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2 UNITED STATES DISTRICT COURT  
3 FOR THE EASTERN DISTRICT OF CALIFORNIA  
4

5 DIANE ANDERSON; DONA CLOUD,  
6  
7 Plaintiffs,

8 v.

9 DAVE SMITH, Clovis Police  
10 Department; JIM KOCH, Corporal,  
11 Clovis Police Department; BETTY  
12 COCHRAN, Clovis Animal Control  
13 Officer; SHAWN KNAPP, Clovis  
14 Animal Control Officer; STEVE  
15 BAKER, Clovis Code Enforcement  
16 Officer; KEN BAXTER, Clovis Code  
17 Enforcement Officer; CITY OF  
18 CLOVIS; DOES 1-20.

19 Defendants.

1:06-CV-1795 OWW SMS

MEMORANDUM DECISION GRANTING  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT AS TO ALL CLAIMS  
AGAINST ALL DEFENDANTS.

20 I. INTRODUCTION

21 This case arises out of the October 26, 2005 entry into  
22 Plaintiffs' residence at 2557 Harvard Avenue in Clovis,  
23 California, by members of the Clovis Police Department, Clovis  
24 Animal Control Officers, and Clovis Code Enforcement Officers.  
25 Plaintiffs' First Amended Complaint ("FAC") alleges seven counts,  
26 some of which encompass several causes of action:

27 (1) "Violation of Federal Civil Rights (Illegal Entry,  
28 Search, Seizure, 4th Amendment Violations)";

(2) "Trespass, Invasion of Privacy, Conversion";

1 (3) "Assault, Battery; Excessive Force";

2 (4) "Violation of Civil Rights (Due Process), Abuse of  
3 Process (Destruction of Pets Without Notice),  
4 Intentional Infliction of Emotional Distress;  
5 Conversion (Destruction of Pets);

6 (5) Violation of Civil Rights (Due Process);  
7 Conspiracy; Abuse of Process (Refusal of Access to  
8 Evidence);

9 (6) Violation of Federal Civil Rights; Conspiracy  
10 (Substantive Due Process: Exclusion From, Loss of Home)

11  
12 Doc. 6.

13 Defendants Dave Smith, Jim Koch, Betty Cochran, Shawn Knapp,  
14 Steve Baker, Ken Baxter, and the City of Clovis, move for summary  
15 judgment, arguing with respect to the Fourth Amendment  
16 allegation: (1) that Plaintiff Dona Cloud consented to the  
17 entry; and alternatively, that the entry was also required  
18 (2) to protect the health and/or safety of a number of animals  
19 residing there in unacceptably unsanitary conditions; and (3) to  
20 protect the health of Ms. Cloud, an elderly woman residing at the  
21 residence, who Defendants claim to have observed outside the  
22 residence with what they believed to be animal feces on her  
23 hands, feet, and person, and an open tracheotomy wound on her  
24 throat. Defendants also maintain that they are entitled to  
25 summary judgment on all of the remaining claims in the case.  
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1 Ms. Anderson admitted to having nine or more dogs, and indicated  
2 her intent to comply with Smith and Cochran's request that she  
3 remove all but three dogs from the residence. *Id.* Ms. Anderson  
4 indicated that she would comply with this request and would be  
5 ready for re-inspection the following week. *Id.* at ¶10.

6  
7 On Tuesday, October 25, 2005, Cochran and Smith returned to  
8 Ms. Anderson's residence, but were unable to establish contact  
9 with anyone. Smith returned the following morning, and was able  
10 to contact Ms. Anderson. *Id.* at ¶11. Ms. Anderson came into the  
11 front yard through her garage. *Id.* Smith called Cochran to meet  
12 them. *Id.* Smith observed unfinished carpentry work, wet floors,  
13 and exposed wires in the open garage, all of which were, in his  
14 opinion, in violation of the municipal building code. *Id.* Once  
15 Cochran arrived, she could smell urine and feces coming from the  
16 home. Cochran Decl. at ¶7.

17  
18 Smith explained to Ms. Anderson that he and Cochran were  
19 there to re-inspect her residence. Ms. Anderson stated that she  
20 understood, but had not been able to comply with the officers'  
21 requests. Smith Decl. at ¶12. Smith told Ms. Anderson that he  
22 was not inclined to give her an extension, as there was a "gross  
23 violation" of City Ordinances and the neighbors were being  
24 inconvenienced. *Id.* Anderson indicated that she understood, but  
25 did not know how to solve the problem and that it would take her  
26 some more time to find homes for the animals. *Id.*

1 Cochran said it would be better to take the animals to the  
2 Clovis Animal shelter, so they could begin the process of  
3 adopting them out. Ms. Anderson reluctantly agreed to surrender  
4 the "puppies." Cochran Decl. at ¶8. Ms. Anderson refused to  
5 allow the officers inside the house to help evacuate the animals.  
6 Smith Decl. at ¶14. She made eight trips in and out of the  
7 house, bringing out a total of sixteen puppies. *Id.* at ¶14.  
8 Officer Smith described the condition of the dogs as follows:  
9

10 Each puppy was similar in size and weight and they  
11 appeared to be six to seven week old shepherd mix  
12 puppies. The puppies had an extremely foul odor  
13 and it was obvious they also had significant flea  
14 infestation and a skin disorder where hair was  
15 missing, and a rash was visible on the puppies'  
16 skin. Fleas jumped from the puppies onto my arms  
17 as I handled them [to Officer Cochran]. The  
18 puppies appeared very weak and in bad condition  
19 all the way around. They were sticky to the touch,  
20 as if they had been soaking in urine.

21 *Id.* at ¶15. Officer Cochran has been an Animal Control Officer  
22 for the City of Clovis for eight years, and an employee at a  
23 veterinarian's office for six years before that. Cochran Decl.  
24 at ¶3. She possesses a Bachelor of Science degree in Animal  
25 Science and has worked with animals for nearly twenty years. *Id.*  
26 She described the condition of the animals Ms. Anderson brought  
27 outside as follows:  
28

29 I immediately noticed the puppies had a strong  
30 odor of urine and feces coming from them, there  
31 was feces matted in the pads of their feet, there  
32 was excessive flea infestation on each puppy, the  
33 puppies had scabs covering their bodies due to the  
34 flea infestation, they were sticky to the touch  
35 from being soaked in urine over a prolonged period  
36 of time without cleaning, and they had distended  
37 abdomens typical of worm infestation. Because of

1 my years of experience working with animals I  
2 recognized the puppies as being very neglected. In  
3 spite of my years of experience dealing with  
4 animals I found the condition of the puppies to be  
5 revolting.

6 *Id.* at ¶9.

7 As Ms. Anderson continued to bring puppies out of the  
8 residence, Officer Smith "could still hear dogs barking inside,"  
9 making it "obvious" to him that "there were still more than three  
10 animals inside the residence." Smith Decl. at ¶16. "As each set  
11 of puppies came out of the home," Cochran "noticed the odor of  
12 urine and feces becoming stronger." Cochran Decl. at ¶10. This  
13 led her "to understand that the smell was coming from the home as  
14 well as the puppies. I believed at this time, due to my years of  
15 experience, that it was necessary to remove all of the animals  
16 from the home immediately in order to protect them." *Id.* By  
17 this time, Corporal Jim Koch had been called to assist with the  
18 investigation. Smith Decl. at ¶16

19 While Officer Smith was discussing the circumstances with  
20 Ms. Anderson, she volunteered information about her 73 year old  
21 mother, Dana Cloud, who was living in the residence. Smith  
22 declares:

23 While discussing the seriousness of the circumstances  
24 with Ms. Anderson, she stated she was frustrated  
25 because she could not accomplish the task of  
26 transporting the animals to other locations because her  
27 mother, a seventy-three-year-old female (plaintiff Dona  
28 Cloud), was in the residence confined to a wheelchair  
and walker, and spent most of the time laying in bed as  
she recovered from tetanus that begin in June of 2005.  
After further discussion, Ms. Anderson said her mother

1 had received a splinter from within the residence that  
2 became infected, causing the tetanus, and she had been  
hospitalized for a lengthy period of time.

3 *Id.* at ¶17. "Considering the description of Ms. Anderson's  
4 mother living within the residence with such a serious health  
5 condition, the unbelievably foul odor emanating from the  
6 residence and condition of the puppies removed from the  
7 residence, along with the significant number of dogs still within  
8 the residence," Officer Smith determined that a health and safety  
9 check of Ms. Anderson's mother was required. *Id.* at ¶18.

11 Smith told Ms. Anderson that the Officers needed to "inspect  
12 the condition of the residence where her mother was  
13 convalescing." *Id.* at ¶19. According to Smith, Ms. Anderson  
14 responded that "she was an in-home service provider for the  
15 elderly working for the County of Fresno and she understood the  
16 need to provide a safe and healthy environment for the elderly.  
17 She also said the condition of the residence was safe and healthy  
18 and there was no need for an inspection. At this time, Ms.  
19 Anderson was told the inspection had to occur for the safety of  
20 her mother, at which time she said 'fine, I'll bring her to you;  
21 stay out of my house.'" *Id.* Ms. Anderson went inside the  
22 residence and wheeled Dona Cloud outside in her wheelchair. *Id.*  
23 at ¶20. According to Smith: "Ms. Cloud had what appeared to be  
24 fecal matter on her hands, feet and legs, otherwise she appeared  
25  
26  
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1 in reasonable health, and appeared alert and oriented." *Id.*<sup>1</sup>  
2 Smith notified Adult Protective Services. *Id.* Case Worker Susan  
3 Woodward, a social worker, responded to the scene. *Id.* Ms.  
4 Woodward concluded that Dona Cloud was in the home of her own  
5 free will and that Adult Protective Services would not intervene.  
6 *Id.* Smith, however, continued to be concerned for the health of  
7 Ms. Cloud and Ms. Anderson because the home was "in violation of  
8 several Municipal and Penal Codes." *Id.* at ¶21.

10 Smith explained to Ms. Anderson "that Section 6.1.503 of the  
11 Clovis Municipal Code state[s] [that] every person keeping an  
12 animal shall at all times keep cages, yards and other enclosures  
13 where the animal is kept in a clean and sanitary condition and  
14 shall remove excreta and manure therefrom every day or as often  
15 as is necessary so as not to become a nuisance in the  
16 neighborhood; and 6.1.503(b) [] states [that] no person shall at  
17 any time maintain any lot or other premises in the city upon  
18 which any animal is kept in an unsanitary condition or in such  
19 condition as to cause the same to be infested with flies or  
20 insects or to create any noxious or offensive odor." *Id.* at ¶22.

23 Smith concluded that "[c]learly the conditions at 2557  
24 Harvard Avenue where humans were living were in severe violation

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25 <sup>1</sup> Ms. Anderson asserts that it was just "dirt" on her mother's  
26 hands, feet, and person, because her mother was helping to clean up the  
27 backyard. Anderson Decl., Doc. 31, at ¶4. This explanation is  
28 considered in view of the fact that Ms. Cloud was confined to a  
wheelchair. Nonetheless, even if accepted, it does not undermine the  
reasonableness of the officers' belief, under the circumstances, that  
the filth observed on Ms. Cloud was feces.



1 of the City Municipal Code, [] flies at the residence numbered in  
2 the hundreds or thousands; fleas were such that every animal and  
3 piece of carpet or bedding was visibly infested, and the noxious  
4 odor was so apparent that the [neighbors] had been calling for  
5 weeks complaining of the odor emanating from 2557 Harvard when  
6 the door was open or the air conditioning was on." *Id.* at ¶23.  
7  
8 Smith further explained that "the conditions of the residence  
9 were not safe or sanitary for her mother or herself." *Id.* at  
10 ¶24.

11 Ms. Anderson explained that she was in the process of  
12 refinancing the home and would be able to fix any problems. *Id.*  
13 at ¶25. According to Smith, Ms. Anderson gave Smith the contact  
14 information for the company that was refinancing the home. Smith  
15 then called the mortgage company and asked to speak to the  
16 appraiser "in order to interview him with respect to the  
17 condition of the home." *Id.* Smith was unable to reach him. *Id.*  
18 Ms. Anderson denies ever giving Officer Smith information about  
19 her home loan. Anderson Decl. at ¶10. She asserts that Smith  
20 must have obtained the information while inside the home. *Id.*

21  
22 At some point after the puppies and Ms. Cloud were brought  
23 outside the residence, Officer Koch conferred with Officer Smith  
24 about entering the home to check on the safety of Ms. Cloud and  
25 the animals. Koch Decl. at ¶13. Koch believed that they did not  
26 need a warrant to do so under an exception to the warrant  
27  
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1 requirement. *Id.*

2 According to Smith, as he was explaining his concern  
3 for Dona Cloud's health and safety, "Ms. Cloud spoke up and  
4 said we could enter the home to check on her living  
5 conditions." *Id.* at ¶26. Smith recalls that "Ms. Anderson  
6 yelled at Ms. Cloud and told her to 'shut up' because 'you  
7 don't know what you're saying'." *Id.* Smith then "told Ms.  
8 Anderson that I would be forced to arrest her if she  
9 continued to threaten her mother." *Id.* Both Ms. Anderson  
10 and Ms. Cloud dispute Smith's recollection that Ms. Cloud  
11 consented to inspection of the home. Anderson Decl. ¶6;  
12 Cloud Decl. ¶1; Ruling on Motion to Suppress in *People v.*  
13 *Anderson*, Ex. F. to Holland Decl, Doc. 32.<sup>2</sup>

14  
15  
16 Smith then explained to Ms. Anderson that the officers  
17 needed to remove the animals from her residence. *Id.* at  
18 ¶27. Smith recalls that Ms. Anderson gave him "permission  
19 to enter her residence for the sake of removing the  
20 animals." *Id.* Ms. Anderson denies this. Anderson Depo. at  
21 136. According to Ms. Anderson, she continued to deny the  
22 Officers entry and, as they were approaching the door, she  
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24 <sup>2</sup> Defendants argue that Plaintiffs' contrary evidence with respect  
25 to consent should be disregarded because: (1) Ms. Anderson was not  
26 present for the entire time that officer Smith was speaking with Ms.  
27 Cloud; and (2) that Ms. Cloud, who has since been diagnosed with  
28 dementia, is not competent to recant her earlier statements. These  
objections go to the weight of Plaintiffs' counter-evidence, not their  
admissibility. Viewing the evidence in a light most favorable to  
Plaintiffs, no consent was given.

1 said "You are not going in." *Id.* She claims that an  
2 officer, possibly Officer Smith, then grabbed her elbow to  
3 prevent her from entering the home. *Id.* This forms the  
4 basis of Ms. Anderson's excessive force claim. She does not  
5 recall that the grabbing of her wrist hurt her in any way.  
6 She was not bruised. She simply asserts that "it made me  
7 mad." *Id.* at 182.<sup>3</sup>

9 Smith's disturbing description of how events unfolded during  
10 the entry into the home is essentially undisputed:

11 28. At this point Betty Cochran, Shawn Knapp, Jim  
12 Koch, and I, made our way to the front door of Ms.  
13 Anderson's residence for the purpose of entering  
14 and removing the unknown number of animals within.  
15 What took place while removing the animals is very  
16 difficult to describe, and pictures were taken to  
17 document the absolute atrocity that was found as  
18 we entered the front door.

19 29. Upon opening the front door of Ms. Anderson's  
20 residence, all officers had to step back because  
21 the odor was so strong. It was necessary that  
22 everyone obtain a mask in order to try to re-enter  
23 the home and collect the animals.

24 30. Once inside the residence, numerous dogs (more  
25 than I was able to count) were running every  
26 direction within the house, the floors of the  
27 residence had what appeared to be remnants of  
28 carpet that were completely disintegrated and  
apparently absorbed into the existing wood floor  
that was wet and saturated with urine and fecal

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3 Defendants attempt to overcome this allegation by pointing out  
that Ms. Anderson admitted in her deposition that she was facing the  
other way when Officer Smith grabbed her elbow. Anderson Depo. at 137.  
According to Defendants, the fact that she "wasn't watching" Smith at  
the time of the contact renders her excessive force and battery claims  
unavailable because she fails to "allege sufficient facts to support  
the required elements of these allegations." Doc. 37 at 11.  
Defendants cite no authority for the proposition that a person cannot  
be the victim of excessive force and/or battery simply because he or  
she was not watching the alleged assailant prior to the allegedly  
unlawful contact.

1 matter. As I looked down the hallway, I saw a  
2 shovel standing against the wall with fecal matter  
3 stacked and smeared three to four feet up the  
4 wall.

5 31. There were numerous dogs in the living  
6 room area and I and others began capturing the  
7 dogs with catch sticks. During this process,  
8 fourteen (14) large breed adult dogs were removed,  
9 each of the dogs was clearly unkempt, infested  
10 with fleas, had severe skin problems, and was  
11 completely non-socialized.

12 32. After seizure of the fourteen dogs, the  
13 inspection of the residence continued. The kitchen  
14 was so dirty and deteriorated that it defies  
15 description by words alone. There were spider webs  
16 so thick it looked like a Halloween decoration.  
17 Animals were hiding within the cupboards that had  
18 been chewed, scratched and clawed to where they  
19 were only partially intact and some cupboards were  
20 actually removed.

21 33. In the living room there was a portable blow-  
22 up airbed covered in linen and blankets which were  
23 smeared with fecal matter. I was informed by Ms.  
24 Anderson this was where her mother had been  
25 sleeping. The fecal matter on the bed was in all  
26 conditions, some fresh and some dried onto the  
27 bedding. It was also obvious from the stains that  
28 dogs had been urinating on the side of the bed.

29 34. Upon entering the hall bathroom, I found adult  
30 cats within the room and they appeared to have  
31 been locked in there for weeks or possibly months  
32 without any cleaning; the bathtub was  $\frac{1}{4}$  full of  
33 liquid that was dark black in color and smelled  
34 very foul of urine and feces, and the room was so  
35 covered in cat urine and feces that I could not  
36 move within without slipping. Betty Cochran  
37 accomplished the task of removing the cats from  
38 the bathroom.

39 35. Further down the hall was a bedroom with a  
40 bathroom which appeared to be "somewhat  
41 functioning" in that the water ran, but that  
42 bathroom was also covered in fecal matter and  
43 urine. There was no possible way of arriving in  
44 this room in a sanitary condition or standing  
45 within that room in any way to utilize the toilet  
46 or shower facilities without standing, walking or  
47 handling animal fecal matter and urine.

48 36. When Ms. Anderson was asked about the master  
49 bedroom, she stated this was the bedroom they used

1 to sleep in until rats began biting their heads at  
2 night, at which time they moved into the living  
3 room where they were now sleeping. Ms. Anderson  
4 also said that the end of the house had no  
5 electricity because rats had chewed the wiring in  
6 the attic. I observed the entire end of the house  
7 was covered in spider webs, which were very thick.

8 37. Upon entering another bedroom and after  
9 removing another dog from that room, I found two  
10 birds in a cage suspended from the ceiling, one a  
11 dove and the other a small parrot-type bird. There  
12 were also several kittens, possibly just several  
13 days old on the floor along with one adult cat.  
14 Five kittens were removed from that room.

15 38. At this time, I heard a strange sound coming  
16 from the mattress in the bedroom, and the mattress  
17 appeared to start moving and a small Lhasa-type  
18 dog was found in such terrible condition that its  
19 hair was matted and missing, it was blind in both  
20 eyes and it was unable to open its mouth due to  
21 the matted hair on its lips. The dog was emaciated  
22 and barely able to move, so it was taken to a  
23 veterinarian by Betty Cochran.

24 Smith Decl. at ¶¶ 28-38. Officer Cochran described similarly  
25 deplorable conditions:

26 15. I entered the home at 2557 Harvard Avenue to  
27 collect the animals. In spite of my experience  
28 dealing with animals I was overwhelmed by the  
odor. I immediately discovered that I was correct  
in believing the home was incredibly unhealthy for  
the animals and they were in need of immediate  
medical rescue from the despicable environment.  
The home was full of feces and urine on the  
floors, counters, and furniture. The house was in  
a state of disrepair and animals appeared to be  
all over the home and even living in the  
cupboards.

16 16. Of the animals collected, all of the kittens  
17 died, all of the adult cats except one died from  
18 combinations of feline leukemia and compromised  
19 immune systems. The single cat that was euthanized  
20 was later caught in the garage at 2557 Harvard and  
21 was being eaten by maggots while it was still  
22 alive.

23 17. Several of the puppies suffered from upper  
24 respiratory infection and were given courses of  
25 antibiotics as treatment. One of those puppies,  
26

1 Rufus, died in my arms from that infection several  
2 weeks later. Despite the antibiotics, he was not  
3 strong enough to recover from the infection  
4 because his immune system was severely compromised  
5 due to the e-coli, coccidiosis, roundworms, and  
6 enterococcus he carried from his time at 2557  
7 Harvard Avenue. I believe each and every puppy  
8 would have had severe problems, including possible  
9 death, if not rescued from 2557 Harvard Avenue on  
10 October 26, 2005.  
11 Cochran Decl. at ¶¶ 15-17 (emphasis added).<sup>4</sup>

12 Ms. Anderson does not contradict the essential nature of the  
13 Officers' description of the condition of the home or of the  
14 animals therein. Rather, she asserts that, although some of the  
15 dogs were "not socialized," none were "vicious." Anderson Decl.  
16 at ¶9. She claims that some of the officers were abusing the  
17 animals as they were collecting them by poking sticks in their  
18 mouths and ensnaring them around the neck. *Id.* She also  
19 maintains that all of the animals were "well fed" and that the  
20 "puppies had scrambled eggs for breakfast the day of the  
21 incident." *Id.* Finally, she asserts that the puppies "had been  
22 dewormed but picked up worms again." *Id.* She does not dispute  
23 the foul smell,<sup>5</sup> the physical condition of the animals, nor the  
24 unsanitary condition of her residence.

25 Ms. Anderson signed a euthanasia form releasing the animals

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26 <sup>4</sup> Plaintiff objects to certain portions of the Cochran Declaration  
27 on the ground that Cochran is not a licensed Doctor of Veterinary  
28 Medicine and is unqualified to offer any veterinary medical opinions  
under Federal Rule of Evidence 701. *See, e.g.,* Doc. 29 at 5, 12. This  
objection is without merit. Officer Cochran is a proper lay witness  
and has specialized knowledge gained because of her employment. *See*  
*U.S. v. Harrison*, 64 F.3d 491, 493 (9th Cir. 1993).

<sup>5</sup> Ms. Anderson in fact admitted in her deposition that, at the time  
of the incident, her sense of smell was not functioning properly.  
Anderson Depo. At 173-74.

1 to the custody of Animal Control. Cochran Decl. at ¶12. Cochran  
2 recalls that, after signing the euthanasia form releasing the  
3 animals, Ms. Anderson pointed at her mother and asked "can you  
4 euthanize her instead?" Cochran Decl. at ¶12. Cochran made sure  
5 to have Ms. Anderson sign the euthanasia form because it would  
6 relieve her of having to reimburse the City of Clovis for the  
7 medical care of the animals pursuant to Penal Code § 597.1. *Id.*  
8 at ¶13. Ms. Anderson asserts that, although she signed the form,  
9 she did not know what she was signing because she was not wearing  
10 her glasses. Anderson Decl. at ¶8. She claims to have told  
11 Officer Cochran that she did not have her glasses. *Id.*<sup>6</sup> Ms.  
12 Anderson claims to have handed only the puppies over on the  
13 condition that they would not be killed. *Id.* She asserts that  
14 she did not turn the remainder of the animals over voluntarily.  
15 *Id.* at ¶8.

18 Despite the fact that the Adult Protective Services worker  
19 who arrived on scene to interview Ms. Anderson and Ms. Cloud  
20 determined that Ms. Cloud was residing in the residence of her  
21 own free will, Corporal Koch and Officer Smith concluded that  
22

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23 <sup>6</sup> Defendants attempt to discount Ms. Anderson's contrary testimony  
24 on this point, emphasizing that, initially, Ms. Anderson claimed to  
25 have written "no glasses" on the back of the Euthanasia form. She has  
26 now changed her story slightly, maintaining that she simply told  
27 Officer Cochran that she did not have her glasses. Anderson Decl. at  
28 ¶8. Defendant also cites to Ms. Anderson's deposition testimony, in  
which she was presented a copy of the form and asked to read it without  
her glasses on. She was able to do so, but only by bringing the form  
close to her face. Anderson Depo. at 167-68. These pieces of evidence  
go to the weight that a trier of fact would give to Ms. Anderson's  
testimony, they do not establish that her version of events is a  
"sham," warranting exclusion for purposes of summary judgment.

1 "conditions of the house were completely uninhabitable and it was  
2 not healthy or reasonable to allow Ms. Anderson and Ms. Cloud  
3 into the residence." Smith Decl. at ¶139. Smith, who was a sworn  
4 building inspector, "was able to conclude that the home violated  
5 multiple codes and was dangerous to any occupants" and exercised  
6 his "authority to vacate the home until it was brought up to  
7 code." *Id.* at ¶40. Although the home was "obviously  
8 uninhabitable," Smith contacted City of Clovis Building Inspector  
9 Ken Baxter "for a second opinion before taking such an extreme  
10 measure as vacating the home." *Id.*

11  
12 Mr. Baxter examined the premises and concurred with Smith's  
13 opinion that the residence was not inhabitable and needed to be  
14 condemned. *Id.* at ¶41. Mr. Baxter red-tagged the residence  
15 mandating that no person enter until significant structural and  
16 mechanical repairs were made. *Id.* Both Ms. Anderson and Ms.  
17 Cloud were admonished that if they were to re-enter the  
18 residence, they would be arrested for trespassing. *Id.* Building  
19 Inspector Baxter explains in his declaration that placing a red  
20 tag on a home gives notice to interested parties that there are  
21 violations of the code and severe problems within the home.  
22  
23 Baxter Decl. at ¶14. He does not recall how he became aware that  
24 a lender had an interest in the home, but once he became aware of  
25 that fact, he was required to send them notice of the red-tagging  
26 pursuant to Uniform Housing Code Section 1101.3. *Id.* at ¶17.  
27  
28



1 Subsequent to the home being "red-tagged" the lender "de funded"  
2 the loan. *Id.* at ¶7.

3 Steve Baker, a Building Official for the City of Clovis and  
4 a state registered quality control engineer, personally visited  
5 the residence subsequent to October 26, 2005. He indicates that  
6 the conditions there "were the worst [he has] seen in 30 years of  
7 building inspection." Baker Decl. at ¶4. He confirmed that the  
8 residence was a "danger to the persons living there." *Id.* at ¶9.  
9 He also confirmed that he signed a Notice and Order on October  
10 31, 2005 concerning conditions at the home and that the City was  
11 required under the Uniform Housing Code to send copies to all  
12 parties with a financial interest in the home. *Id.* at ¶5-6.

13 Officer Smith claims to have helped Ms. Anderson retrieve  
14 personal items from the residence. Smith Decl. at ¶42. Ms.  
15 Anderson disputes this. She states that she was not permitted to  
16 retrieve the family car from the garage, nor were they permitted  
17 to retrieve personal property, including Ms. Cloud's  
18 identification, loan documents pertaining to the refinance,  
19 grooming utensils, undergarments, a cell phone, checkbook, ATM  
20 card, and medicine. Anderson Decl. at ¶7. According to  
21 Anderson, the family was told to go to the Clovis Motel and that  
22 they would "never" be allowed back in. *Id.*

23 Ms. Anderson claims that Defendants refused to provide her  
24 with information about the condition of the puppies, access to  
25

1 those animals, or permission to allow Plaintiffs' veterinarian to  
2 examine the animals. FAC at ¶ 33-34. Ms. Anderson alleges that  
3 law enforcement Defendants "conspired" with other Defendants to  
4 deny her access to this "evidence," which "prejudice[d] [] her  
5 ability to defend herself in the criminal action. *Id.* at ¶35.

6  
7 Ms. Cloud was charged with multiple counts of animal abuse  
8 under California Penal Code § 597.1, involving the puppies she  
9 brought out of the house voluntarily and the animals found inside  
10 the residence. The state trial court granted her motion to  
11 suppress all of the evidence collected from inside the home,  
12 including any evidence regarding the animals collected therein.  
13 Holland Decl., Doc. 32, Ex. F. The case was allowed to proceed  
14 on the single  
15 § 597.1 count involving the puppies Ms. Anderson brought outside  
16 the home voluntarily. Ms. Anderson pleaded no contest to the  
17 charge.<sup>7</sup>

### 18 19 20 III. STANDARD OF DECISION

21 Summary judgment is appropriate when "the pleadings, the  
22 discovery and disclosure materials on file, and any affidavits  
23 show that there is no genuine issue as to any material fact and  
24 that the movant is entitled to judgment as a matter of law."  
25 Fed. R. Civ. P. 56(c). A party moving for summary judgment  
26

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27 <sup>7</sup> Ms. Anderson asserts that she only pled no contest because she  
28 could not afford an attorney. This is not the proper forum in which to  
challenge her plea agreement.

1 "always bears the initial responsibility of informing the  
2 district court of the basis for its motion, and identifying those  
3 portions of the pleadings, depositions, answers to  
4 interrogatories, and admissions on file, together with the  
5 affidavits, if any, which it believes demonstrate the absence of  
6 a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477  
7 U.S. 317, 323 (1986) (internal quotation marks omitted).  
8

9 Where the movant will have the burden of proof on an issue  
10 at trial, it must "affirmatively demonstrate that no reasonable  
11 trier of fact could find other than for the moving party."  
12 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.  
13 2007); *see also S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d  
14 885, 888 (9th Cir. 2003) (noting that a party moving for summary  
15 judgment on claim as to which it will have the burden at trial  
16 "must establish beyond controversy every essential element" of  
17 the claim) (internal quotation marks omitted). With respect to  
18 an issue as to which the non-moving party will have the burden of  
19 proof, the movant "can prevail merely by pointing out that there  
20 is an absence of evidence to support the nonmoving party's case."  
21 *Soremekun*, 509 F.3d at 984.  
22

23  
24 When a motion for summary judgment is properly made and  
25 supported, the non-movant cannot defeat the motion by resting  
26 upon the allegations or denials of its own pleading, rather the  
27 "non-moving party must set forth, by affidavit or as otherwise  
28

1 provided in Rule 56, 'specific facts showing that there is a  
2 genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty*  
3 *Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "Conclusory, speculative  
4 testimony in affidavits and moving papers is insufficient to  
5 raise genuine issues of fact and defeat summary judgment." *Id.*  
6

7 To defeat a motion for summary judgment, the non-moving  
8 party must show there exists a genuine dispute (or issue) of  
9 material fact. A fact is "material" if it "might affect the  
10 outcome of the suit under the governing law." *Anderson*, 477 U.S.  
11 at 248. "[S]ummary judgment will not lie if [a] dispute about a  
12 material fact is 'genuine,' that is, if the evidence is such that  
13 a reasonable jury could return a verdict for the nonmoving  
14 party." *Id.* at 248. In ruling on a motion for summary judgment,  
15 the district court does not make credibility determinations;  
16 rather, the "evidence of the non-movant is to be believed, and  
17 all justifiable inferences are to be drawn in his favor." *Id.* at  
18 255.  
19  
20

#### 21 IV. ANALYSIS

##### 22 A. Federal Civil Rights Claims.

##### 23 1. Section 1983.

24 Plaintiffs' federal civil rights claims arise under Title  
25 42, United States Code, section 1983 ("Section 1983"). Section  
26 1983 creates a cause of action against any person who, acting  
27 under the color of state law, violates rights established by the  
28

1 Constitution or the laws of the United States. *Henderson v. City*  
2 *of Simi Valley*, 305 F.3d 1052, 1056 (9th Cir. 2002). "Section  
3 1983 does not create any substantive rights, but is instead a  
4 vehicle by which plaintiffs can bring federal constitutional and  
5 statutory challenges to actions by state and local officials."  
6 *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006). To  
7 prevail on a section 1983 claim, Plaintiff must show  
8  
9 (1) Defendants acted under color of state law and (2) violated  
10 Plaintiff's federal constitutional or statutory rights. *Dawson*  
11 *v. City of Seattle*, 435 F.3d 1054, 1061 (9th Cir. 2006)(citing  
12 *West v. Atkins*, 487 U.S. 42, 48 (1988)).

13 Here, there is no dispute that the various defendants acted  
14 under color of law. The question is whether Defendants violated  
15 Plaintiffs' federal constitutional rights. Plaintiffs assert  
16 that they were subjected to an illegal warrantless entry and  
17 search of their residence and that items of their property were  
18 seized during the course of that search, Doc. 6 at ¶¶ 7-17(a),  
19 allegations which implicate the Fourth Amendment. Defendants  
20 assert the defense of qualified immunity.  
21

22  
23  
24 2. Qualified Immunity.

25 The Supreme Court recently summarized the purpose of  
26 qualified immunity:

27 The doctrine of qualified immunity protects  
28 government officials "from liability for civil  
damages insofar as their conduct does not violate

1 clearly established statutory or constitutional  
2 rights of which a reasonable person would have  
3 known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818  
4 (1982). Qualified immunity balances two important  
5 interests-the need to hold public officials  
6 accountable when they exercise power irresponsibly  
7 and the need to shield officials from harassment,  
8 distraction, and liability when they perform their  
9 duties reasonably. The protection of qualified  
10 immunity applies regardless of whether the  
11 government official's error is "a mistake of law,  
12 a mistake of fact, or a mistake based on mixed  
13 questions of law and fact." *Groh v. Ramirez*, 540  
14 U.S. 551 (2004) (Kennedy, J., dissenting) (citing  
15 *Butz v. Economou*, 438 U.S. 478, 507 (1978) (noting  
16 that qualified immunity covers "mere mistakes in  
17 judgment, whether the mistake is one of fact or  
18 one of law"))).

19 Because qualified immunity is "an immunity from  
20 suit rather than a mere defense to liability ...  
21 it is effectively lost if a case is erroneously  
22 permitted to go to trial." *Mitchell v. Forsyth*,  
23 472 U.S. 511, 526 (1985) (emphasis deleted).  
24 Indeed, we have made clear that the "driving  
25 force" behind creation of the qualified immunity  
26 doctrine was a desire to ensure that  
27 "'insubstantial claims' against government  
28 officials [will] be resolved prior to discovery."  
*Anderson v. Creighton*, 483 U.S. 635, 640, n. 2  
(1987). Accordingly, "we repeatedly have stressed  
the importance of resolving immunity questions at  
the earliest possible stage in litigation." *Hunter*  
*v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

*Pearson v. Callahan*, 129 S. Ct. 808 (Jan. 21, 2009) (parallel  
citations omitted).

Deciding qualified immunity normally entails a two-step  
analysis. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A court  
must ask whether, taken in the light most favorable to the  
plaintiff, the facts alleged show the officers' conduct violated  
a constitutional right. *Id.* In addition, a court must also  
inquire whether the right violated was "clearly established" by  
asking whether a reasonable officer could believe that the

1 defendant's actions were lawful under then-existing precedent.  
2 *Id.* District courts have discretion to determine the order in  
3 which these inquiries take place. *Pearson*, 129 S. Ct. at 818-  
4 822.

5 The traditional summary judgment approach should be used in  
6 analyzing the first step of the *Saucier* analysis:  
7

8 A court required to rule upon the qualified  
9 immunity issue must consider, then, this threshold  
10 question: Taken in the light most favorable to the  
11 party asserting the injury, do the facts alleged  
12 show the [official's] conduct violated a  
13 constitutional right? Where the facts are  
14 disputed, their resolution and determinations of  
15 credibility are manifestly the province of a jury.

16 *Wall v. County of Orange*, 364 F.3d 1107, 1110-11 (9th Cir.2004)  
17 (internal citations and quotations omitted). In the second step,  
18 the court must ask whether it would be clear to a reasonable  
19 official that his conduct was unlawful in the situation  
20 confronted. Although this inquiry is primarily a legal one,  
21 where the reasonableness of the officer's belief that his conduct  
22 was lawful "depends on the resolution of disputed issues of fact  
23 ... summary judgment is not appropriate." *Wilkins v. City of*  
24 *Oakland*, 350 F.3d 949, 956 (9th. Cir. 2003) (citing *Saucier*, 533  
25 U.S. at 216 (Ginsburg J., concurring)).

26 Applying the second step of the *Saucier* analysis, a court  
27 must ask whether it would be clear to a reasonable official that  
28 his conduct was unlawful in the situation confronted. Although  
this inquiry is primarily a legal one, where the reasonableness

1 of the officer's belief that his conduct was lawful "depends on  
2 the resolution of disputed issues of fact ... summary judgment is  
3 not appropriate." *Wilkins*, 350 F.3d at 956.<sup>8</sup>  
4

5 3. Threshold Issue: Preclusive Effect of State Court  
6 Decisions.

7 a. State Court Decision on Motion to Suppress.

8 The state court granted Defendant's motion to suppress all  
9 of the evidence gathered from inside the Harvard Avenue  
10 residence, rejecting the prosecution's contention that Ms.  
11 Anderson consented to the search, and rejecting the argument that  
12 there were exigent circumstances justifying entry without a  
13 warrant. *See* Holland Decl., Ex. F. The government did not argue  
14 at that time that Ms. Cloud consented to the search. *Id.*

15 The Supreme Court has held that nothing in the language of  
16 § 1983 indicates any congressional intent to deny binding effect  
17 to a state court judgment when that court, acting within its  
18 proper jurisdiction, has given the parties a full and fair  
19

---

20  
21 <sup>8</sup> An officer is entitled to summary judgment if he had a  
22 reasonable, though mistaken, view of either the law or the facts. "An  
23 officer might correctly perceive all of the relevant facts, but have a  
24 mistaken understanding as to whether a particular [action] is legal in  
25 those circumstances." *Saucier*, 533 U.S. at 205. "If the officer's  
26 mistake as to what the law requires is reasonable, however, the officer  
27 is entitled to the immunity defense." *Id.* "The converse also is true:  
28 Officers can have reasonable, but mistaken, beliefs as to the facts  
establishing the existence of probable cause or exigent circumstances,  
for example, and in those situations courts will not hold that they  
have violated the Constitution." *Jeffers v. Gomez*, 267 F.3d 895, 909  
(9th Cir. 2001). But, these rules do not displace the traditional  
summary judgment process. A court may not resolve on summary judgment  
disputes that go to the reasonableness of the officer's belief that the  
conduct was lawful or the credibility of the officer's own recollection  
of the facts.



1 opportunity to litigate the federal issue. *Allen v. McCurry*, 449  
2 U.S. 90, 103-104 (1980). Under the Full Faith and Credit Act, 28  
3 U.S.C. § 1738, federal courts are required to give a state court  
4 final judgment whatever preclusive effect a state court would  
5 give it. *See Love v. Correa*, 2009 WL 347276 (D. Haw. Feb. 11,  
6 2009). Thus, if California courts would preclude relitigation of  
7 the issue, this Court must abide by the same result. Under  
8 California law, issue preclusion applies if:

9  
10 (1) the issue necessarily decided at the previous  
11 proceeding is identical to the one which is sought to  
12 be relitigated; and (2) the previous proceedings  
13 resulted in a final judgment on the merits; and (3) the  
party against whom [issue preclusion] is asserted was a  
party or in privity with a party at the prior  
proceeding.

14 *People v. Meredith*, 11 Cal. App. 4th 1548, 1555 (1993); *see also*  
15 *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990).

16 Here, the issues to be decided are not identical to those  
17 that were at issue during the suppression hearing. The state  
18 trial judge was called upon to determine whether the officers'  
19 conduct did in fact violate the Fourth Amendment under existing  
20 precedent. To do this, Judge Gottlieb examined many of the cases  
21 cited by the parties in this case, and determined that, under  
22 those authorities, the officers' conduct violated the Fourth  
23 Amendment. Here, however, the inquiry required under the  
24 qualified immunity standard is whether the law was clearly  
25 established at the time the officers acted whether their entry  
26 would violate the Fourth Amendment. This is a subtle but  
27  
28

1 significant difference that renders the trial court's decision  
2 inapposite.

3 Privity is also required. "[I]dentity of parties or privity  
4 is a requirement of due process of law." *Clemmer v. Hartford*  
5 *Ins. Co.*, 22 Cal. 3d 865, 874 (1978). Privity exists where "the  
6 non-party is sufficiently close to the original case to afford  
7 application of the principle of preclusion." *People v.*  
8 *Drinkhouse*, 4 Cal. App. 3d 931, 937 (1970); accord *Martin v.*  
9 *County of Los Angeles*, 51 Cal. App. 4th 688, 700 (1997). The  
10 California Supreme Court has held:  
11

12 In the context of collateral estoppel, due process  
13 requires that the party to be estopped must have had an  
14 identity or community of interest with, and adequate  
15 representation by, the losing party in the first action  
16 as well as that the circumstances must have been such  
17 that the party to be estopped should reasonably have  
18 expected to be bound by the prior adjudication.

19 *Clemmer*, 22 Cal.3d at 875.

20 There is authority to support a finding that the Officers  
21 were not in privity with the prosecution. A court in this  
22 district has surveyed the state of the law on this question  
23 before declining to find that law enforcement officers were in  
24 privity with the criminal prosecution:

25 While the issue of privity must be determined with  
26 reference to California law, when dealing with issue  
27 preclusion, "it is often appropriate to look to the law  
28 as it is generally applied in other jurisdictions for  
additional guidance [unless] ... the state-law question  
is not a particularly difficult one." *Haring v.*  
*Prosise*, 462 U.S. 306 (1983). California law on privity  
is anything but clear cut. In looking at issue  
preclusion in other states, the majority of federal  
courts have come to the conclusion that privity does

1 not exist between law enforcement officers and the  
2 criminal prosecution. *See, e.g., Kinslow v. Ratzlaff*,  
3 158 F.3d 1104, 1106 (10th Cir. 1998) (applying Oklahoma  
4 law); *Tierney v. Davidson*, 133 F.3d 189, 195 (2d Cir.  
5 1998) (applying Vermont law); *Kraushaar v. Flanigan*, 45  
6 F.3d 1040, 1050-51 (7th Cir. 1995) (applying Illinois  
7 law); *Smith v. Holtz*, 30 F. Supp. 2d 468, 477 (M.D. Pa.  
8 1998) (applying Pennsylvania law). The Eighth Circuit,  
9 in a case applying North Dakota law, has found privity  
10 to exist between police officers and the criminal  
11 prosecution. *Patzner v. Burkett*, 779 F.2d 1363, 1369  
12 (8th Cir. 1985) ("the deputies in this case can be  
13 properly considered in privity with the state in the  
14 prior adjudication and thus bound by the state court's  
15 determination that the arrest was illegal"). However,  
16 the Eighth Circuit's decisions dealing with other  
17 states' laws have followed the majority view. *See*  
18 *Turpin v. County of Rock*, 262 F.3d 779, 782-83 (8th  
19 Cir. 2001) (applying Nebraska law, "Collateral estoppel  
20 cannot be used against the officers in our case, as the  
21 officers were neither parties nor in privity with the  
22 State in the criminal action and did not have a full  
23 and fair opportunity to litigate the issues in the  
24 criminal action."); *Duncan v. Clements*, 744 F.2d 48, 51  
25 (8th Cir. 1984) (applying Missouri law, "collateral  
26 estoppel is not appropriate in this case because  
27 [police officer], the party against whom collateral  
28 estoppel is asserted, was neither a party nor in  
privity with a party to the prior state criminal  
proceeding").

*Sanders v. City of Bakersfield*, 2005 WL 6267361 (E.D. Cal. Sept.  
30, 2005).

Applying claim and/or issue preclusion jurisprudence, the  
decisions made by Judge Gottlieb in the suppression hearing have  
no binding effect in this litigation as to the individual  
officers who seek the protection of qualified immunity.

b. Application of *Heck v. Humphrey*.

It their opening brief, Defendants suggest that Plaintiff  
Diane Anderson "must prove she was not convicted of a violation  
of California Penal Code Section 597.1 or prove that the

1 conviction was reversed before she may attempt to prove  
2 constitutional violations on the part of defendants." Doc. 28-2  
3 at 7. In support of this argument, Defendants cite *Heck v.*  
4 *Humphrey*, 512 U.S. 477 (1994). *Heck* stands for the proposition  
5 that a plaintiff may not bring a § 1983 action if prevailing on  
6 that action would call into question the "validity of [an]  
7 outstanding criminal judgment[]." *Id.* at 486.

9 Defendants argue that *Heck* is applicable here because  
10 Plaintiff pled guilty to violating Penal Code 597.1 concerning  
11 the condition of the puppies. Defendants maintain that the  
12 success of Plaintiffs' contention that the warrantless entry of  
13 the Harvard Avenue residence was unlawful will require a  
14 determination that the puppies were "not the subjects of cruelty  
15 which would warrant entry to save the other animals."  
16 Defendants' arguments are misplaced. First, Plaintiffs' plea of  
17 no contest to the charge concerning the condition of the puppies  
18 would not, on its own, justify a warrantless entry. More  
19 importantly, Ms. Anderson does not contest the deplorable  
20 condition of the puppies. She asserts that they were "well fed,"  
21 and that they had been "wormed" in the past, but does not contest  
22 the overwhelming evidence that they were diseased, soaked in  
23 their own urine, and otherwise found to be in a hazardous and  
24 life-threatening condition. *Heck* is not implicated in connection  
25 with Plaintiffs' Fourth Amendment claims for unlawful entry,  
26  
27  
28

1 seizure, and use of excessive force.

2 Among other claims Plaintiff Anderson also alleges that her  
3 procedural due process rights were violated because law  
4 enforcement officers, as part of the prosecution team, refused to  
5 provide Ms. Anderson access to the evidence upon which her  
6 prosecution was premised, "even to know what the condition of the  
7 puppies was." Doc. 34 at 18. Success on this claim would  
8 necessarily call into question the validity of her criminal  
9 conviction. Therefore, the procedural due process claim  
10 concerning denial of access to evidence is barred by *Heck*.  
11 Defendant is entitled to summary judgment on that claim.  
12

13  
14 4. Section 1983 Claim Concerning The Entry.

15 Under *Pearson*, the court may examine the second step of the  
16 *Saucier* analysis first. 129 S. Ct at 817. This requires a  
17 determination of whether a reasonable official would have known  
18 that his conduct was unlawful in the situation confronted. "An  
19 officer conducting a search is entitled to qualified immunity  
20 where clearly established law does not show that the search  
21 violated the Fourth Amendment." *Id.* at 822. Although this  
22 inquiry is primarily a legal one, where the reasonableness of the  
23 officer's belief that his conduct was lawful "depends on the  
24 resolution of disputed issues of fact ... summary judgment is not  
25 appropriate." *Wilkins*, 350 F.3d at 956.  
26

27 Defendants advance several justifications for their entry  
28

1 into the residence. The first, and most compelling, is their  
2 contention that extreme and exigent circumstances presenting a  
3 clear and present danger to public health and safety justified  
4 warrantless entry to protect the lives of the animals remaining  
5 in the home after the puppies were found to be in deplorable  
6 condition; the health of Ms. Cloud, an elderly woman convalescing  
7 in the home; and to abate any occupancy of the residence which  
8 was hazardously uninhabitable.

9  
10 The parties largely agree about the relevant authorities.  
11 Both cite *Broden v. Marin Humane Society*, 70 Cal. App. 4th 1212  
12 (1999), which concerned the warrantless entry into a pet store by  
13 an animal control officer responding to reports of stench and  
14 flies at the store. Upon arrival, and based on her experience,  
15 the officer concluded that dead animals were rotting inside the  
16 store. *Id.* at 1217. After trying to locate the owner, the  
17 animal control officer, along with police officer back-up,  
18 entered the store without a warrant. *Id.*

19  
20 The court found that "Penal Code 597.1 is a self-contained  
21 regulatory scheme covering treatment of animals" permitting,  
22 among other things the seizure and impoundment of animals if an  
23 officer "has reasonable grounds to believe that very prompt  
24 action is required to protect the health or safety" of those  
25 animals. *Id.* at 1216. The court held that this statutory  
26 language "is the equivalent of the exigent circumstances  
27  
28

1 exception familiar to search and seizure law”:

2 That exception allows entry without benefit of a  
3 warrant when a law enforcement officer confronts an  
4 emergency situation requiring swift action to save  
5 life, property, or evidence. [citations] There is no  
6 litmus test for emergencies; every case must be  
7 explained in light of what was known to the officer at  
8 the time of entry.

9 *Id.* at 1220-21.

10 The *Broden* court extended the exigent circumstances  
11 exception, which permits entry when persons inside a structure  
12 are in immediate need of aid, to animals:

13 There is no question that law enforcement officers may  
14 make a warrantless entry of a building when there are  
15 reasonable grounds for believing that persons inside  
16 are in need of immediate aid. (*E.g., Tamborino v.*  
17 *Superior Court* (1986) 41 Cal. 3d 919, 924.) Section  
18 597.1 clearly contemplates that animals shall receive a  
19 similar solicitude. Here, Officer Kane received  
20 information from a presumptively reliable citizen  
21 complainant (*see People v. Ramey* (1976) 16 Cal. 3d 263,  
22 269), information she verified when she went to the  
23 scene. Kane’s visit, together with her past experience,  
24 gave a whole new dimension to the report of a bad  
25 smell; Kane treated the smell as that of dead animals.  
26 The fact that flies were trying to get into the  
27 building was powerful corroboration for believing dead  
28 animals were inside. Kane could not see inside the  
building. The landlord would be no help because he did  
not have a key. Repeated attempts to reach Broden were  
unavailing and, with no answering machine, held no  
prospect of success. Short of visible slaughter or  
blood oozing under the door, a more compelling case for  
immediate entry cannot be imagined. Substantial  
evidence supports the findings of the hearing officer  
and the trial court that Kane’s warrantless entry was  
justified by exigent circumstances.

*Id.* at 1222.

29 An unpublished decision issued by the Northern District of  
30 California in a § 1983 case applied *Broden* to permit the  
31 warrantless entry into a mobile home under the exigent

1 circumstances exception. *Jackson v. Silicon Valley Animal*  
2 *Control Auth.*, 2008 WL 4544455 (N.D. Cal. Oct. 2, 2008). In  
3 *Jackson*, an officer received a complaint about animals in bad  
4 health in the Jacksons' mobile home. He also observed outside  
5 the home a dog wearing a diaper to control bleeding and another  
6 dog with a broken jaw. *Id.* at \*8. These circumstances justified  
7 warrantless entry under California Penal Code § 597.1. *Id.*<sup>9</sup>

9 Plaintiffs argue that both *Broden* and *Jackson* are  
10 distinguishable because *Broden* involved the search of a business  
11 and *Jackson* the search of a mobile home, not a house. A  
12 distinction may be drawn between the privacy interest one has in  
13 a place of business and the privacy interest one has in one's  
14 home. *New York v. Burger*, 482 U.S. 691, 699-700 (1987) ("An  
15 expectation of privacy in commercial premises [] is different  
16 from, and indeed less than, a similar expectation in an  
17 individual's home."). However, the basic principle applied in  
18 *Broden*, the exigent circumstances exception to the warrant  
19 requirement, is applicable to non-mobile residences. *See, e.g.,*  
20 *United States v. Brooks*, 367 F.3d 1128, 1135 (9th Cir. 2004)

22 Moreover, Plaintiffs' attempt to distinguish *Jackson* because  
23 it involved a mobile home is without merit. Fourth Amendment  
24

---

25  
26 <sup>9</sup> Plaintiff correctly points out that the *Jackson* court also found  
27 that the search was alternatively justified under the automobile  
28 exception to the warrant requirement because the residence was a mobile  
home. 2008 WL 4544455, \*8. However, this does not diminish *Jackson* as  
persuasive authority for the proposition that the circumstances were  
alternatively justified under the exigent circumstances exception.



1 jurisprudence has carved out a separate exception to the warrant  
2 requirement for automobiles and extended that exception to mobile  
3 homes. *Cal. v. Carney*, 471 U.S. 386, 393 (1985). *Carney*, the  
4 seminal case on this issue, created a conclusive presumption of  
5 exigency when the targeted residence is a mobile home on the  
6 ground that the home could be driven away and because there is a  
7 reduced expectation of privacy stemming from the pervasive  
8 regulation of vehicles capable of traveling on the highway. *Id.*  
9 at 391-92. Notably, the circumstances in *Carney*, unlike the  
10 circumstances presented here, did not otherwise present an  
11 exigency. *Id.*

12  
13 Exigent circumstances are those circumstances that  
14 would cause a reasonable person to believe that entry  
15 was necessary to prevent physical harm to the officers  
16 or other persons, the destruction of relevant evidence,  
17 the escape of the suspect, or some other consequence  
18 improperly frustrating legitimate law enforcement  
19 efforts. To prove that such circumstances existed, the  
20 government cannot rely on speculation about what may or  
21 might have happened. Instead, it must point to  
22 specific and articulable facts which, taken together  
23 with rational inferences, support the warrantless  
24 intrusion. A court, in turn, must view the exigencies  
25 from the totality of circumstances known to the  
26 officers at the time of the warrantless intrusion.  
27 It must consider whether, in light of these  
28 circumstances, an officer's decision to enter without a  
warrant was objectively reasonable.

29 *United States v. Black*, 482 F.3d 1035, 1042 (9th Cir. 2007)

30 (internal citations and quotations omitted).

31 Here, the officers arrived at the scene having received  
32 numerous, prior public complaints and reports of foul odors and  
33

1 barking at the residence. Upon arriving at the residence on  
2 October 26, 2009, they could smell feces and urine from outside  
3 the front gate, and Officer Smith observed violations of the  
4 building code in plain view in the garage once Ms. Anderson came  
5 outside through it. These observations alone might not have  
6 justified entry. However, once Ms. Anderson began bringing the  
7 puppies outside, the situation changed. The dogs were in  
8 horrible physical condition, stank of urine, and were visibly  
9 ill. Even after all of the puppies had been removed from the  
10 house, Officer Smith could tell there were many more animals  
11 remaining inside. Both officers noticed that a terrible smell  
12 was coming from inside the house. At this juncture, even without  
13 the additional, alarming circumstances involving the health of  
14 Ms. Cloud, no clearly established law prohibited the Officers  
15 from entering without a warrant. To the contrary, the Officers  
16 reasonably believed that entry was warranted under the exigent  
17 circumstances exception as articulated in *Broden* and *Jackson*.

20 The situation was compounded by the Officers' interaction  
21 with Ms. Cloud, an elderly woman whom the Officers knew was  
22 convalescing in the home after a bout with tetanus. She was  
23 presented to the officers in a wheelchair with what the Officers  
24 believed to be feces on her person. Ms. Cloud also had an open  
25 trachiotomy wound. Although the elder services officer declined  
26 to take action to remove Ms. Cloud from the premises, the  
27

1 Officers reasonably believed, based on undisputed evidence, that  
2 Ms. Cloud's health and safety were seriously in jeopardy and  
3 reasonably demanded that the home be inspected. Under the  
4 circumstances, the Officers are entitled to qualified immunity as  
5 a matter of law because, based on undisputed objective evidence  
6 of conditions hazardous to animal and human health and safety,  
7 clearly established law authorized their warrantless entry into  
8 the residence based on their reasonable belief that the exigent  
9 circumstances exception applied.  
10

11 Defendants are not entitled to summary adjudication on their  
12 alternative contention that they had consent to enter the  
13 residence, because both Ms. Anderson and Ms. Cloud's consent are  
14 disputed. This is not material to the outcome of the Fourth  
15 Amendment claim, however, as only one exception to the warrant  
16 requirement need apply.  
17

18 Defendants also argue, in the alternative, that the  
19 Community Caretaking Exception and a provision of the Clovis  
20 Municipal code justified entry without a warrant. Although these  
21 are well taken defenses, it is unnecessary to decide these issues  
22 to resolve Defendants' motion for summary judgment.  
23

24  
25 5. Section 1983 Excessive Force Claim.

26 Plaintiff Anderson's entire excessive force claim is  
27 premised on her allegation that an unnamed officer "grabbed" her  
28

1 elbow to prevent her from blocking the door to the residence as  
2 the Officers attempted to enter the home. Although Defendants  
3 dispute whether this occurred, Ms. Anderson's version of the  
4 events is accepted for purposes of summary judgment. Ms.  
5 Anderson stated that she suffered no physical injury as a result  
6 of this contact. The contact simply "made her mad." She does  
7 not describe the degree of force nor that a mark or bruise  
8 resulted.  
9

10 Whether excessive force was used during a search is judged  
11 under the Fourth Amendment's objective reasonableness standard as  
12 articulated in *Graham v. Connor*, 490 U.S. 386, 395 (1989). See  
13 *Wood v. Kitsap County*, 2007 WL 1306548, \*8 (W.D. Wash. May 3,  
14 2007). "Determining whether the force used to effect a  
15 particular seizure is reasonable under the Fourth Amendment  
16 requires a careful balancing of the nature and quality of the  
17 intrusion on the individual's Fourth Amendment interests against  
18 the countervailing governmental interests at stake." *Graham*, 490  
19 U.S. at 396 (internal quotation omitted). "The reasonableness of  
20 a particular use of force must be judged from the perspective of  
21 a reasonable officer on the scene, rather than with the 20/20  
22 vision of hindsight." *Id.* An individual's limited right to  
23 offer reasonable resistance is only triggered by an officer's bad  
24 faith or provocative conduct. *United States v. Span*, 970 F.2d  
25 573, 580 (9th Cir. 1992).  
26  
27  
28

1            "Not every push or shove, even if it may later seem  
2 unnecessary in the peace of a judge's chambers, violates the  
3 Fourth Amendment." *Graham*, 490 U.S. at 396 (internal quotations  
4 and citation omitted). Where the amount of force used was *de*  
5 *minimis* in light of the asserted government interest, an  
6 excessive force claim may be invalid as a matter of law.  
7  
8 *Nakamura v. City of Hermosa Beach*, 2009 WL 1445400, \*11 (C.D.  
9 Cal. 2009) (force used was *de minimis* where, during the course of  
10 arrest, officer told plaintiff to sit down and simultaneously put  
11 his right hand on Plaintiff's shoulder, shoving him to the  
12 ground; and "Plaintiff's buttocks made contact with the ground  
13 but [he] sustained no bruises or cuts"). Here, Plaintiff's only  
14 allegation is that an unnamed officer grabbed her elbow to  
15 prevent her from blocking the door to the house. She sustained  
16 no injury. This use of force, if it occurred, was both *de*  
17 *minimis* and reasonable under the circumstances. The officer  
18 justifiably entered the home without a warrant and was entitled  
19 to ensure that his entry was not blocked. Defendants' motion for  
20 summary adjudication of the excessive force claim is GRANTED.  
21  
22

23            6.    Section 1983 Due Process Claims.

24            a.    Substantive Due Process - Loss of Home.

25            Plaintiffs assert that the unlawful acts of Defendants  
26 resulted in the loss of their home in violation of their  
27 substantive due process rights. This claim is grounded upon  
28

1 Plaintiffs' assertion that their re-finance loan was cancelled  
2 because City of Clovis employees, including Officer Smith,  
3 contacted their lender. Plaintiffs suggest that Officer Smith  
4 acquired their lender's contact information by reading related  
5 documents while he was inside their home. Plaintiffs do not  
6 dispute, however, that once the home was red tagged, Clovis was  
7 required under the Uniform Housing Code to notify all parties  
8 with a financial interest in the home. The name and contact  
9 information for their lender was a matter of public record,  
10 easily determined based on the address and legal description fo  
11 the real property.  
12

13 Plaintiffs cite no authority for the proposition that loss  
14 of one's home, without more, implicates a substantive due process  
15 right protected by the Fourteenth Amendment. The Fourteenth  
16 Amendment bars "any State [from] depriv[ing] any person of life,  
17 liberty, or property, without due process of law." U.S. Const.  
18 amend. XIV, § 1. Under substantive due process jurisprudence,  
19 this Clause "guarantees more than fair process, and the 'liberty'  
20 it protects includes more than the absence of physical  
21 restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).  
22 In this conception, due process encompasses certain "fundamental"  
23 rights. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). The right  
24 to housing is not a fundamental right. *Lindsey v. Normet*, 405  
25 U.S. 56 (1972). Substantive due process also "forbids the  
26  
27  
28

1 government from depriving a person of life, liberty, or property  
2 in such a way that shocks the conscience or interferes with the  
3 rights implicit in the concept of ordered liberty." *Corales v.*  
4 *Bennett*, 567 F.3d 554, 568 (9th Cir. 2009) (internal citations  
5 and quotations omitted). There is nothing shocking about the  
6 City of Clovis condemning the Harvard Avenue residence, a public  
7 nuisance, and then complying with the Uniform Housing Code.  
8

9 b. Procedural Due Process.

10 (1) Refusal of Access to Evidence.

11 Plaintiff Anderson alleges that her procedural due process  
12 rights were violated by Defendants' refusal to provide her access  
13 to or information about the condition of the animals seized from  
14 her residence. FAC at ¶27. As discussed above in the section  
15 concerning *Heck v. Humphrey*, see *infra* Part IV.A.3.b, Defendants  
16 are entitled to summary judgment on this claim because Plaintiff  
17 cannot bring a § 1983 claim that would, if successful, call into  
18 question the validity of her underlying criminal conviction.  
19  
20

21 (2) Destruction of Pets Without Due Process.

22 Plaintiffs also complain that they were not afforded a post-  
23 deprivation hearing required under California Penal Code §  
24 597.1(f), which provides:  
25

26 Whenever an officer authorized under this section  
27 seizes or impounds an animal based on a reasonable  
28 belief that prompt action is required to protect the  
health or safety of the animal or the health or safety  
of others, the officer shall, prior to the commencement

1 of any criminal proceedings authorized by this section,  
2 provide the owner or keeper of the animal, if known or  
3 ascertainable after reasonable investigation, with the  
4 opportunity for a postseizure hearing to determine the  
5 validity of the seizure or impoundment, or both.

6 (1) The agency shall cause a notice to be affixed  
7 to a conspicuous place where the animal was situated or  
8 personally deliver a notice of the seizure or  
9 impoundment, or both, to the owner or keeper within 48  
10 hours, excluding weekends and holidays. The notice  
11 shall include all of the following:

12 (A) The name, business address, and telephone  
13 number of the officer providing the notice.

14 (B) A description of the animal seized,  
15 including any identification upon the animal.

16 (C) The authority and purpose for the  
17 seizure, or impoundment, including the time,  
18 place, and circumstances under which the animal  
19 was seized.

20 (D) A statement that, in order to receive a  
21 postseizure hearing, the owner or person  
22 authorized to keep the animal, or his or her  
23 agent, shall request the hearing by signing and  
24 returning an enclosed declaration of ownership or  
25 right to keep the animal to the agency providing  
26 the notice within 10 days, including weekends and  
27 holidays, of the date of the notice. The  
28 declaration may be returned by personal delivery  
or mail.

(E) A statement that the cost of caring for  
and treating any animal properly seized under this  
section is a lien on the animal and that the  
animal shall not be returned to the owner until  
the charges are paid, and that failure to request  
or to attend a scheduled hearing shall result in  
liability for this cost.

(2) The postseizure hearing shall be conducted  
within 48 hours of the request, excluding weekends and  
holidays. The seizing agency may authorize its own  
officer or employee to conduct the hearing if the  
hearing officer is not the same person who directed the  
seizure or impoundment of the animal and is not junior  
in rank to that person. The agency may utilize the  
services of a hearing officer from outside the agency  
for the purposes of complying with this section.

(3) Failure of the owner or keeper, or of his or  
her agent, to request or to attend a scheduled hearing



1 shall result in a forfeiture of any right to a  
2 postseizure hearing or right to challenge his or her  
liability for costs incurred.

3 (4) The agency, department, or society employing  
4 the person who directed the seizure shall be  
5 responsible for the costs incurred for caring and  
6 treating the animal, if it is determined in the  
7 postseizure hearing that the seizing officer did not  
8 have reasonable grounds to believe very prompt action,  
9 including seizure of the animal, was required to  
10 protect the health or safety of the animal or the  
11 health or safety of others. If it is determined the  
12 seizure was justified, the owner or keeper shall be  
personally liable to the seizing agency for the cost of  
the seizure and care of the animal, the charges for the  
seizure and care of the animal shall be a lien on the  
owner until the charges are paid and the seizing agency  
or hearing officer has determined that the animal is  
physically fit or the owner demonstrates to the seizing  
agency's or the hearing officer's satisfaction that the  
owner can and will provide the necessary care.

13 In this case, no Defendant claims to have provided Ms.  
14 Anderson with notice and/or a hearing under section 597.1.  
15 Instead, Defendants assert that Ms. Anderson surrendered her  
16 ownership interest in the animals by signing the euthanasia form.  
17 Doc. 28-2 at 19. Ms. Anderson denies having knowingly  
18 surrendered her interest in all of the animals. Viewing the  
19 facts in a light most favorable to Ms. Anderson, the court must  
20 assume that the waiver was invalid because she could not read it  
21 without her glasses. The fact that Defendants may have violated  
22 Ms. Anderson's rights under section § 597.1 by depriving her of  
23 her pets without a valid waiver of those rights does not  
24 necessarily make out a procedural due process claim.  
25

26 The Due Process Clauses of the Fifth and Fourteenth  
27 Amendments provide that the government cannot deprive a person of  
28

1 life, liberty, or property without due process of the law. To  
2 trigger Due Process protections, deprivation must be intentional;  
3 negligent deprivation does not violate due process. *Daniels v.*  
4 *Williams*, 474 U.S. 327, 330-31 (1986) ("Where a government  
5 official's act causing injury to life, liberty, or property is  
6 merely negligent, 'no procedure for compensation constitutionally  
7 required.'" (citations omitted).

9 Here, Plaintiff essentially alleges that she was not  
10 afforded the procedural rights supplied by California Penal Code  
11 section 597.1. This is insufficient. Summary judgment on a  
12 procedural due process claim is proper were plaintiff establishes  
13 "only that she was deprived of a liberty interest because  
14 established state procedures were not followed, [and] not that  
15 the established state procedure effected a deprivation." *Vinson*  
16 *v. Cambell County Fiscal Court*, 820 F.2d 194, 199 (6th Cir.  
17 1987). *Paratt v. Taylor*, 451 U.S. 527, 543 (1981), overruled on  
18 other grounds by *Davis v. Williams*, 474 U.S. 327 (1986), rejected  
19 a procedural due process claim based upon "the unauthorized  
20 failure of agents of the State to follow established state  
21 procedure." The *Paratt* Court, applying Nebraska law, reasoned:

22  
23  
24 There is no contention that the procedures themselves  
25 are inadequate nor is there any contention that it was  
26 practicable for the State to provide a predeprivation  
27 hearing. Moreover, the State of Nebraska has provided  
28 respondent with the means by which he can receive  
redress for the deprivation. The State provides a  
remedy to persons who believe they have suffered a  
tortious loss at the hands of the State. See

1                   Neb.Rev.Stat. § 81-8,209 *et seq.* (1976).

2                   *Id.* at 543.

3                   The Ninth Circuit has determined that California law  
4 provides an adequate post-deprivation remedy for property  
5 deprivations by the state. *Barnett v. Centoni*, 31 F.3d 813, 816-  
6 17 (9th Cir. 1994) (citing Cal. Gov. Code §§ 810-895). Pets are  
7 considered property. *Keniston v. Roberts*, 717 F.2d 1295, 1298  
8 (9th Cir. 1983). Ms. Anderson could have, but apparently never  
9 invoked California's post-deprivation procedures to obtain  
10 relief. Even if she had done so, she nevertheless has failed to  
11 demonstrate that those remedies were inadequate in order to  
12 maintain a procedural due process action. *See, e.g., Timberline*  
13 *N.W., Inc. v. Hill*, 141 F.3d 1179, \*4 (9th Cir. 1998) (Table).  
14 Plaintiffs have not attempted to allege that the remedies  
15 available under state law are inadequate. They merely allege  
16 that Defendants failed to follow established state procedures.  
17 This may form the basis for a claim under state law, but does not  
18 support a procedural due process claim. Defendants' motion for  
19 summary judgment is GRANTED.  
20  
21  
22

23                   7.    City of Clovis/Monell Liability.

24                   Defendants move for summary judgment on all federal claims  
25 against the City of Clovis on the ground that Plaintiffs have not  
26 established municipal liability under *Monell v. New York City*  
27 *Dept. of Social Servs.*, 436 U.S. 658, 690, n. 55 (1978). A local  
28

1 government unit may not be held liable for the acts of its  
2 employees under a respondeat superior theory. *Id.* at 691. The  
3 local government unit "itself must cause the constitutional  
4 deprivation." *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th  
5 Cir.1992), cert. denied, 510 U.S. 932 (1993). To maintain a  
6 section 1983 claim against a local government, a plaintiff must  
7 establish the requisite culpability (a "policy or custom"  
8 attributable to municipal policymakers) and the requisite  
9 causation (the policy or custom as the "moving force" behind the  
10 constitutional deprivation). *Monell*, 436 U.S. at 691-694.

12 Here, Plaintiffs allege that the City of Clovis failed to  
13 "reasonably hire, well-educate, instruct, train, manage,  
14 supervise and control the conduct of its" officers and  
15 employees," and that "violations of plaintiffs' civil rights were  
16 committed as a result...." Doc. 6 at ¶5. A section 1983  
17 plaintiff alleging a policy of failure to train peace officers  
18 must show:  
19

20 (1) he/she was deprived of a constitutional right; (2)  
21 the local government entity had a training policy that  
22 amounts to deliberate indifference to constitutional  
23 rights of persons' with whom its peace officers are  
24 likely to come into contact; and (3) his/her  
25 constitutional injury would have been avoided had the  
26 City properly trained those officers.

25 *Blankenhorn v. City of Orange*, 485 F.3d 462, 484 (9th Cir. 2007).  
26 Plaintiffs have produced absolutely no evidence to support a  
27 deliberate indifference claim. Nor is there evidence of any lack  
28

1 of training or supervision of its officers.

2 In response to the motion for summary judgment, Plaintiffs  
3 assert that their claim against the City of Clovis should survive  
4 because the City relied upon a "facially unconstitutional city  
5 ordinance" for their actions. As the entry of the residence was  
6 justified under the exigent circumstances exception to the  
7 warrant requirement, Defendants need not rely on the Clovis  
8 Municipal Code to justify entry. Accordingly, Plaintiffs' claim  
9 against the City of Clovis arising out of the Clovis Municipal  
10 Code is moot. Defendants are entitled to summary judgment as to  
11 Plaintiffs' claims against the City of Clovis  
12

13  
14 8. Federal Conspiracy Claim.

15 Plaintiffs' sixth count alleges a "violation of federal  
16 civil rights" based on a conspiracy. FAC at 16. Specifically,  
17 Plaintiffs allege that the named Defendants conspired with the  
18 prosecuting attorney to violate California Penal Code § 1054.1  
19 and the duty to preserve evidence. For the reasons set forth  
20 above, any claim based upon the failure to preserve evidence is  
21 barred by *Heck*. Title 42 U.S.C. § 1985(3) permits a private  
22 right of action against two or more actors who conspire to deny  
23 Federal Civil rights. However, to prove a violation of section  
24 1985, a plaintiff must prove "some racial, or perhaps otherwise  
25 class-based, invidiously discriminatory animus behind the  
26 conspirators' action. The conspiracy, in other words, must aim  
27  
28

1 at a deprivation of the equal enjoyment of rights secured by the  
2 law to all." *Orin v. Barclay*, 272 F.3d 1207, 1217 (9th Cir.  
3 2001) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).  
4 No such evidence is presented here.

5  
6 B. State Law Claims.

7 The FAC also alleges numerous, related state law claims,  
8 including Trespass, Invasion of Privacy, Conversion, Assault,  
9 Battery, Abuse of Process, Intentional Infliction of Emotional  
10 Distress, Conspiracy, and Interference with Prospective Economic  
11 Advantage. The Assault and Battery claims fail as a matter of  
12 law because the allegedly offensive contact was justified under  
13 the circumstances. *See, e.g., Venegas v. County of Los Angeles*,  
14 153 Cal. App. 4th 1230, 1248 (2007) (citing Cal. Penal Code §  
15 835a for the proposition that "a battery is not committed by a  
16 police officer unless the plaintiff proves the officer used  
17 unreasonable force").  
18

19 A federal court has discretion to exercise jurisdiction over  
20 state law claims after dismissing every claim over which it had  
21 original jurisdiction. *See* 28 U.S.C. § 1367(c) ("The district  
22 courts may decline to exercise supplemental jurisdiction over a  
23 claim ... if ... the district court has dismissed all claims over  
24 which it has original jurisdiction."); *Foster v. Wilson*, 504 F.3d  
25 1046, 1051 (9th Cir. 2007). The district court declines to  
26 exercise jurisdiction over the remaining state law claims, which  
27  
28

1 involve the application of state law doctrines to efforts by City  
2 of Clovis personnel to address what are essentially community  
3 issues.

4  
5 V. CONCLUSION

6 For the reasons set forth above, Defendants are entitled to  
7 summary judgment on all of the federal claims in this case.  
8 Defendants are also entitled to summary judgment on the state law  
9 assault and battery claims. The district court declines to  
10 exercise its jurisdiction over the remaining state law claims.  
11 Defendants shall submit a form of order consistent with this  
12 memorandum decision within five days of electronic service.  
13

14  
15 SO ORDERED

16 Dated: July 10, 2009  
17

18  
19           /s/ Oliver W. Wanger            
20 Oliver W. Wanger  
21 United States District Judge.  
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