

1

2

3

4

5

6

7

8

9

10 GREGORY MORRIS,

11 Plaintiffs,

12 vs.

13 STATE BAR OF CALIFORNIA, et al.,

14 Defendants.  
15 \_\_\_\_\_/

CASE NO. CV F 09-0026 LJO GSA

**ORDER ON DEFENDANT CITY OF  
FRESNO AND MACALPINE'S  
MOTION FOR SUMMARY JUDGMENT**

16 By notice filed on May 7, 2010, Defendants the City of Fresno and Donald MacAlpine  
17 (collectively referred to as “defendants”) move for summary judgment, or in the alternative,  
18 summary adjudication on Plaintiffs’ Fourth, Fifth, Sixth and Ninth Causes of Action in the  
19 Complaint. Plaintiff Gregory Morris did not file an opposition. Pursuant to Local Rule 230(g), this  
20 matter was submitted on the pleadings without oral argument. Having considered the moving  
21 papers, as well as the Court’s file, the Court issues the following order.

22

**FACTUAL BACKGROUND**

23 This is an action by plaintiff Gregory Morris (“plaintiff”) against multiple persons and  
24 entities, generally alleging numerous violations of plaintiff’s civil rights and other rights protected by  
25 federal disability laws.

26 Plaintiff was an attorney admitted to the practice of law in the State of California. (Doc. 1,  
27 Complaint ¶ 53.) In 2002, plaintiff also owned a home located in Fresno, California. (Doc. 1,  
28 Complaint ¶¶ 19, 90.) Plaintiff’s home was insured for fire damage and limited property

1 damage/loss. (Doc. 1, Complaint ¶ 216.) On August 15, 2002, plaintiff alleges an accidental fire  
2 occurred at plaintiff's home. The fire was investigated by the insurer and the Fresno Fire  
3 Department, among other persons and entities. (Doc. 1, Complaint ¶¶ 14, 20, 22.) After the  
4 investigations, on August 25, 2002, plaintiff was arrested and charged with arson and insurance  
5 fraud. (Doc. 1, Complaint ¶¶ 91, 96.) After spending nearly two and one half years defending himself  
6 against the charges, the charges ultimately were dismissed in December 2004. (Doc. 1, Complaint ¶  
7 99.) Plaintiff alleges, however, that exculpatory evidence was actually discovered during the  
8 investigations into the fire at plaintiff's home, but that the various investigating persons and agencies  
9 intentionally or recklessly ignored and disregarded this evidence, with the aim of prosecuting  
10 plaintiff for insurance fraud and arson. (Doc. 1, Complaint ¶ 91.)

11 Plaintiff alleges that following causes of action against the City of Fresno and MacAlpine.

- 12 1. Fourth Cause of action - for conspiracy to violate plaintiff's civil rights. (Doc. 1,  
13 Complaint p. 36).
- 14 2. Fifth Cause of action - for violation of Due Process and Equal Protection, "unlawful  
15 warrantless arrest and prosecution without probable cause." (Doc. 1, Complaint p.  
16 32)
- 17 3. Sixth Cause of action - for supervisory liability for constitutional violations against  
18 fire defendants. (Doc. 1, Complaint p. 30).
- 19 4. Ninth Cause of action - for violation of the California Constitution. (Doc. 1,  
20 Complaint p.48)

## 21 ANALYSIS AND DISCUSSION

### 22 **A. Summary Judgment/Adjudication Standards**

23 F.R.Civ.P. 56(b) permits a "party against whom relief is sought" to seek "summary judgment  
24 on all or part of the claim." Summary judgment/adjudication is appropriate when there exists no  
25 genuine issue as to any material fact and the moving party is entitled to judgment/adjudication as a  
26 matter of law. F.R.Civ.P. 56( c); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587,  
27 106 S.Ct. 1348, 1356 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626,  
28 630 (9<sup>th</sup> Cir. 1987). The purpose of summary judgment/adjudication is to "pierce the pleadings and

1 assess the proof in order to see whether there is a genuine need for trial.” *Matsushita Elec.*, 475 U.S.  
2 at 586, n. 11, 106 S.Ct. 1348; *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d  
3 1401, 1405 (9<sup>th</sup> Cir. 1985).

4 On summary judgment/adjudication, a court must decide whether there is a “genuine issue as  
5 to any material fact,” not weigh the evidence or determine the truth of contested matters. F.R.Civ.P.  
6 56 ( c); *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9<sup>th</sup> Cir. 1997); see *Adickes v.*  
7 *S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598 (1970).

8 The court cannot grant the motion merely because plaintiff has failed to oppose the motion or  
9 failed to submit a statement of disputed facts. *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 950 (9<sup>th</sup>  
10 Cir. 1993). Rule 56(e) requires the party against whom the motion is made to “set for specific facts  
11 showing that there is a genuine issue for trial.” Absent such a showing, a properly supported motion  
12 for summary judgment may be granted if the court finds it appropriate. *Nelson, Robbins, et al v.*  
13 *Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9<sup>th</sup> Cir. 1988) (emphasis added). The moving party still  
14 has to meet its burden of proof. *In re Rogstad*, 126 F.3d 1224, 1227 (1997) (summary judgment is  
15 not an acceptable sanction for violation of a local rule.)

16 To carry its burden of production on summary judgment/adjudication, a moving party “must  
17 either produce evidence negating an essential element of the nonmoving party’s claim or defense or  
18 show that the nonmoving party does not have enough evidence of an essential element to carry its  
19 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210  
20 F.3d 1099, 1102 (9<sup>th</sup> Cir. 2000). “[T]o carry its ultimate burden of persuasion on the motion, the  
21 moving party must persuade the court that there is no genuine issue of material fact.” *Nissan Fire*,  
22 210 F.3d at 1102. “As to materiality, the substantive law will identify which facts are material. Only  
23 disputes over facts that might affect the outcome of the suit under the governing law will properly  
24 preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

25 “If a moving party fails to carry its initial burden of production, the nonmoving party has no  
26 obligation to produce anything, even if the nonmoving party would have the ultimate burden of  
27 persuasion at trial.” *Nissan Fire*, 210 F.3d at 1102-1103; see *Adickes*, 398 U.S. at 160, 90 S.Ct.  
28 1598. “If, however, a moving party carries its burden of production, the nonmoving party must

1 produce evidence to support its claim or defense.” *Nissan Fire*, 210 F.3d at 1103. “If the  
2 nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the  
3 moving party wins the motion for summary judgment.” *Nissan Fire*, 210 F.3d at 1103; *see Celotex*  
4 *Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986) (“Rule 56( c) mandates the entry of  
5 summary judgment, after adequate time for discovery and upon motion, against a party who fails to  
6 make the showing sufficient to establish the existence of an element essential to that party’s case,  
7 and on which that party will bear the burden of proof at trial.”)

8 **B. 42 U.S.C. §1983**

9 “Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
10 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the  
11 claimant of some right, privilege, or immunity protected by the Constitution or laws of the United  
12 States.” *Leer v. Murphy*, 844 F.2d 628, 632-633 (9<sup>th</sup> Cir. 1988).

13 “Section 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for  
14 vindicating federal rights elsewhere conferred.’” *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct.  
15 807, 811 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n. 3, 99 S.Ct. 2689, 2694, n. 3  
16 (1979)). Section 1983 and other federal civil rights statutes address liability “in favor of persons  
17 who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution.” *Carey*  
18 *v. Piphus*, 435 U.S. 247, 253, 98 S.Ct. 1042 (1978) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417,  
19 96 S.Ct. 984, 996 (1976)). “The first inquiry in any § 1983 suit, therefore, is whether the plaintiff  
20 has been deprived of a right ‘secured by the Constitution and laws.’” *Baker v. McCollan*, 443 U.S.  
21 137, 140, 99 S.Ct. 2689 (1979). Stated differently, the first step in a section 1983 claim is to identify  
22 the specific constitutional right allegedly infringed. *Albright*, 510 U.S. at 271, 114 S.Ct. at 811.

23 **C. Fourth Amendment Claims for False Arrest**

24 Defendants argue that plaintiff claims that he was falsely arrested is barred by collateral  
25 estoppel or issue preclusion. Defendant argues that the Fresno County Superior Court found  
26 probable cause, at a contested preliminary hearing, for the crime of arson against plaintiff. (Doc.  
27 106, Defendant P&A p.7.) Defendants argue plaintiff is barred by the prior judicial determination  
28 that probable cause existed for his arrest on the charge of arson.

1 A determination of probable cause at a preliminary hearing may preclude constitutional  
2 violations for false arrest or for malicious prosecution. *Haupt v. Dillard*, 17 F.3d 285 (9th Cir.  
3 1994). A probable cause determination at a preliminary hearing is considered a final judgment on  
4 the merits because the defendant can immediately appeal the determination. *Haupt v. Dillard*, 17  
5 F.3d at 288-89; *McCutchen v. City of Montclair*, 73 Cal.App.4th 1138, 1145-46, 87 Cal.Rptr.2d 95  
6 (1999). In California, an accused can immediately appeal the determination by filing a motion to set  
7 aside the preliminary hearing under California Penal Code § 995 and then obtain review of the  
8 decision on this motion by filing a writ of prohibition under California Penal Code § 999a. *See*  
9 *McCutchen*, 73 Cal.App.4th at 1146. Consequently, a preliminary hearing that determines probable  
10 cause to arrest may bar subsequent claims under § 1983 based on this issue, but not in all  
11 circumstances. *See, e.g., Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir.2004). In  
12 California, as in virtually every other jurisdiction, it is a long-standing principle of common law that  
13 a decision by a judge or magistrate to hold a defendant to answer after a preliminary hearing  
14 constitutes prima facie-but not conclusive-evidence of probable cause. *Awabdy v. City of Adelanto*,  
15 368 F.3d at 1067. A civil plaintiff in a § 1983 action may rebut a prima facie finding of probable  
16 cause “by showing that the criminal prosecution was induced by fraud, corruption, perjury,  
17 fabricated evidence, or other wrongful conduct undertaken in bad faith.” *Id.* At 1067.

18 Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.  
19 *Diruzza v. County of Tehama*, 323 F.3d 1147, 1152 (9th Cir.2003). Under California law, collateral  
20 estoppel (or issue preclusion) is applied if (1) the issue sought to be precluded is identical to that  
21 decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the  
22 issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding  
23 was final and on the merits; and (5) the party to be estopped was a party to the former proceeding or  
24 in privity with a party to the former proceeding. *Id.* In *Haupt*, the court applied Nevada law of  
25 collateral estoppel. 17 F.3d at 288. Nevada's collateral estoppel law is identical to California's  
26 collateral estoppel law. *See McCutchen v. City of Montclair*, 73 Cal.App.4th 1138, 1145, 87  
27 Cal.Rptr.2d 95 (1999).

28 Here, it is undisputed that plaintiff was arrested on suspicion of arson. It is also undisputed

1 that the Fresno County District Attorneys' office reviewed the fire department's investigation of the  
2 fire and filed a felony complaint for arson on August 31, 2001. (Doc. 106, Undisputed Fact, fact 17.)  
3 It is equally undisputed that after a preliminary hearing before a Superior Court Judge, the Court  
4 ordered plaintiff to be held to answer for the crime. (Doc. 106, Undisputed Fact, fact 18.) Thus, the  
5 issue of whether probable cause existed for the arrest was previously adjudicated. No evidence of  
6 "fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith"  
7 has been submitted by plaintiff to rebut the *prima facie* finding of probable cause. *Awabdy*, 368 F.  
8 3d at 1067. Accordingly, the relitigation of the probable cause for arrest is precluded by collateral  
9 estoppel.

10 **D. Fourth Amendment Claim for Malicious Prosecution**

11 Defendant argues plaintiff also claims malicious prosecution. The false arrest claim covers  
12 the time up to the arraignment; but the malicious prosecution claim covers subsequent events.  
13 Defendant argues that plaintiff cannot show the City or MacAlpine was involved in the prosecution  
14 because the County District Attorney made the decision to prosecute. (Doc. 106, Defendants P&A  
15 p.9.) Further, plaintiff cannot show "malice" as part of the City or MacAlpine because the  
16 prosecution was based upon the District Attorney's independent judgment.<sup>1</sup>

17 **1. Civil Rights Malicious Prosecution**

18 In the Ninth Circuit, the general rule is that a claim of malicious prosecution is not  
19 cognizable under 42 U.S.C. § 1983 if process is available within the state judicial system to provide  
20 a remedy. *Usher v. City of Los Angeles*, 828 F.2d 556, 561-562 (9<sup>th</sup> Cir. 1987). However, "an  
21 exception exists to the general rule when a malicious prosecution is conducted with the intent to  
22 deprive a person of equal protection of the laws or is otherwise intended to subject a person to a  
23 denial of constitutional rights." *Usher*, 828 F.2d at 562. In California, the elements of malicious  
24 prosecution are (1) the initiation of criminal prosecution, (2) malicious motivation, and (3) lack of  
25 probable cause. *Usher*, 828 F.2d at 562, citing *Singleton v. Perry*, 45 Cal.2d 489, 494 (1955). If a

---

27 <sup>1</sup> On a procedural issue, defendants argue that the caption of the fifth cause of action states "prosecution without  
28 probable cause," plaintiff's allegations do not allege anything other than "arrest." (Doc. 106, P&A p.9.) Nonetheless, the  
Court will address the merits of the §1983 claims for malicious prosecution.

1 plaintiff cannot establish any one of these three elements, his malicious prosecution action will fail.  
2 *StaffPro, Inc. v. Elite Show Services, Inc.*, 136 Cal.App.4th 1392, 1398, 39 Cal.Rptr.3d 682 (2006).

3 Plaintiff must come forward with evidence that the prosecution was conducted to deny  
4 plaintiff of equal protection. In *Usher*, the Ninth Circuit found, at the pleading stage, allegations  
5 were sufficient for malicious prosecution in violation of 42 U.S. C. §1983. Plaintiff there alleged  
6 defendants illegally arrested him, contrived charges to justify the arrest, submitted false police  
7 reports, called him racially derogatory names and the criminal proceeding terminated in his favor.  
8 The Court stated that these allegations were sufficient to bring the claim within the exception for  
9 malicious prosecution in violation of §1983.

10 Here, plaintiff has not raised an issue of fact as to a “retaliatory motive” by defendant  
11 MacAlpine or an issue of fact as to the absence of probable cause. The question of probable cause  
12 was determined by the Fresno County Superior Court at the preliminary hearing in which the Court  
13 ruled probable cause existed to hold plaintiff for the crimes alleged.

## 14 **2. Presumption of prosecutorial independence**

15 A prosecutor's independent judgment may break the chain of causation between the  
16 unconstitutional actions of other officials and the harm suffered by a constitutional tort plaintiff.  
17 *Beck v. City of Upland*, 527 F.3d 853, 862 (9<sup>th</sup> Cir. 2008). “Put in traditional tort terms, the  
18 prosecutor's independent decision can be a superseding or intervening cause of a constitutional tort  
19 plaintiff's injury, precluding suit against the officials who made an arrest or procured a prosecution.”  
20 *Id.* This presumption can be rebutted by plaintiff showing “a retaliatory motive on the part of an  
21 official urging prosecution combined with an absence of probable cause supporting the prosecutor's  
22 decision.” *Id.* at 865. A prosecutor's independent judgment may break the chain of causation  
23 between the unconstitutional actions of other officials and the harm suffered by a constitutional tort  
24 plaintiff. *Beck*, 527 F.3d at 862; accord *McSherry v. city of Long Beach*, 584 F.3d 1129, 1136 (9<sup>th</sup>  
25 Cir. 2009).

26 Defendants have come forward with evidence that the “prosecutors charging decisions” acted  
27 as an “intervening cause.” They come forward with evidence of the independence of prosecutors  
28 determination to file the criminal information. (Doc. 109, Jenkins Decl. ¶¶2, 4, 6; Request for

1 Admissions #19, 22 (“Admit the City of Fresno did not make the determination to file a criminal  
2 information against you;” “Admit that the District Attorney’s office had the sole discretion to  
3 prosecute the criminal action after August 31, 2001.”)) A Deputy District Attorney Jenkins provides  
4 testimony that it is the District Attorney’s office standard practice and procedure to review police  
5 reports prior to filing complaint. (Doc. 109, Jenkins Decl. ¶2.) The decision to prosecute plaintiff  
6 rested with the District Attorney’s office, and no one told the District Attorney to handle plaintiff’s  
7 prosecution differently because plaintiff was involved. (Doc. 109, Jenkins Decl. ¶¶2, 6.)

8 Plaintiff has not come forward with any evidence that the decision to prosecute plaintiff was  
9 influenced improperly by defendant MacAlpine or the City. The undisputed evidence establishes  
10 that plaintiff was investigated upon the suspicion of arson and there was probable cause to support  
11 plaintiff’s arrest. The evidence is undisputed that the prosecutor made an independent decision to  
12 file an information against plaintiff. The evidence is undisputed that the Fresno Superior Court  
13 found probable cause to hold plaintiff for the crime. Accordingly, summary judgment will be  
14 granted on the claim for malicious prosecution.

#### 15 **E. Due Process**

16 Defendants note that plaintiff alleges a due process violation under the Fifth and Fourteenth  
17 Amendment. (Doc.1 Complaint¶111.) The complaint states:

18 “As a result of their unlawful action, defendants deprived plaintiff of  
19 his liberty without due process of law and deprived him of equal  
20 protection of the laws in violation of the Fifth and Fourteenth  
Amendments to the Constitution of the United States and 42 U.S.C.  
§1983.) (Doc. 1, Complaint ¶111.)

21 When a governmental conduct is governed by a specific Constitutional amendment, the  
22 conduct is not analyzed under due process. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865,  
23 1870-1871, 104 L.Ed.2d 443 (1989) requires that if a constitutional claim is covered by a specific  
24 constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under  
25 the standard appropriate to that specific provision, not under the rubric of substantive due process.  
26 The Fourth Amendment provides an explicit textual source of constitution protection against  
27 unlawful seizures. *Graham*, 490 U.S. at 394-95 (that Amendment, not the more generalized notion  
28 of “substantive due process,” must be the guide for analyzing these claims).

1 As plaintiff alleges constitutional violations arising from his arrest, this claim is pursuant to  
2 the Fourth Amendment and not Due Process. Accordingly, plaintiff cannot establish a Due Process  
3 violation.

4 **F. Equal Protection**

5 Defendant argues that plaintiff alleges an equal protection claim under the Fourteenth  
6 Amendment, but the allegations are identical to those under the Fourth Amendment. (Doc.106, P&A  
7 p.11; Doc. 1, Complaint ¶111.)

8 “The Equal Protection Clause of the Fourteenth Amendment commands that no state shall  
9 ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a  
10 direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne*  
11 *Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985). The “purpose of the equal protection  
12 clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against  
13 intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its  
14 improper execution through duly constituted agents.” *Sioux City Bridge Co. v. Dakota County*, 260  
15 U.S. 441, 445, 43 S.Ct. 190 (1923).

16 A section 1983 plaintiff alleging an equal protection violation must prove that: (1) the  
17 defendants treated plaintiff differently from others similarly situated; (2) the unequal treatment was  
18 based on an impermissible classification; (3) the defendants acted with discriminatory intent in  
19 applying this classification; and (4) plaintiff suffered injury as a result of the discriminatory  
20 classification. *Moua v. City of Chico*, 324 F.Supp.2d 1132, 1137 (E.D. Cal. 2004); *see Barren v.*  
21 *Harrington*, 152 F.3d 1193, 1194 (9<sup>th</sup> Cir. 1998) (a section 1983 plaintiff alleging denial of equal  
22 protection “must show that the defendants acted with an intent or purpose to discriminate against  
23 plaintiff based on membership in a protected class.”), *cert. denied*, 525 U.S. 1154 (1999); *Van Pool*  
24 *v. City and County of San Francisco*, 752 F.Supp. 915, 927 (N.D.Cal.1990) (section 1983 plaintiff  
25 must prove purposeful discrimination by demonstrating that he “receiv[ed] different treatment from  
26 that received by others similarly situated,” and that the treatment complained of was under color of  
27 state law).

1 *Class Of One*

2 Equal protection claims may be brought by a “‘class of one,’ where the plaintiff alleges that  
3 he has been intentionally treated differently from others similarly situated and that there is no  
4 rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564,  
5 120 S.Ct. 1073 (2000) (“*Olech*”). Defendants attribute to the Ninth Circuit Court of Appeals to  
6 “circumscribe” *Olech*’s class of one equal protection due to potential to require federal court review  
7 of “almost every executive and administrative decision made by state or local actors.” In *Engquist v.*  
8 *Oregon Dept. of Agriculture*, 478 F.3d 985, 995-996 (9<sup>th</sup> Cir. 2007), *cert. denied*, 128 S.Ct. 977, 169  
9 L.Ed.2d 800 (2008), the Ninth Circuit explained:

10 In addition to significantly altering traditional personnel practices, applying  
11 the class-of-one theory to public employment would also generate a flood of new  
12 cases, requiring the federal courts to decide whether any public employee was fired  
13 for an arbitrary reason or a rational one. *See Jennings*, 383 F.3d at 1211. The theory  
14 would apply not only to discharges, but also to other employment actions, such as  
15 promotions, disciplinary actions, and decisions about pay, benefits and transfers.  
16 Contrary to the Supreme Court's admonition, federal courts would be required to  
17 “review the multitude of personnel decisions that are made daily by public agencies.”  
18 *Bishop*, 426 U.S. at 349, 96 S.Ct. 2074.

19 Finally, we believe that *Olech* is too slender a reed on which to base such a  
20 transformation of public employment law. “It seems unlikely that the Supreme Court  
21 intended such a dramatic result in its per curiam opinion in *Olech*.” *Campagna v.*  
22 *Mass. Dep't of Envtl. Prot.*, 206 F.Supp.2d 120, 127 (D.Mass.2002), *aff'd*, 334 F.3d  
23 150 (1st Cir.2003). Accordingly, we hold that the class-of-one theory of equal  
24 protection is inapplicable to decisions made by public employers with regard to their  
25 employees.

26 Defendants note the numerous courts have held the *Engquist* is bars “class of one” claims in relation  
27 to discretionary decisions made outside the employment context. Nonetheless, this Court will  
28 assume, without deciding, that the class of one applies.

To succeed on a “class of one” equal protection claim, a plaintiff bears the burden to prove  
that: (1) he/she has been intentionally treated differently than others; and (2) there is no rational basis  
for the difference in treatment. *Thorton v. City of St. Helens*, 425 F.3d 1158, 1167 (9<sup>th</sup> Cir. 2005);  
*Seariver Mar. Fin. Holdings Inc. v. Mineta*, 309 F.3d 662, 679 (9<sup>th</sup> Cir. 2002).

27 Similarity Requirement

28 As to the different treatment element, a plaintiff must demonstrate that “the level of similarity

1 between plaintiff and the persons with whom they compare themselves must be extremely high.”  
2 *Neilson v. D’Angelis*, 409 F.3d 100, 104 (2<sup>nd</sup> Cir. 2005). To succeed, plaintiffs “must demonstrate  
3 that they were treated differently than someone who is *prima facie* identical in all relevant respects.”  
4 *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7<sup>th</sup> Cir. 2002). The similarity requirement  
5 requires a plaintiff to show:

6 no rational person could regard the circumstances of the plaintiff to differ from those  
7 of a comparator to a degree that would justify the differential treatment on the basis of  
8 a legitimate government policy; and (ii) the similarity in circumstances and difference  
in treatment are sufficient to exclude the possibility that the defendant acted on the  
basis of mistake.

9 *Neilson*, 409 F.3d at 105; *see Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1<sup>st</sup> Cir. 2007) (plaintiff  
10 “must show that the parties with whom he seeks to be compared have engaged in the same activity  
11 vis-a-vis the government entity without such distinguishing or mitigating circumstances would  
12 render the comparison in utile.”)

13 Here, no evidence is introduced by plaintiff of the similarity between plaintiff and others who  
14 may have been treated differently. No evidence is introduced to support similarity in circumstances  
15 and any difference in treatment. Defendants present evidence that plaintiff’s case was treated on an  
16 individual basis upon the evidence available.

#### 17 Rational Basis

18 To prevail on the rational basis element, a “class of one” plaintiff must “negative any  
19 reasonably conceivable state of facts that could provide a rational basis for the classification.”  
20 *Lauth*, 424 F.3d 631, 634 (7<sup>th</sup> Cir. 2005) (quoting *Board of Trustees v. Garrett*, 531 U.S. 356, 367,  
21 121 S.Ct. 955 (2001)). The “rational-basis inquiry is a very lenient one, and specifically ‘attach[es]  
22 no] legal significance to the timing’ of legislative or municipal action.” *RUI One Corp. v. City of*  
23 *Berkeley*, 371 F.3d 1137, 1156 (9<sup>th</sup> Cir. 2004) (quoting *Bannum, Inc. v. City of Fort Lauderdale*, 157  
24 F.3d 819, 822, n. 3 (11<sup>th</sup> Cir. 1998)). “Governmental action only fails rational basis scrutiny if no  
25 sound reason for the action can be hypothesized.” *Garrett*, 531 U.S. at 367, 121 S.Ct. 955.

26 In *Bizzarro v. Miranda*, 394 F.3d 82, 88-89 (2<sup>nd</sup> Cir. 2005), the Second Circuit Court of  
27 Appeals explained:

28 The pertinent question in a constitutional claim is not whether the defendants

1 correctly understood the rules they were enforcing. *Olech* does not empower federal  
2 courts to review government actions for correctness. Rather, an *Olech*-type equal  
3 protection claim focuses on whether the official's conduct was rationally related to  
4 the accomplishment of the work of their agency.

5 A decision "can be considered irrational" only when the decision-maker "acts with no legitimate  
6 reason for its decision." *Harlen v. Associates v. Incorporate Village of Mineola*, 273 F.3d 494, 500  
7 (2<sup>nd</sup> Cir. 2001) (quotation marks and citation omitted). "[D]ecisions that are imprudent, ill-advised,  
8 or even incorrect may still be rational." *Rossi v. West Haven Bd. of Ed.*, 359 F.Supp.2d 178, 183 (D.  
9 Conn. 2005).

10 Here, as the undisputed evidence shows there was probable cause for the arrest and holding  
11 plaintiff for the alleged crime. Thus, there is a rational basis for any different treatment of plaintiff  
12 by the City and MacAlpine. Accordingly, as plaintiff does not show either element under a "class of  
13 one," he cannot establish a claim for violation of equal protection.

#### 14 **G. Fresno City Liability for Section 1983 Claims**

15 A local government unit may not be held liable for the acts of its employees under a  
16 respondeat superior theory. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691, 98  
17 S.Ct. 2018 (1978); *Davis v. Mason County*, 927 F.2d 1473, 1480 (9<sup>th</sup> Cir.), *cert. denied*, 502 U.S.  
18 899, 112 S.Ct. 275 (1991); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9<sup>th</sup> Cir. 1989).  
19 "Federal case law has long barred respondeat superior liability against state actors in suits brought  
20 under 42 U.S.C. § 1983." *Fed. of African American Contractors v. City of Oakland*, 96 F.3d 1204,  
21 1214 (9<sup>th</sup> Cir. 1996). Claimants suing state actors under 42 U.S.C. § 1983 "must establish that their  
22 alleged injury was the result of a 'policy or custom' of that state actor." *African American  
23 Contractors*, 96 F.3d at 1215.

24 "[A] municipality cannot be held liable *solely* because it employs a tortfeasor." *Monell*, 436  
25 U.S. at 691, 98 S.Ct. at 2018. The local government unit "itself must cause the constitutional  
26 deprivation." *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9<sup>th</sup> Cir. 1992), *cert. denied*, 510 U.S. 932,  
27 114 S.Ct. 345 (1993). Because liability of a local governmental unit must rest on its actions, not the  
28 actions of its employees, a plaintiff must go beyond the respondeat superior theory and demonstrate  
that the alleged constitutional violation was the product of a policy or custom of the local

1 governmental unit. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197 (1989);  
2 *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-480, 106 S.Ct. 1292 (1986). To maintain a civil  
3 rights claim against a local government, a plaintiff must establish the requisite culpability (a “policy  
4 or custom” attributable to municipal policymakers) and the requisite causation (the policy or custom  
5 as the “moving force” behind the constitutional deprivation). *Monell*, 436 U.S. at 691-694, 98 S.Ct.  
6 2018.

7 An actionable policy or custom is demonstrated by:

- 8 1. An “express policy that, when enforced, causes a constitutional deprivation,” *Baxter*  
9 *v. Vigo County School Corp.*, 26 F.3d 728, 735 (7<sup>th</sup> Cir. 1994);
- 10 2. A “widespread practice that, although not authorized by written law or express  
11 municipal policy, is so permanent and well settled to constitute a ‘custom or usage’  
12 with the force of law,” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.Ct.  
13 915 (1988) (plurality opinion); or
- 14 3. Constitutional injury caused by a person with “final policymaking authority,”  
15 *Praprotnik*, 485 U.S. at 123, 108 S.Ct. 915.

16 “The description of a policy or custom and its relationship to the underlying constitutional  
17 violation, moreover, cannot be conclusory; it must contain specific facts.” *Spiller v. City of Texas*  
18 *City, Police. Dept.*, 130 F.3d 162, 167 (5<sup>th</sup> Cir. 1997). “[E]xistence of a policy, without more, is  
19 insufficient to trigger local government liability.” *Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9<sup>th</sup> Cir.  
20 1992). However, “municipal liability may be imposed for a single decision by municipal  
21 policymakers under appropriate circumstances.” *Pembaur*, 475 U.S. 469, 480, 106 S.Ct. 1292  
22 (1986).

23 “More importantly, where action is directed by those who establish governmental policy, the  
24 municipality is equally responsible whether that action is to be taken only once or to be taken  
25 repeatedly.” *Pembaur*, 475 U.S. at 481, 106 S.Ct. 1292. Local government liability is based on  
26 “whether governmental officials are final policymakers for the local government in a particular area,  
27 or on a particular issue.” *McMillan v. Monroe County, Ala.*, 520 U.S. 781, 785, 117 S.Ct. 1734  
28 (1997).

1 To impose *Monell* liability, a plaintiff “must identify the policy, connect the policy to the city  
2 itself and show that the particular injury was incurred because of the execution of that policy.  
3 Plaintiff must, of course, prove that his injury was caused by city policy.” *Bennett v. City of Slidell*,  
4 728 F.2d 762, 767 (5<sup>th</sup> Cir. 1984).

5 Plaintiff has not identified or presented evidence of an official policy or custom of any entity  
6 Defendant that caused the alleged constitutional violations. Plaintiff has not offered any evidence  
7 against the officer. Plaintiff stands on the allegations in the complaint. Plaintiff tenders no facts  
8 other than the alleged personal misdeeds of the officer as evidence of a policy statement, ordinance,  
9 regulation, decision, custom, usage, or practice of the City of Fresno that caused his injury.  
10 Accordingly, his *Monell* claim fails as a matter of law. *City of Los Angeles v. Heller*, 475 U.S. 796,  
11 799, 106 S.Ct. 1571 (1986) (per curiam) (“If a person has suffered no constitutional injury at the  
12 hands of the individual police officer, the fact that the departmental regulations might have  
13 authorized the use of constitutionally excessive force is quite beside the point.”). Accordingly,  
14 summary judgment is granted as to Plaintiff’s § 1983 claims against the City of Fresno.

15 **H. Conspiracy pursuant to 42 U.S.C. 1983**

16 Plaintiff’s fourth cause of action also claims conspiracy under §1983. (Doc. 1, Complaint  
17 ¶89.) Defendants argue that there is no evidence that defendants entered into any agreement to  
18 violate plaintiff’s constitutional rights.

19 To show a conspiracy between the defendants under § 1983, plaintiffs must allege “an  
20 agreement or ‘meeting of the minds’ to violate constitutional rights.” *United Steelworkers of America*  
21 *v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir.1989) (en banc). Thus, a cause of action  
22 under § 1983 for conspiracy, plaintiff must show: “(1) the existence of an express or implied  
23 agreement among the defendant officers to deprive him of his constitutional rights, and (2) an actual  
24 deprivation of those rights resulting from that agreement.” *Ting v. United States*, 927 F.2d 1504,  
25 1512 (9th Cir.1991)).

26 Plaintiff has not come forward with evidence to show there was an agreement between  
27 defendants or whether the agreement was explicit or inferred. Defendants present evidence that they  
28 did not conspire to violate plaintiff’s rights. Defendant MacAlpine states he did not handle the fire

1 investigation “differently because it involved Plaintiff;” he was not asked to handle it differently  
2 because it was plaintiff; and he did not reach any agreement with anyone about violating plaintiff’s  
3 rights. (Doc. 110, MacAlpine Decl. ¶¶15-18.) Plaintiff admits that defendants did not conspire with  
4 other defendants to violate plaintiff’s constitutional rights. (Doc. 111, Rubin Decl., RFA no.7.)<sup>2</sup>  
5 Further, as explained above, there is no question of fact as to whether any constitutional violation  
6 occurred. It is undisputed that there was probable cause to arrest and hold plaintiff for the alleged  
7 crime. Accordingly, as there is no evidence that defendants conspired with anyone, summary  
8 judgment on this claim is appropriate.

9 **I. Qualified Immunity as to Defendant MacAlpine**

10 Defendants argue that defendant MacAlpine is immune from liability for his actions.

11 Where a constitutional violation occurs, a police officer is entitled to qualified immunity if he  
12 acted reasonably under the circumstances. *KRL v. Estate of Moore*, 512 F.3d 1184, 1189 (9<sup>th</sup> Cir.  
13 2007). The Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272,  
14 outlined a two-step approach to qualified immunity. The first inquiry is whether “[t]aken in the light  
15 most favorable to the party asserting the injury, do the facts alleged show the officer's conduct  
16 violated a constitutional right?” *Id.* at 201, 121 S.Ct. 2151. If the answer to the first inquiry is yes,  
17 the second inquiry is whether the right was clearly established: in other words, “whether it would be  
18 clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* at 202,  
19 121 S.Ct. 2151. The Supreme Court in *Pearson v. Callahan*, --- U.S. ----, 129 S.Ct. 808, 172  
20 L.Ed.2d 565 (2009), held that “judges of the district courts and the courts of appeals should be  
21 permitted to exercise their sound discretion in deciding which of the two prongs of the qualified  
22 immunity analysis should be addressed first in light of the circumstances in the particular case at  
23 hand.” *Id.* at 818. The Supreme Court further stated that “the judges of the district courts and the  
24 courts of appeals are in the best position to determine [what] order of decisionmaking will best  
25 facilitate the fair and efficient disposition of each case.” *Id.* at 821. When law enforcement officials

---

26  
27 <sup>2</sup> Defendants present evidence that they propounded Requests for Admissions (“RFA”) to plaintiff, to which plaintiff  
28 never responded. Pursuant to Fed.R.Civ.P. 36, RFAs not responded to are deemed admitted. Rule 36 (“A matter is admitted  
unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written  
answer . . .”)

1 reasonably but mistakenly conclude that probable cause is present, the officials should not be held  
2 personally liable. *Crowe v. County of San Diego*, 593 F.3d 841 (9th Cir. 2010). Officers are  
3 immune from suit when they reasonably believe that probable cause existed, even though it is  
4 subsequently concluded that it did not, because they "cannot be expected to predict what federal  
5 judges frequently have considerable difficulty in deciding and about which they frequently differ  
6 among themselves." *Crowe*, 593 F.3d at 868.

7 Here, the undisputed evidence establishes that MacAlpine acted reasonably under the  
8 circumstances. The investigator of the fire concluded that the fire in the home was "suspicious."  
9 (Doc. 110, MacAlpine Decl. ¶3.) MacAlpine of the City continued the investigation. In the course of  
10 his investigation, MacAlpine examined the residence and materials provided by the initial  
11 investigators; met with witnesses and Plaintiff; reviewed materials from the insurance adjuster  
12 pursuant to the Insurance Code<sup>3</sup>; communicated with the fire investigator for the insurance  
13 company; and allowed Plaintiff to submit to a polygraph test. (Doc. 110, MacAlpine Decl., ¶¶ 2-9;  
14 Exs. A-F). MacAlpine was presented with the following facts during his investigation:

- 15 1. The residence was in a gated community;
- 16 2. Plaintiff was home alone;
- 17 3. Plaintiff indicated that he locked the doors and set his alarm;
- 18 4. There were no signs of forced entry;
- 19 5. Plaintiff had no recent work undertaken on his property;
- 20 6. There were multiple areas of origin;
- 21 7. Natural or accidental fire was ruled out by various individuals due to multiple fire sets;
- 22 8. Plaintiff changed his version of events, and his statements were inconsistent with the  
23 physical evidence and/or testimony of others;
- 24 9. Plaintiff was less than forthright about his drug use;
- 25 10. Plaintiff failed the polygraph test and was determined to be deceitful;
- 26 11. Plaintiff was having financial problems;
- 27 12. Plaintiff made an insurance claim;
- 28 13. A cigarette lighter was found in one of the rooms which was a point of origin.

1 (Doc. 110, MacAlpine, ¶¶ 2-9, Exs. A-F; Doc. 108 Eastom, ¶¶ 2-5, Ex. A; Doc. 109, RFA Nos. 2-5,  
2 10, 21, 26 [MacAlpine]; R.A. Nos. 10, 21-24, 26 [City]). MacAlpine then issued an arrest  
3 declaration, obtained a warrant, and arrested plaintiff. Based on the above undisputed facts, there is  
4 no issue of fact whether MacAlpine acted reasonably under the circumstance. Accordingly, as a  
5 matter of law, plaintiff has not raised an issue of fact as to whether MacAlpine is entitled to qualified  
6 immunity.

## 7 **J. Supervisor Liability Under 42 U.S.C. §1983**

8 The Sixth Cause of action alleged Supervisory Liability against defendant MacAlpine. As  
9 best the allegations can be read, they allege that MacAlpine failed to “instruct, supervise and disciple  
10 on a continuing basis the subordinates” from harassing plaintiff, unlawfully arresting plaintiff,  
11 conspiring to violate plaintiff rights, and depriving plaintiff of his rights. (Doc. 1, Complaint ¶118.)

### 12 **1. Overview of Supervisor Liability**

13 A supervisory official may be liable under Section 1983 only if he or she was personally  
14 involved in the constitutional deprivation, or if there was a sufficient causal connection between the  
15 supervisor's wrongful conduct and the constitutional violation. *Redman v. County of San Diego*, 942  
16 F.2d 1435, 1446-47 (9th Cir.1991)), *cert. denied*, 502 U.S. 1074 (1992); *Hansen v. Black*, 885 F.2d  
17 642, 646 (9th Cir.1989) (same). Supervisors can be held liable for (a) their own culpable action or  
18 inaction in the training, supervision, or control of subordinates; (b) their acquiescence in the  
19 constitutional deprivation of which a complaint is made; or (3) for conduct that showed a reckless or  
20 callous indifference to the rights of others. *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir.  
21 2000).

22 Under no circumstances, however, is there *respondeat superior* liability under § 1983; that is,  
23 there is no liability under § 1983 solely because one is responsible for the actions or omissions of  
24 another. *Redman v. County of San Diego*, 942 F.2d at 1446. A supervisor therefore generally “is  
25 only liable for constitutional violations of his subordinates if the supervisor participated in or  
26 directed the violations, or knew of the violations and failed to act to prevent them.” *Taylor v. List*,  
27 880 F.2d 1040, 1045 (9<sup>th</sup> Cir. 1989).

28

1           **2. Defendant MacAlpine was not a Supervisor**

2           There is no evidence that MacAlpine was a supervisor for anyone. Defendant presents  
3 evidence that MacAlpine did not supervise the only other person involved in the arson investigation,  
4 Howard Eastom. Investigator Eastom presents evidence that defendant MacAlpine was not his  
5 supervisor and did not train him. (Doc. 108, Eastom Decl. ¶13.) Defendant MacAlpine presents  
6 evidence that he is not investigator Eastom’s supervisor. (Doc. 110, MacAlpine Dec. ¶19.) There is  
7 no evidence that, even if MacAlpine was a supervisor, he “participated in or directed” any violations.  
8 There is no evidence MacAlpine was aware that there was the potential of any violations. Thus,  
9 plaintiff has failed to raise any issue of fact that MacAlpine was a supervisor, and even if he was a  
10 supervisor, he knew or participated in alleged constitutional violations.

11           **3. No Constitutional Violation**

12           Plaintiff must come forward with evidence of a constitutional violation. As explained *supra*,  
13 there is no evidence of a constitutional violation by the City or MacAlpine. There is no evidence of  
14 a constitutional violation by investigator Eastom.

15           **K. Claim for Damages under the California Constitution**

16           **1. Damages under the California Constitution**

17           Defendant argues California law does not permit a claim for damages for violation of Article  
18 1 of the California Constitution. *Katzberg v. Regents of the University of California*, 29 Cal. 4<sup>th</sup> 300,  
19 329 (2002).

20           The California Supreme Court has held that state constitutional provisions do not necessarily  
21 support a claim for monetary damages. *Katzberg v. Regents of University of California*, 29 Cal.4th  
22 300, 127 Cal.Rptr.2d 482, 58 P.3d 339 (2002) (the California Supreme Court declined to recognize a  
23 constitutional tort to remedy the asserted violation of Art. 1, § 7(a) in the absence of a statutory  
24 provision or common law tort authorizing such a remedy.) State courts have expressly rejected state  
25 constitutional damage claims for violation of the due process and equal protection clauses. *Javor v.*  
26 *Taggart*, 98 Cal.App.4th 795, 807, 120 Cal.Rptr.2d 174 (2002) ("It is beyond question that a plaintiff  
27 is not entitled to damages for a violation of the due process clause or the equal protection clause of  
28 the state Constitution."). *See also Degrossi v. Cook*, 29 Cal.4th 333, 335, 127 Cal.Rptr.2d 508, 58

1 P.3d 360 (2002) (no private right of action for damages for violation of free speech clause of  
2 California Constitution). A plaintiff is not entitled to damages for a violation of the due process  
3 clause or the equal protection clause of the state Constitution. *Carlsbad Aquafarm, Inc. v. State*  
4 *Dept. of Health Services*, 83 Cal.App.4th 809, 815-823, Cal.Rptr.2d 87 (2000) (due process); *Gates*  
5 *v. Superior Court*, 32 Cal.App.4th 481, 516-524, 38 Cal.Rptr.2d 489 (1995) (equal protection.)<sup>3</sup>

6 Accordingly, plaintiff’ claims for damages for Due Process and Equal Protection violations  
7 are inconsistent with California law.

8 **2. No evidence that Plaintiff Exhausted the Government Tort Claims Act**

9 Defendants argue that the claim should be dismissed because plaintiff did not file a  
10 Government Tort Claim.

11 Under the Government Claims Act, there is no common law tort liability for public entities in  
12 California; instead, such liability must be based on statute. Cal.Gov.Code § 815(a); *Guzman v.*  
13 *County of Monterey*, 46 Cal. 4th 887, 95 Cal. Rptr. 3d 183, 209 P.3d 89 (2009). No suit for money  
14 or damages may be brought against a government entity (or against a government employee acting in  
15 the scope of employment) unless and until a timely claim has been presented pursuant to the  
16 Government Claims Act (Gov.C. § 810 et seq.) Claims for personal injury (including wrongful  
17 death) or property damage must be presented “not later than six months after the accrual of the cause  
18 of action.” Gov. Code §911.2.

19 Defendants present undisputed evidence that plaintiff did not file a tort claim. Defendants  
20 present undisputed evidence that plaintiff did not file any claim arising out of the fire, subsequent  
21 investigation and/or his prosecution. (Doc. 112, Trost Decl. ¶3.) Thus, as plaintiff did not file a tort

---

22  
23 <sup>3</sup> The *Katzberg* case did not preclude all damages claims for state constitutional violations. *Katzberg* sets out a  
24 framework to determine whether damages are appropriate. *Katzberg*, 29 Cal.4th at 317, 127 Cal.Rptr.2d 482, 58 P.3d 339.  
25 Under the *Katzberg* test, a court considering this question must: (1) look at the language and history of the provision for an  
26 affirmative intent to authorize a claim for damages; (2) in the absence of such affirmative intent, consider whether an adequate  
27 remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and  
28 significance of the constitutional provision; (3) if these factors weigh against the recognition of a right to damages, the inquiry  
ends. If, however, the factors weigh in favor of recognizing such a right, the court should also consider any special factors  
counseling hesitation in recognizing a damages action, including deference to legislative judgement, avoiding of adverse  
policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to  
assess particular types of damages. *Id.* at 317, 127 Cal.Rptr.2d 482, 58 P.3d 339. The Court has not been presented with  
arguments by either party as to the *Katzberg* factors.

1 claim, he may not pursue a tort claim arising from the action.

2 **CONCLUSION**

3 For the foregoing reasons, the Court GRANTS the motion for summary judgment in favor of  
4 defendant City of Fresno and in favor of defendant Don MacAlpine and against plaintiff Gregory  
5 Morris as follows:

- 6 1. The motion is GRANTED as to Fourth Cause of action for violation of plaintiff's  
7 civil rights pursuant to 42 U.S.C. §1983;
- 8 2. The motion is GRANTED as to Fifth Cause of action for violation of Due Process  
9 and Equal Protection, "unlawful warrantless arrest and prosecution without probable  
10 cause;"
- 11 3. The motion is GRANTED as to Sixth Cause of action for supervisory liability for  
12 constitutional violations;
- 13 4. The motion is GRANTED as to the Ninth Cause of action for damages under the  
14 California Constitution.

15 IT IS SO ORDERED.

16 **Dated: June 9, 2010**

**/s/ Lawrence J. O'Neill**  
**UNITED STATES DISTRICT JUDGE**

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28