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

DAVID BENHAM; CITIES4LIFE; GLOBAL IMPACT MINISTRIES d/b/a LOVE LIFE and LOVE LIFE CHARLOTTE, Plaintiffs, v. CITY OF CHARLOTTE, NORTH CAROLINA; MECKLENBURG COUNTY, NORTH CAROLINA, Defendants.	Case No. 3:20-cv-232 (GCM)

BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Even during times of national and local crisis, the First and Fourteenth Amendments to the United States Constitution remain in season, protecting the fundamental rights of speech and religion. Thus, even while taking steps to mitigate the threat of COVID-19, government officials still must respect constitutional boundaries. Defendants Mecklenburg County and the City of Charlotte failed to do so, selectively suppressing Plaintiffs' First Amendment activities and discriminating against their pro-life viewpoint.

And now Defendants ask this Court to ignore that it ever happened, simply because they have—at least for the moment while litigation is pending—stopped the constitutional violations. But deprivation of First Amendment freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Having violated Plaintiffs' constitutional rights, Defendants cannot pretend like nothing happened and evade all consequences.

This case is not moot for several reasons. When Plaintiffs brought this action, they sought relief to address both the harm already suffered as well as the ongoing (at the time) harm under the Proclamation. In seeking dismissal, Defendants focus only on the request for prospective relief, ignoring the harm already inflicted. But the Proclamation's expiration does not remedy the constitutional violations Plaintiffs have suffered, and the Complaint's request for

relief for the past harm presents a live controversy. That alone suffices to invalidate Defendants' mootness argument. Indeed, if a party has "a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012) (citation omitted).

"A case becomes moot only when it is impossible for a court to grant any effectual relief . . . ." *United States v. Ketter*, 908 F.3d 61, 65 (4th Cir. 2018) (quoting *Knox*, 567 U.S. at 307). At least some of the relief Plaintiffs request—like the nominal and compensatory damages for past constitutional violations—is unquestionably available if Plaintiffs prevail. That too is sufficient to reject Defendants' motion to dismiss for mootness. Then, if Plaintiffs ultimately prevail on the merits, the Court can evaluate at that time what specific relief may or may not be appropriate given facts that have been developed.

The question now, though, is not whether all forms of relief sought in the Complaint remain appropriate. Instead, it is whether—taking all factual allegations as true and viewing them in the light most favorable to Plaintiffs—Plaintiffs may be entitled to any relief. The answer to that question is unequivocally "yes."

Because Plaintiffs' claims for nominal and compensatory damages provide two independent live controversies, this Court should reject Defendants' mootness arguments. Defendants' motions also fail to prove that they will not repeat their unconstitutional behavior. Defendants have not even tried to meet their "heavy

burden" of showing they will never return to their unconstitutional policies and conduct, as required to moot the claims for relief. Instead, they defend those policies on the merits. These circumstances highlight the importance of the Court exercising jurisdiction to safeguard Plaintiffs' First and Fourteenth Amendment rights.

Mootness aside, to survive dismissal on the merits, Plaintiffs need only "plausibly allege[] in [their] complaint that [their rights] were violated." *Tobey v. Jones,* 706 F.3d 379, 387 (4th Cir. 2013). In assessing those allegations, this Court "accept[s] as true the facts alleged in the complaint and view[s] them in the light most favorable to the plaintiff[s]." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006). Under this standard, Plaintiffs alleged plausible claims that their First Amendment rights of free expression and religious exercise were infringed when Defendants enforced a vague law against them, demanding—under threat of arrest—that they desist from speaking and praying while walking.

Defendants also seek to evade the consequences of violating Plaintiffs' constitutional rights, by asking this Court to abstain. But their arguments for abstention fail because the *Younger* factors are not met. Abstention by a federal court—which is highly disfavored—is not appropriate when parties will not have "an adequate opportunity to present [their constitutional] claim[s] in the state . . . proceeding[s]." *Potomac Elec. Power Co. v. Sachs*, 802 F.2d 1527, 1531–32 (4th Cir. 1986). Although Mr. Benham was arrested, there is no state proceeding in which Plaintiffs Cities4Life and Global Impact Ministries are parties and can adjudicate

their grievances. These organizations comprise many employees, volunteers, and other representatives whose constitutional rights were infringed and continue to be jeopardized by Defendants' unpredictable conduct.

Having already denied Plaintiffs their First Amendment rights, Defendants now seek to deny Plaintiffs their day in court. This Court should reject that effort.

ARGUMENT

I. The motions to dismiss should be denied because this Court retains jurisdiction over a live controversy.

Defendants' Rule 12(b)(1) motions do not contest any jurisdictional facts in the Complaint, but make only a facial challenge to this Court's subject matter jurisdiction. Therefore, "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns v. United States,* 585 F.3d 187, 192 (4th Cir. 2009). A facial attack under Rule 12(b)(1) "requires the court merely to look and see if the plaintiff[s] ha[ve] sufficiently alleged a basis of subject matter jurisdiction." *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1261 (4th Cir. 1997) (cleaned up). Accordingly, "it is extremely difficult to dismiss a claim for lack of subject matter jurisdiction." *Id*. at 1260 (citations omitted). Plaintiffs' factual allegations are sufficient to show jurisdiction and survive Defendants' facial attack.[1]

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[1] The City claims that this Court may consider extrinsic evidence to determine subject matter jurisdiction, Dkt. No. 21 at 7 n.2, but that is true only if the 12(b)(1) motion to dismiss is a *factual*, not facial, attack, *Garcia*, 104 F.3d at 1261. Regardless, Defendants do not offer any competing facts and do not contest any of the jurisdictional facts Plaintiffs alleged.

That the Proclamation is not currently in effect does not deprive this Court of jurisdiction. "Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Powell v. McCormack*, 395 U.S. 486, 497 (1969). In addition to the fact that the Proclamation's expiration does not moot certain aspects of Plaintiffs' claims, as discussed below, the controversy remains live and justiciable regardless.

A. Defendants' policy changes do not undermine Plaintiffs' standing.

In claiming that Plaintiffs lack standing, Defendants confuse standing and mootness. They misunderstand the nature of damages from a deprivation of constitutional liberty. "Unlike questions of mootness and ripeness, the standing inquiry asks whether a plaintiff had the requisite stake in the outset of the litigation.' " *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018), cert. denied, 140 S. Ct. 111 (2019) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180 (2000)). Standing is "[t]he requisite personal interest that must exist at the commencement of the litigation." *Laidlaw*, 528 U.S. at 189 (emphasis added). Whether Defendants have ceased their unconstitutional actions since the Complaint was filed is not relevant to standing.

Stated differently, the standing analysis is unaffected by the Proclamation's expiration. To have standing, Plaintiffs "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. ——, ——, 136 S. Ct. 1540, 1547 (2016). Here, that Defendants perpetrated a

constitutional injury on Plaintiffs must be assumed true on the well-pled facts. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). This Court can redress that injury—which is based on the time during which the Proclamation was in effect and enforced against Plaintiffs—through a declaration that the enforcement was unconstitutional and an award of nominal or compensatory damages.

The redressability requirement of standing is not onerous. Plaintiffs "must show that 'it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.' " *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018) (quoting *Laidlaw*, 528 U.S. at 181). But they "need not show that a favorable decision will relieve [their] every injury." *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). Rather, Plaintiffs "need only show that they personally would benefit in a tangible way from the court's intervention." *Id.* (citation omitted). Plaintiffs' complaint proves this beyond doubt: the Court can tangibly relieve at least some of Plaintiffs' injuries by awarding Plaintiffs damages. *See, e.g.*, *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) ("[A] nominal damages award does render a plaintiff a prevailing party by allowing him to vindicate his 'absolute' right to procedural due process through enforcement of a judgment against the defendant"); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428 (4th Cir. 2007) ("If [plaintiff] is right [on the merits alleged], it has suffered an injury by the City's application of an unconstitutional ordinance that is redressable at least by nominal damages").

The County spends only three paragraphs attempting to dispute Plaintiffs' standing, and exclusively cites cases about the unrelated question of mootness, Dkt. No. 19 at 4–5; the City spills more ink but focuses narrowly on Plaintiffs' request for prospective relief and for costs, Dkt. No. 21 at 11. Both Defendants ignore the crux of the Complaint, which is that Plaintiffs were deprived of their constitutional rights to free speech and free exercise, thus entitling them to damages. This damages claim independently confers standing.

The merits of those constitutional claims are not relevant to Plaintiffs' standing. And the Article III injuries are inherent. "To demonstrate injury in fact, it [is] sufficient . . . to show that [one's] First Amendment activities ha[ve] been chilled." *Smith v. Frye*, 488 F.3d 263, 272 (4th Cir. 2007). Plaintiffs' First Amendment activities were not just chilled; law enforcement stopped them outright. That suffices to give Plaintiffs standing.

B. Plaintiffs' request for damages for past constitutional harms presents a live controversy.

The City and County violated Plaintiffs' constitutional freedoms, including their free-speech and free-exercise rights. Depriving these rights, even temporarily, inflicts harm. *See Legend Night Club*, 637 F.3d at 302. The harm was especially profound because Plaintiffs' mission and message are potentially life-altering, given their intended audience and abortion's permanency.

Because Defendants violated their constitutional rights, Plaintiffs sought nominal and compensatory damages. Both requests for damages present active controversies that nullify Defendants' mootness argument. *See Ellis v. Bhd. of Ry.,*

Airline & S.S. Clerks, Freight Handlers, Express & Station Emps., 466 U.S. 435, 442 (1984) (explaining that the case was not moot—even though the injunction claim appeared to be—given the "undeniably minute" claim for damages). That is only sensible. After all, allowing an unconstitutional policy to expire does not remedy the harm resulting from that policy's past application.

Plaintiffs deserve relief for these deprivations of their liberty. And this Court has jurisdiction to grant it. *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003) ("Although the Plaintiffs' claims for declaratory and injunctive relief are moot, their damage claim continues to present a live controversy"); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983) (holding that procedural due process claims presented a "live controversy even after the disciplinary proceedings were dropped" because the plaintiff had a "right to seek, at a minimum, nominal damages").

A "continuing controversy over damages" means that the case is not moot. *Alvarez v. Smith*, 558 U.S. 87, 92 (2009). The controversy continues here because the Complaint includes claims for damages to remedy past harms. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007) (plaintiff "sought damages in her complaint, which is sufficient to preserve our ability to consider the question").

1. Plaintiffs' claim for nominal damages defeats Defendants' mootness claim.

Plaintiffs seek nominal damages. Dkt. No. 1 at ¶ 160 and p. 45 (Prayer for Relief). Nominal damages are critical to ensure that when the government

tramples constitutional liberties—truly invaluable rights—citizens can vindicate those rights. Not only does that benefit victims of unconstitutional action, but it benefits the public as well. Government actors that face consequences are less apt to violate constitutional rights than those who act with impunity. The government cannot dodge judicial scrutiny by simply repealing, modifying, or failing to extend unconstitutional laws.

As the Supreme Court explained, "[b]y making the deprivation of [absolute] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Accordingly, the Fourth Circuit has repeatedly recognized that a request for nominal damages defeats mootness claims. *E.g., Mellen*, 327 F.3d at 365; *Henson*, 719 F.2d at 72 n.5; *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 631–32 (4th Cir. 2016). And it is in good company: every circuit except one agrees. *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1536 n.6 (2020) (Alito, J., dissenting).

A brief survey of Fourth Circuit cases demonstrates that Plaintiffs' request for nominal damages maintains a live controversy. For instance, in *Mellen v. Bunting*, the plaintiffs alleged that the Virginia Military Institute violated the Establishment Clause by including a public prayer at mealtime. 327 F.3d at 360. The plaintiffs had graduated, so "their claims for declaratory and injunctive relief [were] moot." *Id.* But the case was not. Because the nominal damages claim "continue[d] to present a live controversy," the Court evaluated the Establishment

Clause claim. *Id.* at 365. In doing so, it answered "basically the same question as the district court answered in awarding declaratory relief." *Id.* at 365 & n.6.

Nominal damages also maintain a live controversy when, as here, the challenged activity—or challenged law—is no longer in effect. The Fourth Circuit has repeatedly made this point. *E.g.*, *Covenant Media*, 493 F.3d at 429 n.4 (challenge to a later-amended ordinance was not moot, because the plaintiff sought nominal damages). One case involved a business's constitutional challenge to a sign ordinance. *Cent. Radio*, 811 F.3d at 628. During the lawsuit, the city amended the ordinance. *Id.* That mooted the business's "request for prospective relief based on the content restrictions in the prior ordinance." *Id.* at 628, 632. But the request for "relief in the form of nominal damages" for the speech restriction was "not moot." *Id.* at 632. Ultimately, the Fourth Circuit evaluated the constitutionality of "the former sign code" and held that it violated the First Amendment. *Id.* at 628, 632, 634. Notably, its analysis focused on targeted exemptions in the prior code that the revised code eliminated. *Id.* at 631, 633–34.

Just as the request for nominal damages in *Central Radio* warranted constitutional analysis of deleted ordinance terms, Plaintiffs' request for nominal damages warrants review of Defendants' now-expired Proclamation and its enforcement. *See also Covenant Media*, 493 F.3d at 429 n.4 (explaining that the replacement of a challenged law did "not moot" the case because the plaintiff, if "correct on the merits, [was] entitled to at least nominal damages").

None of Defendants' arguments undermine these precedents. The cases the City cites in arguing that claims are moot after a challenged law is no longer on the books focus on prospective relief. Not one of them includes a damages claim. *See* Dkt. No. 21 at 10–11. But here, Plaintiffs' "claim for nominal damages based on a prior constitutional violation is not moot because [Plaintiffs'] injury was complete at the time the violation occurred." *Am. Humanist Ass'n v. Greenville Cty. Sch. Dist.*, 652 Fed. App'x. 224, 226–27, 231–32 (4th Cir. 2016) (rejecting mootness argument where plaintiffs sought nominal damages for Establishment Clause claim even though defendant school had adopted a new policy and plaintiffs had moved to a different state).

In sum, Fourth Circuit precedent guts Defendants' mootness argument. And the cases Defendants cite are inapt because they did not confront a request for nominal damages for past constitutional injury. Plaintiffs' request for nominal damages is independently sufficient to deny Defendants' motion to dismiss.

2. Plaintiffs' request for compensatory damages provides an independent basis for jurisdiction.

Plaintiffs' claim for compensatory damages presents a second live controversy. After all, "nothing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents. . . . If there is any chance of money changing hands, [a] suit remains live." *Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019).

Because Plaintiffs may be entitled to damages—nominal, compensatory, or both—they have "a concrete interest, however small, in the outcome of the

litigation," so "the case is not moot." *Knox*, 567 U.S. at 307–08 (citation omitted). The Proclamation's expiration does not change that reality. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989) ("The expiration of the ordinance has not rendered the controversy . . . moot" given the "live controversy" over whether refusal to award a contract "was unlawful," warranting damages).

Defendants admit that the Complaint requests damages in terms of costs incurred. Dkt. No. 21 at 14; *See* Complaint at ¶ 144 ("The Advocates [Plaintiffs] incurred costs as a result of the Proclamation and Defendants' unlawful application of the Proclamation"). But the City argues that "nothing is alleged about what these costs were actually incurred for . . . nor is anything alleged about why these costs were necessitated," Dkt. No. 21 at 14, and that perhaps the costs were "*de minimis*," *id.* at 18. These arguments are, respectively, incorrect and irrelevant.

a. Plaintiffs adequately allege compensatory damages, which need not be itemized at the pleading stage.

Defendants' claim—that Plaintiffs allege "nothing" about the costs incurred—is false. *See* Dkt. No. 1 at ¶ 145. At a minimum, Plaintiffs allege the need for their advisors to travel from other parts of the state to assist Plaintiffs in carrying out their charitable mission and expressive activities, in the face of potential interference by Defendants. *Id.* Plaintiffs' members traveled to the site that day, too, but Defendants prevented them from providing their services and furthering their ministry objectives. *See id.* at ¶ 142. That time and travel cost money, and it justifies compensation.

For standing purposes at the pleading stage, Plaintiffs need not itemize every dollar in damages that may later be proven at trial. Federal courts do not require itemization of compensatory damages claims at the motion to dismiss stage. In fact, courts routinely proceed with damages allegations that are not quantified—for example, when claims for emotional distress seek compensatory damages. *Burt v. Abel*, 585 F.2d 613, 616 (4th Cir. 1978) (if "plaintiff is able in good faith to allege actual damages" on remand, a trier of fact will determine "the amount of actual damages attributable" to the unconstitutional conduct). Likewise, district courts frequently estimate whether damages sought exceed the $75,000 jurisdictional threshold, even when there are no dollar amounts alleged in the complaint. *Lawson v. Tyco Elecs. Corp.*, 286 F. Supp. 2d 639, 641 (M.D.N.C. 2003) ("Because pleading rules in some states, including North Carolina, prohibit plaintiffs from initially pleading an exact amount in some circumstances, a determination of the amount in controversy from the face of the complaint is not possible").

Even at the final stage where a court grants relief, Plaintiffs "need not establish proof, with mathematical certainty, of the amount of loss or damage," in order for damages to be recoverable. *Muhler Co. v. Ply Gem Holdings, Inc.*, 637 F. App'x 746, 749 (4th Cir. 2016) (cleaned up); *cf. McGowan v. Gillenwater*, 429 F.2d 586, 587 (4th Cir. 1970) (jury properly disregarded amount of damages alleged in complaint because "[t]he function of the pleadings is to notify court and counsel of the bare bones of the controversy, and rarely do they have any evidentiary value").

Accordingly, the Fourth Circuit has held that a plaintiff alleging general damages for constitutional violations has pled sufficient injury to state a claim for relief. Even where a "complaint requests damages generally without specifying any particular type," it "would not preclude [Plaintiffs] from recovering compensatory damages" for a First Amendment violation. *Wilcox v. Brown*, 877 F.3d 161, 169 (4th Cir. 2017) (reversing district court's dismissal of complaint).

Defendants make several assumptions about Plaintiffs' compensatory damages that are not reasonable and are factually incorrect. For example, the Complaint states that actual costs were incurred and gives a specific example of an attorney's travel costs from another part of the state while the incident was transpiring. Dkt. No. 1 at ¶¶ 144–146 ("For instance, . . ."). The City takes this example and builds an argument on the premise that it is the *only* example. *See* Dkt. No. 21 at 16–20 (assuming, incorrectly and without a basis, that Plaintiffs' expenses were "de minimis" and were aimed at litigation). The County, without explanation, states that the "only . . . pre-litigation costs Plaintiffs allege [are] the fact an attorney and an unnamed, non-plaintiff drove from Greensboro after hearing of the arrests." Dkt. No. 19 at 5. Why the County focuses on "pre-litigation costs" is unclear, when Plaintiffs have requested "*all* appropriate damages, including compensatory" and when, by definition, most costs resulting from constitutional injuries occur prior to litigation. *See* Dkt. No. 1 at p. 45. Nor do Defendants have a basis for concluding that an example of Plaintiffs' costs constitutes the entirety of Plaintiffs' costs.

Defendants' assumptions are wrong. The City misinterprets what the attorney's costs were for, and assumes the attorney acted only to launch a defense for the arrestees: "In other words, after the Revised Joint Proclamation was enforced against Plaintiffs on April 4, Plaintiffs directed their attorney to investigate the matter and, presumably, advise them on their possible legal recourse." Dkt. No. 21 at 16. But Plaintiffs are not seeking attorneys' fees as the basis for their injury, and this Court cannot construe Plaintiffs' allegations in the light *least* favorable to Plaintiffs, which is not the proper standard. *Cf. Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 189 (4th Cir. 2002) ("[A]t the motion to dismiss stage, a court must accept the allegations of the complaint as true and view the complaint in the light most favorable to the plaintiff").

One of the reasons the attorney traveled immediately upon hearing of the incident was to attempt to prospectively insure an understanding of how the Proclamation was being interpreted and applied, to help assess how Cities4Life, Global Impact Ministries, Love Life, and Love Life Charlotte could continue carrying out their mission. Relatedly, the attorney was required to travel on that morning to make sure that Plaintiffs could continue engaging in protected speech and association, providing their charitable services, and engaging in their religious exercise. His presence was immediately necessary to communicate with officers so that none of the other representatives of Cities4Life and Global Impact Ministries would be subject to arrest—that day or any other day in the future. All of this is

fairly encompassed within the Complaint's allegations. *See, e.g.*, Dkt. No. 1 at ¶¶ 144–146.

Such costs are not simply "spending money in response to a law, standing alone," as the City suggests. Dkt. No. 21 at 17. For that reason, the City's reliance on *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Board of Trustees*, 19 F.3d 241 (5th Cir. 1994), also fails. There, the Fifth Circuit held that "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party [was] insufficient to impart standing." *Id.* at 244. That is not the extent of Plaintiffs' costs, which, as explained above, were mission-oriented, not litigation-oriented, and were part of the damage flowing directly from Defendants' unconstitutional conduct.

The City's reliance on *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), likewise does not hold up under scrutiny. In *Lane*, the plaintiffs alleged that they were injured by a drain on their resources from looking generally into the operation of handgun transfer provisions. *Id.* at 675. The Fourth Circuit rejected the argument, explaining that not every "organization that decides to spend its money on educating members, responding to member inquiries, or undertaking litigation in response to legislation suffers a cognizable injury." *Id.* Plaintiffs here do not allege costs based on any of those three things.

Rather, the particular cost Defendants zero in on was instead incurred as a direct result of their imposing an unconstitutional law with vague and

discriminatory enforcement. *Cf. Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) (noting that a "cognizable injury under the First Amendment is self-censorship, which occurs when a claimant is chilled from exercising her right to free expression"). It is compensable.

b. Plaintiffs' claim for compensatory damages is enough to support standing, even if the amount is small.

It is irrelevant whether the ultimate compensation awarded may not be a significant sum. Even the loss of "a dollar or two" is sufficient to confer Article III standing. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008). "[A]n identifiable trifle is enough for standing to fight out a question of principle." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973). This is because "[a] judgment for damages in any amount, whether compensatory or nominal, modifies" Defendants' behavior "for [Plaintiffs'] benefit by forcing [Defendants] to pay an amount of money [they] otherwise would not pay." *Farrar*, 506 U.S. at 113.

In the face of this well settled caselaw, the City argues that Plaintiffs have no Article III injury because they "have alleged nothing . . . to suggest that their costs were anything more than *de minimis*." Dkt. No. 21 at 18. But Plaintiffs bear no burden to prove significant monetary costs. The City's argument that "there is no authority for the idea that *de minimis* expenses, voluntarily incurred, create standing" is simply wrong. *See SCRAP*, 412 U.S. at 689 n.14 (rejecting argument that standing should be limited to those "'significantly' affected," because "'[i]njury

in fact' . . . serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem") (citations omitted).

C. The claims for prospective relief are not moot, because Defendants have not made it "absolutely clear" that they would not resume the unconstitutional actions.

Defendants argue that the case is moot because they let the Proclamation expire. But under the voluntary cessation doctrine, the "test for mootness . . . is a stringent one," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (citation omitted), and Defendants face a "heavy" and "formidable" burden, *Laidlaw*, 528 U.S. at 189–90. Such a "case *might* be moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Aladdin's Castle*, 455 U.S. at 289 n.10 (citation omitted) (emphasis added). Defendants have done nothing of the sort.

The Fourth Circuit has repeatedly "held that when a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (citations omitted). Defendants here retain the authority to reissue an identical or equally unconstitutional proclamation whenever they choose. And given the vigor with which they defend the Proclamation, Defendants might resume the policy any time they feel that COVID-19 statistics warrant stricter rules.

As in *Wall*, "nothing . . . suggests that [Defendants are] actually barred—or even consider[] [them]sel[ves] barred—from reinstating the . . . policy should [they]

so choose." 741 F.3d at 497. To the contrary, Defendants argue at length defending the wisdom and propriety of the Proclamation. *See, e.g.*, Dkt. No. 19 at 8–24; Dkt. No. 21 at 1–3. Here, like in *Wall*, "the fact that at least three separate policies have been utilized . . . since [March] indicates some degree of doubt that the new policy will remain in place for long." 741 F.3d at 497; *see* Dkt. No. 21 at 3.

A "bald assertion[]" that the government "will not resume a challenged policy" is insufficient to moot a cause of action. *Id.* at 498. Defendants do not even make that assertion, bald or otherwise. At most, the County reports that the Proclamation "was rescinded April 30, 2020, in favor of the Governor's state-wide order, which itself has since expired," Dkt. No. 19 at 2, and the City simply says that "on April 29, the temporary restriction . . . was rescinded, and it has not been in effect since," Dkt. No. 21 at 2. Defendants have not provided any assurances that they will not reenact their unconstitutional policies if COVID-19 cases rise. Rather, the County boasts that it "addressed this public health crisis by implementing . . . [the] Proclamation[] to slow the spread of this deadly disease." Dkt. No. 19 at 1. And the City insists that the Proclamation was "essential." Dkt. No. 21 at 2.

In other words, Defendants would not hesitate to repeat their prior, unconstitutional behavior. *See Knox*, 567 U.S. at 307 (noting that "voluntary cessation of challenged conduct does not ordinarily render a case moot" and that "it is not clear why the union would necessarily refrain from" the challenged action where it "continues to defend [its] legality"). As the Fourth Circuit has noted,

"courts have been particularly unwilling to find that a defendant has met its heavy burden to establish that its allegedly wrongful conduct will not recur when the defendant expressly states that . . . it could return to the [abandoned] policy in the future." *Porter v. Clarke*, 852 F.3d 358, 365 (4th Cir. 2017).

Additional facts suggest that Defendants may again restrict Plaintiffs' speech and expressive, religious activities. As anyone following the news knows, many state and local governments relaxed restrictions relating to COVID-19 only to reinstitute them after an uptick in infection rates. North Carolina is no exception. Roughly two weeks before Defendants moved to dismiss, North Carolina's Governor and Health and Human Services Secretary extended the statewide Safer at Home Phase 2 order, which has now been extended again through September 11.[2] The Phase 2 extension requires everyone to wear face coverings in public spaces, whether inside or outside, where keeping a physical distance of six feet is not possible.[3] Three days before after Defendants filed their motions, the County also mandated face masks.[4]

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[2] *Why is North Carolina extending Safer at Home Phase 2?* https://www.nc.gov/covid-19/staying-ahead-curve/phase-2-extension-faqs#why-is-north-carolina-extending-safer-at-home-phase-2 (last visited Aug.28, 2020).

[3] NC Department of Health and Human Services, *Frequently Asked Questions on Cloth Face Coverings,* https://files.nc.gov/covid/documents/about/managing-overall-health/FAQs-Cloth-Face-Coverings.pdf (last visited Aug. 28, 2020).

[4] Kimberly Johnson, *Mecklenburg Commissioners Approve Stricter Mask Mandate*, https://patch.com/north-carolina/charlotte/mecklenburg-commissioners-approve-stricter-mask-mandate (July 8, 2020).

The graphs below of COVID-19 data in Mecklenburg County suggest that the situation may be even worse now than it was when Defendants issued and enforced the Proclamation against Plaintiffs—in any event key metrics have not substantially improved.[5] In addition, Mecklenburg County continues to have the highest number of reported COVID-19 cases and deaths—by far—of any county in North Carolina.[6]

Defendants also recently changed course to adopt stricter COVID-19 restrictions on public schooling. Although the Charlotte–Mecklenburg School District planned to reopen schools with partial in-classroom attendance on August 17, it recently altered the policy to mandate fully remote education until further notice.[7]

D. Defendants' unconstitutional actions are capable of repetition, yet evading review.

If Defendants choose to revert to the Proclamation or similar strictures, Plaintiffs will suffer again. And then another policy change could just as easily occur before the case is fully litigated. This a classic example of issues capable of repetition yet evading review, which are exempt from mootness. *See Davis v. Fed.*

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[5] *Data for August 19,* https://www.mecknc.gov/news/Pages/Mecklenburg-County-COVID-19-Data-for-August-19.aspx (Aug. 19, 2020).

[6] *North Carolina Coronavirus Maps and Case Count,* https://www.nytimes.com/interactive/2020/us/north-carolina-coronavirus-cases.html (last visited Aug. 28, 2020).

[7] *CMS Adjusts Back-to-School Plan During Emergency Meeting Thursday,* https://spectrumlocalnews.com/nc/charlotte/news/2020/07/16/charlotte-mecklenburg-schools-votes-on-back-to-school-plan (July 30, 2020).

Election Comm'n, 554 U.S. 724, 735 (2008) (noting the exception's application when an action's duration does not allow it to be fully litigated prior to expiration and when there is a reasonable expectation that the same action will affect the complaining party again).

The ever-changing COVID-19 data and corresponding governmental reactions create a fluid situation in which rules are implemented, changed, eliminated, and reinstituted with breathtaking speed. The fact that the Proclamation was in place for less than sixty days—and was twice revised in that short window—underscores the point. *See* Dkt. No. 21 at 3.

These circumstances highlight the importance of the Court exercising jurisdiction here, permitting this case to proceed, and allowing Plaintiffs to seek relief that will reduce the risk of future harm to Plaintiffs and the public.

II. Plaintiffs have alleged everything necessary to satisfy the liberal standards for pleading federal claims.

This Court is "obliged, in applying Rule 12(b)(6) principles, to accept the allegations of the [] Complaint as true and to view them in the light most favorable to [Plaintiffs]." *Ridpath*, 447 F.3d at 309. "Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations," *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013), but instead requires "the assumption that all the allegations in the complaint are true (even if doubtful in fact)," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

To survive dismissal, a complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551

U.S. 89, 934 (2007) (per curiam) (citations omitted). This Court should not dismiss a constitutional claim "for want of jurisdiction [unless] the alleged claim . . . clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Lee v. Hodges*, 321 F.2d 480, 483 (4th Cir. 1963) (quoting *Bell v. Hood*, 327 U.S. 678, 681–83 (1946)). "[W]here a complainant raises allegations which may or may not state a federal claim, a district court should take jurisdiction to decide the merits of the controversy so long as the questions raised are not frivolous on their face." *Donohoe Const. Co. v. Montgomery Cty. Council*, 567 F.2d 603, 607 (4th Cir. 1977).

"Under the liberal rules of federal pleading, a complaint should survive a motion to dismiss if it sets out facts sufficient for the court to infer that all the required elements of the cause of action are present." *Wolman v. Tose*, 467 F.2d 29, 33 n.5 (4th Cir. 1972). The claims for relief need only be plausible on their face. *Twombly*, 550 U.S. at 570. What this Court must determine is "whether the complaint states a cause of action on which relief could be granted," not "how strong a case the plaintiff may be able to prove or whether he will in the end prevail." *Lee*, 321 F.2d at 485 (cleaned up).

Plaintiffs have met this test in establishing the basic elements of their claims. Taken as true, Plaintiffs' factual allegations lead to "the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). After all, Defendants are the ones who enacted and enforced the unconstitutional Proclamation.

The County's argument for why dismissal is warranted under 12(b)(6) is focused entirely on the merits of the claims. *See* Dkt. No. 19 at 8–25. The cases the County cites were also decided on the merits. *E.g.*, *id.* at 9, 10, 12, 13–14, 16, 22. But this is not the time for resolving the merits of the dispute. A motion to dismiss under Rule 12(b)(6) "does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses." *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013).

Defendants have not argued—and cannot argue—that Plaintiffs' constitutional claims are "patently frivolous," *Hughes v. Chater*, 114 F.3d 1176 (4th Cir. 1997), or "wholly insubstantial," *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015). Accordingly, the Complaint survives dismissal.

A. Plaintiffs have alleged facts stating a plausible free speech claim because Defendants targeted their religious speech.

It is well settled that the First Amendment protects religious speech. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). Prayer in a public place is a type of protected religious speech. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111–12 (2001).

Plaintiffs allege that Defendants did not act neutrally in drafting and enforcing the Proclamation, but targeted certain religious speakers and certain expressive activities—including prayer—for disfavored treatment. Part of the problem was Defendants crafting exceptions for secular activities (e.g., walking outdoors for exercise) while prohibiting similar religious activities (e.g., prayer

walking outdoors). *See, e.g.*, Dkt. No. 1 at ¶¶ 96, 150. Another part of the problem was enforcing the Proclamation against Plaintiffs, even while they were complying with the face of the law. *Id.* at ¶ 115.

These allegations give rise to Plaintiffs' Free Speech claim. Because the Proclamation "applies to particular speech because of the topic discussed or the idea or message expressed," it is a content-based speech regulation and demands strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Even worse, because the Proclamation as enforced doesn't ban all speech about certain topics, but only the pro-life perspective, it engages in viewpoint discrimination—"an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Defendants are free to argue on the merits that the Proclamation doesn't regulate speech or that it satisfies the appropriate constitutional scrutiny, Dkt. No. 19 at 14–16, but that is not the question for this Court in determining whether Plaintiffs have adequately pled this claim—which they have. As with all claims, at the motion to dismiss stage "a plaintiff need not demonstrate that her right to relief is probable or that alternative explanations are less likely; rather, she must merely advance her claim 'across the line from conceivable to plausible.' " *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015) (quoting *Twombly*, 550 U.S. at 570). So long as a plaintiff alleges a plausible prima facie claim of discrimination, a court may not dismiss that claim — even if the defendant

advances a nondiscriminatory alternative explanation for its decision, and even if that alternative appears more probable. *Id.*; *see Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017) ("The question is not whether there are more likely explanations for the City's action . . . but whether the City's impliedly proffered reason . . . is so obviously an irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation that it renders [the plaintiff's] claim of pretext implausible").

Defendants' viewpoint discrimination against Plaintiffs' speech is evident in the Complaint's allegations. Although (i) Plaintiffs qualified as exempted "essential businesses" and "organizations that provide charitable and social services," and (ii) their activities qualified as exempted "essential activities" and "human services operations" under the Proclamation, and (iii) Plaintiffs followed the Proclamation's social distancing strictures, Defendants applied the Proclamation against Plaintiffs to stifle their religious speech. Dkt. No. 1 at ¶¶ 107–115.

The Complaint supports this conclusion. One week before the CMPD arrested Plaintiffs for advancing a message of which the government disapproved, a CMPD officer confirmed that Plaintiffs' expressive activity complied with the Proclamation. *Id.* at ¶¶ 120. Yet seven days later under the exact same Proclamation, with Plaintiffs speaking the same message and offering the same help to women visiting the same abortion clinic, Plaintiffs suddenly became outlaws. *Id.* at ¶¶ 120–124.

What changed? As the Complaint alleges, a City official sent word to CMPD that the government disapproved of Plaintiffs' presence near the abortion facility. Specifically, the City's Mayor Pro Tem re-tweeted pictures of Plaintiffs engaging in their religious speech and social services work (all while social distancing), and demanded that the CMPD "please shut this activity down," then thanked the CMPD "for showing up and hopefully putting an[] end to this." *Id.* at ¶¶ 125–127. The Mayor Pro Tem later tweeted that Plaintiffs were "violating the law" and "should be issued citations if they do not comply with" it. *Id.* at ¶ 128.

After the City's chief executive singled out Plaintiffs in this way, CMPD reversed course and reneged on its assurances that Plaintiffs could engage in their constitutionally protected religious free speech, in accordance with the Proclamation. After the Mayor Pro Tem's accusations and demands, CMPD sent at least 10 patrol vehicles and a dozen officers to corral Plaintiffs, who numbered fewer than 10 and were following the law as CMPD confirmed a week before. *Id.* at ¶¶ 131–133. CMPD then arrested multiple members of Plaintiffs' organizations, alleging (contrary to the facts) that they had violated the Proclamation's 10-person limit. *Id.* at ¶¶ 133, 147. Yet CMPD ignored larger groups congregated at nearby parks and shopping establishments. *Id.* at ¶¶ 134, 150. Defendants do not dispute these factual allegations.

Such disparate treatment—with its genesis in governmental disapproval of Plaintiffs' speech—shows that Defendants' enforcement of the Proclamation is predicated not on public health concerns but rather on the government punishing

Plaintiffs' pro-life views about life, pregnancy, and motherhood, and their religious mission to offer help to women considering abortion. *Id.* at ¶¶ 156–157, 193–195. These allegations are more than enough to plausibly suggest that Defendants wielded the Proclamation as a sword, preventing Plaintiffs from speaking and working in the community, and silencing their prayers and offers of hope.

B. Plaintiffs have alleged facts stating a plausible free exercise claim because the Proclamation targeted their religious viewpoint.

The Free Exercise Clause of the First Amendment, applicable to the states through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), precludes laws that prohibit the free exercise of religion, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id.* at 533. The "effect of a law in its real operation is strong evidence of its object," *id.* at 535, and "there are many ways of demonstrating that the object or purpose of a law is the suppression of . . . religious conduct," *id.* at 533. Even "subtle departures from neutrality" and "covert suppression of particular religious beliefs" are prohibited. *Id.* at 534 (cleaned up). A law that is "underinclusive" to the government's asserted interest is not generally applicable. *Id.* at 543. Finally, "a law targeting religious beliefs as such is never permissible." *Id.* at 533.

Plaintiffs have alleged that their religious beliefs motivate them to pray, speak biblical messages of hope, and provide charitable services through an

organized nonprofit ministry. Dkt. No. 1 at ¶¶ 167–170. But Defendants enacted a facially non-neutral law that "exempts certain secular activities while prohibiting similar religiously motivated activities," including Plaintiffs'. *Id.* at ¶¶ 95–96, 171. In addition, Defendants have enforced the Proclamation in a non-neutral way, "interfer[ing] with the [Plaintiffs'] religious expression and practices without any evidence of a compelling need" based on public health. *Id.* at ¶ 175. They have done so even when Plaintiffs fully complied with the Proclamation. *Id.* at ¶¶ 107–115, 121. And they have acted non-neutrally consistent with government officials' oral expressions that demonstrate hostility toward Plaintiffs' religious ministry. *Id.* at ¶¶ 124–131.

As alleged, therefore, Defendants' conduct "infringe[s] upon or restrict[s] practices because of their religious motivation," *Lukumi*, 508 U.S. at 533, and imposes "burdens only on conduct motivated by religious belief," *id.* at 543. Thus Plaintiffs' pleadings plausibly support the " 'slight suspicion' of religious animosity that the Supreme Court, in both *Lukumi* and *Masterpiece Cakeshop*[v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018)], indicated could raise constitutional concern." *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 165 (2d Cir. 2020) (citations omitted) (reversing dismissal of free exercise claims).

In similar challenges to COVID-19 regulations applied unequally to burden religious exercise, district courts have allowed the cases to proceed—and ultimately ruled in favor of plaintiffs. *See, e.g.*, *Berean Baptist Church v. Cooper*, 2020 WL 2514313, at *7 (E.D.N.C. May 16, 2020) (enjoining, as likely violative of free

exercise rights, state COVID-19 order banning gatherings of 10 or more indoors for worship while allowing such gatherings at "countless other businesses of all kinds"); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020) (enjoining on free exercise grounds an executive order banning mass gatherings for religious services while exempting various stores and business); *First Baptist Church v. Kelly*, 2020 WL 1910021, at *8 (D. Kan. Apr. 18, 2020) (denying motion to dismiss free exercise claim where "comparable secular gatherings are subjected to much less restrictive conditions" under state's COVID-19 executive order). This Court should take the same path.

Plaintiffs have (more than) adequately alleged a free exercise claim.

C. Plaintiffs have adequately alleged an expressive association Claim.

"[A]n association that seeks to transmit . . . a system of values engages in expressive activity." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000). Plaintiffs do just that when they engage in prayer walking and counseling as part of their religiously motivated services. Dkt. No. 1 at ¶¶ 63–64, 70–71. This Court must "give deference to an association's assertions regarding the nature of its expression . . . [and] give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653.

Plaintiffs have alleged that they desire to "interface," "meet with," and "provide referrals" to those they serve. Dkt. No. 1 at ¶ 73. For instance, this is how Plaintiffs connect women with free mobile sonograms on site. *Id.* at ¶ 43. It is how Plaintiffs are able to "pray for any needs that people going in or out of the facilities

may share." *Id.* at ¶ 39. This in-person interaction is also critical because it allows Plaintiffs to offer potentially life-saving treatment after a woman ingests abortion-inducing drugs. *Id.* at ¶¶ 45–46.

It is certainly plausible, as Plaintiffs alleged, that Plaintiffs' expressive association is more effective in person, in the vicinity of other like-minded members, and near the abortion facility. *See, e.g., id.* at ¶¶ 72–73. Defendants' enforcement of the Proclamation prevented from engaging in these group expressive activities. *Id.* at ¶ 190.

In the face of these plausible allegations, Defendants cannot obtain dismissal of the expressive association claim simply because they think Plaintiffs could use "other means, such as electronic platforms" to associate. *See* Dkt. No. 19 at 17. The First Amendment "presume[s] that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 791 (1988). The well pled facts show that Plaintiffs' expressive association is fundamentally and necessarily face to face (even while socially distanced).

D. Plaintiffs' vagueness allegations are well pled.

The Complaint alleges a due process claim under the Fourteenth Amendment that is, at a minimum, plausible. Plaintiffs allege, for example, that the Proclamation includes terms that are unconstitutionally vague and leave Defendants with unbridled discretion. Dkt. No. 1 at ¶¶ 204–209. Specifically, terms that should allow Plaintiffs to engage in their expressive, charitable, and religious

activities—e.g., "charitable and social services," "outdoor activity," "human services operations," and "necessities of life"—are left substantially undefined and open to Defendants' arbitrary interpretation. *Id.* at ¶ 207. This lawsuit itself shows that Plaintiffs have already been adversely affected by lack of clarity in these key terms. Nor have Defendants specified how they will determine whether more than 10 people are "gathered" or who is part of a "gathering"—particularly relevant with outdoor, distanced activities. *Id.* at ¶¶ 151, 208.

As the complaint's allegations show, the Proclamation is so vague that Defendants have changed the way they interpreted and enforced it from week to week. On March 28, Defendants said Plaintiffs' activities were fully compliant; but on April 4, Defendants arrested and cited Plaintiffs for the same speech and conduct. *Id.* at ¶¶ 120–121. On April 11, a CMPD officer told Plaintiffs that Defendants were changing the way they enforced the Proclamation (again), and would be interpreting differently whether a "gathering" exceeds 10 people and who within the "gathering" was subject to punishment. *Id.* at ¶¶ 153–154.

These pleadings sufficiently allege that the Proclamation does not give Plaintiffs "adequate notice of what conduct is prohibited" or "include sufficient standards to prevent arbitrary and discriminatory enforcement." *Manning v. Caldwell for City of Roanoke,* 930 F.3d 264, 272 (4th Cir. 2019) (concluding that the district court erred in dismissing a vagueness challenge); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and

subjective basis, with the attendant dangers of arbitrary and discriminatory application").

E. Plaintiffs allege a plausible equal protection claim.

The Complaint alleges, citing the Proclamation as support, that Defendants permit gatherings of more than 10 people to walk outdoors for exercise, but do not permit Plaintiffs to walk outdoors in a gathering of more than 10 people when their purpose is prayer and religious speech. Dkt. No. 1 at ¶¶ 236–237. Similarly, the Complaint alleges that Defendants allow other organizations providing services to operate under an exemption to the Proclamation, but do not extend the same exemption to Plaintiffs. *Id.* at ¶ 238. For example, the Complaint alleges that at the same time Plaintiffs were cited and arrested, "scores (if not hundreds)" of people were gathered together in an adjacent parking lot and building, yet none were arrested or cited. *Id.* at ¶¶ 134–136. The Complaint also alleges that "nearby parks had more than 10 people present who were not engaged in essential business under the Proclamation or exercising their First Amendment rights," while Plaintiffs were doing both. *Id.* at ¶ 150.

These allegations plausibly state an equal protection claim. "An equal protection violation occurs . . . when a law is facially neutral, but its administration or enforcement disproportionately affects one class of persons over another and a discriminatory intent or animus is shown." *Monroe v. City of Charlottesville*, 579 F.3d 380, 388 (4th Cir. 2009) (citation omitted). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). "When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008).

The Complaint alleges that Defendants have not treated Plaintiffs equally to others and that no legitimate public health reason exists for the differential treatment. These well pled allegations form a plausible basis for Plaintiffs' equal protection claim.

III. Abstention under *Younger* is inappropriate and would deprive Cities4Life and Global Impact Ministries of the opportunity to seek constitutionally guaranteed relief.

Younger abstention is the exception, not the rule: "federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984). Importantly, "*Younger* abstention is not appropriate if the litigant will not be afforded an adequate opportunity to litigate constitutional claims in the state proceedings." *Reaching Hearts Int'l, Inc. v. Prince George's Cty.*, 584 F. Supp. 2d 766, 793 n.20 (D. Md. 2008), aff'd, 368 F. App'x 370 (4th Cir. 2010) (citing *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)).

For that reason, Cities4Life's and Global Impact Ministries' claims are not subject to *Younger* abstention. They are not parties to the state proceedings and thus will have no opportunity to litigate their constitutional claims there. Both entities represent members who were *not* arrested or cited but whose rights were

infringed by application of the Proclamation. *See* Dkt. No. 1 at ¶¶ 69, 133, 142. These groups and individuals cannot be deprived of the opportunity to litigate their constitutional claims just because *other people* coincidentally were injured by the same law and punished by state authorities.

This is not a close question. For example, in *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Bd. of Higher Education*, the Third Circuit denied *Younger* abstention as to federal plaintiffs without state criminal charges because "pending prosecution against *someone else* affords no opportunity for non-parties to assert their own first amendment rights, because the state will not permit them to participate in the defense of penal charges against others." 654 F.2d 868, 882 (3d Cir. 1981) (emphasis added). In *Robinson v. Stovall*, the Fifth Circuit "d[id] not agree that the non-arrested plaintiffs fall under the same burden of *Younger* abstention as their arrested colleagues." 646 F.2d 1087, 1091 (5th Cir. 1981). The Seventh Circuit similarly rejected abstention where one federal plaintiff was "not presently a plaintiff in the state proceeding" and "was not the subject of the [state charges]," and the state court parties "most likely could not assert [the federal plaintiff's] constitutional rights before the state tribunal." *Bickham v. Lashof*, 620 F.2d 1238, 1244 (7th Cir. 1980). The same is true here.

The cases the County cites on this point do not address the relevant question. *Norfolk Southern Railway Co. v. McGraw* is distinguishable because the federal plaintiffs were actual litigants in the state proceedings. *Norfolk Southern*

71 F. App'x 967, 972 (4th Cir. 2003). The district court abstained because the plaintiff had "not attempted to present his federal claims in related state court proceedings," in which case federal courts generally "assume that state procedures will afford an adequate remedy." *Id.*; *but see* Dkt. No. 19 at 6 (County citing *Norfolk S. Ry. Co.* and claiming that *non-litigant* Plaintiffs "have ample opportunity to raise their constitutional challenges in the course of the state court proceedings"). Likewise, as the County's cite reveals, *Moore v. City of Asheville* involved a single federal plaintiff who was a defendant in state criminal proceedings. 396 F.3d 385, 387 (4th Cir. 2005). Cities4Life and Global Impact Ministries are not state-court defendants, so these precedents do not apply.

In arguing that this Court must abstain, the County relies primarily on a case in which the district court did *not* abstain. *See* Dkt. No. 19 at 5–8. The *Lighthouse* district court retained jurisdiction over the plaintiff's motion for preliminary injunction and temporary restraining order (currently on appeal) — and retains jurisdiction over the merits of the plaintiff's complaint. *Lighthouse Fellowship Church v. Northam*, 2020 WL 2110416, at *1 (E.D. Va. May 1, 2020) (appeal filed May 4, 2020). It exercised jurisdiction and considered likelihood of success on the merits of plaintiff's free speech, free exercise, and other claims—just as Plaintiffs ask the Court to do here. *Id.*

The only portion in the *Lighthouse* case where the district court abstained was in the course of denying an emergency injunction pending appeal. *Lighthouse Fellowship Church v. Northam*, 2020 WL 2614626, at *10 (E.D. Va. May 21, 2020).

That procedural posture—and standard of review—is entirely differently from a motion to dismiss. What matters is that the *Lighthouse* court ruled on the merits of the church's motion for preliminary injunction and temporary restraining order—without abstaining (even though the criminal charges had already commenced). If anything, *Lighthouse* undermines Defendants' abstention arguments.

Defendants' reliance on *Cinema Blue* is also unfounded. The Fourth Circuit abstained in that case because "the express purpose of the injunction was to vindicate the rights of parties, the federal plaintiffs, who were parties to the pending state prosecution." *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 53 (4th Cir. 1989). But Cities4Life and Global Impact Ministries are not state-court defendants. In that scenario, *Cinema Blue* held that "an individual *who is not a party to ongoing state proceedings* [is] entitled, over abstention objections, to federal injunctive relief against future enforcement of state laws." *Id.* In other words, the Fourth Circuit distinguished our facts here (with the exception of Mr. Behnam)[8]—and made clear that *Younger* does not apply.

The City's cases are no better. The only federal plaintiff in *Huffman v. Pursue, Ltd.* was, yet again, the only litigant in the duplicative state proceeding. 420 U.S. 592 (1975); *but see* Dkt. No. 21 at 21–22 (discussing *Huffman* at length and attempting to analogize it). The City's passing cite to *ACLU v. Bozardt*, 539 F.2d 340 (4th Cir. 1976), is slightly closer, but still distinguishable. There, the

[8] Even as to Mr. Benham, this Court's consideration of his request for declaratory relief and damages would neither enjoin nor otherwise block the state proceedings.

ACLU asked a federal court to *block* the state court proceedings against one of its members. *Id.* at 342. Cities4Life and Global Impact Ministries have not asked for anything of the sort — and have disclaimed relief relating to any state charges. Dkt. No. 1 at ¶ 143. Relatedly, *Bozardt* concluded that granting the ACLU's requested relief would necessarily impact the proceedings against one of its members and therefore "directly interfere with the pending state proceedings." 539 F.2d at 343. The same is not true here because Plaintiffs are not asking the Court to rule on whether the arrests were legal, nor are they seeking a preliminary injunction.

Federal courts do not abstain from hearing constitutional claims simply because a federal complaint coincides with a state criminal proceeding that may address a portion of the issues. Turning the *Younger* test into the question whether "the federal plaintiff's interests would be vindicated proves too much." *New Jersey-Philadelphia Presbytery*, 654 F.2d at 881. To be sure, in many cases, if "the state defendants obtained rulings invalidating the local laws, the federal plaintiffs would have been vindicated . . . [,] no matter how unrelated the federal plaintiff." *Id.* But "[t]hat does not mean that a federal plaintiff may not bring an action so long as some state proceeding addressing the same constitutional issue is pending." *Id.*

The same logic applies here. Though state criminal proceedings against certain individuals may involve some overlapping facts and issues, they do not "provide[] an adequate opportunity for the plaintiff[s Cities4Life and Global Impact Ministries]" to make their case. *United States v. South Carolina*, 720 F.3d 518, 526

(4th Cir. 2013). This is the "pivotal question" in an abstention analysis, and the answer here requires this Court to retain jurisdiction over the claims. *Potomac Elec. Power Co. v. Sachs*, 802 F.2d 1527, 1531–32 (4th Cir. 1986).

CONCLUSION

Plaintiffs David Benham, Cities4Life, and Global Impact Ministries followed the law when they cautiously engaged in free speech and religious exercise (while social distancing), offering charitable services to voluntary recipients in their community during the COIVD-19 pandemic. But their religious mission wasn't ideologically pleasing to City and County officials. So, while groups around Charlotte freely assembled, walked, shopped, and transacted business, Plaintiffs were threatened and cited for virtually identical conduct.

Given Plaintiffs' well-pled allegations, Defendants cannot sweep their constitutional violations under the rug. This Court should deny the motions to dismiss and give Plaintiffs an opportunity to flesh out their plausible First and Fourteenth Amendment claims through discovery.

Dated this 31st day of August, 2020.

Respectfully Submitted,

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**Special Admission*

CERTIFICATE OF SERVICE

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This the 31st day of August, 2020

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