage in sexual activity and instead claimed only that someone had taken her money. Plaintiffs allege that Shelton reported Mangum's recantation of her rape allegation to the Durham Police Watch Commander.

Plaintiffs allege that Mangum subsequently gave "wildly conflicting and patently implausible statements" to personnel at Duke Medical Center and to other Durham Police Officers regarding whether she had been raped at the party, and denied that she had engaged in sexual intercourse prior to the alleged rape.[2] (Second Am. Comp ¶ 57–59). These conflicting statements included "separately and alternatively claim[ing] that she had been raped by three, four, five, and twenty different men," "that she had been performing at a bachelor's party, and that one of the alleged rapists was the groom," and "that her (now three) assailants were named Adam, Brett, and Matt." (Second Am. Compl. ¶ 58, 60, 61). Mangum also claimed that Pittman had assisted the rapists, that Pittman had threatened Mangum and pushed her out of the car onto glass, and that Pittman had stolen her money and possessions, which Plaintiffs allege officers knew was false given Sgt. Shelton's involvement in

[2] Plaintiffs allege that "[t]his statement was utterly disproved by subsequent DNA testing, which established, among other things, that the various rape kit items collected from Mangum contained DNA from at least four unidentified males—none of whom was a Duke lacrosse player—and that corroborated the witness statement provided by Mangum's driver, Jarriel Johnson. Johnson had told Durham Police that he had driven Mangum to various locations in the Durham area so that Mangum could have sexual intercourse with other men in the hours and days before the party, and that Johnson himself had had sexual intercourse with Mangum in the days before the party." (Second Am. Compl. ¶ 59).

removing Mangum from the car. (Second Am. Compl. ¶ 62). Plaintiffs further allege additional conflicting statements by Mangum regarding whether she was drunk, whether she was in pain, and whether she had otherwise been physically assaulted. Plaintiffs allege that "Durham Police officers at Duke Medical Center were so convinced that Mangum's rape claim was a hoax that they were overheard stating that if any charges were brought relating to the party, they would not exceed misdemeanor assault." (Second Am. Compl. ¶ 66). Plaintiffs allege that Nifong, Addison, Gottlieb, Himan, Wilson, and the "Supervisory Defendants" (Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger) were aware of all of these facts, including the inconsistencies and contradictions in Mangum's account and the conclusions of Durham Police officers on the scene. (Second Am. Compl. ¶ 67–68).

Personnel at Duke Medical Center performed a rape examination that "produced no physical or medical evidence consistent with either rape or the traumatic assault Mangum had claimed." (Second Am. Compl. ¶ 70). Plaintiffs allege that at the end of the examination, officers from the Durham Police Department took custody of the rape kit items for submission to the State Bureau of Investigation. (Second Am. Compl. ¶ 75).

Plaintiffs allege that on March 14, 2006, the responsibility for investigating Mangum's rape claim was assigned to Investigator B. Jones. Investigator Jones concluded that there was "no evidence to proceed with a criminal investigation and that the file would be closed." (Second Am. Compl. ¶ 80). However, rather than closing the investigation, Durham Police reassigned the investigation to Defendant Gottlieb, who, according to the Second Amended Complaint, was "known to supervisory officials in the City of Durham and the Durham Police

Department as having a history of selective and malicious prosecution, false arrest, excessive use of force, manufacturing of evidence, and filing of false police reports against students at Duke University." (Second Am. Compl. ¶ 82). Plaintiffs contend that "Gottlieb was so notorious in his dislike of Duke students that he had even been reassigned from covering the Trinity Park neighborhood around Duke University because of his prior misconduct and abhorrent record with respect to Duke students." (Second Am. Compl. ¶ 82). Plaintiffs contend that Gottlieb was nevertheless put in charge of the investigation, which Durham Police knew was related to a party attended by Duke students. Gottlieb assigned Defendant Himan, an investigator who had started only two months earlier, to assist him with the investigation.

Plaintiffs allege that on March 16, 2006, Defendants Gottlieb and Himan interviewed Mangum. Plaintiffs allege that Mangum gave contradictory accounts of what had occurred and gave physical descriptions of her alleged attackers but could not identify them in photo arrays shown to her by Durham Police Investigator R.D. Clayton. Plaintiffs allege that Mangum was shown photo arrays again on March 21, but Mangum failed to identify anyone in the array as her attacker. Plaintiffs contend that Mangum did identify one individual that she was "100% confident that she had seen" at the party, but Durham Police confirmed that that individual was not at the party. (Second Am. Compl. ¶ 98). Plaintiffs contend that Mangum gave a subsequent written statement to Gottlieb and Himan on April 6, 2006, and that she "continued to contradict her various, already-inconsistent accounts." (Second Am. Compl. ¶ 101). Plaintiffs allege that Durham Police subsequently learned that several years earlier, Mangum had claimed that she had been the victim of a purported gang rape by three men, which police

had declined to pursue at the time. (Second Am. Compl. ¶ 105).

Plaintiffs allege that on March 20, 2006, Himan spoke with Kim Pittman, the exotic dancer who had performed with Mangum. During the interview, Pittman stated that the assault allegations were a "crock" and that "there was no opportunity for the alleged assault to have occurred." (Second Am. Compl.¶ 87). Plaintiffs allege that Gottlieb, acting with "the intent to obstruct justice and to tamper with a witness," instructed Himan to "summon Pittman to their Durham Police station and to arrest her on an outstanding warrant if she did not recant her prior statement that Mangum was lying." (Second Am. Compl. ¶ 87, 88).

Plaintiffs allege that Gottlieb and Himan obtained and executed a search warrant for Plaintiff Evans' home at 610 N. Buchanan where the alleged assault had occurred, and that the residents, including Plaintiff Evans, cooperated with police. (Sec Am. Compl. ¶ 110). Plaintiffs allege that Evans and the other residents of the house voluntarily submitted to "hours of isolated interviews" at the police station, and voluntarily provided DNA and hair samples. (Second Am. Compl. ¶ 112–115). Plaintiffs allege that on March 22 and 23, 2006, Gottlieb and Himan obtained a Non–Testimonial Order requiring white members of the lacrosse team to provide DNA samples, submit to physical examinations, and allow themselves to be photographed.[3] The members of the lacrosse team, including Plaintiffs, fully cooperated with the Non–Testimonial Order. (Second Am. Compl. ¶ 120–122).

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[3] Only the white members of the team were subject to the Non–Testimonial Order because Mangum claimed that her alleged attackers were white.

Plaintiffs allege that on March 24, 2006, Defendant Nifong, the Interim District Attorney for the Fourteenth Prosecutorial District of North Carolina, learned of the investigation. At the time, according to the Second Amended Complaint, Nifong "was engaged in a hotly-contested political campaign" to be elected as District Attorney. (Second Am. Compl. ¶ 128). Plaintiffs allege that Nifong recognized that "he was in a position to exploit Mangum's high-profile, racially-charged rape allegation for his personal political gain." (Second Am. Compl. ¶ 130). Plaintiffs allege that Nifong contacted Durham Police officials, who agreed that Nifong would direct the police investigation. (Second Am. Compl. ¶ 131). Plaintiffs allege that Defendant Lamb instructed Gottlieb and Himan to take direction from Nifong regarding the investigation, and were further instructed to report the investigation's progress to Durham Police senior command staff. (Second Am. Compl. ¶ 133). Nifong assigned Defendant Wilson, an investigator with the District Attorney's Office, to coordinate with Gottlieb and Himan with respect to the police investigation. (Second Am. Compl. ¶ 135).

Plaintiffs allege that Nifong met with Gottlieb and Himan on March 27, 2006 for a briefing regarding the investigation. According to the Second Amended Complaint, based on the information presented at that meeting, Nifong recognized "that there was no basis to charge the three innocent Duke lacrosse players." (Second Am. Compl. ¶ 138). Nifong nevertheless proceeded to provide extensive interviews with news media in which he stated that "he had 'no doubt' that three members of the Duke lacrosse team had engaged in a vicious and racially-motivated gang rape" and made multiple other statements as set out in the Second Amended Complaint. (Second Am. Compl. ¶ 146–147).

Plaintiffs allege that on or about March 30, 2006, the SBI crime lab finished its analysis of the rape kit, which revealed "no fibers, foreign hairs, blood, semen, sperm, or other forensic evidence supporting Mangum's allegations." (Second Am. Compl. ¶ 149). Plaintiffs contend that Nifong nevertheless continued to make public statements in support of Mangum's claims. (Second Am. Compl. ¶ 150). Plaintiffs allege that members of the Durham Police Department, specifically Spokesperson Addison and Defendant Hodge, also made statements falsely indicating that Mangum had been brutally assaulted by members of the Duke lacrosse team and that members of the lacrosse team were obstructing justice. (Second Am. Compl. ¶ 156–160). This included a "Wanted" poster for members of the lacrosse team that Addison disseminated in and around the Duke campus.

Plaintiffs allege that on March 28 and 29, 2006, the SBI crime lab personnel notified Nifong that "they had examined the items from the rape kit and were unable to find any semen, blood, or saliva on any of the rape kit items." (Second Am. Compl. ¶ 170). Plaintiffs allege that Nifong was subsequently provided with a report from the SBI concluding "that no DNA from any of the players was found on the accuser's rape kit items or clothing; that DNA from one of the residents of 610 N. Buchanan was found on a towel in the house; and that DNA from another resident of 610 N. Buchanan was found on the floor in one of the bathrooms in the house." (Second Am. Compl. ¶ 172). However, Plaintiffs allege that Nifong continued to make public statements and began to "tailor his comments" to match these results. (Second Am. Compl. ¶ 173).

Plaintiffs allege that despite knowing that there was "no evidence to corroborate Mangum's various inconsistent and contradictory accounts," Nifong then began a

conspiracy with Durham Police, including Gottlieb, Himan, and the Supervisory Defendants, to manufacture false identifications and falsify DNA testing results in order to support charges against Plaintiffs. (Second Am. Compl. ¶ 175–176). On March 29, 2006, the Supervisory Defendants, including Defendants Baker, Chalmers, and Hodge, met with Himan and Gottlieb and ordered them to "expedite the identifications and arrests of Duke lacrosse players, notwithstanding the evidence demonstrating Plaintiffs' innocence, in order to satisfy a Durham community that had been misled by the false and inflammatory Nifong Statements and Durham Police Statements into believing that three white Duke lacrosse players had committed a violent and racially-motivated gang rape." (Second Am. Compl. ¶ 179). Plaintiffs allege that on March 31, 2006, Himan and Gottlieb met with Nifong to develop a new identification procedure in which Mangum would be shown an array consisting solely of photographs of Duke lacrosse players. Nifong, Gottlieb and Himan "designed and conducted this suggestive procedure with the intention that the identifications it produced would be used to obtain indictments and convictions of three Duke lacrosse players." (Second Am. Compl. ¶ 181). Plaintiffs allege that Defendants Lamb and Ripberger and the other Supervisory Defendants approved and later ratified this procedure, even though it was contrary to official policy. (Second Am. Compl. ¶ 182–183). On April 4, 2006, the photo array was shown to Mangum, and she was instructed that "every photograph she would be shown was an individual who attended the party." (Second Am. Compl. ¶ 188). Mangum then picked Plaintiffs from the photo array, although in doing so she contradicted previous descriptions and statements she had given. (Second Am. Compl. ¶ 191–194).

Also on April 4, 2006, Nifong began searching for another laboratory to conduct DNA testing. Durham Police investigators located DSI, a laboratory in Burlington, North Carolina, that could perform more sensitive DNA testing. Plaintiffs allege that DSI's Lab Director, Defendant Meehan, was willing to "cut its standard prices" in order to be involved in the investigation. (Second Am. Compl. ¶ 200). Plaintiffs allege that Nifong obtained an Order to allow for the transfer of the rape kit and reference DNA samples to DSI for additional testing. DSI's subsequent analysis revealed DNA from other unidentified males, none of whom was a Duke lacrosse player. The analysis "resulted in the exclusion with 100% certainty of all members of the lacrosse team, including the three innocent Plaintiffs, as possible donors of DNA found on the rape kit items." (Second Am. Compl. ¶ 206). Plaintiffs allege that on April 10, 2006, Nifong, Himan, and Gottlieb met with Meehan and DSI President Clark, and Meehan orally reported the results of the analysis. However, Plaintiffs allege that Nifong, Himan, Gottlieb, Clark, and Meehan "conspired to conceal and obfuscate these exculpatory results" in order to "manufacture probable cause, obtain indictments, and subsequently prosecute three Duke lacrosse players on rape charges." (Second Am. Comp. ¶ 208–209). The intended effect of this conspiracy was to "facilitate an indictment and prosecution of the three innocent Duke lacrosse players, while concealing the true results of DNA testing, which established Plaintiffs' actual innocence." (Second Am. Compl. ¶ 210). The Second Amended Complaint further alleges that the Supervisory Defendants were aware of the DNA testing and this illicit agreement but continued to allow Nifong to have responsibility for the investigation and continued to allow Gottlieb and Himan participate in this investigation.

On April 17, 2006, Nifong obtained grand jury indictments against Plaintiffs Finnerty and Seligmann for first-degree rage, first-degree sex offense, and kidnapping "in order to deprive the two innocent Duke lacrosse players of their civil rights and to assure his own election to the position of District Attorney." (Second Am. Compl. ¶ 214). Plaintiffs allege that Gottlieb and Himan provided inculpatory testimony before the grand jury, "despite actual knowledge of Finnerty's and Seligmann's innocence." (Second Am. Compl. ¶ 215). Plaintiffs allege that Nifong, Gottlieb, Himan, and the Supervisory Defendants agreed not to provide information to the grand jury regarding Mangum's varying and inconsistent accounts of events. Instead, Nifong, Gottlieb, and Himan "agreed in advance of the April 17 Indictments that they would mislead the grand jury as to the nature of the evidence concerning Finnerty and Seligmann." (Second Am. Compl. ¶ 219).

On April 21, 2006, Nifong, Gottlieb, and Himan met again with Meehan and Clark at DSI's offices. Plaintiffs allege that at the meeting, Meehan reported that DNA from at least four different men was found on the items in the rape kit, and none of the DNA matched any of the Duke lacrosse players. Plaintiffs allege that Defendants Nifong, Gottlieb, Himan, Meehan, and Clark nevertheless agreed to "conceal and obfuscate this exculpatory evidence," and "conspired and acted to fabricate [a] false and misleading report." (Second Am. Compl. ¶ 225–226). The "intended and actual effect of this illicit agreement was to fabricate a false and misleading 'final' report of DNA testing" while concealing "the true results of DNA testing" in order to "sustain the prosecutions of Finnerty and Seligmann, and support and sustain the indictment and prosecution of Evans." (Second Am. Compl. ¶ 226). Plaintiffs allege that as part of the conspiracy, "these Defendants agreed that there would be no report or

notes memorializing the substance of their discussions" during the meeting. (Second Am. Compl. ¶ 225). Plaintiffs allege that the Supervisory Defendants were aware of this conspiracy but continued to allow Nifong to direct the investigation and Gottleib and Himan to participate in it. Plaintiffs allege that Meehan subsequently prepared a report, and Nifong, Himan, Meehan and Clark agreed that the report would be provided to Plaintiffs "under the knowingly false pretense that it represented the final report of DSI's work and contained all of DSI's findings with respect to DNA testing." (Second Am. Compl. ¶ 231).

Plaintiffs allege that on May 15, 2006, Nifong used the report, "which Nifong knew to be misleading," to cause a grand jury indictment to be returned against Plaintiff Evans for first-degree rape, first-degree sexual offense, and kidnapping. (Second Am. Compl. ¶ 238). Plaintiffs allege that Gottlieb, Himan, and Nifong agreed in advance of the Indictment "that they would mislead the grand jury as to the evidence concerning Evans." (Second Am. Compl. ¶ 241).

Plaintiffs allege that after the indictments were obtained, Defendants engaged in further misconduct to conceal their earlier actions and to continue to restrain Plaintiffs and deny them due process. For example, Plaintiffs allege that when taxicab driver Moezeldin Ahmad Elmostafa provided a statement confirming that he had picked Plaintiff Seligmann up prior to the time of the purported attack, Nifong, Wilson, and Himan investigated and then arrested Elmostafa in an effort to force him to recant Seligmann's alibi. (Second Am. Compl. ¶ 245–253). In addition, Plaintiffs allege that Himan and Gottlieb, acting at the direction or approval of the Supervisory Defendants, arrested Pittman after she stated that Mangum's rape allegations were a "crock," and of-

fered her "a deal on her parole violation" if she changed her categorical denial and her timeline of events. (Second Am. Compl. ¶ 256–260). Plaintiffs also allege that Defendants Nifong, Wilson, Lamb, Gottlieb, and Himan, at the direction of the Supervisory Defendants, attempted to intimidate and discredit Durham Police Officer Shelton for reporting Mangum's recanting of her rape claim on March 13. (Second Am. Compl. ¶ 264). Plaintiffs further allege that in July 2006, Defendant Gottlieb created an after-the-fact "report" of the investigation, which was "an intentional fabrication in an attempt to cover up inconsistencies and contradictions in Mangum's actual statements regarding the incident." (Second Am. Compl. ¶ 266–267). Plaintiffs allege that as part of this fabricated account, "in order to conceal the disparities between Mangum's actual description of her alleged attackers during the March 16 interview and the Plaintiffs, Gottlieb simply invented a new account that Mangum had purportedly given during the March 16 interview." (Second Am. Compl. ¶ 269).

As the prosecution proceeded, Plaintiffs allege that "Defendants continued to make false public statements in an attempt to continue their conspiracy, to cover up their own wrongdoing, and to maintain the inflammatory atmosphere." (Second Am. Compl. ¶ 272). Plaintiffs allege that Nifong affirmatively and intentionally misrepresented to the state court on multiple occasions that he was aware of no other exculpatory evidence or DNA testing, and that he had provided Plaintiffs with all discovery materials, which were false statements of material fact. (Second Am. Compl. ¶ 275–308). At Nifong's direction, Defendant Wilson subsequently met with Mangum "the sole purpose of which was to revive the prosecution by persuading Mangum to alter her statements to conform to the revelations regarding the lack of Plaintiffs' DNA on the rape kit items." (Second Am.

Compl. ¶ 310). Plaintiffs allege that during the interview, Mangum provided another contradictory account of events and recanted her rape allegations. However, Nifong did not dismiss the prosecution and continued with the sexual assault and kidnapping charges.

In December 2006, ethics complaints against Nifong were filed with the North Carolina State Bar based on his conduct in the investigation and prosecution of Plaintiffs. On January 12, 2007, Nifong recused himself from the prosecution and referred the cases to the North Carolina Attorney General. The Attorney General "conducted an intensive, independent investigation" and ultimately "dismissed all of the remaining charges" against Plaintiffs, concluding that Plaintiffs were innocent of all charges against them. (Second Am. Compl. ¶ 318–319). The Attorney General concluded that "'these cases were the result of a tragic rush to accuse and a failure to verify serious allegations.'" (Second Am. Compl. ¶ 320). Nifong was subsequently disbarred by the North Carolina State Bar and was found guilty of criminal contempt in state court for his conduct during the prosecution of the charges against Plaintiffs. (Second Am. Compl. ¶ 326–328).

Plaintiffs subsequently filed the present suit alleging, *inter alia,* that Defendants maliciously conspired to bring the charges against them, that Defendants knew that the charges against Plaintiffs were unsupported by probable cause, that Defendants concealed evidence and fabricated false evidence to support the charges, that Defendants made false public statements about the investigation, and that Defendants conspired to charge Plaintiffs on facts they knew to be untrue. Based on these allegations, Plaintiffs contend that Defendants violated their rights under the Federal Constitution and Federal Statutes, and under North Carolina state law. Spe-

cifically, Plaintiffs assert the following claims: (1) 42 U.S.C. § 1983 claim for Malicious Prosecution and Seizure; (2) 42 U.S.C. § 1983 claim for Concealment of Evidence; (3) 42 U.S.C. § 1983 claim for Fabrication of False Evidence; (4) 42 U.S.C. § 1983 claim for False Public Statements; (5) 42 U.S.C. § 1983 claim against the City pursuant to *Monell;* (6) 42 U.S.C. § 1983 claim for "Supervisory Violations"; (7) 42 U.S.C. § 1983 claim for Conspiracy; (8) 42 U.S.C. § 1985(2) claim for Obstruction of Justice; (9) 42 U.S.C. § 1985(2) claim for Witness Tampering; (10) 42 U.S.C. § 1985(3) claim for Conspiracy; (11) 42 U.S.C. § 1986 claim for Conspiracy (Durham Police); (12) 42 U.S.C. § 1986 claim for Conspiracy (DSI); (13) Malicious Prosecution; (14) Obstruction of Justice; (15) Intentional Infliction of Emotional Distress; (16) Negligence by Durham Police; (17) Negligent Supervision, Hiring, and Training by Durham Police; (18) Negligent Infliction of Emotional Distress by Durham Police; (19) Negligent Infliction of Emotional Distress by Durham Police; (20) Negligence by DSI; (21) Negligent Supervision, Hiring and Training by DSI; (22) Negligent Infliction of Emotional Distress by DSI; and (23) violation of the North Carolina Constitution.

Plaintiffs' claims and contentions in the Second Amended Complaint are directed selectively against the various Defendants, and those Defendants can be divided into six groups for purposes of analyzing the claims and the various Motions to Dismiss: (1) Defendant Nifong, who was the District Attorney, and Defendant Wilson, who was the Investigator employed by the District Attorney's Office ("Defendants Nifong and Wilson" or "the DA Defendants"), (2) Defendant Gottlieb, who was the detective with the Durham Police Department, and Defendant Himan, who was the investigator employed by the Durham Police Department, both of whom were directly involved in the investigation ("Defendants

Gottlieb and Himan" or "the Police Officer Defendants"); (3) Defendant DSI, which was the DNA testing lab retained to provide forensic analysis services relating to the investigation, as well as DSI's President, Defendant Clark, and the lab director, Defendant Meehan ("the DSI Defendants"), (4) Defendant Addison, the Durham Police Department spokesperson ("Addison"); (5) Defendant Baker, who was the Durham City Manager; Defendant Chalmers, who was the Durham Chief of Police; Defendant Council, who was the Commander of the Durham Police Uniform Patrol Bureau; Defendant Hodge, who was the Deputy Chief of Police; Defendant Lamb, who was the Commander of the Durham Police District Two Uniform Patrol; Defendant Ripberger, who was a Lieutenant with the Durham Police Department; and Defendant Russ, who the was Executive Officer to the Chief of Police (collectively, the "Supervisory Defendants,") and (6) the City of Durham, which operates the Durham Police Department ("the City"). In considering the various Motions to Dismiss, the Court will first outline the applicable legal standard for considering motions to dismiss, and will then apply that standard to analyze each of the 23 claims raised by Plaintiffs in this case.

II. STANDARD OF REVIEW ON MOTIONS TO DISMISS

In reviewing a Motion to Dismiss for failure to state a claim pursuant to Rule 12(b)(6), the Fourth Circuit has directed that "we 'take the facts in the light most favorable to the plaintiff,' but 'we need not accept the legal conclusions drawn from the facts,' and 'we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.'" *Giarratano v. Johnson,* 521 F.3d 298, 302, 304 (4th Cir. 2008) (quoting *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 180

(4th Cir. 2000)). In *Ashcroft v. Iqbal,* the Supreme Court addressed the appropriate standard for analyzing motions to dismiss pursuant to Rule 12(b)(6), noting that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). The Court in *Iqbal* laid out "two working principles" for considering Rule 12(b)(6) motions to dismiss. First, the Court in *Iqbal* noted that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Thus, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" or "'naked assertions' devoid of 'further factual enhancement'" will not do. *Id.* In this regard, the *Iqbal* Court noted that Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," but Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 1949, 1950. Thus, in considering a Rule 12(b)(6) Motion to Dismiss, courts may begin by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950.

Second, the *Iqbal* Court noted that "only a complaint that states a plausible claim for relief survives a motion to dismiss," and therefore courts must determine whether the facts actually pled in the complaint show that the pleader is entitled to relief. *Id.* Thus, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* "A claim has facial plausibility when the plaintiff pleads factual con-

tent that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. 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.* at 1949 (internal citations omitted). Thus, dismissal of a complaint is proper where plaintiffs' factual allegations fail to "produce an inference of liability strong enough to nudge the plaintiff's claims 'across the line from conceivable to plausible.'" *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,* 591 F.3d 250, 256 (4th Cir. 2009) (citing *Iqbal,* 129 S. Ct. at 1952 (internal quotation omitted)).

In considering claims that are asserted under state law, the Court "must rule as the North Carolina courts would, treating decisions of the Supreme Court of North Carolina as binding, and 'departing from an intermediate court's fully reasoned holding as to state law only if 'convinced' that the state's highest court would not follow that holding.'" *Iodice v. United States,* 289 F.3d 270, 275 (4th Cir. 2002). However, pleading standards are a matter of procedural law governed in this Court by federal, not state, law. *See Jackson v. Mecklenburg County, N.C.,* No. 3:07–cv–218, 2008 WL 2982468, at *2 (W.D.N.C. July 30, 2008) ("North Carolina substantive law applies to the elements of Plaintiffs' state law claims but the Federal Rules of Civil Procedure govern procedural law and North Carolina 'pleading requirements, so far as they are concerned with the degree of detail to be alleged, are irrelevant in federal court even as to claims arising under state law.'" (quoting *Andresen v. Diorio,* 349 F.3d 8, 17 (1st Cir. 2003) (citations omitted))). Therefore, the

Iqbal procedural pleading standard applies to both federal and state law claims in this case.

III. ANALYSIS OF CLAIMS ASSERTED IN THIS CASE

The Court will consider each of Plaintiffs' alleged claims to determine whether Plaintiffs have stated a claim under these standards and the applicable state and federal law. The Court will consider each of the counts in the order in which they are asserted. Most of the counts will be considered individually, although some of the overlapping claims in this case are considered together. The Court acknowledges that there may still be some duplication of analysis between similar claims, except where it can be avoided, but the Court has organized the analysis in this way in order to ensure that each claim is separately addressed.

Counts 1, 2, 3: 42 U.S.C. § 1983 claims for violations of the Fourth and Fourteenth Amendments, based on Malicious Prosecution and Seizure, Concealment of Evidence, and Fabrication of False Evidence, asserted against Defendant Nifong, Gottlieb, Himan, Wilson, Clark, Meehan, and DSI, in their individual capacities

Counts 1 through 3 are claims for malicious prosecution, concealment of evidence, and fabrication of false evidence asserted against Defendants Nifong and Wilson (the DA Defendants), DSI, Clark, and Meehan (the DSI Defendants), and Gottlieb and Himan (the Investigators), individually, and are all related to Plaintiffs' contention that they were arrested and prosecuted without probable cause. These claims are brought pursuant to 42 U.S.C. § 1983, which prohibits any person, acting under

color of state law, from depriving an individual of their rights secured under the Constitution and laws of the United States.

Count 1 alleges a claim for "Malicious Prosecution and Seizure" for initiating and continuing criminal prosecutions against Plaintiffs without probable cause. Count 2 alleges a claim for "Concealment of Evidence" for "concealing and obfuscating" evidence in order to manufacture probable cause to obtain indictments. Count 3 alleges a claim for "Fabrication of False Evidence" for conspiring to produce a false and misleading DNA report, intimidating witnesses to obtain false statements to manufacture probable cause, and manipulating photo arrays to secure false witness identifications, all in order to manufacture probable cause and secure indictments against Plaintiffs, resulting in the unconstitutional seizure of Plaintiffs in violation of the Fourth and Fourteenth Amendments. In Plaintiffs' Consolidated Response, Plaintiffs note that Counts 1, 2, and 3 are all based on claims for unlawful seizure pursuant to a legal process that was not supported by probable cause, in violation of the Fourth Amendment made applicable to the States through the Fourteenth Amendment. Plaintiffs further note that Counts 2 and 3 are also based on violation of the Fourteenth Amendment Due Process Clause for bad faith concealment of evidence and fabrication of evidence to mislead the grand juries about probable cause and thus effect the unlawful seizure of Plaintiffs.

The constitutional rights at issue with respect to these claims are (1) the right under the Fourth Amendment not to be seized without probable cause and (2) the right under the Fourteenth Amendment not to be deprived of liberty without due process of law. Defendants contend that Plaintiffs have not alleged a violation of the Fourth or Fourteenth Amendment, and that they are entitled to

"qualified immunity" because "[g]overnment officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Washington v. Wilmore,* 407 F.3d 274, 281 (4th Cir. 2005) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)). Therefore, if the Court determines that Plaintiffs' constitutional rights would have been violated on the facts alleged, the Court must then "consider whether the right was clearly established at the time such that it would be clear to an objectively reasonable officer that his conduct violated that right." *Brown v. Gilmore,* 278 F.3d 362, 367 (4th Cir. 2002).[4] If it would have been clear to an objectively reasonable officer that his conduct violated that right, qualified immunity would not apply. The Court will therefore consider these claims, and the "qualified immunity" defense, first with respect to the Fourth Amendment, and then with respect to the Fourteenth Amendment Due Process Clause.

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[4] In determining whether a governmental official is entitled to qualified immunity, the Court must first decide "'whether a constitutional right would have been violated on the facts alleged.'" *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151, 2155, 150 L. Ed. 2d 272 (2001)). If the violation of the right is established, "courts must consider whether the right was clearly established at the time such that it would be clear to an objectively reasonable officer that his conduct violated that right." *Id.* However, pursuant to *Pearson v. Callahan*, courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009).

A. Fourth Amendment Violations

As the basis for Counts 1, 2, and 3, Plaintiffs first contend that their Fourth Amendment rights were violated based on their "seizure," that is, their arrest, without probable cause. "'The Fourth Amendment prohibits law enforcement officers from making unreasonable seizures, and seizure of an individual effected without probable cause is unreasonable.'" *Miller v. Prince George's County,* 475 F.3d 621, 627 (4th Cir. 2007) (quoting *Brooks v. City of Winston–Salem,* 85 F.3d 178, 183 (4th Cir. 1996)). The Fourth Circuit has held that claims for arrest and prosecution without probable cause are cognizable under the Fourth Amendment, which "define[s] the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." *Taylor v. Waters,* 81 F.3d 429, 436 (4th Cir. 1996) (applying *Albright v. Oliver,* 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)); *see also Lambert v. Williams,* 223 F.3d 257, 261 (4th Cir. 2000) (noting that under *Albright,* the "right to be free from prosecution without probable cause was not a substantive due process right, but rather was . . . a right to be free from unreasonable seizures"). In considering the scope of such a claim based on the Fourth Amendment, the Fourth Circuit has held that a plaintiff's allegations that he was seized "pursuant to legal process that was not supported by probable cause and that the criminal proceedings terminated in his favor are sufficient to state a § 1983 malicious prosecution claim alleging a seizure that was violative of the Fourth Amendment." *Brooks,* 85 F.3d at 183–84. In *Albright v. Oliver,* 510 U.S. 266, 276–81, 114 S. Ct. 807, 814–17, 127 L. Ed. 2d 114 (1994) (Ginsburg, J., concurring), Justice Ginsburg noted that submission to arrest is unquestionably a "seizure" and further noted that subsequent misconduct, prior to dismissal of the charges, can perpetuate the Fourth Amendment viola-

tion. Therefore, § 1983 claims for "malicious prosecution" based on arrest pursuant to legal process not supported by probable cause are potentially cognizable under the Fourth Amendment.

Defendants nevertheless contend that with respect to this Fourth Amendment claim in the present case, the determination by the grand jury to indict Plaintiffs conclusively establishes the existence of probable cause and effectively bars any potential § 1983 claim based on an alleged Fourth Amendment violation. Defendants further note that there is no duty to present exculpatory evidence to the grand jury, and failure to present exculpatory evidence to the grand jury cannot establish a constitutional violation.

However, in considering similar contentions in the context of a *Bivens* claim, the D.C. Circuit recently concluded that in a civil case for malicious or retaliatory prosecution, a grand jury indictment is only prima facie evidence of probable cause that may be rebutted by evidence that the indictment was "produced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Moore v. Hartman*, 571 F.3d 62, 69 (D.C. Cir. 2009). The D.C. Circuit pointed to the weight of authority on this issue among the circuits, noting that

> several of our sister circuits have held that a grand jury indictment is prima facie evidence of probable cause which may be rebutted. *See, e.g., White v. Frank*, 855 F.2d 956, 961–62 (2d Cir. 1988) ("[T]hough an indictment by a grand jury is generally considered prima facie evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be

rebutted by proof that the defendant misrepresented, withheld, or falsified evidence."); *see also Gonzalez Rucci v. INS,* 405 F.3d 45, 49 (1st Cir. 2005) (generally an indictment establishes probable cause, but there is an exception if law enforcement officers knowingly presented false testimony to the grand jury); *Rothstein v. Carriere,* 373 F.3d 275, 282–83 (2d Cir. 2004) (grand jury indictment creates presumption of probable cause; may be rebutted if plaintiff "establish[es] that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith"); *Riley v. City of Montgomery, Alabama,* 104 F.3d 1247, 1254 (11th Cir. 1997) ("[A]n indictment is prima facie evidence of probable cause which can be overcome by showing that it was induced by misconduct."); *Rose v. Bartle,* 871 F.2d 331, 353 (3d Cir. 1989) (grand jury indictment "constitutes prima facie evidence of probable cause to prosecute, but . . . may be rebutted by evidence that the presentment was procured by fraud, perjury or other corrupt means"); *Hand v. Gary,* 838 F.2d 1420, 1426 (5th Cir. 1988) ("obtaining an indictment is not enough to insulate state actors from an action for malicious prosecution under § 1983" when "finding of probable cause remained tainted by the malicious actions of the government officials"); *Harris v. Roderick,* 126 F.3d 1189, 1198 (9th Cir. 1997) (same; explicitly adopts reasoning of *Hand*). *Cf. Awabdy v. City of Adelanto,* 368 F.3d 1062, 1067 (9th Cir. 2004) (in a later civil ac-

> tion for malicious prosecution, a judicial finding of probable cause in a criminal proceeding is prima facie evidence of probable cause which may be rebutted by a "showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith"); *Hinchman v. Moore*, 312 F.3d 198 (6th Cir. 2002) (a judicial finding of probable cause in a criminal proceeding does not bar a future malicious prosecution claim where plaintiff alleges the police officer supplied false information to establish probable cause); *DeLoach v. Bevers*, 922 F.2d 618, 620–21 (10th Cir. 1990) (despite judicial determination of probable cause, police officer "cannot hide behind the decisions of others involved in [plaintiff's] arrest and prosecution if she deliberately conceals and mischaracterizes exculpatory evidence").

Moore, 571 F.3d at 67. The D.C. Circuit acknowledged that in the criminal context, "the return of an indictment conclusively establishes probable cause" but nevertheless concluded that "[n]othing in these cases requires that their holdings control in a civil action such as this in which an essential element of the cause of action is a lack of probable cause." *Id.* at 68.

The Fourth Circuit has likewise recognized that when police officers effect a "seizure" by arresting an individual pursuant to an arrest warrant, the officers are liable under the Fourth Amendment if the officers "intentionally lie in warrant affidavits, or recklessly include or exclude material information known to them." *Miller*, 475 F.3d at 630. Thus, "[a]n investigation need not be perfect, but an officer who intentionally or recklessly

puts lies before a magistrate, or hides facts from him, violates the Constitution unless the untainted facts themselves provide probable cause." *Id.* at 630–31; *Brooks v. City of Winston–Salem*, 85 F.3d 178, 183–84 (4th Cir. 1996); *see also Washington*, 407 F.3d at 283 ("[A] grand jury's decision to indict" will not "shield a police officer who deliberately supplied misleading information that influenced the decision." (quoting *Jones v. Chicago*, 856 F.2d 985, 994 (7th Cir. 1988))); *White v. Wright*, 150 Fed. Appx. 193, 196–98 (4th Cir. 2005) (applying this rule where allegedly false evidence was used by prosecutors before a grand jury to obtain an indictment that resulted in the plaintiff's seizure, but finding that plaintiff had failed to present evidence of non-testimonial acts by the officers); *Hand v. Gary*, 838 F.2d 1420, 1427–28 (5th Cir. 1988) (concluding that an official is not liable for a Fourth Amendment violation for an arrest based on a warrant or an indictment "if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury," but further finding that "[a]ny misdirection of the magistrate or the grand jury by omission or commission perpetuates the taint of the original official behavior").

With regard to omissions, the Fourth Circuit has noted that "[a]n affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation," but a facially sufficient affidavit is still subject to challenge if it includes "omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate." *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990) (emphasis in original). In this context, "'[r]eckless disregard' can be established by evidence that an officer acted 'with a high degree of awareness of [a statement's] probable falsity,' that is, 'when viewing all the evidence, the affiant must have entertained serious

doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.'" *Miller,* 475 F.3d at 627 (quoting *Wilson v. Russo,* 212 F.3d 781, 788 (3d Cir. 2000)). Likewise, as to omissions, "'reckless disregard' can be established by evidence that a police officer 'failed to inform the judicial officer of facts [he] knew would negate probable cause.'" *Id.* (quoting *Beauchamp v. City of Noblesville, Inc.,* 320 F.3d 733, 743 (7th Cir. 2003)). However, "[a] plaintiff's 'allegations of negligence or innocent mistake' by a police officer will not provide a basis for a constitutional violation." *Id.* at 627–28 (quoting *Franks v. Delaware,* 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978)). Thus, where officials deliberately or recklessly supply false or misleading information that is used to obtain an indictment, or deliberately or recklessly omit material information that the officials know would negate probable cause, the officials may be liable if their actions result in the seizure of an individual without probable cause.

Based on these cases, this Court concludes that the Fourth Circuit would recognize a potential § 1983 claim for violation of the Fourth Amendment when an individual is arrested pursuant to legal process that was not supported by probable cause, if the criminal proceedings terminated in the individual's favor. *See Brooks,* 85 F.3d at 183–84. In addition, the Fourth Circuit has also recognized that even when a probable cause determination has been made by a neutral third party, "an officer who intentionally or recklessly puts lies before a magistrate, or hides facts from him, violates the Constitution unless the untainted facts themselves provide probable cause." *Miller,* 475 F.3d at 630–31. Therefore, this Court concludes that a potential § 1983 claim for violation of an individual's Fourth Amendment rights could be stated based on an official's intentional or reckless creation of false or

misleading evidence that is necessary to a finding of probable cause and that is used before a magistrate judge or grand jury to ultimately effect the individual's arrest, or the deliberate or reckless omission of material information that the officials know would negate probable cause, if the criminal proceedings ultimately terminated in the individual's favor.[5]

To the extent that Defendants have raised a "qualified immunity" defense, the Court concludes that there is no question that these rights were clearly established, and no reasonable official could have believed that it was permissible to deliberately or recklessly create false or misleading evidence to present to a grand jury to effect a citizen's indictment and arrest. *See Miller*, 475 F.3d at 631–32 ("[T]he Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or 'with reckless disregard for the truth' makes material false statements or omits material facts. . . . No reasonable police officer . . . could believe that the Fourth Amendment permitted such conduct." (internal citations omitted)); *Brooks*, 85

[5] The Court acknowledges that these doctrines are ordinarily applied where the probable cause determination has been made by a magistrate judge issuing an arrest warrant, rather than by a grand jury. Therefore, with respect to claims that government officials prepared false and misleading evidence for presentation in grand jury proceedings in order to deprive citizens of their liberty rights, the constitutional violation might be more appropriately viewed as a due process violation rather than a Fourth Amendment violation, and that possibility is also discussed infra. However, the Supreme Court's decision in *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), although not addressing the context of grand jury proceedings, could be read to require that any claims for pre-trial deprivations of liberty be analyzed under the Fourth Amendment. The Court has therefore considered the claims as Fourth Amendment claims.

F.3d at 183–84.[6] At the time of the acts alleged in the Second Amended Complaint, the Fourth Amendment rights outlined above were clearly established, and no reasonable official could have believed that it was permissible to deliberately or recklessly create false or misleading evidence to obtain an indictment in the absence of probable cause. *See Miller,* 475 F.3d at 632; *Brooks,* 85 F.3d at 183.

Therefore, having considered these contentions, the Court concludes that Plaintiffs can state a claim under § 1983 for violation of the Fourth Amendment in Counts 1, 2, and 3, but only to the extent that Plaintiffs can meet the standards set out above, specifically by alleging that Plaintiffs were arrested pursuant to an indictment that was obtained by the intentional or reckless creation of false or misleading evidence used before the grand jury that was necessary to a finding of probable cause, or the deliberate or reckless omission of material information that officials knew would negate probable cause. Plaintiffs have alleged such claims here, and it will be Plaintiffs' burden to present factual support for there claims after an opportunity for discovery. The Court notes that Defendants raise extensive factual contentions to dispute these allegations and to demonstrate that probable cause existed even if the allegedly false statements are removed and the material omissions are included. This analysis includes extensive parsing of pieces of the Second Amended Complaint, as well as contentions by the Defendants blaming one another for any alleged viola-

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[6] The Court notes that in the context of a search or seizure conducted pursuant to a warrant, qualified immunity is analogous to the "good faith" exception to the exclusionary rule applied in criminal cases under *United States v. Leon*, 468 U.S. 897, 922–23, 104 S. Ct. 3405, 3420–21, 82 L. Ed. 2d 677(1984). *See Malley v. Briggs*, 475 U.S. 335, 344–45, 106 S. Ct. 1092, 1098, 89 L. Ed. 2d 271 (1986).

tion here. However, the analysis suggested by Defendants requires factual analysis beyond the allegations in the Second Amended Complaint, and the cases cited by the Defendants in support of this analysis involve summary judgment determinations, not determinations on a motion to dismiss. Therefore, having considered the parties' contentions in this regard, the Court finds that this parsing of the facts, and certainly any consideration of Defendants' factual contentions in response, is more appropriate at summary judgment after an opportunity for discovery, when the factual record is before the Court for consideration. At this stage in the case, the Court simply concludes that where officers deliberately or recklessly supply false or misleading evidence to support a grand jury indictment as alleged in the present case, or deliberately omit material information knowing that it would negate probable cause, the officers may be liable under § 1983 for violation of an individual's Fourth Amendment rights, if their actions result in the seizure of an individual without probable cause.

Therefore, the Court concludes that Plaintiffs have stated a plausible claim for violation of the Fourth Amendment rights in this case. However, before considering whether Plaintiffs have stated a claim as to each Defendant against whom this claim is asserted, the Court will consider Plaintiffs' alternative contention that their rights under the Fourteenth Amendment were also violated.

B. Fourteenth Amendment Violations

In addition to the Fourth Amendment claims, Plaintiffs also contend that their Fourteenth Amendment Due Process rights were violated by the bad faith concealment of evidence and the fabrication of inculpatory evidence. The Fourteenth Amendment protects citizens against deprivations of liberty or property without due

process of law. U.S. Const. amend. XIV. "[T]he Due Process Clause of the Fourteenth Amendment 'guarantees more than fair process' and 'includes a substantive component that provides heightened protection against government interference with certain fundamental rights.' . . . The core of the concept of substantive due process is the 'protection of the individual against arbitrary action of government.'" *Martin v. Saint Mary's Dep't of Soc. Servs.,* 346 F.3d 502, 511 (4th Cir. 2003) (citations omitted). The Fourth Circuit has generally held that a claim related to the initiation or continuation of a prosecution on less than probable cause, including failure to disclose exculpatory information during the investigation phase, "does not allege a deprivation of any right guaranteed under the Due Process Clause of the Fourteenth Amendment," and is instead cognizable only pursuant to the Fourth Amendment. *See Taylor v. Waters,* 81 F.3d 429, 436 (citing *Albright v. Oliver,* 510 U.S. 266, 268–76, 114 S. Ct. 807, 810–14, 127 L. Ed. 2d 114 (1994) and *Baker v. McCollan,* 443 U.S. 137, 142–46, 99 S. Ct. 2689, 2693–96, 61 L. Ed. 2d 433 (1979)); *see also United States v. Ruiz,* 536 U.S. 622, 628, 122 S. Ct. 2450, 2454 153 L. Ed. 2d 586 (2002) (noting that a defendant's right to receive exculpatory material from prosecutors is "a right that the Constitution provides as part of its basic 'fair trial' guarantee" under the Fifth and Sixth Amendments (citing *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215 (1963))); *see generally Jean v. Collins,* 221 F.3d 656 (4th Cir. 2000) (en banc, with multiple opinions by an evenly divided court).

However, the Fourth Circuit has also held that individuals possess a Fourteenth Amendment Due Process right not to be deprived of liberty as a result of the deliberate fabrication of evidence by a government officer acting in an investigating capacity. *See Washington v. Wilmore,* 407 F.3d 274, 282 (4th Cir. 2005) (citing *Zahrey*

v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000)); *White v. Wright*, 150 Fed. Appx. 193, 198–99 (4th Cir. 2005). Indeed, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit. Actions taken in contravention of this prohibition necessarily violate due process (indeed, we are unsure what due process entails if not protection against deliberate framing under color of official sanction)." *Washington*, 407 F.3d at 285 (Shedd, J., concurring) (quoting *Limone v. Condon*, 372 F.3d 39, 44–45 (1st Cir. 2004)). This right "not to be deprived of liberty as a result of the fabrication of evidence by an investigating officer . . . was clearly established in 1983" long before the events alleged in the Second Amended Complaint. *See Washington*, 407 F.3d at 283–84.

Although this Fourteenth Amendment right clearly applies to the use of false evidence *at trial*, Defendants nevertheless contend that this Fourteenth Amendment right cannot apply to the *pre-trial* fabrication of evidence, even if the fabricated evidence results in a citizen's seizure, because *pre-trial* seizures are considered only under the Fourth Amendment. However, in articulating the right not to be deprived of liberty as a result of fabricated evidence in *Washington*, the Fourth Circuit has favorably cited the Second Circuit's decision in *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000), which specifically recognized a Fourteenth Amendment right in the context of *pre-trial* proceedings, where the fabricated evidence resulted in the citizen's arrest after his indictment. *See Washington*, 407 F.3d at 282 (citing *Zahrey*, 221 F.3d at 349–50); *see also Robertson v. Elliott*, 315 Fed. Appx. 473, 476–77 (2009) (unpublished) (identifying the Fourteenth Amendment as the applicable constitutional right where the plaintiff alleged that

fabricated evidence resulted in the plaintiff's indictment and arrest before the charges were ultimately dismissed).

In considering these issues, the Court acknowledges the various overlapping constitutional doctrines at issue here, and the lack of clear guidance on the structure of such claims. *See Lambert v. Williams,* 223 F.3d 257, 260 (4th Cir. 2000) (noting that there continues to be an "'embarrassing diversity of judicial opinion' over the composition or even existence, of a claim for 'malicious prosecution' founded in § 1983" (citation omitted)). However, the Court has already determined that the claims asserted by Plaintiffs in Counts 1, 2, and 3 are going forward at this time based on alleged violations of their Fourth Amendment rights, as discussed above. The Court further concludes that under current precedent, Plaintiffs' claims should be analyzed pursuant to the Fourth Amendment, rather than the Fourteenth Amendment. *See Albright v. Oliver,* 510 U.S. 266, 273, 114 S. Ct. 807, 813, 127 L. Ed. 2d 114 (1994) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" (citation omitted)). However, in light of the unsettled legal doctrines, and in light of the deprivation of liberty alleged here based on Plaintiffs' indictments and arrests, this Court will not dismiss Plaintiffs' alternative Fourteenth Amendment claims at this time, and these Fourteenth Amendment claims will go forward as alternatives to the Fourth Amendment claims, all as part of Counts 1, 2, and 3.[7]

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[7] The Court notes however, that the claims will only be analyzed under the Fourth Amendment standards set out above, unless sub-

C. Absolute Immunity Defenses

Several of the Defendants nevertheless contend that Plaintiffs cannot establish a § 1983 claim, under either the Fourth or Fourteenth Amendment, because any testimony that may have been given before the grand jury is entitled to "absolute immunity." In this regard, the Court notes that the Supreme Court has held that in litigation brought pursuant to § 1983, witnesses, including both police officer witnesses and expert witnesses, are entitled to absolute immunity for testimony they may have given at trial, even if the testimony was perjured. *See Briscoe v. LaHue,* 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). Based on *Briscoe,* the Fourth Circuit has likewise found that this absolute witness applies to grand jury testimony. *See Lyles v. Sparks,* 79 F.3d 372, 378 (4th Cir. 1996). However, Plaintiffs in the present suit acknowledge this immunity and do not attempt to assert claims based on any of the Defendants' actual grand jury testimony. Instead, Plaintiffs contend that the Defendants engaged in investigatory, non-testimonial acts to create false and misleading evidence inculpating Plaintiffs. In this regard, the Fourth Circuit has held that even though an officer cannot be held liable for his testimony in a legal proceeding, this immunity does not extend to the "initial act of fabrication," and would not protect an officer who allegedly fabricated a police report where the report was later used at trial. *Washington v. Wilmore,* 407 F.3d 274, 283 (4th Cir. 2005); *see also Brown v. Daniel,* 230 F.3d 1351, 2000 WL 1455443, at *2 (4th Cir. Sept. 29, 2000) (table opinion). Similarly, an expert witness can be liable not for his testimony, but for non-testimonial, deliberate creation of misleading evidence. *See Gregory v. City of Louisville,*

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sequent Fourth Circuit or Supreme Court cases provide for a different analysis.

444 F.3d 725, 738–41 (6th Cir. 2006); *Spurlock v. Satterfield*, 167 F.3d 995, 1003–04 (6th Cir. 1999). Therefore, in the present case, under current Fourth Circuit law, Plaintiffs may not base their claim on any of the Defendants' grand jury testimony, which is protected by absolute witness immunity, but this immunity does not extend to alleged non-testimonial acts by the Defendants to create false and misleading evidence to inculpate Plaintiffs.[8]

Defendants Nifong and Wilson also contend that they are protected by absolute prosecutorial immunity. Under the doctrine of Prosecutorial Immunity, prosecutors are absolutely immune from liability for "prosecutorial actions that are 'intimately associated with the judicial phase of the criminal process.'" *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 860 (2009) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128 (1976)). This immunity includes actions such as the "decision to initiate a prosecution," preparation for trial, and the presentation of evidence in court. *See id.* However, "absolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is

[8] In addition, the Court notes that the Supreme Court has granted certiorari in the case of *Rehberg v. Paulk*, raising the issue of whether a government official who acts as a "complaining witness" by presenting perjured testimony against an innocent citizen is entitled to absolute witness immunity in a § 1983 suit. *See Rehberg v. Paulk*, 611 F.3d 828, 839–40 (11th Cir. 2010) (finding that investigator had absolute immunity for testimony before grand jury), cert. granted, 79 U.S.L.W. 3377, 2011 WL 940891 (U.S. Mar. 21, 2011) (No. 10–788). Therefore, the Court will consider any subsequent determinations by the Supreme Court in addressing the scope of any absolute witness immunity raised by Defendants in this case, but Plaintiffs' claims will go forward at this time under current Fourth Circuit law based on Plaintiffs' allegations of non-testimonial fabrications, as discussed above.

instead engaged in other tasks, say, investigative or administrative tasks." *Id.* at 861. Thus, the Supreme Court has held that "absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation [or] when the prosecutor makes statements to the press." *Id.* (internal citations omitted). In *Buckley v. Fitzsimmons,* the Supreme Court specifically considered the application of absolute immunity to § 1983 claims asserted against a prosecutor for "allegedly fabricating evidence during the preliminary investigation of a crime." 509 U.S. 259, 261, 113 S. Ct. 2606, 2609, 125 L. Ed. 2d 209 (1993). As in the present case, the plaintiff in *Buckley* alleged that "in order to obtain an indictment in a case that had engendered 'extensive publicity' and 'intense emotions in the community,' the prosecutors fabricated false evidence" and that prosecutors made "false statements about petitioner in a press conference" in order "to gain votes." *Id.* at 262, 113 S. Ct. at 2610. The Supreme Court ultimately concluded that the prosecutor was not entitled to absolute immunity for his investigative work, including his alleged efforts to fabricate evidence prior to initiation of judicial proceedings. *Id.* at 275–78, 113 S. Ct. at 2616–18.

In the present case, Defendant Wilson contends that he was an investigator acting at the direction of and under the supervision of Nifong, and that all of his alleged actions were prosecutorial in nature, entitling both Wilson and Nifong to absolute prosecutorial immunity. Nifong has joined in this contention. In response, Plaintiffs acknowledge that absolute immunity would bar claims for "trial advocacy duties" such as presenting charges and evidence to the grand jury. *See Buckley,* 509 U.S. at 267 n.3, 273, 274 n.5, 113 S. Ct. at 2612 n.3, 2615, 2616 n.5 ("[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate

for the State, are entitled to the protections of absolute immunity," including "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made."). However, Plaintiffs contend that they have alleged acts by Defendants Nifong and Wilson beyond just evaluation and presentation of evidence as advocates. Specifically, Plaintiffs have alleged that Nifong took over the investigation in this matter before any suspects had been identified, and then proceeded, with his investigator, Wilson, and with the assistance of the Gottlieb and Himan and the DSI Defendants, to create false and misleading evidence inculpating Plaintiffs. Based on the allegations in the Second Amended Complaint, Nifong was acting far outside his prosecutorial role and was instead assuming an investigatory role in this matter, going so far as to assume supervision of an investigation that had just begun. *Cf. id.* at 273, 113 S. Ct. 2616 (noting that absolute immunity does not apply "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer," including "searching for the clues and corroboration that might give him probable cause"). Therefore, the Court concludes that the claims against Nifong and Wilson for their investigatory acts, including the alleged preparation of false and misleading evidence during the course of the investigation, would not be barred by Prosecutorial Immunity. Thus, Nifong and Wilson are liable for their investigatory acts to the same extent as other investigating officials. *See Zahrey v. Coffey,* 221 F.3d 342, 353–54 (2d Cir. 2000) (noting that prosecutor could be held liable for fabrication of evidence in his investigatory role, because "it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that [the plaintiff] would be indicted and arrested"

and "[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty").

D. Sufficiency of Allegations as to Individual Defendants

However, the Court must still consider whether Plaintiffs have sufficiently stated a claim as to each of the particular Defendants against whom these Counts are asserted. In considering this issue, the Court notes that these claims are first asserted against Defendants Nifong and Wilson. Nifong is alleged to have been directly responsible for the creation of false and misleading evidence that led to Plaintiffs' indictments and arrests, and therefore Plaintiffs have alleged sufficient involvement by Nifong in the constitutional violations. The allegations are less clear with respect to Nifong's investigator, Wilson, however. Wilson contends that Plaintiffs may not rely on alleged actions by Wilson that occurred *after* Plaintiffs' indictments and arrests to establish any violation of Plaintiffs' constitutional rights. However, in Counts 1 through 3, Plaintiffs allege that Wilson conspired with others to conceal and obfuscate evidence and produce false and misleading evidence to secure Plaintiffs' indictments and arrests. In reciting their factual contentions, Plaintiffs also allege involvement by Wilson prior to Plaintiffs' indictments and arrests, specifically that Nifong assigned Wilson to coordinate with Gottlieb and Himan with respect to the police investigation after Nifong took over supervision of the investigation, and that Wilson was part of the conspiracy to seize Plaintiffs without probable cause using false and misleading evidence. It will be Plaintiffs' burden to present sufficient, specific evidence of actual participation by Wilson in the

constitutional violation in order to support the § 1983 claims against him, but the Court finds that Plaintiffs have pled enough facts to state a claim that is "plausible on its face" as to Wilson based on his alleged involvement in investigatory acts that are not protected by absolute prosecutorial immunity, and that are alleged to have caused Plaintiffs' seizure in violation of the Fourth Amendment.

As to Defendants Gottlieb and Himan, these Defendants are the police officers who are alleged to have directly participated in the creation of false and misleading evidence. Gottlieb and Himan contend that they cannot be liable for these claims because they turned over all of the relevant evidence and information to Nifong. However, Plaintiffs' contention in the Second Amended Complaint is that Gottlieb and Himan did not just turn over the evidence to Nifong, but actually acted with Nifong to deliberately create the false and misleading evidence. Although it will be Plaintiffs' burden to prove this contention, at this stage Plaintiffs have alleged direct involvement by Gottlieb and Himan in the constitutional violations that are at issue here.

Finally, with respect to the DSI Defendants, Plaintiffs allege that Defendants Meehan and Clark of DSI, acting under color of state law, were both directly involved in the deliberate creation of false and misleading evidence before the indictments and arrests, in order to manufacture probable cause so that Plaintiffs could be indicted and arrested. A private party may be held liable under § 1983 in certain circumstances if they are acting "under color of state law." "[T]he party charged with the deprivation must be a person who may fairly be said to be a state actor . . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise

chargeable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 L. Ed. 2d 482 (1982). To the extent that a § 1983 claim is based on an alleged "joint participation" or "conspiracy" between private actors and public actors, a bare assertion of a "conspiracy" is insufficient, and a plaintiff must plead enough factual matter to plausibly suggest that an agreement was made to deprive them of their constitutional rights. *See Howard v. Food Lion, Inc.*, 232 F. Supp. 2d 585, 597 (M.D.N.C. 2002); *see also Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002) ("To be liable as a co-conspirator, a private defendant must share with the public entity the goal of violating a plaintiff's constitutional rights."). Thus, to be acting "under color of state law" based on joint participation, the "private action must have a 'sufficiently close nexus' with the state [so] that the private action 'may be fairly treated as that of the State itself.'" *DeBauche v. Trani*, 191 F.3d 499, 507 (4th Cir. 1999) (citation omitted).

Plaintiffs in the present case allege that Meehan and Clark joined with Gottlieb, Nifong, and Himan to create false and misleading evidence, and reached an agreement to violate Plaintiffs' constitutional rights. Having considered these contentions, the Court concludes that Plaintiffs have alleged sufficient facts to state a claim against Clark and Meehan for their alleged role in the claimed constitutional violations. The allegations are sufficient to give notice as to how they are alleged to have participated in the violation of Plaintiffs' rights, and are sufficient to allege action "under color of state law" at this stage in the case. *Cf. Brown v. Miller*, 519 F.3d 231, 237 (5th Cir. 2008) ("[T]he deliberate or knowing creation of a misleading and scientifically inaccurate serology report amounts to a violation of a defendant's due process rights, and . . . a reasonable laboratory technician in 1984 would have understood that those actions violated

those rights."). That issue will, however, be subject to further review on a motion for summary judgment to determine whether sufficient evidence exists to support this claim as to Clark and Meehan. With respect to Defendant DSI, a corporation may be held liable under § 1983 for constitutional violations based on acts of those with "final policymaking authority" for the corporation, in this case, Defendant Clark as President of DSI. *See Rodriguez v. Smithfield Packing Co.,* 338 F.3d 348, 355 (4th Cir. 2003) (noting that § 1983 liability may be imposed on a corporation acting under color of state law "for a single decision by [corporate] policymakers under appropriate circumstances" (internal quotations omitted)). Therefore, Plaintiffs have alleged potential § 1983 claims against all of the DSI Defendants.[9]

As a result of these determinations, Counts 1, 2, and 3, collectively, will go forward to the extent recognized and discussed above, as to Defendants Nifong, Wilson, Gottlieb, Himan, Clark, Meehan, and DSI.

Count 4: 42 U.S.C. § 1983 Claim for Making False Public Statements, asserted against Defendants Nifong, Hodge, and Addison, in their individual capacities

Count 4 is asserted against Defendants Nifong, Deputy Chief Hodge, and Spokesperson Addison, individually, for Making False Public Statements regarding the investigation which injured Plaintiffs and which were "intended to inflame the Durham community and grand jury pool against the Plaintiffs an other Duke lacrosse

[9] In addition, as previously discussed, although the Defendants may be entitled to "witness immunity" for their actual testimony, that immunity does not extend to non-testimonial creation of false and misleading evidence.

players, and to compromise the fairness of subsequent judicial proceedings." (Second Am. Compl. ¶ 366).

As discussed above, the Fourteenth Amendment protects against deprivations of liberty or property rights without due process of law. In this regard, the Supreme Court has recognized the right to due process "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Wisconsin v. Constantineau,* 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L. Ed. 2d 515 (1971). However, the Supreme Court has also held that an injury to reputation alone does not deprive a plaintiff of "liberty" or "property" interests so as to state a Fourteenth Amendment violation. *See Paul v. Davis,* 424 U.S. 693, 711–12, 96 S. Ct. 1155, 1165–66, 47 L. Ed. 2d 405 (1976). In *Paul,* the Supreme Court held that where defamatory flyers were distributed by police officers and caused the plaintiff reputational harm, the plaintiff could not state a Fourteenth Amendment violation unless the plaintiff alleged, in addition to the defamatory statement, that some other right or status was altered or extinguished. *See id.* Under *Paul,* a Fourteenth Amendment claim based on defamatory statements by government actors requires a plaintiff to allege "(1) the utterance of a statement about her that is injurious to her reputation, 'that is capable of being proved false, and that he or she claims is false,' and (2) 'some tangible and material state-imposed burden . . . in addition to the stigmatizing statement.'" *Velez v. Levy,* 401 F.3d 75, 87 (2d Cir. 2005). Such a claim is referred to as a "stigma-plus" claim. *Id.*; *Cooper v. Dupnik,* 924 F.2d 1520, 1532 n.22 (9th Cir. 1991) ("The 'plus' part of this test can be met by either the denial of a right specifically secured by the Bill of Rights (such as the right to free speech or counsel), or the denial of a state-created property or liberty interest such that the Fourteenth Amendment's Due Process Clause is violated.").

In the present case, in their Consolidated Response, Plaintiffs note that their claim is not based solely on reputational injury to the Plaintiffs. Instead, Plaintiffs contend that they have stated a claim because the false public statements made by governmental officials in this case were intended to inflame the grand jury pool and result in indictments against Plaintiffs, and also because the false statements were made in connection with Plaintiffs' seizure pursuant to legal process not supported by probable cause in violation of the Fourth and Fourteenth Amendments. Other courts have recognized a "stigma-plus" claim where officers are alleged to have made defamatory statements in connection with unlawful arrests or seizures in violation of the Fourth Amendment. *See, e.g., Cooper,* 924 F.2d at 1534–36; *Marrero v. Hialeah,* 625 F.2d 499, 517–19 (5th Cir. 1980); *see also Albright v. Oliver,* 510 U.S. 266, 294–96, 114 S. Ct. 807, 823–26 127 L. Ed. 2d 114 (1994) (Stevens, J., dissenting) (noting that injury to reputation plus unconstitutional prosecution is sufficient to establish "stigma plus"). In addition, the court in *Cooper* noted that "the law on this point—that defamation in connection with the violation of a constitutional right states a claim under section 1983—was clear" and "it should have been clear to a reasonable public official" that such claims were actionable. *Cooper,* 924 F.2d at 1535–36.

In light of these cases and in light of the circumstances alleged in the Second Amended Complaint, the Court concludes that Plaintiffs have alleged a § 1983 claim for violation of their constitutional rights based on the government officials' false public statements. Specifically, the Court finds that Plaintiffs have alleged a "stigma-plus" claim with a "tangible state-imposed burden . . . in addition to the stigmatizing statement," because the false public statements were made in connection with the alleged Fourth and Fourteenth Amend-

ment violations discussed above with respect to Counts 1, 2, and 3. Because this right was clearly established, qualified immunity would not apply with respect to these claims. With respect to Defendant Nifong, Plaintiffs have alleged that Nifong created false and misleading evidence that resulted in their unlawful seizure as discussed above, and made ongoing false public statements in connection with that seizure and based on that evidence. With respect to Defendants Addison and Hodge, Plaintiffs contend that Addison and Hodge made false public statements in connection with the grand jury proceedings and the deprivations of their Fourth and Fourteenth Amendment rights. *See also Velez,* 401 F.3d at 88–89 (noting that "[w]hen government actors defame a person and—either previously or subsequently—deprive them of some tangible legal right or status . . . a liberty interest may be implicated, even though the 'stigma' and 'plus' were not imposed at precisely the same time" or by "the same actor," as long as they are "connected"); *Marrero,* 625 F.2d at 519 (noting that it is sufficient "that the defamation occur in connection with, and be reasonably related to, the alteration of the right or interest"). To the extent that these Defendants contest the particular nature or timing or effect of what was allegedly said, the Court concludes that such a factual inquiry is more appropriate on a motion for summary judgment, and Plaintiffs have alleged that each of the named Defendants made deliberately false public statements in connection with the alleged falsification of evidence that was used to subject them to indictment and arrest. In addition, this right was clearly established well before the conduct alleged in the present case, and a reasonable official would have known that it violated clearly established constitutional rights to deliberately make false public statements regarding a citizen in connection with an unlawful arrest of that citizen. To the extent that Defendants raise fac-

tual contentions about what a reasonable official would have done based on what they knew at the time, the Court concludes that this analysis would involve consideration of factual contentions and would be more appropriate at summary judgment on a factual record. At this point, Plaintiffs have sufficiently stated a plausible claim, although it will of course be Plaintiffs' burden to present evidence in support of these claims going forward. Therefore, Count 4 will go forward as to Defendants Nifong, Addison, and Hodge.

Count 5: 42 U.S.C. § 1983 Claim, asserted against the City pursuant to *Monell*

In Count 5, Plaintiffs assert § 1983 claims against the City under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Pursuant to *Monell*, a municipality is not vicariously liable under § 1983 for actions of its employees; instead, a municipality is only liable under § 1983 if the alleged constitutional violations were the result of a municipal policy or practice. A municipality may be liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037–38. A plaintiff can establish liability under *Monell* where the constitutional injury is proximately caused by a written policy or ordinance, or by a widespread practice that is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 926, 99 L. Ed. 2d 107 (1988) (citation omitted). In addition, the Supreme Court has also recognized that liability may be imposed on a municipality where the constitutional injury is proximately caused by the decision of an official with final policymaking authority, that is, an offi-

cial with authority to establish and implement municipal policy in that area. *Id.* at 127, 108 S. Ct. at 926. Finally, municipal liability has been recognized based on inadequate training or supervision of employees if the training or supervision was so inadequate as to establish "deliberate indifference" to the rights of citizens and if the deficiency caused the constitutional violation alleged. *See City of Canton v.. Harris,* 489 U.S. 378, 390–92, 109 S. Ct. 1197, 1206, 103 L. Ed. 2d 412 (1989). In sum, "[a] policy or custom for which a municipality may be held liable can 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 'manifest[s] 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) (quoting *Carter v. Morris,* 164 F.3d 215, 218 (4th Cir. 1999)). Such a claim only exists if, "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. of the County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 404, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626 (1997).

In the present case, Plaintiffs assert a claim against the City[10] alleging express policies or widespread customs that led to the constitutional violations alleged in

[10] Plaintiffs originally asserted this claim against the Supervisory Defendants in their "official capacities," but Plaintiffs agree that the "official capacity" claims are duplicative and may be dismissed. Therefore, this claim is being asserted only against the City.

Counts 1, 2, 3, and 4. Specifically, Plaintiffs allege that Durham police had an established policy or custom permitting officers to publish premature conclusions of criminality and guilt, and that Durham police had an established policy or custom targeting Duke University students for harassment through selective and improper enforcement of the criminal laws, including selective and malicious prosecution and manufacturing of false evidence by Defendant Gottlieb with the knowledge of the Supervisory Defendants.

In addition, Plaintiffs also assert the claim against the City based on allegations that officials with final policymaking authority for the Durham police caused or ratified the unconstitutional conduct of their subordinates as to Counts 1–4. Plaintiffs similarly allege that officials with final policymaking authority failed to exercise adequate supervisory responsibility over Gottlieb and assigned Gottlieb to lead the investigation, thus endorsing and ratifying Gottlieb's unconstitutional conduct. On this point, the Court notes that to impose municipal liability based on the decision of a final policymaking official, the final policymaking official must have been "aware of the constitutional violation and either participated in, or otherwise condoned, it." *Love–Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004). This includes situations where "the authorized policymakers approve a subordinate's decision and the basis for it," since "their ratification would be chargeable to the municipality because their decision is final." *Praprotnik*, 485 U.S. at 127. Thus, liability may be imposed where the final policymaking official intentionally participates in or ratifies the constitutional violation. In addition, where a final policymaking official makes a decision or acts in a manner that is not in itself unconstitutional, liability may still exist if the final policymaking official acts with "deliberate indifference to the risk that a violation of a particular constitutional or

statutory right will follow the decision." *Bd. of the County Comm'rs of Bryan County,* 520 U.S. at 411, 117 S. Ct. at 1392; *see also Carter v. Morris,* 164 F.3d 215, 218–19 (4th Cir. 1999) (describing the required connection between the official's deliberate indifference and the ultimate constitutional violation).

Finally, Plaintiffs allege that the City is liable for the unconstitutional conduct of Defendant Nifong. On this point, Plaintiffs allege that officials with final policymaking authority failed to exercise adequate supervisory responsibility over Nifong and conferred authority on Nifong to direct the investigation knowing that Nifong's "political ambition was driving his personal engagement with the investigation." (Second Am. Compl. ¶ 388). Plaintiffs also contend that Nifong himself was given "final policymaking authority" for the Durham Police Department and as a final policymaking official, Nifong instructed Durham Police officers to engage in constitutional violations.

In considering these contentions, the Court notes that although "[t]he substantive requirements for proof of municipal liability are stringent," § 1983 claims are not subject to any heightened pleading standard, and "primary reliance must be placed on discovery controls and summary judgment to ferret out before trial unmeritorious suits against municipalities." *Jordan v. Jackson,* 15 F.3d 333, 338–40 (4th Cir. 1994). Thus, where a complaint alleges the existence of municipal policies, alleges that officials with final policymaking authority condoned and ratified unconstitutional conduct of subordinates, and alleges that the policies proximately caused the alleged constitutional violation, the allegations are sufficient at the motion to dismiss stage, although the "required showings are appreciably more demanding" at summary judgment. *Jordan,* 15 F.3d at 340.

Having considered Plaintiffs' contentions in the present case with respect to the City, the Court concludes that Plaintiffs have sufficiently stated a claim for *Monell* liability against the City at this stage in the case. Specifically, the Court concludes that Plaintiffs have alleged that the City had a policy of targeting Duke students that led to multiple constitutional violations against Duke students, particularly by Gottlieb, and that the City through its final policymaking officials nevertheless continued the policy and ratified and condoned those violations. Plaintiffs have stated a plausible claim that this condoning of constitutional violations in the enforcement of the policy led to the constitutional violations and injuries alleged by Plaintiffs in the present case.[11] Whether evidence exists to support this contention is not a question before the Court on the present motions. Of course, at later stages in the case, Plaintiffs will be required to present evidence to support these contentions, including evidence to establish the existence of an official policy or custom, and proof that the policy was the cause of the constitutional violation and injuries alleged here. *See Jordan*, 15 F.3d at 339–40. However, given the preliminary stage of this case, the Court concludes that those issues are more appropriately resolved at summary judgment, since resolution of this issue will require con-

[11] In addition to the policy of targeting Duke students and ratification of Gottlieb's constitutional violations and assignment of Gottlieb to the investigation, Plaintiffs allege that Durham had a policy of publishing premature official conclusions of guilt. However, the Court does not reach the issue of whether these allegations are sufficient to state a *Monell* claim based on this policy, since the Court has already determined that Plaintiffs have alleged a sufficient policy to support a *Monell* claim at this stage in the case, as discussed above. Any further consideration of this issue is therefore reserved for summary judgment determination.

sideration of facts and proof beyond the allegations in the Second Amended Complaint.

However, with respect to Plaintiffs' contention that *Monell* liability should attach to the City based on "delegation" to Nifong, or based on Nifong's alleged status as a "final policymaker" for the City, the Court notes that "[w]hether a particular official has 'final policymaking authority' is a question of state law," and is "dependent on the definition of the official's functions under relevant state law." *McMillian v. Monroe County,* 520 U.S. 781, 786, 117 S. Ct. 1734, 1737, 138 L. Ed.2d 1 (1997) (internal citation omitted). "A municipal agency or official may have final policymaking authority by direct delegation from the municipal lawmaking body, or by conferral from higher authority" such as state law. *Spell v. McDaniel,* 824 F.2d 1380, 1387 (4th Cir. 1987) (internal citations omitted); *see also Pembaur v. City of Cincinnati,* 475 U.S. 469, 481–85, 106 S. Ct. 1292, 1299–1301, 89 L. Ed. 2d 452 (1986) (holding that a County Prosecutor may be a final policymaking official for the County where County officials delegated authority to the Prosecutor and state law authorized the County Prosecutor to establish county policy in appropriate circumstances). "Delegation may be express, as by a formal job-description, or implied from a continued course of knowing acquiescence by the governing body in the exercise of policymaking authority by an agency or official." *Spell,* 824 F .2d at 1387 (internal citations omitted); *see also Praprotnik,* 485 U.S. at 130, 108 S. Ct. at 927. ("[G]oing along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make policy."). In addition, in determining whether an official has final policymaking authority in an area, "[t]he most critical factor is not the practical finality of an official's 'acts and edicts,' but their 'policy' nature." *Spell,* 824 F.2d at 1386 (noting that policymaking authority is "authority to

set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government).

Under North Carolina law, the District Attorneys are state actors who act on behalf of the State of North Carolina and answer to the State Attorney General. N.C. Const. art. IV, § 18(1); N.C. Gen. Stat. § 7A–61, 69; *see also Nivens v. Gilchrist,* 444 F.3d 237, 249 (4th Cir. 2006) (holding that a suit against a District Attorney in his "official capacity" in North Carolina is a suit against the State as is therefore subject to Eleventh Amendment immunity). Although the Second Amended Complaint alleges that the City delegated authority to Defendant Nifong to direct the investigation, the Court concludes that delegation of authority to supervise a particular investigation is not equal to delegation of authority to set City law enforcement policy. Moreover, there is no state law that would allow a city to delegate its policymaking authority to a state prosecutor, and only the state legislature has authority to prescribe duties for District Attorneys or supervise the District Attorney's exercise of authority. *See* N.C. Const. art. IV, § 18(1) ("The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe."); *State v. Smith,* 359 N.C. 199, 225, 607 S.E.2d 607, 625 (2005) (Brady, J., concurring); *Simeon v. Hardin,* 339 N.C. 358, 373, 451 S.E.2d 858, 868 (1994) ("[T]he district attorney's duties, including the docketing of criminal cases, are derived from statutes promulgated by the General Assembly pursuant to authority granted in Article IV, Section 18 of the North Carolina Constitution."). Therefore, the Court concludes that the City could not

have delegated its policymaking authority to Nifong, and the claims against Nifong in his "official capacity" are claims against the State, not the City.[12] In light of this conclusion, the City cannot be liable under § 1983 for "official capacity" claims against Defendant Nifong or for alleged conduct by Nifong as a "policymaker." However, the City is still responsible for its own policies that result in constitutional violations by City employees, even if the City employees were acting in coordination with or at the direction of Nifong. As noted above, Plaintiffs have alleged that the constitutional injuries alleged in Counts 1, 2, 3, and 4 were committed by City police officers, were approved or ratified by City officials with final policymaking authority for the City, and were the result of City policies adopted by those City officials. Therefore, although the Court rejects the legal contention that Nifong had final policymaking authority for the City or that the City delegated its policymaking authority to Nifong, the Court has nevertheless concluded that the Plaintiffs have stated a claim against the City pursuant to *Monell,* and any further consideration or determination of whether liability can be established will be before the Court at summary judgment.[13] The Court notes,

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[12] The Court notes that Plaintiffs have not attempted to name the State as a party in this case or otherwise bring this suit against the State, since under the Eleventh Amendment, the State is immune from suits brought in federal court, and the State would not be a "person" subject to suit under § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983.").

[13] The Court notes that Plaintiffs have not alleged that DSI or its employees had "final policymaking authority" for the City. As discussed above, the City can only be liable for its own policies, including decisions made by those with final policymaking authority for the City.

however, that a "*Monell*" claim is not in and of itself a § 1983 claim, and is instead simply the basis for holding the City liable for the underlying constitutional violations. Therefore, the Court's conclusion as to this *Monell* claim against the City simply means that the City is properly included as a Defendant on Counts 1, 2, 3, and 4.

Count 6: 42 U.S.C. § 1983 Claims for Supervisory Violations, asserted against the Supervisory Defendants (Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger), in their individual capacities

Count 6 is asserted against the Supervisory Defendants (Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger) in their individual capacities for (a) failure to supervise the investigation, (b) failure to control and supervise Gottlieb, and (c) failure to train, control and supervise Addison.

Supervisory officials may be liable under § 1983 if "(1) . . . the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) . . . the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices [ ]'; and (3) . . . there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994). As discussed above, the Supreme Court in *Ashcroft v. Iqbal* reiterated that "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution." 129 S. Ct. 1937, 1948

(2009) (emphasis added). In *Iqbal,* the Supreme Court affirmed that under § 1983, supervisors "may not be held accountable for the misdeeds of their agents" and noted that as such, "the term 'supervisory liability' is a misnomer." *Id.* at 1949. Thus, each government actor "is only liable for his or her own misconduct" which requires the requisite intent for the type of constitutional violation pled. *See id.* (holding that where the underlying constitutional violation required a showing of "purpose" to discriminate, "a supervisor's mere knowledge of his subordinate's discriminatory purpose" is not sufficient to establish a constitutional violation by the supervisor). However, in applying this standard, circuit courts have concluded that supervisory liability may still be imposed based on "deliberate indifference" where the underlying constitutional violation itself may be established based on deliberate indifference. *See Starr v. Baca,* No. 09–55233, 2011 WL 477094, at *4 (9th Cir. 2011); *see also, e.g., Smith v. Ray,* No. 09–1518, 2011 WL 317166, at *8 (4th Cir. Feb. 2, 2011) (continuing to apply the *Shaw v. Stroud* "deliberate indifference" standard).

In light of this evolving case law, and given the allegations presented by Plaintiffs, the Court concludes that Plaintiffs have sufficiently alleged conduct by the Supervisory Defendants to at least raise a plausible claim at this stage in the case.[14] In the present case, Plaintiffs allege that these Supervisors knew of Gottlieb's previous constitutional violations against Duke students, including fabrication of warrants and searches and seizures without probable cause, and were deliberately indifferent to the rights of citizens by condoning and ratifying that be-

[14] Moreover, it is apparent that these Supervisory Defendants will necessarily be involved in the discovery process in this case in any event, given their direct involvement in the alleged events and the ongoing claims against the City and other City employees.

havior and then assigning him to an investigation involving Plaintiffs and other Duke students. Plaintiffs also contend that the Supervisory Defendants knew of the unlawful actions by Nifong, Gottlieb, Wilson, and Himan to manufacture false and misleading evidence to effect Plaintiffs' seizure without probable cause, and that the Supervisory Defendants failed to act, demonstrating a deliberate indifference[15] or tacit authorization of the actions, ultimately allowing the actions to continue and leading to Plaintiffs' unlawful seizure. In this regard, Plaintiffs allege that the Supervisory Defendants directly participated in meetings with Gottlieb and Himan regarding the investigation and prosecution, and authorized the constitutional violations. Plaintiffs similarly allege that the Supervisory Defendants knew that Addison was making false public statements in connection with the unlawful seizure, and that the Supervisory Defendants failed to act, evidencing deliberate indifference to Plaintiffs' constitutional rights. Although the Supervisory Defendants contend that they could not control Nifong and Wilson, the Court notes that the claims alleged in Count 6 against the Supervisory Defendants are not based on their failure to control Nifong or Wilson, and are instead based on their failure to train, supervise,

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[15] In this case, for the claims alleged in Counts 1–3, Plaintiffs must allege that false or misleading information was presented to the grand jury knowingly and intentionally, or with reckless disregard for the truth. Thus, the requisite intent to establish a constitutional violation and defeat qualified immunity is actual intent or reckless disregard. As discussed above, under *Iqbal*, each government actor "is only liable for his or her own misconduct" which requires the requisite intent for the type of constitutional violation pled. Therefore, "deliberate indifference," which requires a showing of actual intent or reckless disregard, would be sufficient to establish the requisite intent. *See Starr v. Baca*, No. 09–55233, 2011 WL 477094, at *2–4 (9th Cir. 2011).

control or intervene with respect to Defendants Gottlieb and Himan. Based on these allegations, the Court concludes that Plaintiffs have stated potential § 1983 claims against the Supervisory Defendants. These Defendants raise the defense of qualified immunity, but as discussed above with respect to Count 1–3, a reasonable police officer would have known that it would violate clearly established constitutional law to deliberately or recklessly present false or misleading evidence to obtain an indictment and effect a seizure without probable cause. In addition, under the Fourth Circuit's decision in *Shaw,* it was clearly established that an official violated the Constitution if, in deliberate indifference to the constitutional rights of citizens, the official knew of his subordinate's constitutional violations and failed to act. Here, Plaintiffs allege that the Supervisory Defendants knew of Gottlieb's previous constitutional violations and were deliberately indifferent to the rights of citizens by condoning and ratifying that behavior and then assigning him to an investigation involving Plaintiffs and other Duke students. In addition, Plaintiffs allege that the Supervisory Defendants knew of the alleged constitutional violations and ratified and approved that conduct. Therefore, the Court will allow the claims against the Supervisory Defendants Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger to go forward at this time, but at summary judgment, it will be Plaintiffs' burden to "pinpoint[ ] the persons in the decisionmaking chain whose deliberate indifference permitted the constitutional abuses to continue unchecked," and the Court will scrutinize evidence regarding each Defendant's direct, individual involvement, and evidence regarding their individual intent, in order to determine whether any of them is potentially liable under § 1983 for their own conduct with respect to the alleged constitutional violations that are proceeding in this case. *See Shaw,* 13 F.3d at 798.

Therefore, the Motion to Dismiss will be denied as to Count 6, and the claims asserted in Count 6 against Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger will go forward at this time.

Count 7: 42 U.S.C. § 1983 Claim for "Conspiracy," asserted against the City and against Nifong, Gottlieb, Himan, Addison, Wilson, Clark, Meehan, DSI, and the Supervisory Defendants (Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger), in their individual capacities

Count 7 is a claim of a general "conspiracy" against the City and against all of the Defendants in their individual capacities, for conspiring to charge and prosecute Plaintiffs, knowing the charges were not supported by probable cause. This claim alleges a conspiracy that included manufacturing a "phony identification," fabricating and concealing DNA test results, and "agreeing to make false and materially incomplete statements to the grand juries." (Second Am. Compl. ¶ 440).

"To establish a civil conspiracy under § 1983," Plaintiffs must allege that the Defendants "acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in [Plaintiffs] deprivation of a constitutional right." *Hinkle v. City of Clarksburg,* 81 F.3d 416, 421 (4th Cir. 1996). To establish such a claim, Plaintiffs must ultimately prove that "each member of the alleged conspiracy shared the same conspiratorial objective," that is, that Defendants "positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan." *Id.* In this case, based on the potential constitutional violations actually stated here, the allegation of an unlawful plan must have related to the unlawful seizure of Plaintiffs without probable cause using false and misleading evidence, and the

release of false, defamatory statements in connection with that unlawful seizure.

However, with respect to Defendants Nifong, Wilson, Gottlieb, Himan, Clark, Meehan, DSI, Addison, and Hodge the Court has already discussed the substance of the alleged violations by those Defendants as set out in Counts 1 through 4, including allegations of conspiracy, as well as claims against the City in Count 5, and against the Supervisory Defendants in Count 6. Count 7 alleges conspiracy charges against those same Defendants based on those same alleged violations, and the standards applicable to those Counts, as discussed above, will be the applicable standards in this case. Any general allegations of "conspiracy" will be considered with respect to the specific alleged constitutional violations raised in those counts. Therefore, the Court concludes that there is no need for a separate "conspiracy" claim, and the general "conspiracy" claim asserted in Count 7 will be dismissed.

Counts 8, 9, 10: 42 U.S.C. § 1985 Claims

Counts 8, 9, and 10 of the Second Amended Complaint are brought pursuant to 42 U.S.C. § 1985. Specifically, Count 8 is brought against all of the Defendants in their individual capacities, as well as against the City, for Conspiracy in violation of 42 U.S.C. § 1985(2) for Obstruction of Justice with the intent to deny Plaintiffs the equal protection of the laws. Count 9 is brought against Defendants Nifong, Wilson, Gottlieb, Himan, and the Supervisory Defendants (Baker, Chalmers, Hodge, Russ, Council, Lamb, Ripberger) in their individual capacities, as well as against the City, for Conspiracy in violation of 42 U.S.C. § 1985(2) for Witness Tampering. Count 10 is brought against all Defendants in their individual capacities, as well as against the City, for Con-

spiracy in violation of 42 U.S.C. § 1985(3) to deprive Plaintiffs of equal protection of the laws.

With respect to the § 1985 claims in Counts 8, 9, and 10, Plaintiffs bring Counts 8 and 9 pursuant to the second clause of 42 U.S.C. § 1985(2), which prohibits obstruction of justice in state court proceedings "with intent to deny any citizen the equal protection of the laws." *See* 42 U.S.C. § 1985(2); *Kush v. Rutledge,* 460 U.S. 719, 724–27, 103 S. Ct. 1483, 1486–88, 75 L. Ed. 2d 413 (1983).[16] Plaintiffs bring Count 10 pursuant to 42 U.S.C. § 1985(3) for conspiracy to deprive Plaintiffs the equal protection of the laws. With respect to all of these claims, the " 'language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" *Kush,* 460 U.S. at 726, 103 S. Ct. at 1487 (quoting *Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S. Ct. 1790, 1798, 29 L. Ed. 2d 338 (1971)).

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[16] The Court notes that Count 9 could be read as attempting to assert a claim pursuant to the first clause of 42 U.S.C. § 1985(2), which prohibits two of more persons from conspiring to deter a witness from testifying truthfully in federal court, and which does not require that the conspirators act with the "intent to deprive their victims of the equal protection of the laws." *Kush v. Rutledge*, 460 U.S. 719, 724–25, 103 S. Ct. 1483, 1487, 75 L. Ed. 2d 413 (1983). However, in their various Motions to Dismiss, Defendants have noted that none of the allegations in the Second Amended Complaint involve any proceedings in federal court, and Plaintiffs in the Consolidated Response concede that they have not asserted a claim pursuant to this provision. Instead, Plaintiffs contend that Count 9, like Count 8, is intended to assert a claim pursuant to the second clause of § 1985(2), which prohibits conspiracy to obstruct justice in state court proceedings with "the intent to deprive their victims of the equal protection of the laws." *Id.* Therefore, the Court will treat Counts 8 and 9 as having both been asserted pursuant to the second clause of § 1985(2).

The Supreme Court has interpreted these provisions of § 1985 narrowly, and has held that plaintiffs must establish as an element of the cause of action that the conspirators were motivated by a purpose to discriminate against a recognized class of persons. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 268–72, 113 S. Ct. 753, 758–60, 122 L. Ed. 2d 34 (1993).[17] This "discriminatory purpose" for purposes of § 1985, "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 271–72, 113 S. Ct. at 760 (citation omitted). This discriminatory intent must be shared by all of the conspirators, and "willful blindness" to the discriminatory intent of others is insufficient to establish a claim under § 1985. *See Simmons v. Poe,* 47 F.3d 1370, 1378 (4th Cir. 1995). Thus, to allege a claim under the provisions of § 1985 at issue in the present case, Plaintiffs must allege that all of the conspirators were motivated by a purpose to discriminate against a recognized class of persons of which Plaintiffs were members.

Further, with respect to the "recognized classes of persons" protected by § 1985, the Supreme Court has noted that § 1985(3) was adopted in 1871 as part of the Ku Klux Klan Act in order to "combat the prevalent animus" against blacks and their supporters. *United Bhd. of Carpenters & Joiners of America v. Scott,* 463 U.S. 825, 836, 103 S. Ct. 3352, 3360, 77 L. Ed. 2d 1049 (1983). Given this statutory purpose, the Supreme Court has further noted that "it is a close question whether

[17] This discussion relates only to the requirements for claims brought pursuant to the second clause of § 1985(2) and the first clause of § 1985(3), which are the provisions at issue in this case.

§1985(3) was intended to reach any class-based animus" other than animus against blacks and "those who championed their cause." *Id.; see also Harrison v. Kvat Food Mgmt., Inc.*, 766 F.2d 155, 157–61 (4th Cir. 1985) (noting that § 1985(3) was "enacted to fulfill a particular purpose and designed to meet particular conditions," in 1871 to afford "a remedy for the vindication of the civil rights of those being threatened and injured, notably blacks and advocates for their cause" and that "the original objective of the 1871 Civil Rights Act and § 1985(3) was the protection of blacks and their supporters in the South"). Although the Supreme Court has not definitively identified all of the "recognized classes of persons" for purposes of § 1985(3), the Court of Appeals for the Fourth Circuit has noted that "the class protected can extend no further than to those classes of persons who are, so far as the enforcement of their rights is concerned, 'in unprotected circumstances similar to those of the victims of Klan violence.'" *Buschi v. Kirven*, 775 F.2d 1240, 1258 (4th Cir. 1985) (quoting *United Bhd. of Carpenters*, 463 U.S. at 851, 103 S. Ct. at 3368); *see also Harrison*, 766 F.2d at 161 (noting the Supreme Court's "lack of enthusiasm for expanding the coverage of § 1985(3) to any classes other than those expressly provided by the Court"); *Phillips v. Mabe*, 367 F. Supp. 2d 861, 873 (M.D.N.C. 2005) (noting that "[p]laintiffs have standing under § 1985 only if they can show they are members of a class that the government has determined 'requires and warrants special federal assistance in protecting their civil rights'" (citations omitted)). Thus, the Supreme Court and the Court of Appeals for the Fourth Circuit have narrowly interpreted the "recognized classes of persons" who may bring § 1985 claims, and this Court is bound to follow that interpretation in the present suit.

Applying these standards in the present case, the Court finds that Plaintiffs have not alleged that they were in a classification entitled to protection under § 1985(2) or § 1985(3). In the Second Amended Complaint, Plaintiffs allege that they were "undergraduate student[s] enrolled at Duke University" and that they were members of the Duke men's lacrosse team. However, based on the case law set out above, it is clear that "Duke students" or "Duke Lacrosse team members" are not classes entitled to protection under § 1985. *Cf. McGee v. Schoolcraft Cmty. Coll.,* 167 Fed. Appx. 429, 435–36 (6th Cir. 2006) (finding that a group of individuals seeking an advanced degree is not a class entitled to special protection under § 1985(3)); *Lewin v. Cooke,* 95 F. Supp. 2d 513, 525–26 (E.D. Va. 2000) (holding that a class of students does not qualify as a class entitled to § 1985(3) protection); *Murphy v. Villanova Univ.,* 520 F. Supp. 560, 561–62 (E.D. Pa. 1981) (same); *Crain v. Martinez,* No. 93–942–CIV–ORL–22, 1994 WL 391672, at *1 (M.D. Fla. July 12, 1994)) (same); *Naglak v. Berlin,* No. 87–3427, 1988 WL 30920, at *4 (E.D. Pa. March 30, 1988) (same); *see also Upah v. Thornton Dev. Auth.,* 632 F. Supp. 1279, 1281 (D. Colo. 1986) (holding that a class composed of out-of-state residents is not a class within the protection of § 1985(3)); *Korotki v. Goughan,* 597 F. Supp. 1365, 1374 (D. Md. 1984) (same); *Ford v. Green Giant Co.,* 560 F. Supp. 275, 277–78 (W.D. Wash. 1983) (same).

Moreover, the Court notes that Plaintiffs do not allege in the Second Amended Complaint that they are members of any racial class, but in the Consolidated Response, Plaintiffs contend that they have alleged race discrimination as "white plaintiffs." However, the § 1985 claims based on this contention fails for two reasons. First, the Supreme Court and Fourth Circuit have indicated an intent to limit the protections of § 1985 to dis-

crimination against "those classes of persons who are, so far as the enforcement of their rights is concerned, 'in unprotected circumstances similar to those of the victims of Klan violence.'" *Buschi*, 775 F.2d at 1258 (quoting *United Bhd. of Carpenters*, 463 U.S. at 851, 103 S. Ct. at 3368); *see also Cloaninger v. McDevitt*, No. 106cv135, 2006 WL 2570586 (W.D.N.C. Sept. 3, 2006) ("As recognized by the controlling law in the Fourth Circuit, the only class of persons protected by Section 1985(3) are African Americans." (citing *Harrison*, 766 F.2d at 161–62)); *Stock v. Universal Foods Corp.*, 817 F. Supp. 1300, 1310 (D. Md.1993) (dismissing § 1985(3) claim because plaintiff, as a white male, was not a member of a class that has suffered historically pervasive discrimination); *Blackmon v. Perez*, 791 F. Supp. 1086, 1093 (E.D. Va.1992) (dismissing § 1985(3) claims by white plaintiffs because "plaintiffs do not represent a class of persons who [do] not enjoy the possibility of [ ]effective state enforcement of their rights" (internal quotations omitted)).[18]

Second, even if the Fourth Circuit decided to extend § 1985 to additional classes of persons, including 'white plaintiffs' as a class, Plaintiffs here have not sufficiently

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[18] The Court notes that the decision in *Waller v. Butkovich*, 605 F. Supp. 1137 (M.D.N.C. 1985) cited by Plaintiffs, did not directly address this question, and in any event was based on reasoning that was subsequently repudiated by the Fourth Circuit in *Buschi*, 775 F.2d 1240, and *Harrison*, 766 F.2d 155. In addition, the Court further notes that this Court's previous decision in *Phillips v. Mabe* did not address the question of whether a § 1985 claim could be based on alleged discrimination against whites as a class; instead. *Phillips* involved § 1985 claims brought by a white plaintiff who alleged discrimination based on his efforts to protect the interests of black students, and the Court concluded that the plaintiff was not a member of a protected class and did not have standing to assert § 1985 claims there. *See Phillips*, 367 F. Supp. 2d at 873–74.

alleged facts in support of such a claim. When a plaintiff attempts to assert a conspiracy claim pursuant to § 1985(2) and § 1985(3), the Fourth Circuit has made clear that the purported conspiracy must be alleged in more than just a "conclusory manner," and must include allegations of "concrete supporting facts." *Simmons,* 47 F.3d at 1377. "[C]ourts have thus required that plaintiffs alleging unlawful intent in conspiracy claims under § 1985(3) or § 1983 plead specific facts in a nonconclusory fashion to survive a motion to dismiss." *Gooden v. Howard County,* 954 F.2d 960, 969–70 (4th Cir. 1992); *see also Jenkins v. Trs. of Sandhills Cmty. Coll.*, 259 F. Supp. 2d 432, 445 (M.D.N.C. 2003). In this case, the Court finds that the facts alleged in Plaintiffs' Second Amended Complaint would state a claim only for discrimination against them as "Duke Students" by Defendant Gottlieb or for personal political gain by Defendant Nifong. Thus, Plaintiffs do not allege any facts that would establish intent by the Defendants to discriminate against whites as a class, or intent to injure Plaintiffs or deprive them of their rights because they were white. *See Bray,* 506 U.S. at 267–72, 113 S. Ct. at 758–60 (holding that plaintiffs must establish as an element of the cause of action that the conspirators were motivated by a purpose to discriminate against a recognized class of persons). The Second Amended Complaint does include a conclusory allegation that "one or more Defendants" engaged in acts that were "motived by invidious racial animus, intended to foment invidious racial animus against Plaintiffs in the Durham community and/or intended to take advantage of the invidious racial animus that they had fomented in the Durham community against Plaintiffs." (Second Am. Compl. ¶ 448, 463). However, this allegation includes several conclusory alternatives without any definite or specific allegations, and in any event this contention is simply not supported by any factual allegations to sup-

port a claim that Defendants were motivated by a purpose to discriminate against whites. *Cf. Jordan v. Alt. Res. Corp.,* 458 F.3d 332, 345–46 (4th Cir. 2006) (dismissing allegations as "conclusory" in a claim of racial discrimination under 42 U.S.C. § 1981 where the plaintiff alleged simply that race was a 'motivating factor' in the action taken against him "without explaining how that conclusion is consistent with the allegations," since "it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage"). In addition, an allegation that "one Defendant" acted with racial animus is insufficient to allege a conspiracy in which all of the conspirators were motivated by a shared intent to discriminate on the basis of race. *Cf. Simmons,* 47 F.3d at 1378; *Martin v. Boyce,* No. 1:99CV01072, 2000 WL 1264148, at *7 (M.D.N.C. July 20, 2000) (noting that for claims under § 1985(3), "all of the conspirators must share the same forbidden animus" and "when only one conspirator is motivated by a forbidden purpose, there can be no meeting of the minds, no agreement, to deprive another of the equal protection of the laws based on his race").

Therefore, the Court concludes that Plaintiffs have failed to state a claim under § 1985(2) or § 1985(3) because Plaintiffs are not members of a "recognized class of persons" entitled to protection under § 1985 and because even if they were members of a recognized class of persons, they have failed to sufficiently allege racial or other class-based invidiously discriminatory animus as the purpose of the alleged conspirators' action. Counts 8, 9, and 10 will therefore be dismissed as to all Defendants.[19]

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[19] The Court notes that to the extent Plaintiffs contend that Defendants violated their constitutional rights, the Court has already recognized the ability of Plaintiffs to pursue those claims pursuant

Counts 11 & 12: 42 U.S.C. § 1986 Claims

Counts 11 and 12 are based on alleged violations of 42 U.S.C. § 1986 for failing to prevent the violations of § 1985 that were alleged in Counts 8, 9, and 10. Count 11 is asserted against the Supervisory Defendants (Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger) in their individual capacities, as well as against the City, for Conspiracy in violation of 42 U.S.C. § 1986 for failing to prevent the violations of § 1985. Similarly, Count 12 is asserted against the DSI Defendants (Clark, Meehan, and DSI), in their individual and official capacities, for Conspiracy in violation of 42 U.S.C. § 1986 for failing to prevent the violations of § 1985. In their Consolidated Response, Plaintiffs note that Counts 11 and 12 are derivative claims based on the existence of the § 1985 conspiracy.

However, "[a] cause of action based upon § 1986 is dependent upon the existence of a claim under § 1985." *Trerice v. Summons,* 755 F.2d 1081, 1085 (4th Cir. 1985). Therefore, when the underlying § 1985 claims are dismissed, the § 1986 claims should also be dismissed. *See id.* In the present case, because all of the § 1985 claims are being dismissed, the Court concludes that the § 1986 claims asserted in Counts 11 and 12 should also be dismissed as to all of the Defendants.

As a result of these determinations, Counts 11 and 12 will be dismissed as to all of the Defendants.

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to 42 U.S.C. § 1983, without having to establish membership in a protected class or class-based discrimination by Defendants. However, the sections of § 1985 at issue here are very limited in scope. As such, the claims alleged in this case are simply not within the limited scope of those particular provisions of § 1985, at least as those sections been interpreted by the Supreme Court and the Fourth Circuit.

Count 13: Malicious Prosecution and Conspiracy, asserted against the City and against Nifong, Wilson, Gottlieb, Himan, Addison, Clark, Meehan, DSI, in their individual capacities

In Count 13, Plaintiffs assert a claim against the City and against Defendants Nifong, Wilson, DSI, Clark, Meehan, Gottlieb, Himan, Addison, in their individual capcities for Malicious Prosecution and Conspiracy, including conspiring to manufacture false and misleading expert reports, intimidating witnesses, and manipulating witness identification procedures in order to advance the criminal process against Plaintiffs.

Under North Carolina law, a plaintiff asserting a claim of malicious prosecution must show that the defendant "(1) instituted, procured, or participated in the criminal proceeding against [the] plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of [the] plaintiff." *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (quoted in *Hill v. Hill*, 142 N.C. App. 524, 537, 545 S.E.2d 442, 451 (2001) (Tyson, J., dissenting) (adopted as the decision of the Supreme Court of North Carolina in *Hill v. Hill*, 354 N.C. 348, 553 S.E.2d 679 (2001))). With respect to the first prong of this test, the North Carolina Court of Appeals has repeatedly recognized that an action for malicious prosecution can lie against anyone who "instituted, procured or participated in the criminal proceeding against [the] plaintiff." *See, e.g., Thomas v. Sellers*, 142 N.C. App. 310, 314, 542 S.E.2d 283, 287 (2001). In *Moore v. City of Creedmoor*, the North Carolina Supreme Court was equally divided on the question of whether a Chief of Police "initiated" a suit when he provided information to the district attorney and the district attorney filed a *civil* nuisance suit. *See* 345 N.C. 356, 371,

481 S.E.2d 14, 24 (1997) (noting that the court was equally divided on this question). However, North Carolina courts have continued to recognize malicious prosecution claims against individuals who provide evidence and information used in a criminal prosecution. *See, e.g., Nguyen v. Burgerbusters, Inc.,* 182 N.C. App. 447, 450–54, 642 S.E.2d 502, 505–07 (2007); *Becker v. Pierce,* 168 N.C. App. 671, 675–78, 608 S.E.2d 825, 828–30 (2005). In this regard, "[i]t is well established that the act of giving honest assistance and information to prosecuting authorities does not render one liable for malicious prosecution." *Nguyen,* 182 N.C. App. at 450, 642 S.E.2d at 506 (internal quotation omitted). "However, where 'it is unlikely there would have been a criminal prosecution of [a] plaintiff except for the efforts of a defendant, [the North Carolina Court of Appeals] has held a genuine issue of fact existed and the jury should consider the facts comprising the first element of malicious prosecution." *Id.* (internal quotation omitted). Where the claim of malicious prosecution is made against a police officer or investigator, North Carolina courts have recognized potential malicious prosecution claims where an officer arrested an individual and brought them before a magistrate without probable cause and then allowed the prosecution to continue even after another person was arrested. *See Moore,* 124 N.C. App. at 42–46, 476 S.E.2d at 421–24; *see also Hedgepeth v. Swanson,* 223 N.C. 442, 444–45, 27 S.E.2d 122, 123–24 (1943) (holding that a sheriff may be liable for malicious prosecution for submitting a false affidavit to obtain a search warrant, criminal warrant, and arrest of a citizen without probable cause out of hate and revenge, and with malice).

In the present case, Plaintiffs have alleged that Defendants Nifong, Addison, Gottlieb, Himan, Wilson, Clark, and Meehan all procured or participated in the proceedings against them by manufacturing and manipu-

lating evidence on which the prosecution was based. Defendants Gottlieb, Himan, Wilson, Clark, and Meehan nevertheless contend that they cannot be liable for malicious prosecution for providing information to the prosecutor. However, Plaintiffs have alleged that Defendants Gottlieb, Himan, Wilson, Clark, and Meehan did not just give honest information and assistance to Defendant Nifong. Instead, Plaintiffs allege that these Defendants created false and misleading evidence, conspired with Nifong to initiate the prosecution, and affirmatively participated in efforts to initiate and maintain that prosecution, such that the criminal prosecution would not have existed except for the efforts of these Defendants. Similarly with respect to Defendant Addison, Plaintiffs allege that Addison made false and inflammatory public statements in his role as official Durham Police spokesperson, acting in concert with the other Durham Police Defendants, intending to inflame the jury pool, compromise the fairness of the criminal proceedings, and otherwise procure the prosecution of Plaintiffs. Therefore, the Court finds that the allegations are sufficient to satisfy the first prong of the claim for malicious prosecution as to Addison. As a result, the Court concludes that the allegations are sufficient to satisfy the first prong as to Defendants Nifong, Wilson, Gottlieb, Himan, Meehan, Clark, and Addison.

Defendants Gottlieb, Himan, Meehan, and Clark also contend that they cannot be liable for malicious prosecution because they acted in good faith to assist in the investigation and perform their assignments. These Defendants are correct that as to any Defendant who was acting in good faith, or even who may have been simply negligent, Plaintiffs cannot state a claim for malicious prosecution. To state a claim for malicious prosecution under state law, a plaintiff must establish that the defendant acted with malice, that is, that the defendant was

"motivated by personal spite and a desire for revenge" or that the defendant acted with "reckless and wanton disregard" for the plaintiffs' rights. *Hill v. Hill*, 142 N.C. App 524, 537, 545 S.E.2d 442, 451 (2001) (Tyson, J., dissenting) (adopted as the decision of the Supreme Court in *Hill v. Hill*, 354 N.C. 348, 553 S.E.2d 679 (2001)); *Moore*, 345 N.C. at 371, 481 S.E.2d at 24. However, in the present case, Plaintiffs allege that these Defendants were all acting with "malice, spite, ill-will, and wanton disregard for Plaintiffs' rights" by intentionally creating false and misleading evidence to support the prosecution. (Second Am. Compl. ¶ 489–494). Ultimately, it will be Plaintiffs' burden to prove this allegation, and summary judgment will be appropriate on this claim as to any Defendant who was acting in good faith or was simply negligent. Nevertheless, at this stage, Plaintiffs have alleged that the Defendants acted with the requisite malice.

Finally, as noted above, Defendant Nifong enjoys absolute prosecutorial immunity for the decision to prosecute, but that immunity does not extend to investigatory acts by Defendants Nifong and Wilson, particularly the creation of false and misleading evidence during the investigation. North Carolina courts have not specifically considered the reach of absolute prosecutorial immunity with respect to acts of investigators hired by District Attorneys, such as Defendant Wilson, or to investigatory acts of District Attorneys themselves. However, in their Motions to Dismiss, Defendants Nifong and Wilson assume that the federal rule set out in *Buckley* applies to state law claims as well. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273–76, 113 S. Ct. 2606, 2615–17, 125 L. Ed. 2d 209 (1993) (concluding that absolute prosecutorial immunity does not extend to investigatory or administrative acts). Therefore, at least for purposes of the present Motions, this Court will assume that North Carolina courts would apply a rule similar to the federal rule for

determining the scope of prosecutorial immunity for state law claims brought against prosecutors or their investigators in their individual capacities for non-judicial, investigatory activities like those ordinarily performed by police officers, and would conclude that Defendants Wilson and Nifong do not have absolute prosecutorial immunity for their non-judicial investigatory activities. *See* Strong's North Carolina Index 4th, *District Attorneys* § 9 (noting that "[a]bsolute immunity does not extend to conduct taken by a prosecutor in an investigatory capacity"); *Buckley,* 509 U.S. at 273–76, 113 S. Ct. at 2615–17. Therefore, the Court concludes that Defendants Nifong and Wilson are not immune from a claim of malicious prosecution for their investigatory actions to the extent they are alleged to have acted with the requisite malice.

Similarly, with respect to the state law claims against Clark and Meehan, the Court notes that under state law, reports and testimony made by a witness or in preparation for being called as a witness in a judicial proceeding are subject to absolute privilege under state law. *See Sharp v. Miller,* 121 N.C. App. 616, 617, 468 S.E.2d 799, 801 (1996); *Williams v. Congdon,* 43 N.C. App. 53, 55, 257 S.E.2d 677, 678 (1979). However, as discussed previously, Plaintiffs contend that their claims here are based on non-testimonial investigative work by Meehan and Clark that included participation in a conspiracy to create false and misleading evidence. Therefore, the Court concludes that while Meehan and Clark are entitled to absolute immunity for their testimony, Plaintiffs may state potential claims to the extent they were functioning in an investigatory capacity to the same extent as the other investigators.

Therefore, having considered the issues that have been raised, the Court concludes that the claim for mali-

cious prosecution will go forward as to Defendants Nifong, Wilson, Himan, Gottlieb, Clark, Meehan, and Addison in their individual capacities. In addition, to the extent that the individual Defendants are alleged to have been acting in the course and scope of their employment, the principle of *respondeat superior* would apply to this state tort claim. In this regard, with respect to state torts, "liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 491, 340 S.E.2d 116, 121 (1986). Plaintiffs have alleged *respondeat superior* liability for the employers of the individuals named in this Count, and therefore this claim will go forward against the City based on the allegations against Defendants Himan and Gottlieb, and against DSI based on the allegations against Defendants Clark and Meehan.[20]

Based on the foregoing, the Motions to Dismiss Count 13 will be denied, and the claims asserted in Count 13 for malicious prosecution will go forward as to De-

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[20] The Court notes that *respondeat superior* liability would not extend liability to the City for the alleged torts of Meehan and Clark, who were employees of DSI. In addition, the claims against Nifong and Wilson would not impose *respondeat superior* liability on the City since they are not City employees. As discussed in Count 5, Defendant Nifong does not have an official capacity with respect to the City, and any official capacity claim against Nifong would be a claim against the State, which Plaintiffs have not asserted here. Therefore, the claims against the City are based on the alleged conduct of Gottlieb and Himan, and the claims against DSI are based on the alleged torts of Clark and Meehan.

fendants Nifong, Wilson, Himan, Gottlieb, Clark, Meehan, Addison, DSI and the City.

Count 14: Obstruction of Justice and Conspiracy, asserted against the City and against Nifong, Wilson, Gottlieb, Himan, Clark, Meehan, DSI, in their individual capacities

Count 14 is a claim for Obstruction of Justice asserted against Defendants Nifong, Wilson, DSI, Clark, Meehan, Gottlieb, Himan, and the City based on alleged Obstruction of Justice and Conspiracy, including conspiring to manufacture false and misleading reports, intimidating witnesses, and manipulating witness identification procedures in order to advance the criminal process against Plaintiffs.

"Obstruction of justice is a common law offense in North Carolina. . . . It is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *Jones v. City of Durham,* 183 N.C. App. 57, 59, 643 S.E.2d 631, 633 (2007) (internal quotations omitted) (citing *In re Kivett,* 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) and *Broughton v. McClatchy Newspapers, Inc.,* 161 N.C. App. 20, 33, 588 S.E.2d 20, 30 (2003)). This tort would include, for example, claims that "Defendants attempted to impede the legal justice system through [a] false affidavit," *Jackson v. Blue Dolphin Commc'ns of N.C. L.L.C.,* 226 F. Supp. 2d 785, 794 (W.D.N.C. 2002), and claims that Defendants "conspired to impede [the] investigation of this case by destroying . . . records and by falsifying and fabricating records." *Henry v. Deen,* 310 N.C. 75, 86, 310 S.E.2d 326, 333 (1984); *see also Reed v. Buckeye Fire Equip.,* 241 Fed. Appx. 917, 928 (4th Cir. 2007) (collecting cases).

In the present case, Plaintiffs contend that Defendants Nifong, Wilson, Gottlieb, Himan, Clark, Meehan,

and DSI obstructed justice by manufacturing false and misleading evidence and intimidating witnesses in a manner that impaired the judicial process. Although not separately repeated in Count 14, Plaintiffs have also alleged throughout the Second Amended Complaint that these Defendants were motivated by malice, spite, ill-will and wanton disregard for Plaintiffs' rights in order to overcome any public official immunity that might otherwise apply. In addition, Plaintiffs have sufficiently alleged that these actions were taken by Defendants Nifong and Wilson in an investigatory capacity, such that absolute prosecutorial immunity would not apply, at least as to those investigatory activities. Therefore, the Court concludes that Plaintiffs have stated a claim for obstruction of justice against Defendants Nifong, Wilson, Gottlieb, Himan, Clark, and Meehan, although the Court notes again that it will be Plaintiffs' burden to present evidence in support of this claim as to each individual Defendants.

In addition, Plaintiffs have also asserted this claim against the City based on the principle of *respondeat superior,* pursuant to which the City is held liable for the acts of its employees. Therefore, the claim for Obstruction of Justice will go forward against the City based on the claim asserted against Defendants Gottlieb and Himan in their official capacities. This claim will also go forward against DSI on the basis of potential *respondeat superior* liability for the alleged torts of Clark and Meehan.[21] Therefore, the Motions to Dismiss will be de-

[21] As noted above, *respondeat superior* liability would not extend liability to the City for the alleged torts of Meehan and Clark, who were employees of DSI. In addition, the claims against Nifong and Wilson would not impose *respondeat superior* liability on the City since they are not City employees. As discussed in Count 5, Defendant Nifong does not have an official capacity with respect to the City, and any official capacity claim against Nifong would be a claim

nied, and Count 14 will go forward against DSI and the City, and against Nifong, Wilson, Gottlieb, Himan, Clark, and Meehan in their individual capacities.

Count 15: Intentional Infliction of Emotional Distress and Conspiracy, asserted against the City and against Nifong, Wilson, Gottlieb, Himan, Addison, Hodge, Clark, Meehan, DSI, in their individual capacities

Count 15 is asserted against the City and against Defendants Nifong, Wilson, DSI, Clark, Meehan, Gottlieb, Himan, Hodge, Addison, in their individual capacities for Intentional Infliction of Emotional Distress and Conspiracy for manufacturing inculpatory evidence, making false and inflammatory statements, and intimidating witnesses, all with the intent to cause Plaintiffs to suffer severe emotional distress.

Under North Carolina law, "liability arises under the tort of intentional infliction of emotional distress when a defendant's conduct exceeds all bounds of decency tolerated by society and the conduct causes mental distress of a very serious kind." *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988). "The essential elements of an action for intentional infliction of emotional distress are '1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress.'" *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (quoting *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981)). With respect to the first element, conduct is "ex-

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against the State, which Plaintiffs have not asserted here. Therefore, the claims against the City are based on the alleged conduct of Gottlieb and Himan, and the claims against DSI are based on the alleged torts of Clark and Meehan.

treme and outrageous" when it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Hogan v. Forsyth Country Club Co.,* 79 N.C. App. 483, 493, 340 S.E.2d 116, 123 (1986). With respect to the second element, "[a] defendant is liable for this tort when he 'desires to inflict severe emotional distress . . . [or] knows that such distress is certain, or substantially certain, to result from his conduct . . . [or] where he acts recklessly . . . in deliberate disregard of a high degree of probability that the emotional distress will follow' and the mental distress does in fact result." *Dickens v. Puryear,* 302 N.C. 437, 449, 276 S.E.2d 325, 333 (1981) (quoting Restatement (Second) of Torts § 46 cmt.i (1965)). With respect to the third element, "the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Waddle,* 331 N.C. at 83, 414 S.E.2d at 27 (quoting *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.,* 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied,* 327 N.C. 644, 399 S.E.2d 133 (1990)). "Humiliation and worry are not enough." *Jolly v. Acad. Collection Serv.,* 400 F. Supp. 2d 851, 866 (M.D.N.C. 2005). The North Carolina Supreme Court has noted that "[e]motional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea," but "*[i]t is only where it is extreme that the liability arises.*" *Waddle,* 331 N.C. 73, 84, 414 S.E.2d 22, 27 (1992) (emphasis in original); *see also*

Pacheco v. Rogers & Breece, Inc., 157 N.C. App. 445, 451, 579 S.E.2d 505, 509 (2003) (applying this standard and noting that "[e]ven assuming, *arguendo*, that some issues are 'too obvious to dispute,' the legal presence of severe emotional distress is not among these," and rejecting the contention that outrageous conduct can substitute for severe emotional distress).

In the present case, with respect to the requirement that Plaintiffs have suffered "severe emotional distress," the Court notes that in the Second Amended Complaint, Plaintiffs do not include any specific allegations of emotional or mental disorders or severe and disabling emotional or mental conditions suffered by any of the Plaintiffs individually. Indeed, the Second Amended Complaint does not include any specific identification of any particular Plaintiff's mental or emotional condition or the nature of his emotional distress. With respect to this issue, this Court has previously dismissed claims for intentional infliction of emotional distress ("IIED") where the complaint included only a conclusory statement of damages, without any "factual allegations regarding the type, manner, or degree of severe emotional distress [the plaintiff] experienced." *Swaim v. Westchester Acad., Inc.*, 170 F. Supp. 2d 580, 585 (M.D.N.C. 2001); *see also Vogler v. Countrywide Home Loans, Inc.*, No. 1:10CV370, 2010 WL 3394034, at *9 (M.D.N.C. Aug. 26, 2010) (dismissing claim as insufficient where "[p]laintiffs assert that they suffered severe emotional distress, but do not allege any facts in support of this assertion"); *Baucom v. Cabarrus Eye Ctr., P.A.*, No. 1:06CV209, 2007 WL 1074663, at *5 (M.D.N.C. Apr. 4, 2007) (noting that "[a]lthough the amended complaint makes the conclusory statement that Defendant's actions caused 'great emotional distress,' Plaintiff does not allege any facts or conditions from which she suffered to support this motion"); *cf. Holleman v. Aiken*, 193 N.C. App. 484,

501, 668 S.E.2d 579, 590 (2008) (concluding that the plaintiff had failed to allege a claim for IIED where the "plaintiff has failed to make any specific allegations as [to] the nature of her severe emotional distress"); *Soderlund v. Kuch*, 143 N.C. App. 361, 371, 546 S.E.2d 632, 639 (2001) ("The crux of establishing 'severe emotional distress' is that the emotional or mental disorder may generally be diagnosed by professionals trained to do so," even if an actual diagnosis has not been made); *Fox–Kirk v. Hannon*, 142 N.C. App. 267, 281, 542 S.E.2d 346, 356 (2001) (holding that a claim for infliction of emotional distress was "not justiciable" where, at the time of the filing of the complaint, the plaintiff "had not sought any medical treatment or received any diagnosis for any condition that could support a claim for severe emotional distress").

In the present case, Plaintiffs contend that they "have suffered and continue to suffer from emotional and mental conditions generally recognized and diagnosed by trained professionals." However, a "label and conclusion" or "naked assertion" will not suffice under the pleading standards set out in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Plaintiffs have failed to include any factual allegations as to each Plaintiff's emotional or mental disorders, condition, or diagnosis, in order to support the contention that each of them suffered from severe emotional distress. Plaintiffs also failed to sufficiently allege a link between any emotional or mental disorder or condition and the specific misconduct alleged in this claim.[22] Therefore, Defendants' Motions to Dismiss as to Count 15 will be granted, and Plaintiffs'

[22] The Court notes, however, that emotional distress damages are nevertheless recoverable under Counts 1–6 and 13 and 14, which are going forward, without any additional factual allegations regarding the nature, diagnosis, or severity of Plaintiffs' emotional distress.

claims for intentional infliction of emotional distress will be dismissed on this basis.

Count 16: Negligence, asserted against the City

Count 16 is a claim against the City for Negligence, alleging failure by Defendants Hodge and Addison to use due care in making public statements regarding the investigation, and failure of Defendants Gottlieb and Himan to use due care in conducting the investigation. "Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions." *Hart v. Ivey,* 332 N.C. 299, 305, 420 S.E.2d 174, 177–78 (1992). Liability is established "if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care." *Id.* at 305, 420 S.E.2d at 178.

This claim was originally asserted against Defendants Gottlieb, Himan, Hodge, and Addison in their individual and official capacities, as well as the City. However, Plaintiffs agree that any negligence claims asserted against the individual Defendants in their individual capacities would be barred by public official immunity. "The public immunity doctrine protects public officials from individual liability for negligence in the performance of their governmental or discretionary duties." *Campbell v. Anderson,* 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003); *see also Thomas v. Sellers,* 142 N.C. App. 310, 313, 542 S.E.2d 283, 286 (2001) (noting that under state law, a public officer is not liable in his individual capacity unless his conduct is "malicious, corrupt, or outside the scope of his official authority"); *Moore v. Evans,* 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996). Plaintiffs also agree that the "official capacity" claims are actually claims against the City. There-

fore, this negligence claim is now being asserted only against the City.

However, the City has not addressed this claim in its briefing to the extent that Plaintiffs assert this claim against the City based on alleged negligence by City employees Gottlieb, Himan, and Addison.[23] Therefore, this claim for negligence against the City will not be dismissed at this time. To the extent that the City asks for the opportunity to raise additional argument on these claims, the City may raise those arguments after discovery in summary judgment motions.[24] Therefore, this claim will go forward at this time.

Count 17: Negligent Supervision, Hiring, Training, Discipline, and Retention, asserted against the City

Count 17 is a claim for Negligent Supervision, Hiring, Training, Discipline, and Retention for negligent supervision of Defendants Addison, Gottlieb, and Himan in the course of the investigation. "North Carolina recognizes

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[23] In its renewed Motion to Dismiss, the City attempts to incorporate the briefing of Defendants Himan and Addison with respect to these claims. However, because this claim was not raised in the City's briefing, Plaintiffs have not had the opportunity to respond to this contention as it relates to the City. The Court will therefore consider this issue further at summary judgment to the extent that Plaintiffs' claims against the City are based in negligence.

[24] The City has filed a separate, pre-discovery Motion for Summary Judgment as to this claim raising the defense of governmental immunity, and that Motion is addressed below in relation to Count 23. The Court also notes that other claims are going forward against the City under 42 U.S.C. § 1983 and state law, and therefore it is more appropriate to allow further briefing on the negligence claims at summary judgment with the other claims, rather than undertaking additional briefing on Motions to Dismiss.

the existence of a claim against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another." *Hogan v. Forsyth Country Club Co.,* 79 N.C. App. 483, 494, 340 S.E.2d 116, 123 (1986). This type of claim "becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment." *Id.* at 495, 340 S.E.2d at 124. "However, before the employer can be held liable, plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency." *Id.*

This claim was originally asserted against the individual Supervisory Defendants in both their official and individual capacities, but Plaintiffs concede that the "official capacity" claims are duplicative of the claim against the City and may be dismissed. With respect to the "individual capacity" claims, Plaintiffs concede that these claims would be barred by public official immunity. As noted above, "[t]he public immunity doctrine protects public officials from individual liability for negligence in the performance of their governmental or discretionary duties." *Campbell v. Anderson,* 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003); *see also Thomas v. Sellers,* 142 N.C. App. 310, 313, 542 S.E.2d 283, 286 (2001); *Moore v. Evans,* 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996). Therefore, this claim is now being asserted only against the City.

To the extent that this claim is asserted against the City, the Court concludes that this claim should go forward at the time. In this regard, the Court notes that just as in Count 16, the City has not addressed this claim in its briefing. To the extent that the City asks for the opportunity to raise additional argument on these claims,

the City may raise those arguments after discovery in summary judgment motions.[25] Therefore, the claims against the City in Count 17 will go forward at this time.

Count 18 & 19: Negligent Infliction of Emotional Distress, asserted against the City

Count 18 is a claim for Negligent Infliction of Emotional Distress for actions by Defendants Gottlieb and Himan and the Supervisory Defendants (Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger) for manufacturing false evidence, concealing evidence, and violating Durham Police Department procedures. Count 19 is also a claim for Negligent Infliction of Emotional Distress, this claim based on actions by Addison and the Supervisory Defendants involving the publication of false and inflammatory statements.[26]

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[25] The City has filed a separate, pre-discovery Motion for Summary Judgment as to this claim raising the defense of governmental immunity, and that Motion is addressed below in relation to Count 23. The Court also notes that other claims are going forward against the City under 42 U.S.C. § 1983 and state law, and therefore it is more appropriate to allow further briefing on the negligence claims at summary judgment with the other claims, rather than undertaking additional briefing on Motions to Dismiss.

[26] These claims were originally asserted against the individual Defendants in both their official and individual capacities, but Plaintiffs concede that the "official capacity" claims are duplicative of the claim against the City and may be dismissed. With respect to the "individual capacity" claims, Plaintiffs concede that these claims would be barred by public official immunity. As noted above, "[t]he public immunity doctrine protects public officials from individual liability for negligence in the performance of their governmental or discretionary duties." *Campbell v. Anderson*, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003); *see also Thomas v. Sellers*, 142 N.C. App. 310, 313, 542 S.E.2d 283, 286 (2001); *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996). Therefore, these claims are now being asserted only against the City.

In order to state a claim for Negligent Infliction of Emotional Distress ("NIED") under North Carolina law, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *McAllister v. Khie Sem Ha*, 347 N.C. 638, 645, 496 S.E.2d 577, 582–83 (1998) (quoting *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990), *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990)). Thus, to state a claim for NIED, Plaintiffs must allege a sufficient basis to support the contention that that they each suffered "severe emotional distress" under North Carolina law, and that the "severe emotional distress was the foreseeable and proximate result" of the defendant's alleged negligence. *Id.* at 645, 496 S.E.2d at 583. "[M]ere temporary fright, disappointment or regret will not suffice." *Id.* As with a claim for intentional infliction of emotional distress, "severe emotional distress" requires an "emotional or mental disorder . . . which may be generally recognized and diagnosed by professionals trained to do so." *Id.*

As noted above, in the Second Amended Complaint, Plaintiffs do not include any specific allegations of emotional or mental disorders or severe and disabling emotional or mental conditions suffered by any of the Plaintiffs, and the Second Amended Complaint does not include any specific identification of any particular Plaintiff's mental or emotional condition or the nature of their emotional distress. It is not sufficient to state summarily that all Plaintiffs suffered "severe emotional distress." As noted above, Plaintiffs have failed to detail the specifics of each Plaintiff's emotional or mental disorders, condition, or diagnosis. *Cf. Holleman v. Aiken*, 193 N.C. App. 484, 502, 668 S.E.2d 579, 590 (2008) (dismissing

NIED claim because "plaintiff does not make any specific factual allegation as [to] her 'severe emotional distress'); *Swaim v. Westchester Acad., Inc.*, 170 F. Supp. 2d 580, 585 (M.D.N.C. 2001). Therefore, the Motion to Dismiss as to Count 18 and 19 will be granted, and Plaintiffs' claims for negligent infliction of emotional distress against the City will be dismissed.[27]

Count 20: Negligence, asserted against Clark, Meehan, and DSI

Count 20 is a negligence claim asserted against DSI and Defendants Clark and Meehan in their individual and official capacities.[28] Count 20 alleges a claim for Negligence in preparing the expert report and disclosing the results of the analysis.

As noted above, under North Carolina law, a plaintiff states a claim for negligence if he alleges sufficient facts to establish "(1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984); *see also Estate of Mullis*

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[27] The Court notes that the City moved to dismiss these claims in its Renewed Motion to Dismiss, but the City did not address these claims in its original briefing. However, other Defendants addressed these and other claims for Intentional and Negligent Infliction of Emotional Distress, and as in those other claims, the Court concludes that Plaintiffs have failed to sufficiently allege "severe emotional distress."

[28] To the extent claims are asserted against Clark and Meehan in their "official capacities," the Court notes that Clark and Meehan were employees and agents of DSI, and the "official capacity" claims must be construed as claims against DSI, not against the City.

by Dixon v. Monroe Oil Co., 349 N.C. 196, 201, 505 S.E.2d 131, 135 (1998) (noting that a common law negligence claim has four essential elements: "duty, breach of duty, proximate cause, and damages").

However, in the present case, Plaintiffs have not identified any legally cognizable duty of care that Clark, Meehan, and DSI would owe to the Plaintiffs. According to the allegations in the Second Amended Complaint, Clark, Meehan, and DSI were operating pursuant to a request from Nifong or Durham Officials. Therefore, while Clark, Meehan, and DSI may have had an obligation to the City, that did not create a duty to others who were not parties to the agreement. North Carolina has adopted the rule from the Restatement (First) of Contracts § 145, that "'A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless, (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences, or (b) the promisor's contract is with a municipality to render services the nonperformance of which would subject the municipality to a duty to pay damages to those injured thereby.'" *Matternes v. City of Winston–Salem*, 286 N.C. 1, 14–15, 209 S.E.2d 481, 488–89 (1974) (adopting the rule from the Restatement (First) of Contracts § 145 (1932)). There is no allegation here to support the conclusion that the agreement by Nifong or the City with DSI manifested an intent to compensate members of the public or that nonperformance of the contract would subject the City to damages. *Cf. Walker v. City of Durham*, 158 N.C. App. 747, 582

S.E.2d 80, 2003 WL 21499222, at *2 (2003) (table opinion) (finding no liability for City for negligent handling or destruction of evidence or for failing to conduct DNA tests). Therefore, the Court concludes that Clark, Meehan, and DSI did not owe a duty of care to Plaintiffs, and Plaintiffs cannot recover from Clark, Meehan, or DSI for simple negligence.[29] Therefore, the Motions to Dismiss will be granted as to Count 20, and this claim will be dismissed.

Count 21: Negligent Supervision, Hiring, Training, Discipline, and Retention, asserted against Clark, Meehan, and DSI

Count 21 alleges a claim for Negligent Supervision, Hiring, Training, Discipline, and Retention against Clark and DSI for negligently hiring, supervising, training, and retaining Meehan, and against Clark, Meehan, and DSI for negligently hiring, supervising, training, and retaining the lab personnel assisting Meehan with respect to the preparation of reports of scientific testing.

"North Carolina recognizes the existence of a claim against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 494, 340 S.E.2d 116, 123 (1986). This type of claim "becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment." *Id.* at 495, 340 S.E.2d at 124. "However, before the employer can be held liable, plaintiff must prove that the incompetent employee

[29] To the extent that Plaintiffs base their claim on intentional misconduct involving falsification or fabrication of evidence, those claims are considered as part of Plaintiffs' claim for malicious prosecution and obstruction of justice in Counts 13 and 14.

committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency." *Id.*

Thus, under North Carolina law, an employer may be held liable for the tortious acts of its employees, based on either a theory of (1) *respondeat superior* if the employee was acting in the scope of his or her employment, or (2) negligent supervision if, "prior to the [tortious] act, the employer knew or had reason to know of the employee's incompetency" even if "the act of the employee either was not, or may not have been, within the scope of his employment" *Id.* at 495, 340 S.E.2d at 124. Therefore, the negligent supervision claim may be asserted as an alternative to *respondeat superior* liability under state law.

In the present case, the Court has concluded that the negligence claim in Count 20 against Clark and Meehan should be dismissed, and therefore no negligent supervision claim can be raised as to that dismissed claim. However, the Court has also concluded that the claims for malicious prosecution and obstruction of justice are going forward as to Defendants Clark and Meehan. The claims for malicious prosecution and obstruction of justice are also going forward against DSI on the basis of *respondeat superior* liability. As discussed above, a negligent supervision claim may be asserted as an alternative to *respondeat superior* liability under state law, and applies even if the employee was not acting within the scope of his employment, if the employer knew or had reason to know of the employee's incompetency. *Id.* Therefore, the Court will not dismiss the claim asserted in Count 21 for negligent supervision to the extent that it is asserted against DSI for negligent supervision of Clark and Meehan.

However, a claim for negligent hiring, retention, and supervision would be actionable only against the employer, not the individual supervisors. *Cf. Foster v. Crandell,* 181 N.C. App. 152, 170–71, 638 S.E.2d 526, 538–39 (2007) (noting that liability for negligent hiring or retention would extend only to an employer who employed an incompetent employee either as an employee or independent contractor, not to co-employees); *Ostwalt v. Charlotte–Mecklenburg Bd. of Educ.,* 614 F. Supp. 2d 603, 609 (W.D.N.C. 2008) ("North Carolina courts have determined that no claim for negligent supervision lies when the Defendant is not the employer of the individual who commits the tortious act."). Therefore, this claim is properly dismissed as to Clark and Meehan individually. Therefore, the Motions to Dismiss Count 21 will be granted as to Defendants Clark and Meehan individually, and those claims will be dismissed. However, the Motions to Dismiss Count 21 will be denied as to DSI, their employer, and that claim will go forward at this time.

Count 22: Negligent Infliction of Emotional Distress, asserted against Clark, Meehan, and DSI

Count 22 alleges a claim for Negligent Infliction of Emotional Distress against Defendants Clark, Meehan, and DSI and for manufacturing false evidence and failing to follow proper standards, resulting in severe emotional distress to Plaintiffs.

As discussed above, in order to state a claim for Negligent Infliction of Emotional Distress ("NIED") under North Carolina law, Plaintiffs must allege a sufficient basis to support the contention that they each suffered "severe emotional distress" under North Carolina law, and that the "severe emotional distress was the foreseeable and proximate result" of Defendants' alleged negli-

gence. *McAllister v. Khie Sem Ha*, 347 N.C. 638, 645, 496 S .E.2d 577, 583 (1998). As with a claim for intentional infliction of emotional distress, "severe emotional distress" requires an "emotional or mental disorder . . . which may be generally recognized and diagnosed by professionals trained to do so." *Id.* However, Plaintiffs have failed to include any specific allegations of emotional or mental disorders or severe and disabling emotional or mental conditions suffered by any of the Plaintiffs, and the Second Amended Complaint does not include any specific identification of any particular Plaintiff's mental or emotional condition or the nature of their emotional distress. *Cf. Holleman v. Aiken*, 193 N.C. App. 484, 502, 668 S.E.2d 579, 591 (2008); *Swaim v. Westchester Acad., Inc.*, 170 F. Supp. 2d 580, 585 (M.D.N.C. 2001). Therefore, Plaintiffs' claims for negligent infliction of emotional distress in Count 22 will be dismissed.[30]

Count 23: Violation of the North Carolina Constitution, asserted against the City

Finally, Plaintiffs in the Second Amended Complaint have added Count 23, which is a claim against the City for violation of the North Carolina Constitution. As the basis for this claim, Plaintiffs contend that they have been deprived of their rights under Article I, Section 19 of the North Carolina Constitution. As part of the claim, Plaintiffs note that this cause of action is pled "as an alternative remedy, should the City prevail in its contention that the other state-law causes of action pleaded herein are barred in whole or part by principles of governmental immunity." (Second Am. Compl. ¶ 571).

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[30] Moreover, the Court notes that, as discussed in Count 20, Plaintiffs cannot state a negligence claim against Clark, Meehan, or DSI in any event.

With respect to these contentions, the Court notes that, as discussed above, Plaintiffs have asserted state law claims against the City for malicious prosecution, obstruction of justice and negligence with respect to Counts 13, 14, 16, and 17 that will not be dismissed on a Motion to Dismiss. However, the City has filed a separate Motion for Summary Judgment [Doc. # 78], contending that the state law claims are barred by the doctrine of governmental immunity. In this regard, the City enjoys governmental immunity on these state law claims except to the extent that its immunity has been waived by the purchase of insurance. *See Mullins v. Friend,* 116 N.C. App. 676, 680, 449 S.E.2d 227, 229 (1994); N.C. Gen. Stat. § 160A–485(a). Plaintiffs have alleged in the Second Amended Complaint that the doctrine of governmental immunity does not apply to bar the state law claims because "the City of Durham has purchased liability insurance and/or participates in a municipal risk-pooling scheme sufficient under N.C. Gen. Stat. § 160A–485 to waive its immunity against civil liability." (Second Am. Compl. ¶ 17). However, in the Motion for Summary Judgment, the City contends that it has not purchased insurance that would waive its immunity for the state law claims asserted by Plaintiffs. Specifically, the City contends that while it has purchased insurance coverage, those policies do not extend coverage to claims against the City for which a defense of governmental immunity would otherwise be available.

After the Motion for Summary Judgment was filed, the North Carolina Supreme Court issued a decision in *Craig v. New Hanover County Bd. of Educ.,* 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009), concluding that a claim may potentially be asserted under the state constitution if other state law claims would be barred by governmental immunity. Therefore, in response to that decision, Plaintiffs subsequently added the claim in Count 23

as an alternative claim, should it ultimately be determined that the state law claims would otherwise be barred by governmental immunity.

In their renewed Motions to Dismiss, Defendants contend that Count 23 should be dismissed because Plaintiffs cannot state a claim under the North Carolina Constitution. Defendants contend that Plaintiffs have not alleged any constitutional violation and that Plaintiffs have other "adequate remedies" at state law. Under North Carolina law, a claim under the state constitution may only be asserted when there is no other adequate remedy under state law. *See id.; see also Corum v. Univ. of N.C.,* 330 N.C. 761, 782–86 413 S.E.2d 276, 289–92 (1992). Thus, to assert a direct constitutional claim, "a plaintiff must allege that no adequate state remedy exists to provide relief for the injury." *Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010). "An adequate state remedy exists if, assuming the plaintiff's claim is successful, the remedy would compensate the plaintiff for the same injury alleged in the direct constitutional claim." *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 437, 528 S.E.2d 911, 915–16 (2000),. *rev'd in part on other grounds,* 354 N.C. 327, 554 S.E.2d 629 (2001). Moreover, an adequate remedy is one that "provide[s] the possibility of relief under the circumstances." *Craig,* 363 N.C. at 340, 678 S.E.2d at 355. Thus, "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.* at 339–40, 678 S.E.2d at 355.

In *Craig,* the Supreme Court held that where governmental immunity bars a common law negligence claim, that negligence claim does not provide an adequate remedy at state law. *Id.* The court further held that when a tort remedy is barred by governmental im-

munity, a "plaintiff may move forward in the alternative, bringing his colorable claims directly under [the] State Constitution based on the same facts that formed the basis for his common law negligence claim." *Id.* at 340, 678 S.E.2d at 355. The court noted that the "holding does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case. Rather, it simply ensures that an adequate remedy must provide the possibility of relief under the circumstances." *Id.* Thus, the state supreme court has concluded that where a negligence claim is asserted against the municipality but no recovery is available due to the doctrine of governmental immunity, then no adequate state remedy exists.

In the present case, unresolved questions remain with respect to whether there are other adequate remedies under state law, particularly in light of the City's assertion of governmental immunity. Therefore, to the extent that Defendants contend that Count 23 should be dismissed because there are alternative remedies, the Court will deny the Motion to Dismiss as to Count 23, and allow it to go forward as a potential alternative claim should the City ultimately prevail on its governmental immunity defense.

Moreover, since these claims are going forward on an alternative basis, the Court concludes that there is no need to resolve the City's governmental immunity defense on a preliminary summary judgment determination, and that determination is better made after an opportunity for discovery and consideration with all of the remaining claims and defenses together. This approach is particularly appropriate here given that claims are proceeding against the City in any event under 42 U.S.C. § 1983. Therefore, the Motion to Dismiss as to Count 23 will be denied, and the City's Motion for Summary

Judgment [Doc. # 78] raising the governmental immunity defense will be denied at this time without prejudice to the City raising the defense as part of a comprehensive Motion for Summary Judgment at the close of discovery.

IV. CONCLUSION

Having undertaken this comprehensive review of the 23 claims asserted in this case, the Court concludes that the Motions to Dismiss will be granted in part and denied in part as set out herein. In summary, Counts 1, 2, and 3 will go forward under 42 U.S.C. § 1983 for alleged violations of the Fourth and Fourteenth Amendment for unlawful seizures without probable cause based on Plaintiffs' contentions that they were arrested pursuant to indictments that were obtained by the intentional or reckless creation of false or misleading evidence used before the grand jury that was necessary to a finding of probable cause, or the deliberate or reckless omission of material information that officials knew would negate probable cause. These counts are proceeding against Defendants Nifong, Wilson, Gottlieb, Himan, Meehan, Clark, and DSI. Count 4 will go forward under 42 U.S.C. § 1983 for violation of the Fourteenth Amendment based on alleged false and stigmatizing statements made in connection with the alleged constitutional violations in Counts 1, 2, and 3. Count 4 is proceeding as to Defendants Nifong, Addison, and Hodge. The claims asserted in Counts 1, 2, 3, and 4 are also going forward against the City based on the additional allegations contained in Count 5 setting out claims for municipal liability. However, to the extent that there are claims proceeding against the City, Plaintiffs may not recover punitive damages from the City. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247,

271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616 (1981).[31] Therefore, the claim for punitive damages against the City will be dismissed. Finally, the Court will allow the § 1983 claims in Counts 1, 2, 3, and 4 to go forward against the Durham Police "Supervisory Defendants," specifically, Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger, based on Plaintiffs' allegations as discussed with respect to Count 6. However, at summary judgment, it will be Plaintiffs' burden to "pinpoint the persons in the decision-making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked," and the Court will scrutinize evidence regarding each Defendant's direct, individual involvement, and evidence regarding their individual intent, in order to determine whether any of them is potentially liable under § 1983 for their own conduct with respect to the alleged constitutional violations that are proceeding in this case.[32] With respect to the last § 1983 claim, set

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[31] To the extent that Defendants also challenge Plaintiffs' request for injunctive relief, the Court notes that to have standing to assert a claim for injunctive relief, "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02, 103 S .Ct. 1660, 1665, 75 L. Ed. 2d 675 (1981) (emphasis added) (citations omitted). Plaintiffs must allege a "real and immediate threat of repeated injury" beyond just "speculation." *Id.* at 102–05, 103 S. Ct. at 1665–66. Given the claims that are proceeding against the City in this case, the Court concludes that there is no basis to further address the scope of remedies available at this time, and the Court will resolve the availability of injunctive relief at summary judgment after an opportunity for discovery.

[32] In addition, special attention should be given during the discovery process to ensure that these Supervisors are not unduly burdened, in light of the potential qualified immunity defense and the protections it affords.

out in Count 7 as a claim for "Conspiracy," the Court concludes that this claim does not set out any separate constitutional violation, and all of the underlying claims are already addressed with respect to Counts 1–4. Therefore, the separate general "conspiracy" claim in Count 7 will be dismissed. In addition, Plaintiffs' claims in Counts 8, 9, 10, 11 and 12 asserted pursuant to 42 U.S.C. § 1985 and § 1986 fail to state a plausible, legally-viable claim and will be dismissed.

With respect to the state law claims, the Court concludes that Plaintiffs have stated a claim in Count 13 for malicious prosecution as to Defendants Nifong, Wilson, Himan, Gottlieb, Clark, Meehan, and Addison. The Court similarly concludes that Plaintiffs have stated a claim in Count 14 for Obstruction of Justice as to Defendants Nifong, Wilson, Gottlieb, Himan, Clark, and Meehan. Counts 13 and 14 will also go forward against the City and DSI on the basis of *respondeat superior* liability. In addition, as an alternative to *respondeat superior* liability under state law, Plaintiffs have also stated a claim for negligent supervision as to the City in Count 17 and DSI in Count 21.

Finally, the state law claim for negligence against the City asserted in Count 16 is also going forward at this time, as are the alternative claims asserted against the City in Count 23 under the state constitution. With respect to the state law claims against the City in Counts 13, 14, 16, and 17, and the state constitutional claim asserted in Count 23, the Court concludes that these claims, and the governmental immunity defense raised in the City's Motion for Summary Judgment [Doc. # 78], are intertwined claims, some of which are pled in the alternative, that must be resolved at summary judgment

after an opportunity for discovery, given the factual issues raised.[33]

However, the Court concludes that Plaintiffs have failed to state a claim for Intentional Infliction of Emotional Distress in Count 15 or for Negligent Infliction of Emotional Distress in Counts 18, 19, and 22, and those claims will be dismissed. The Court also concludes that Plaintiffs have failed to state a claim for negligence against Defendants Clark, Meehan, and DSI as asserted in Count 20, and therefore the state law negligence claim in Count 20 will be dismissed.

Based on this determination, the Court notes that claims are going forward as to Defendant Nifong in Counts 1, 2, 3, 4, 13, and 14; against Defendants Gottlieb, Himan, Wilson, Clark, Meehan, and DSI in Counts 1, 2, 3, 13, and 14, plus Count 21 as to Defendant DSI; against Defendant Addison in Counts 4 and 13; against the City in Counts 1, 2, 3, and 4 (based on the allegations in Count 5), as well as in Counts 13, 14, 16, 17, and 23; and against Defendants Hodge, Baker, Chalmers, Russ, Council, Lamb, and Ripberger in Counts 1, 2, 3, 4, and 6. All of the remaining claims are dismissed, including all of the claims asserted in Counts 7, 8, 9, 10, 11, 12, 15, 18, 19, 20, and 22.

Having undertaken this comprehensive review of the claims asserted in this case, the Court notes that this case, like many § 1983 cases, is complex and involves multiple Defendants, requiring significant analysis, resulting in this rather extensive Memorandum Opinion. The Court notes that of the three "related cases," *see*

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[33] As with the § 1983 claims, Plaintiffs may not recover punitive damages against the City on the state claims. *See Efird v. Riley*, 342 F. Supp. 2d 413, 430 (M.D.N.C. 2004) (citing *Long v. City of Charlotte*, 306 N.C. 187, 208, 293 S.E.2d 101, 115 (1982)).

supra note 1, this case involves the most significant alleged constitutional deprivations, but was commendably more concise. However, a complaint of over 150 pages, with over 570 numbered paragraphs, as in this case, is still beyond what is necessary or appropriate under Rule 8. Review of this case, and particularly of the related cases involving complaints that are 2 and 3 times as long, required the Court to undertake the time-consuming process of wading through a mass of legally unsupportable claims and extraneous factual allegations in an attempt to "ferret out the relevant material from a mass of verbiage." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1281 (3d ed. 2004). The Court has nevertheless undertaken this process and has considered each of the claims in all three cases. Going forward, the parties are encouraged to make every effort to reduce the volume of filings and to avoid unnecessary rhetoric, and to proceed on the remaining claims in a direct, professional manner, without requiring unnecessary involvement from the Court.

The Court is also compelled to note that the allegations in the Second Amended Complaint that are going forward, particularly as to Counts 1–3, set out allegations of significant abuses of government power. Indeed, the intentional use of false or misleading evidence before a grand jury to obtain an indictment and arrest without probable cause is exactly the type of "unreasonable" search and seizure that the Fourth Amendment was designed to protect against, and would violate the most fundamental concepts of due process. In this regard, it has been noted that "'if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit (indeed, we are unsure what due process entails if not protection against deliberate fram-

ing under color of official sanction).'" *Washington v. Wilmore,* 407 F.3d 274, 285 (Shedd, J., concurring) (quoting *Limone v. Condon,* 372 F.3d 39, 44–45 (1st Cir. 2004)). In addition, "the Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or 'with reckless disregard for the truth' makes material false statements or omits material facts. . . . No reasonable police officer . . . could believe that the Fourth Amendment permitted such conduct." *Miller v. Prince George's County,* 475 F.3d 621, 631–32 (4th Cir. 2007) (internal citations omitted). Thus, there can be no question that the Constitution is violated when government officials deliberately fabricate evidence and use that evidence against a citizen, in this case by allegedly presenting the false evidence to a grand jury in order to obtain an indictment of individuals that the officials know are innocent. The Court acknowledges the "'embarrassing diversity of judicial opinion' over the composition or even existence, of a claim for 'malicious prosecution' founded in § 1983." *Lambert v. Williams,* 223 F.3d 257, 260 (4th Cir. 2000). However, Defendants in this case essentially contend that this Court should take the most restrictive view of the applicable doctrines and should conclude that no provision of the Constitution has been violated, and that no redressable claim can be stated, when government officials intentionally fabricate evidence to frame innocent citizens, even if the evidence is used to indict and arrest those citizens without probable cause. This Court cannot take such a restrictive view of the protections afforded by the Constitution. Therefore, the Court concludes that Plaintiffs have stated a potential violation of their constitutional rights in this case. This case will therefore proceed to discovery on the claims as set out above, and it will ultimately be Plaintiffs' burden to present proof in support of these claims.

IT IS THEREFORE ORDERED that the Motions to Dismiss [Doc. # 117, 119, 120, 121, 123, 124, 125, 126, 127 are GRANTED IN PART and DENIED IN PART as set out herein. IT IS FURTHER ORDERED that the City of Durham's Motion for Summary Judgment [Doc. # 78] is DENIED at this time, without prejudice to the City raising the issues asserted therein as part of a comprehensive Motion for Summary Judgment at the close of discovery.

A separate Order will be entered contemporaneously herewith.