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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JESSE I. SANTANA, et al.,

Plaintiff,

v.

THE COUNTY OF YUBA, et al.,

Defendant.

No. 2:15-cv-00794 KJM-EFB

ORDER

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1 In April 2014, a jury acquitted attorneys Jesse Santana and David Vasquez of all  
2 charges of bribing a witness and obstructing justice. In this civil lawsuit, filed after the criminal  
3 trial's conclusion, Santana and Vasquez contend the prosecution was part of a plan to thwart  
4 Santana's appointment to the Sutter County Superior Court. The defendants all move to dismiss  
5 under Rule 12 of the Federal Rules of Civil Procedure, and several also filed special motions to  
6 strike the complaint under California Civil Code of Civil Procedure section 425.16, the state's  
7 "anti-SLAPP" statute.

8 The court held a hearing on August 7, 2015. Jaime Leños appeared for Santana  
9 and Vasquez. Lauren Calnero appeared for Yuba County, Patrick McGrath, John Vacek, Mary  
10 Barr, and Gene Stober. John Whitesides appeared for the City of Marysville and Randall Elliot.  
11 Michael Fox appeared for Judge Julia Scrogin. Wendy Green appeared for Timothy Evans. After  
12 considering the parties' briefing and the arguments at hearing, the court grants the motions to  
13 dismiss, in part with leave to amend, and grants in part and denies in part the special motions to  
14 strike without prejudice to renewal.

15 I. BACKGROUND

16 A. Allegations

17 The story of Santana's and Vasquez's complaint spans several years. At this stage,  
18 their case rests on only allegations, but on a motion to dismiss, the court regards these allegations  
19 as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Santana and Vasquez allege as follows.

20 1. Civil Settlement Negotiations in 2007

21 A little more than eight years ago, in early November 2007, Detective Randall  
22 Elliott of the Marysville Police Department met with Socorro Acevedo, her mother, and her sister  
23 about an alleged case of abuse. Compl. ¶ 34, ECF No. 1. Acevedo, at the time younger than  
24 eighteen, told Elliott that Joseph Griesa, her boss at a local towing company, had physically and  
25 sexually abused her at work. *Id.* She showed Elliott some sexual text messages she had received  
26 from Griesa. *Id.* ¶ 50. After the interview, Elliott attempted to investigate her story by making a  
27 pretextual phone call to Griesa, but was unsuccessful. *Id.* ¶ 51. He told Acevedo it would be a

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1 tough case to prosecute because the trial would likely come down to a he-said, she-said credibility  
2 contest. *Id.* But he suggested Acevedo could pursue a civil remedy. *Id.* ¶¶ 35–36.

3           After Elliott told Acevedo and her family the police could probably not help them,  
4 he again contacted Griesa, the alleged abuser, who was a former probation officer. *Id.* ¶ 52.  
5 Elliott said he was investigating Acevedo’s allegations that Griesa sexually abused Acevedo, gave  
6 him a copy of the relevant Penal Code sections, and told him to talk to a lawyer before saying  
7 anything. *Id.* Griesa agreed. *Id.* He hired David Vasquez. *Id.* ¶ 53. Vasquez called Elliott, who  
8 told him about the charges he was investigating. *Id.* Vasquez said he would be on vacation, and  
9 asked that Elliott wait to forward the results of his investigation to the District Attorneys’ Office  
10 until after he returned and had a chance to review the case and talk about it with Griesa. *Id.* ¶ 54.  
11 Elliott agreed to wait. *Id.*

12           Later the same month, Elliott heard from Acevedo’s sister that Griesa had begun  
13 removing his computer, video camera, and other things from his office. *Id.* ¶ 55. She said these  
14 items contained evidence of the alleged abuse and would corroborate Acevedo’s story, so Elliott  
15 should obtain a warrant and search Griesa’s office. *Id.* ¶ 56. It was a late Friday afternoon, and  
16 Elliott thought it would take hours to prepare an affidavit and obtain a warrant from a judge and  
17 much longer to search the tow yard where Griesa worked. *Id.* ¶ 57. He said a warrant would not  
18 be worth the effort because a search would turn up no evidence. *Id.* ¶ 58. He reiterated his  
19 impression that the case would come down to a credibility contest between Griesa and Acevedo,  
20 and never obtained a warrant. *Id.* ¶ 58.

21           In the meantime, Acevedo and her family had contacted an attorney, Jesse  
22 Santana. *Id.* ¶ 37. They told him the interview with Elliott had left them feeling helpless. *Id.*  
23 Santana agreed to represent them pro bono and reassured them of their option to seek  
24 compensation from Griesa in a civil case. *Id.* ¶¶ 38, 41. Santana said the family had some time  
25 before they needed to file a complaint, and that he could attempt to negotiate a settlement with  
26 Griesa, but because Acevedo was younger than eighteen, a judge would need to approve any  
27 agreement. *Id.* ¶ 39. Acevedo told Santana she preferred to keep the lurid details of the ordeal  
28 private; she feared that if her father learned about the abuse, he could suffer a stroke, and that if

1 her brother learned about it, he would take matters into his own hands. *Id.* ¶ 40. She said she  
2 didn't want to testify about the abuse in court or file any criminal charges. *Id.* Santana agreed to  
3 pursue a settlement with Griesa and avoid the publicity of a civil complaint or criminal case.  
4 *Id.* ¶ 41.

5 Griesa had similar conversations with Vasquez. *Id.* ¶¶ 69–70. Griesa was  
6 concerned that if Acevedo's allegations were made public, they would be extremely damaging to  
7 his reputation, to his high school coaching position, and to his business. *Id.* ¶ 69. Vasquez told  
8 Griesa that sexual assault victims generally choose not to testify about the abuse in open court,  
9 and that if the District Attorney learned Acevedo would not testify, charges might not be filed.  
10 *Id.* ¶ 78. Vasquez cautioned this was no guarantee, and a criminal case was always a possibility,  
11 *id.*, but Griesa said he was not worried about a criminal prosecution and asked Vasquez how to  
12 handle the civil suit, *id.* ¶ 70. Vasquez said he could attempt to resolve the case out of court and  
13 avoid any public disclosure of Acevedo's allegations, and Griesa asked him to try. *Id.* ¶¶ 70–71.  
14 In a follow-up meeting, Vasquez cautioned Griesa again he could make no guarantees about the  
15 criminal case, but the two discussed a possible good-faith payment of \$50,000 to encourage civil  
16 settlement discussions. *Id.* ¶¶ 70, 72. Vasquez deposited the money into his client trust account  
17 and cautioned Griesa that any final settlement would need court approval; Griesa urged Vasquez  
18 to avoid any publicity and danger to himself and the family business. *Id.* ¶ 73.

19 At some point, Santana contacted Vasquez. *Id.* ¶ 42. The two discussed a possible  
20 settlement, and eventually \$100,000 was proposed as a fair amount. *Id.* Santana reported the  
21 results of his negotiations to Acevedo and her family and reminded them they would need to  
22 obtain court approval. *Id.* ¶ 43. Santana drafted a proposed civil release, which he forwarded to  
23 Vasquez. *Id.* ¶ 44. When Vasquez learned Acevedo preferred not to testify in court against  
24 Griesa, he requested an addition to the draft: Acevedo would promise to “exercise any privilege  
25 she may have pursuant to law, not to testify in any proceedings.” *Id.* ¶ 45. No one objected to  
26 this amendment. *Id.* A later draft agreement provided as follows:

27 In consideration of the sum of one hundred thousand dollars  
28 (\$100,000.00), Socorro Acevedo will request that criminal charges  
not be filed against Joe Griesa, and will exercise any privilege she

1 may have pursuant to law, not to testify in any proceedings, and she  
2 will not file any civil action, arising out of the underlying facts,  
3 against Joe Griesa. Joe Griesa will pay \$50,000.00 now and the  
4 remaining \$50,000.00 within 60 days. In exchange, Socorro  
5 Acevedo forever releases and discharges Joe Griesa from all claims,  
6 demands, damages, actions, and causes of action of every kind and  
7 nature in any way related to Joe Griesa's interactions with Socorro  
8 Acevedo.

9 *Id.* In December 2007, about a month after Acevedo and her family first met with Detective  
10 Elliott, she and her mother signed a release that included the language quoted above.

11 *Id.* ¶¶ 45–46. Acevedo made it clear she wanted to put the episode behind her and move away to  
12 college. *Id.* ¶¶ 46–47. Santana again reminded them the settlement would not be final until  
13 Griesa signed the release and it was approved by a judge. *Id.* ¶ 48.

14 During these negotiations, no criminal case was filed, but Griesa understood the  
15 criminal case was always a possibility. *Id.* ¶ 77. He saw the settlement payment as a business  
16 decision because he could not afford public disclosure. *Id.* ¶ 79. Griesa never spoke to Santana  
17 about Acevedo or her claims, and Santana never attempted to dissuade Acevedo from testifying  
18 against Griesa. *Id.* ¶ 79.

19 Vasquez contacted Detective Elliott to tell him about the possible civil settlement  
20 between Acevedo and Griesa. *Id.* ¶ 60. Elliott said this could be a good resolution to the case.  
21 *Id.* ¶ 61. But Elliott never documented his awareness of these negotiations or his impression that  
22 a civil settlement could be a good resolution. *Id.* ¶ 62. Vasquez also spoke about the proposed  
23 settlement with Melanie Bendorf, a Yuba County Deputy District Attorney. *Id.* ¶ 60. And  
24 Santana called Elliott to say he was representing Acevedo and that she wanted to avoid a criminal  
25 prosecution, put the ordeal behind her, and move out of town for college. *Id.* ¶ 63. Finally,  
26 Griesa contacted Elliott to talk about the release and his agreement to pay \$100,000. *Id.* ¶ 76.  
27 Elliott told Griesa to get a second opinion. *Id.*

28 Soon after speaking to Santana and Vasquez, Elliott finalized a report of his  
investigation and submitted it to the District Attorney's office. *Id.* ¶ 65. Rather than  
recommending criminal charges be filed against Griesa, Elliott recommended charges against  
Santana and Vasquez. *Id.*

1           The settlement agreement between Griesa and Acevedo never became final.  
2           Acevedo changed her mind about the release, *id.* ¶ 66, and Griesa never signed it, *id.* ¶ 80.  
3           Acevedo never received the \$50,000 deposited in Vasquez’s trust account, and the money was  
4           returned to Griesa. *Id.* ¶ 81. Griesa found a new lawyer, Timothy Evans. *Id.* ¶ 83. Acevedo also  
5           found a new lawyer. *Id.* ¶ 68. Santana called Detective Elliott to tell him Acevedo had a new  
6           attorney and that she wanted to say more about crimes Griesa had committed against her. *Id.*  
7           ¶¶ 67–68. Santana was not paid. *See id.* ¶ 41. Elliott said Acevedo could call him if she wanted.  
8           *Id.* ¶ 67. Santana offered to give Elliott the name and number of her new lawyer, but Elliott said  
9           he was not interested. *Id.* ¶ 68.

10                           2.       Santana’s Judicial Application and the Criminal Prosecution

11           Before Santana took on his representation of Acevedo, he had submitted his  
12           application to the Governor’s office for an appointment to a vacant seat on the Sutter County  
13           Superior Court. *Id.* ¶ 82. He was a prominent Hispanic lawyer with a strong support base among  
14           the Hispanic community. *Id.* Vasquez was one of his supporters. *Id.*

15           Susan Green, a former Sutter County District Attorney, had applied for the same  
16           vacant seat. *Id.* Among her supporters were Judge Julia Scrogin of the Sutter County Superior  
17           Court, Yuba County District Attorney Patrick McGrath, Yuba County Deputy District Attorneys  
18           Melanie Bendorf and John Vacek, Detective Elliott, and Griesa’s new attorney, Timothy Evans.  
19           *Id.* ¶ 83. Each preferred Green over Santana for the judgeship. *Id.* ¶ 84. They knew the  
20           Governor would be announcing an appointment as early as June 2008; soon after they learned  
21           Santana had applied, they concocted the criminal investigation and prosecution against Santana to  
22           scuttle his application and sully his reputation. *Id.* ¶¶ 85–86, 90. The plan was to charge Vasquez  
23           to cover up their ulterior motive; he was “collateral damage.” *Id.* ¶ 85. In anticipation of  
24           Santana’s application, the conspirators held a “secret meeting” to discuss the filing of unfounded  
25           criminal charges against him. *Id.* ¶ 87.

26           Together—along with Yuba County District Attorney Investigators Gene Stober  
27           and Mary Barr—Scrogin, McGrath, Bendorf, Vacek, Elliott, and Evans “abused their positions of  
28           power, conducted and pursued a negligent and improper investigation, fabricated and pursued



1 criminal charges, improperly and illegally empaneled a criminal grand jury, knowingly presented  
2 incompetent and irrelevant evidence, withheld exonerating evidence and maliciously prosecuted  
3 Jesse Santana and David Vasquez.” *Id.* ¶ 88. Santana and Vasquez were indicted “for conspiracy  
4 to obstruct justice, bribery, dissuading a witness, and dissuading a witness for financial gain.” *Id.*  
5 ¶ 90.

6 With their knowledge and approval, a warrant to search Santana’s and Vasquez’s  
7 law offices was prepared and executed. *Id.* ¶ 92. They found Griesa’s file. *See id.* ¶ 96. Evans,  
8 who at this time represented Griesa, told Griesa the District Attorney’s office would not file  
9 charges against him if he agreed to cooperate in the investigation of Santana and Vasquez and  
10 testify against them. *Id.* ¶ 95. Griesa agreed to cooperate in the investigation in return for the  
11 defendants’ promise not to file child molestation and sexual assault charges against him. *Id.*  
12 ¶¶ 96–97.

13 In November 2008, Judge Scrogin empaneled a grand jury to oversee Santana’s  
14 investigation and consider an indictment. *Id.* ¶ 98. She selected and swore in the grand jurors  
15 and presided over a contempt hearing in which Acevedo was compelled to provide testimony to  
16 the grand jury against Santana. *Id.*

17 Judge Scrogin “had a history with Santana.” *Id.* ¶ 99. In 2004, when she was a  
18 prosecutor, she lost a high-profile murder case against a client of Santana’s. *Id.* Before she  
19 empaneled the grand jury in Santana’s prosecution, Scrogin had admitted to bias against him  
20 arising from her support of Green for the Superior Court judgeship; Scrogin had also written a  
21 letter to the Governor in support of Green. *Id.* ¶ 100. In the months before she presided over the  
22 grand jury considering Santana’s case, she therefore had consistently recused herself from any  
23 case in which Santana appeared as counsel. *Id.* ¶ 101. But she did not recuse herself from the  
24 grand jury proceedings in Santana’s case, even after Acevedo’s attorney requested her recusal.  
25 *Id.* ¶ 103.

26 After Judge Scrogin empaneled the grand jury, McGrath, Bendorf, Vacek, Elliott,  
27 and Stober “knowingly fabricated false charges and presented incompetent and irrelevant  
28 evidence, withheld exonerating and other information that they were constitutionally obligated to

1 present to the grand jury, unlawfully and illegally obtained an indictment against Jesse Santana  
2 and David Vasquez, without probable cause.” *Id.* ¶ 105.

3 In January 2009, Green was appointed to the Sutter County Superior Court. *Id.*  
4 ¶ 107. Santana, of course, was not. In September 2010, he filed a writ with the California Court  
5 of Appeal to set aside the indictment against him on account of Judge Scrogin’s bias. *Id.* ¶ 108.  
6 In an unpublished opinion, the California Court of Appeal found Judge Scrogin was indeed biased  
7 and had acted “without fundamental jurisdiction to empanel a grand jury to indict defendant  
8 Santana, and her actions toward that end were therefore void.” *Santana v. Super. Ct.*,  
9 No. C066008, 2012 WL 1777801, at \*10 (Cal. Ct. App. May 16, 2012).<sup>1</sup> The Court of Appeal’s  
10 decision was issued in 2012, long after Green had been appointed.

11 After the Court of Appeal set aside Santana’s indictment, Santana and Vasquez  
12 were prosecuted by criminal complaint rather than indictment. *Id.* ¶ 111. A state magistrate and  
13 the California Superior Court found the prosecution was founded on probable cause. *See*  
14 *generally* *Marysville & Elliott Req. J. Not. Ex. C*, ECF No. 11-2.<sup>2</sup> The defendants turned the case  
15 over to the California State Attorney General’s Office. Compl. ¶ 111. The case went to trial  
16 before a jury on three charges: conspiracy to obstruct justice, dissuading a witness, and  
17 dissuading a witness for financial gain, the last against Vasquez only. *Id.* During the trial, the  
18 same district attorneys who had prosecuted the indictment acted as investigators and testified as  
19 witnesses against Santana and Vasquez. *Id.* ¶ 112. On April 25, 2014, after less than an hour of  
20 deliberations, the jury found Santana and Vasquez were not guilty of any charge. *Id.* ¶ 113. After  
21 the trial, McGrath was quoted in a local newspaper: “Our investigation was solid and we stand by  
22 our prosecution of Mr. Santana and Mr. Vasquez.” *Id.* ¶ 114.

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24 <sup>1</sup> The court takes judicial notice of this decision. *See* Fed. R. Evid. 201 (governing  
25 judicial notice); *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 976 (9th Cir. 2012) (a court  
26 may consider proper subject of judicial notice on a motion to dismiss); *Reyn’s Pasta Bella,*  
*LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir. 2006) (a court may take judicial notice of  
public filings in other, related cases).

27 <sup>2</sup> The court grants the unopposed request for judicial notice of this document. *See supra*  
28 note 1.

1           B.     Procedural History of this Case

2           Santana and Vasquez filed their complaint in this court on April 13, 2015 against  
3 Yuba County, the Yuba County District Attorney’s Office, McGrath, Bendorf, Vacek, Barr,  
4 Stober, the Marysville Police Department, Elliott, Judge Scrogin, and Evans. *Id.* at 1. They  
5 allege five claims: (1) violation of the Fourth Amendment, under 42 U.S.C. §§ 1981 and 1983,  
6 against all the defendants except Evans, *id.* ¶¶ 123–28; (2) violation of the Fourteenth  
7 Amendment Due Process Clause, under 42 U.S.C. §§ 1981 and 1983, against all the defendants  
8 except Evans, *id.* ¶¶ 129–34; (3) malicious prosecution, against all the defendants, *id.* ¶¶ 135–39;  
9 (4) negligence, against all the defendants, *id.* ¶¶ 140–43; and (5) intentional infliction of  
10 emotional distress, against all the defendants, *id.* ¶¶ 144–47. They request damages, attorneys’  
11 fees, and costs. *Id.* at 28.

12           The defendants, in four groups, have filed motions to dismiss and special motions  
13 to strike. First, the Yuba County defendants (The County, the District Attorney’s Office,  
14 McGrath, Bendorf, Vacek, Barr, and Stober) move to dismiss under Federal Rule of Civil  
15 Procedure 12(b)(6) and move to strike the complaint under California Code of Civil Procedure  
16 section 425.16. They argue they are state actors and are therefore immune under the Eleventh  
17 Amendment to the U.S. Constitution. They also point out that the complaint attacks actions they  
18 undertook as prosecutors and witnesses, so they contend they are entitled to immunity, both under  
19 federal and state law. If they are not immune, the Yuba County defendants argue Santana and  
20 Vasquez cannot state a claim for malicious prosecution because the investigation and prosecution  
21 were founded on probable cause. They also argue Santana and Vasquez cannot state a  
22 substantive due process claim for malicious prosecution. And finally, Yuba County argues the  
23 complaint’s factual allegations are inadequate to show it is liable as a municipality.

24           As for the complaint’s state-law claims, the Yuba County defendants request  
25 dismissal of any state claims for lack of jurisdiction if the federal claims are dismissed; and they  
26 alternatively request a more definite statement. *See generally* Yuba Mot. Dismiss, ECF No. 19.  
27 Their motion to strike is based on similar legal arguments, but also contends that Santana and

28       /////

1 Vasquez cannot support their allegations with evidence. *See generally* Yuba Mot. Strike, ECF  
2 No. 20.

3 Second, the City of Marysville and Detective Elliott move to dismiss for  
4 essentially the same reasons as the Yuba County defendants, drawing attention to previous state  
5 court decisions finding Santana's and Vasquez's prosecution was based on probable cause. *See*  
6 *generally* Marysville Mot., ECF No. 11-1.

7 Third, Judge Scrogin moves to dismiss, arguing that she is protected by absolute  
8 immunity as a judge and immunity as a state actor under the Eleventh Amendment. Should the  
9 court find she is not immune, she argues Santana's and Vasquez's claims are barred both as  
10 untimely under the statute of limitations and under the California Government Tort Claims Act.  
11 *See generally* Scrogin Mot., ECF No. 16-1.

12 Fourth, Evans moves similarly to dismiss and to strike. He argues the complaint  
13 includes no allegation of his participation in the prosecution itself, and he argues that regardless  
14 of his absence from the alleged scheme, the defendants had probable cause to charge plaintiffs.  
15 He also argues the court lacks subject matter over the claims against him, which are founded  
16 solely on state law. *See generally* Evans Mot., ECF No. 8-1. If the state law claims are allowed  
17 to proceed in federal court, he argues Santana and Vasquez cannot show he was negligent  
18 because he never had an attorney-client relationship with either of them. He argues they cannot  
19 state a claim for intentional infliction of emotional distress because his actions were not beyond  
20 the bounds of decency.

21 Santana and Vasquez filed an opposition to each motion. Opp'n Yuba Dismiss,  
22 ECF No. 24; Opp'n Yuba Strike, ECF No. 25; Opp'n Evans, ECF No. 21; Opp'n Marysville,  
23 ECF No. 28; Opp'n Scrogin, ECF No. 23. The defendants each replied. *See* Yuba Reply  
24 Dismiss, ECF No. 29; Yuba Reply Strike, ECF No. 30; Evans Reply, ECF No. 26; Marysville  
25 Reply, ECF No. 28; Scrogin Reply, ECF No. 27.

26 As a preliminary matter, although the complaint alleges claims under 42 U.S.C.  
27 § 1981, it does not identify the basis of these claims. On its own motion, the court strikes these  
28 allegations and orders a more definite statement of any § 1981 claims. *See, e.g., Anderson v.*

1 *Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 367 & n. 5 (11th Cir. 1996) (“[T]he court,  
2 acting *sua sponte*, should have struck the plaintiff’s complaint . . . and instructed plaintiff’s  
3 counsel to file a more definite statement.”).

4 The court first addresses the special motions to strike, then the motions to dismiss.

5 II. SPECIAL MOTIONS TO STRIKE

6 A. In General

7 California enacted Section 425.16 of the Code of Civil Procedure “to curtail the  
8 ‘disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional  
9 rights of freedom of speech and petition for the redress of grievances.’” *Bulletin Displays, LLC v.*  
10 *Regency Outdoor Adver., Inc.*, 448 F. Supp. 2d 1172, 1178–79 (C.D. Cal. 2006) (quoting Cal.  
11 Civ. Proc. Code § 425.16(a)). It is meant as a procedural remedy for any person sued in a so-  
12 called “strategic lawsuit against public participation,” or SLAPP,<sup>3</sup> and provides as follows:

13 A cause of action against a person arising from any act of that  
14 person in furtherance of the person’s right of petition or free speech  
15 under the United States Constitution or the California Constitution  
16 in connection with a public issue shall be subject to a special  
motion to strike, unless the court determines that the plaintiff has  
established that there is a probability that the plaintiff will prevail  
on the claim.

17 Cal. Civ. Proc. Code § 425.16(b)(1). Special motions to strike under this section are commonly  
18 referred to as anti-SLAPP motions. *See, e.g., Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261  
19 (9th Cir. 2013), *pet. rehr’g en banc denied*, 736 F.3d 1180 (9th Cir. 2013); *Manufactured Home*  
20 *Communities, Inc. v. Cnty. of San Diego*, 655 F.3d 1171, 1176 (9th Cir. 2011).

21 The legislature meant Section 425.16 to provide defendants a cheap, early  
22 opportunity to squelch meritless litigation. *Soukup*, 39 Cal. 4th at 278. An anti-SLAPP motion  
23 calls for a “summary judgment-like procedure,” *Varian Medical Systems, Inc. v. Delfino*, 35 Cal.  
24 4th 180, 192 (2005), that proceeds in two stages:

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25  
26  
27 <sup>3</sup> The usages “SLAPP action” and “SLAPP suit” are redundant, but common. *See, e.g.,*  
28 *Shropshire v. Fred Rappoport Co.*, 294 F. Supp. 2d 1085, 1089 (N.D. Cal. 2003); *Soukup v. Law*  
*Offices of Herbert Hafif*, 39 Cal. 4th 260, 279 (2006).

1 First, the court decides whether the defendant has made a threshold  
2 showing that the challenged cause of action is one arising from  
3 protected activity. . . . If the court finds that such a showing has  
4 been made, it must then determine whether the plaintiff has  
5 demonstrated a probability of prevailing on the claim. Only a cause  
6 of action that satisfies both prongs of the anti-SLAPP statute—*i.e.*,  
7 that arises from protected speech or petitioning *and* lacks even  
8 minimal merit—is a SLAPP, subject to being stricken under the  
9 statute.

10 *Soukup*, 39 Cal. 4th at 278–79 (citations and internal quotation marks omitted; emphasis in  
11 original). The statute’s language must be construed broadly. *Id.* § 425.16(a).

12 B. Anti-SLAPP Motions in Federal Court

13 When sitting in diversity, a federal district court applies federal procedure and  
14 state substantive law. *See, e.g., Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*,  
15 559 U.S. 393, 398 (2010). In 1999, the Ninth Circuit found section 425.16 applies in federal  
16 courts. *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970–73 (9th Cir.  
17 1999); *see also Makaeff*, 736 F.3d at 1182 (“California’s anti-SLAPP statute, by creating a  
18 separate and additional theory upon which certain kinds of suits may be disposed of before trial,  
19 supplements rather than conflicts with the Federal Rules.”) (Wardlaw and Callahan, JJ.,  
20 concurring in denial of rehearing en banc). Sections 425.16(f) and (g),<sup>4</sup> however, impose  
21 procedural limitations directly at odds with the Federal Rules of Civil Procedure. *Metabolife*  
22 *Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001); *Bulletin Displays*, 448 F. Supp. 2d at  
23 1180; *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 979–82 (C.D. Cal. 1999).

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24 <sup>4</sup> Those subparagraphs provide as follows:

25 (f) The special motion may be filed within 60 days of the service of the complaint  
26 or, in the court’s discretion, at any later time upon terms it deems proper. The  
27 motion shall be scheduled by the clerk of the court for a hearing not more than 30  
28 days after the service of the motion unless the docket conditions of the court  
require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a  
notice of motion made pursuant to this section. The stay of discovery shall remain  
in effect until notice of entry of the order ruling on the motion. The court, on  
noticed motion and for good cause shown, may order that specified discovery be  
conducted notwithstanding this subdivision.

Cal. Civ. Proc. Code § 425.16(f), (g).

1 For example, “[s]ection 425.16 limits discovery and makes further discovery an exception, rather  
2 than the rule. Rule 56 does not limit discovery. On the contrary, it ensures that adequate  
3 discovery will occur before summary judgment is considered.” *Metabolife*, 264 F.3d at 846  
4 (quoting *Rogers*, 57 F. Supp. 2d at 982). For this reason, sections 425.16(f) and (g) do not apply  
5 to litigation in federal court.<sup>5</sup> *Id.* Incorrect application of the federal rules is reversible error. *Id.*;  
6 *see also Makaeff*, 736 F.3d at 1183 (citing Fed. R. Civ. P. 12(d)<sup>6</sup>) (Wardlaw and Callahan, JJ.,  
7 concurring in denial of rehearing en banc).

8 This structure has led some district courts to adopt a tiered approach to anti-  
9 SLAPP motions. First, “[i]f an anti-SLAPP motion is based on legal deficiencies in the  
10 complaint, a federal court ‘must determine the motion in a manner that complies with the  
11 standards set by Federal Rules 8 and 12.’” *Bulletin Displays*, 448 F. Supp. 2d at 1180 (quoting *In*  
12 *re Bah*, 321 B.R. 41, 45 n.6 (9th Cir. B.A.P. 2005)); *accord Rogers*, 57 F. Supp. 2d at 982.  
13 Second, “[i]f a defendant makes an anti-SLAPP motion based on the plaintiff’s failure to submit  
14 evidence to substantiate its claims, the motion is treated as a motion for summary judgment, and  
15 discovery ‘must be developed sufficiently to permit summary judgment under Rule 56.’” *Id.*  
16 (quoting *In re Bah*, 321 B.R. at 45 n.6); *accord Rogers*, 57 F. Supp. at 982; *see also Metabolife*,  
17 264 F.3d at 846–47 (reversing to allow for further discovery); *Shropshire v. Fred Rappoport Co.*,  
18 294 F. Supp. 2d 1085, 1099 (N.D. Cal. 2003) (“The Court is unable to resolve this issue at this  
19 stage of the proceeding, when no discovery has been permitted, because the applicability of the  
20 anti-SLAPP statute turns on disputed questions of fact.”).

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23 <sup>5</sup> Some judges have found this limitation so thoroughly “eviscerates” section 425.16 as to  
24 show its purposes are entirely at odds with the Federal Rules, and therefore completely  
25 inapplicable in federal courts. *Makaeff*, 736 F.3d at 1189 (Watford, Paez, Bea, JJ., and Kozinski,  
26 CJ., dissenting from denial of rehearing en banc). But this view does not represent the law of the  
27 Circuit.

26 <sup>6</sup> That subsection provides, “If, on a motion under Rule 12(b)(6) or 12(c), matters outside  
27 the pleadings are presented to and not excluded by the court, the motion must be treated as one  
28 for summary judgment under Rule 56. All parties must be given a reasonable opportunity to  
present all the material that is pertinent to the motion.”

1           At hearing, the defendants explained that their motions argue both legal and  
2 evidentiary deficiencies. The court therefore first determines whether the defendants have made a  
3 “threshold showing that the challenged cause of action is one arising from protected activity.”  
4 *Soukup*, 39 Cal. 4th at 278(citation and quotation marks omitted). Then, for claims passing this  
5 test, the court addresses the complaint’s purported legal deficiencies to determine whether the  
6 plaintiffs have “demonstrated a probability of prevailing on the claim.” *Id.* (citation and  
7 quotation marks omitted). Because this analysis essentially overlaps with the remaining motions  
8 based on Federal Rule of Civil Procedure 12, separate treatment is unnecessary. *Cf.* *Yuba Mot.*  
9 *Strike 8–9 & n.2* (incorporating by reference the arguments in the concurrent motion to dismiss  
10 under Rule 12(b)(6); *Yuba Reply Strike 4–5 & n.1* (same).

11           Because the court dismisses the complaint in part with leave to amend, to the  
12 extent the defendants challenge the plaintiffs’ ability to put forward evidence, the special motions  
13 are denied without prejudice to renewal after any amendments to the pleadings and any discovery  
14 allowed or required by the Federal Rules.

15           C.     Protected Activity

16           Section 425.16 applies only to state-law claims when those claims are invoked in  
17 federal court. *Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010). The complaint  
18 alleges three state-law claims: malicious prosecution, negligence, and intentional infliction of  
19 emotional distress. Each is based on the same alleged wrongs—the investigation and prosecution  
20 of criminal charges against Santana and Vasquez—so they may be considered together.

21           1.     Evans

22           Section 425.16 reaches all claims “arising from any statement or writing made in,  
23 or in connection with an issue under consideration or review by, an official proceeding or body.”  
24 *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 734 (2003) (citation and quotation marks  
25 omitted). That is, section 425.16 reaches (1) “any written or oral statement or writing made  
26 before a . . . judicial proceeding,” (2) “any written or oral statement or writing made in connection  
27 with an issue under consideration or review by a . . . judicial body,” and (3) “any other conduct in  
28 furtherance of the exercise of the constitutional right of petition.” Cal. Civ. Proc. Code



1 § 425.16(e); *see also Jarrow*, 31 Cal. 4th at 734. An activity need not be constitutionally  
2 protected; rather, the defendant “need only show that the activity falls within the scope of [section  
3 425.16(e)].” *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 184 Cal. App. 4th  
4 1539, 1549 (2010). Claims arising from litigation activity, including malicious prosecution  
5 claims against attorneys, therefore fall within the reach of section 425.16. *See, e.g., Rusheen v.*  
6 *Cohen*, 37 Cal. 4th 1048, 1056 (2006); *Zamos v. Stroud*, 32 Cal. 4th 958, 965 (2004); *Jarrow*,  
7 31Cal. 4th at 741.

8 Here, the complaint alleges Evans supported Green for the Sutter County  
9 judgeship, Compl. ¶¶ 83–84, and planned to help cook up charges against Santana and Vasquez to  
10 spoil Santana’s application, *id.* ¶ 91. Evans allegedly conspired with the Yuba County defendants  
11 to conduct a “negligent and improper investigation,” to fabricate evidence, to illegally empanel a  
12 grand jury, and to present incompetent and irrelevant evidence in a scheme of malicious  
13 prosecution. *Id.* ¶ 88. Santana and Vasquez allege that he knew about and approved of a  
14 recklessly untruthful application for a warrant to search their offices, *id.* ¶ 92, and that he  
15 persuaded Griesa to waive his attorney-client privilege, *id.* ¶¶ 95–97.

16 In essence, Santana and Vasquez allege Evans helped find evidence to support the  
17 criminal prosecution, which he understood would prevent Santana’s judicial appointment. These  
18 are litigation activities California courts have found to be protected by the anti-SLAPP statute.  
19 *See, e.g., Jarrow*, 31 Cal. 4th at 741 (bringing and maintaining a case is a protected activity, even  
20 if allegedly done maliciously and without probable cause); *Dickens v. Provident Life & Acc. Ins.*  
21 *Co.*, 117 Cal. App. 4th 705, 714 (2004) (“[A] malicious prosecution cause of action predicated  
22 upon the claim the defendants . . . were instrumental in bringing upon a criminal prosecution  
23 against the plaintiff . . . is subject to an anti-SLAPP motion.”); *Dove Audio, Inc. v. Rosenfeld,*  
24 *Meyer & Susman*, 47 Cal. App. 4th 777, 784 (1996) (“communications preparatory to or in  
25 anticipation of the bringing of an action or other official proceeding” are protected activities).

26 2. Yuba County Defendants

27 Counties, district attorneys, deputy district attorneys, and investigators are  
28 “persons” within the meaning of the anti-SLAPP statute, which protects governmental entities

1 and their representatives.<sup>7</sup> *See Bradbury v. Super. Ct.*, 49 Cal. App. 4th 1108, 1114–15 (1996)  
2 (district attorney’s public statements on matters of public concern were subject to protection of  
3 section 425.16). Yuba County, McGrath, Vacek, Bendorf, Barr, and Stober are therefore within  
4 the scope of section 425.16.

5 Despite the fact that California courts have extended section 425.16 to district  
6 attorneys and litigation activities, the defendants have cited no case to show section 425.16  
7 applies to the litigation activities of district attorneys in criminal cases specifically. *See Yuba*  
8 *Mot. Strike* at 7–8. Neither has the court located any directly relevant published decision,<sup>8</sup>  
9 although in *Miller v. Filter*, 150 Cal. App. 4th 652 (2007), the court held that deputized members  
10 of the California District Attorneys’ Association were entitled to protection under section 425.16.  
11 In *Miller*, a District Attorney had deputized members of the California District Attorneys  
12 Association to prosecute a mine for alleged violations of worker safety laws that resulted in a  
13 workplace death. *Id.* at 656–57 & n.1. The criminal prosecution crumbled when the court found  
14 no proof that the safety violations had caused the death. *Id.* at 657. The vindicated defendants  
15 then brought a civil action, alleging claims of malicious prosecution against the deputized  
16 prosecutors, who moved to strike the complaint under section 425.16. *Id.* The civil trial court  
17 denied the motion, the deputized prosecutors appealed, and the court of appeal reversed. *Id.*

18 The state court of appeal held that the deputized district attorneys were deputy  
19 district attorneys as a matter of law. *See id.* at 660–65. Therefore, because “[t]he complaint was  
20 based on defendants’ filing of the criminal action against plaintiffs and the presentation of  
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22 <sup>7</sup> Section 425.16(d) provides that the anti-SLAPP statute “shall not apply to any  
23 enforcement action brought in the name of the people of the State of California by the Attorney  
24 General, district attorney, or city attorney, acting as a public prosecutor.” Cal. Civ. Proc. Code  
25 § 425.16(d). This subparagraph makes the anti-SLAPP remedy unavailable to parties to an action  
brought by a public prosecutor, *see, e.g., People v. Health Labs. of N. Am., Inc.*, 87 Cal. App. 4th  
442, 448 (2001); it does not prohibit invocation of the anti-SLAPP statute by government  
representatives.

26 <sup>8</sup> In an unpublished opinion, the California Court of Appeal has held that “[t]he initiation  
27 and prosecution of [a] criminal case [are] unquestionably protected activities under the anti-  
28 SLAPP statute.” *Gaeta v. Silva*, No. H031964, 2008 WL 4573313, at \*1 (Cal. Ct. App. Oct. 15,  
2008).

1 evidence before the grand jury,” the prosecution was a protected activity. *Id.* at 665–66. To  
2 support this conclusion, the court of appeal cited two civil-litigation cases, *Briggs v. Eden*  
3 *Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (1999), and *Dove Audio*, 47 Cal. App.  
4 4th at 784.

5 In light of this reasoning, this court concludes that the litigation activities of  
6 district attorneys and their deputies in criminal cases are protected activities within the meaning  
7 of section 425.16. Because the anti-SLAPP statute protects persons who are “instrumental in  
8 bringing upon a criminal prosecution,” *Dickens*, 117 Cal. App. 4th at 714, the court concludes it  
9 applies to Investigators Barr and Stober as well.

10 Turning now to the substance of section 425.16’s test, the complaint alleges the  
11 Yuba County defendants supported Green over Santana for the vacant judgeship, Compl.  
12 ¶¶ 82-84, and secretly planned to investigate and charge Santana to derail his candidacy, *id.*  
13 ¶¶ 85–87. They conducted a “negligent and improper investigation, . . . fabricated and pursued  
14 criminal charges, improperly empaneled a criminal grand jury, knowingly presented incompetent  
15 and irrelevant evidence, withheld exonerating evidence and maliciously prosecuted” Santana and  
16 Vasquez. *Id.* ¶ 88. They supported their application for a warrant to search Santana’s and  
17 Vasquez’s offices with a recklessly untruthful statement of facts. *Id.* ¶ 92. After the case was  
18 turned over to the State Attorney General’s office, they “participated as investigators and  
19 witnesses” in the trial against Santana and Vasquez. *Id.* ¶¶ 111–12.

20 The thrust of these allegations is simple: the Yuba County defendants planned and  
21 executed a criminal prosecution on a deficient evidentiary basis, all in an effort to secure Green’s  
22 appointment to the bench. Like Evans’s alleged actions, these are litigation activities subject to  
23 the protection of section 425.16. *See also Zucchet v. Galardi*, 229 Cal. App. 4th 1466, 1477  
24 (2014) (“[T]rial testimony and statements made to prosecutors preparing for a trial fall under the  
25 definition of activity in furtherance of the right to free speech or petition as defined in the anti-  
26 SLAPP statute.”); *Miller*, 150 Cal. App. 4th at 652 (“the defendants’ filing of [a] criminal action  
27 against plaintiffs and the presentation of evidence before the grand jury” was protected activity).

28 ////

1           D.     Unprotected Conduct Illegal as a Matter of Law

2           Although the complaint alleges protected activities within the scope of section  
3 425.16, Santana and Vasquez may evade the defendants’ motions to strike if the “assertedly  
4 protected speech or petitioning activity was illegal as a matter of law.” *Flatley v. Mauro*,  
5 39 Cal. 4th 299, 305 (2006). A defendant’s conduct is “illegal as a matter of law” if he either  
6 concedes his conduct was illegal or if “uncontroverted and conclusive evidence” establishes as  
7 much. *Id.* at 320. This is a separate question from the plaintiff’s probability of prevailing, *i.e.*,  
8 the second part of the section 425.16 test, addressed in a separate section below. *Id.*

9           Here, although Santana and Vasquez allege the defendants offered false testimony  
10 or committed crimes, the defendants deny these allegations. Neither does uncontested and  
11 conclusive evidence establish the defendants’ conduct was illegal as a matter of law. Construed  
12 in the light most favorable to Santana and Vasquez, the evidence<sup>9</sup> Santana cites to argue the  
13 defendants’ conduct was illegal shows only that Evans, McGrath, Bendorf, Judge Scrogin, and  
14 Susan Green met at a restaurant in December 2007 and spoke about the vacant judgeship, Jesse  
15 Santana, and a possible case related to Santana’s and Vasquez’s efforts to settle the case against  
16 Griesa. *See* Griesa Dep. 117–19, ECF No. 25-2. This is far from uncontroverted proof of  
17 conspiracy to conduct a malicious prosecution.

18           In arguing Evans’s conduct was illegal as a matter of law, Santana and Vasquez  
19 also cite the Court of Appeal’s opinion in *Santana v. Superior Court*, vacating Santana’s  
20 indictment. *See* Opp’n Evans at 16. They seem to argue that because Evans gave false  
21 testimony, section 425.16’s protection evaporates. *See, e.g., Lefebvre v. Lefebvre*, 199 Cal. App.  
22 4th 696, 705 (2011). But the *Santana* court did not find that Evans gave false testimony; rather, it  
23 expressed confusion about why Evans had offered testimony on civil compromise: criminal

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25           <sup>9</sup> The court considers this evidence in light of the California Supreme Court’s decision in  
26 *Flatley*, *see* 39 Cal. 4th at 305 (referring to “uncontroverted and conclusive evidence,” rather than  
27 allegations), and the fact that Santana and Vasquez, who oppose the motion, are its proponents.  
28 Neither are the parties here foreclosed from further investigating the possibility that the  
defendants’ conduct was “illegal as a matter of law” such that a renewed motion under section  
425.16 would be denied.

1 charges had not yet been filed, so “the person injured” could not “appear[] before the court in  
2 which the action is pending.” 2012 WL 1777801 at \*7 & n.12 (quoting Cal. Pen. Code § 1378).  
3 Evans’s testimony to the grand jury was at worst irrelevant or unhelpful to the indictment  
4 decision, not illegal.

5 In conclusion, the defendants have met their burden to show plaintiffs’ state-law  
6 claims arise from protected activity. The court therefore proceeds to an evaluation of the  
7 complaint’s legal sufficiency, the second stage of the anti-SLAPP inquiry.

### 8 III. ANTI-SLAPP LEGAL SUFFICIENCY; FEDERAL-LAW MOTIONS TO DISMISS

#### 9 A. Legal Sufficiency in an Anti-SLAPP Motion

10 As described above, in the face of an anti-SLAPP motion, a plaintiff must establish  
11 a “probability” he will prevail in his claim. Cal. Civ. Proc. Code § 425.16(b)(1); *Bulletin*  
12 *Displays*, 448 F. Supp. 2d at 1179. Because the court here tables questions of evidence until  
13 discovery is developed, as required by the Federal Rules, the plaintiffs’ burden is similar to that  
14 they face when confronted by a federal-law motion to dismiss or for judgment on the pleadings.  
15 See, e.g., *Metabolife*, 264 F.3d at 840; *Bulletin Displays*, 448 F. Supp. 2d at 1179. In fact, “[i]f a  
16 defendant makes a special motion to strike based on alleged deficiencies in the plaintiff’s  
17 complaint, the motion must be treated in the same manner as a motion under Rule 12(b)(6) . . . .”  
18 *Rogers*, 57 F. Supp. 2d at 983.

#### 19 B. Legal Standard on a Motion to Dismiss under Rule 12(b)(6)

20 A party may move to dismiss for “failure to state a claim upon which relief can be  
21 granted.” Fed. R. Civ. P. 12(b)(6). The motion may be granted only if the complaint lacks a  
22 “cognizable legal theory” or if its factual allegations do not support a cognizable legal theory.  
23 *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). The court  
24 assumes these factual allegations are true and draws reasonable inferences from them. *Iqbal*,  
25 556 U.S. at 678.

26 A complaint need contain only a “short and plain statement of the claim showing  
27 that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), not “detailed factual allegations,”  
28 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule demands more than

1 unadorned accusations; “sufficient factual matter” must make the claim at least plausible. *Iqbal*,  
2 556 U.S. at 678. In the same vein, conclusory or formulaic recitations of elements do not alone  
3 suffice. *Id.* (quoting *Twombly*, 550 U.S. at 555). Evaluation under Rule 12(b)(6) is a context-  
4 specific task drawing on “judicial experience and common sense.” *Id.* at 679. And aside from  
5 the complaint, district courts have discretion to examine documents incorporated by reference,  
6 *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1159–60 (9th Cir. 2012); affirmative defenses  
7 based on the complaint’s allegations, *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013);  
8 and proper subjects of judicial notice, *W. Radio*, 678 F.3d at 976.

9           Should a motion to dismiss be granted, district courts ordinarily allow the plaintiff  
10 leave to amend “when a viable case may be presented.” *Lipton v. Pathogenesis Corp.*, 284 F.3d  
11 1027, 1039 (9th Cir. 2002). However, “liberality in granting leave to amend is subject to several  
12 limitations.” *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir.  
13 2011) (citation and quotation marks omitted). Leave need not be granted where the amendment  
14 of the complaint would cause the opposing party undue prejudice, is sought in bad faith,  
15 constitutes an exercise in futility, or creates undue delay. *Id.* The court’s decision is one of  
16 discretion. *Id.*

17           With these rules in mind, the court addresses the defendants’ motions.

18           C. Yuba County Defendants<sup>10</sup>

19           The Yuba County defendants argue for dismissal of all of the claims against  
20 them.<sup>11</sup> The court considers first the federal law claims, then the state law claims.

21           1. Federal Claims Under 42 U.S.C. § 1983

22           As a preliminary matter, “[w]hen both a municipal officer and a local government  
23 entity are named, and the officer is named only in an official capacity, the court may dismiss the  
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26 <sup>10</sup> Many arguments raised by the City of Marysville and Detective Elliott apply equally to  
27 the Yuba County defendants. In the interest of clarity, the court has addressed these arguments  
28 jointly in this section.

<sup>11</sup> Except for the § 1981 claims, which are not addressed, as noted above.

1 officer as a redundant defendant.” *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep’t*,  
2 533 F.3d 780, 799 (9th Cir. 2008); *see also Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (“As  
3 long as the government entity receives notice and an opportunity to respond, an official-capacity  
4 suit is, in all respects other than name, to be treated as a suit against the entity.”). The official-  
5 capacity claims against the individual Yuba County defendants are therefore dismissed with  
6 prejudice and without leave to amend.

7 Santana and Vasquez assert several claims under 42 U.S.C. § 1983. That section  
8 provides, in relevant part,

9 Every person who, under color of any statute, ordinance, regulation,  
10 custom, or usage, of any State . . . , subjects, or causes to be  
11 subjected, any citizen of the United States or other person within  
12 the jurisdiction thereof to the deprivation of any rights, privileges,  
or immunities secured by the Constitution and laws, shall be liable  
to the party injured in an action at law, suit in equity, or other  
proper proceeding for redress . . . .

13 42 U.S.C. § 1983. A claim under § 1983 includes two elements: “(1) the defendants acted under  
14 color of law, and (2) their conduct deprived [the plaintiff] of a constitutional right.” *Stein v.*  
15 *Ryan*, 662 F.3d 1114, 1118 (9th Cir. 2011) (alteration in original). Here, the defendants challenge  
16 only the second element, whether Santana and Vasquez were deprived of a constitutional right.

17 The complaint alleges violations of the Fourth and Fourteenth Amendments. *See*  
18 *Compl.* at 24–26. At hearing, the plaintiffs clarified they allege both direct violations of these  
19 Amendments and independent claims for malicious prosecution to deny them of the same rights.  
20 For their part, the Yuba County defendants contend both that they are immune from liability and  
21 that the substantive allegations against them are inadequately pled. The court addresses first the  
22 immunities they assert.

23 a) Immunities

24 Federal law recognizes several varieties of absolute immunity in § 1983 cases.  
25 Here, the individual Yuba County defendants raise three. First, they argue the Eleventh  
26 Amendment protects them from liability because they are state actors and not “persons” within  
27 the meaning of section § 1983. Second, they argue they are entitled to absolute immunity as  
28 prosecutors. And third, they argue they are entitled to absolute immunity as witnesses.

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(1) Eleventh Amendment

“Claims under § 1983 are limited by the scope of the Eleventh Amendment.” *Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir. 1997). Actions against states and state officials in their official capacities can proceed in three circumstances: when the state gives its consent; when Congress abrogates the state’s Eleventh Amendment immunity in a valid exercise of power; and when a plaintiff seeks prospective relief from a government official. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996); *Green v. Mansour*, 474 U.S. 64, 68 (1985). Here, California has not consented to this action, the plaintiffs do not seek prospective relief, and Congress did not abrogate California’s immunity by passing § 1983. *Quern v. Jordan*, 440 U.S. 332, 341 (1979). The plaintiffs do not dispute these conclusions; moreover, as noted above, the claims against the Yuba County defendants in their official capacities are redundant of the claims against the County in this case.

But “state officials, sued in their individual capacities, are ‘persons’ within the meaning of § 1983,” and “[t]he Eleventh Amendment does not bar such suits.” *Hafer v. Melo*, 502 U.S. 21, 31 (1991). “Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law.” *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *accord Monell v. N.Y. City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978)). The individual-capacity claims may proceed if otherwise adequately alleged and if not barred by another immunity.

(2) Prosecutorial Immunity

State prosecuting attorneys are absolutely immune in actions for damages under § 1983 when they act within the scope of their duties by initiating and pursuing criminal prosecutions, *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976), carrying out “the traditional functions of an advocate,” *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997). Absolute immunity protects even against claims of malicious prosecution, use of perjured testimony, and suppression of material evidence. *See Imbler*, 424 U.S. at 430. It is meant to avoid “deflection of the prosecutor’s energies from his public duties, and the possibility he would shade his decisions instead of exercising the independence of judgment required by the public trust.” *Id.* at 423. This



1 rule represents a painful sacrifice, to be sure: absolute prosecutorial immunity may well leave  
2 “the genuinely wronged defendant without civil redress against a prosecutor whose malicious or  
3 dishonest action deprives him of liberty.” *Id.* at 427. It should come as no surprise then that  
4 immunity is not automatic and that the Supreme Court recognizes absolute immunity sparingly.  
5 *Genzler v. Longanbach*, 410 F.3d 630, 636–37 (9th Cir. 2005) (citing *Burns v. Reed*, 500 U.S.  
6 478, 486–87 (1991)). The prosecutor who asserts absolute immunity bears the burden to show  
7 the protection is justified. *Genzler*, 410 F.3d at 636.

8 Absolute prosecutorial immunity applies only to conduct “intimately associated  
9 with the judicial phase of the criminal process.” *Burns*, 500 U.S. at 486 (quoting *Imbler*, 424  
10 U.S. at 430). For this reason, when a prosecutor argues she is absolutely immune under this rule,  
11 the court must determine whether she performed a “quasi-judicial function.” *Broam v. Bogan*,  
12 320 F.3d 1023, 1029 (9th Cir. 2003). If so, she is immune, even if she violated the plaintiff’s  
13 constitutional rights. *Id.* In making this determination, the court looks not to the prosecutor’s  
14 motivation, but to the “ultimate acts” themselves. *See Ashelman v. Pope*, 793 F.2d 1072, 1078  
15 (9th Cir. 1986) (en banc).

16 Many activities that take place before a prosecution is officially instituted may be  
17 protected by absolute prosecutorial immunity. *Imbler*, 424 U.S. at 431 n.33. For example,  
18 appearing in court in support of an application for a search warrant, presenting evidence at a  
19 hearing, evaluating evidence, interviewing witnesses, and preparing charging documents are all  
20 acts subject to the protection of absolute immunity. *Kalina*, 522 U.S. at 130; *Buckley v.*  
21 *Fitzsimmons*, 509 U.S. 259, 273 (1993); *Burns*, 500 U.S. at 492. But giving legal advice to the  
22 police is not. *Burns*, 500 U.S. at 496. And a prosecutor enjoys only qualified immunity, not  
23 absolute immunity, for investigatory, administrative, or investigative functions such as “gathering  
24 physical evidence and conducting interrogations to determine whether a crime has been  
25 committed and whether probable cause exists to arrest a suspect.” *Broam*, 320 F.3d at 1028,  
26 1031. Similarly, absolute immunity does not protect a prosecutor who fabricates evidence during  
27 the early stages of an investigation, or who holds defamatory press conferences. *See Buckley*, 509  
28 U.S. at 275–77.

1 Here, McGrath, Bendorf, and Vacek are absolutely immune to claims regarding  
2 their actions “preparing for the initiation of judicial proceedings or for trial”; this includes “the  
3 professional evaluation of the evidence assembled by the police and appropriate preparation for  
4 its presentation at trial or before a grand jury.” *Buckley*, 509 U.S. at 273. These tasks are part of  
5 their duties as “advocate[s] for the State.” *Imbler*, 424 U.S. at 431 n.33. The plaintiffs therefore  
6 may not maintain this action on the basis of their allegation that McGrath, Bendorf, and Vacek  
7 “fabricated and pursued criminal charges, improperly empaneled a grand jury, knowingly  
8 presented incompetent and irrelevant evidence, withheld exonerating evidence, and maliciously  
9 prosecuted” Santana and Vasquez. Compl. ¶ 88. Even if unconstitutional, these were the acts of  
10 advocates preparing for trial and are protected by absolute immunity. *See Genzler*, 410 F.3d  
11 at 637–38.

12 Santana and Vasquez also allege McGrath, Bendorf, and Vacek planned and  
13 participated in an investigation that began long before evidence was gathered, victims were  
14 interviewed, search warrants were obtained, or charges were prepared. *See, e.g.*, Compl. ¶¶ 85–  
15 87 (secret plans to investigate and charge Santana); *id.* ¶ 92 (participation in the collection of  
16 evidence). Prosecutors act like the police when they “search[ ] for clues and corroboration that  
17 might give [them] probable cause to recommend that a suspect be arrested,” and accordingly they  
18 bear only qualified immunity for these acts. *Buckley*, 509 U.S. at 273. Like the hypothetical  
19 prosecutor the Supreme Court described in *Buckley*, who “plans and executes a raid on a  
20 suspected weapons cache,” McGrath, Bendorf, and Vacek may assert only qualified immunity in  
21 defense to the plaintiffs’ claims that they helped collect and manufacture the evidence against  
22 Santana and Vasquez.

### 23 (3) Testimonial Immunity

24 The defendants’ immunity as prosecutors does not extend to their testimony at the  
25 criminal trial, which certainly is not provided as part of an advocate’s traditional role. *See*  
26 *Kalina*, 522 U.S. at 130. But another immunity protects the testimony of trial witnesses: “a trial  
27 witness has absolute immunity with respect to *any* claim based on the witness’ testimony.”  
28 *Rehberg v. Paulk*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1497, 1505 (2012) (emphasis in original); *see also*

1 *Briscoe v. LaHue*, 460 U.S. 325, 345–46 (1983). Even perjury on the witness stand does not  
2 destroy this immunity. *Rehberg*, 132 S. Ct. at 1505.<sup>12</sup> A trial witness’s absolute immunity shares  
3 a common heritage with a prosecutor’s absolute immunity. *See, e.g., Briscoe*, 460 U.S. at 335.  
4 Testimonial absolute immunity protects not only private, uninterested witnesses; police officers  
5 as well are immune to claims arising from their testimony at trial. *Rehberg*, 132 S. Ct. at 1505–  
6 08; *Biscoe*, 460 U.S. at 335.

7           Here, despite this immunity, Santana and Vasquez argue McGrath, Bendorf, and  
8 Vacek are liable for their testimony in the criminal trial because they participated in the criminal  
9 case as both witnesses and prosecutors. Compl. ¶ 112; Opp’n Yuba Dismiss at 8 (citing *Kalina*,  
10 522 U.S. 118). In *Kalina*, the Supreme Court held that although a state deputy district attorney  
11 was absolutely immune for actions undertaken “in connection with the preparation and filing of  
12 . . . the information and the motion for an arrest warrant,” she could be held liable under § 1983  
13 for certifying “under penalty of perjury” that the facts underlying the information and motion  
14 were true.<sup>13</sup> 522 U.S. at 129–31. The *Kalina* Court reasoned that by attesting to the accuracy of  
15 those facts, the prosecutor had “performed an act that any competent witness might have  
16 performed.” *Id.* at 129–30. And because another person who had done that same act would be  
17 protected by only qualified immunity, so would the prosecutor. *Id.* at 130–31; *see also Malley v.*  
18 *Briggs*, 475 U.S. 335, 341–43 (1986) (a police officer applying for a warrant is protected by only  
19 qualified immunity). The Court noted that “tradition, as well as the ethics of our profession,  
20 generally instruct counsel to avoid the risks associated with participating as both advocate and  
21 witness in the same proceeding.” *Kalina*, 522 U.S. at 130.

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22  
23  
24 <sup>12</sup> “In *Briscoe*, the Court concluded that the possibility of civil liability was not needed to  
25 deter false testimony at trial because other sanctions—chiefly prosecution for perjury—provided  
a sufficient deterrent.” *Rehberg*, 132 S. Ct. at 1505 (citing 460 U.S. at 342).

26 <sup>13</sup> Justice Scalia, writing separately to concur, explained that “[a] conscientious prosecutor  
27 reading our cases should now conclude that there is absolute immunity for the decision to seek an  
arrest warrant after filing an information, but only qualified immunity for testimony as a witness  
28 in support of that warrant.” 522 U.S. at 131–32 (Scalia, J., concurring).



1 testimony at the criminal trial. The complaint is dismissed with prejudice and without leave to  
2 amend to the extent these immunities apply. The court now turns to the substantive adequacy of  
3 the complaint’s federal claims against the Yuba County defendants.

4 b) Pleading Adequacy

5 As noted above, Santana and Vasquez allege violations of their Fourteenth  
6 Amendment rights to substantive due process and equal protection of the law, their Fourth  
7 Amendment right to be free of unlawful searches and seizures, and malicious prosecution to  
8 deprive them of each of the same rights. The court addresses first the Fourteenth Amendment  
9 claims.

10 (1) Fourteenth Amendment

11 Santana and Vasquez allege violations of their Fourteenth Amendment right to  
12 substantive due process, and clarify this claim “stems from the malicious prosecution.” Opp’n  
13 Yuba Dismiss at 11.

14 “[N]o substantive due process right exists under the Fourteenth Amendment to be  
15 free from prosecution without probable cause.” *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069  
16 (9th Cir. 2004) (citing *Albright v. Oliver*, 510 U.S. 266 (1994)); accord *Lacey v. Maricopa Cnty.*,  
17 693 F.3d 896, 919 (9th Cir. 2012) (en banc) (a claim for malicious prosecution under § 1983 must  
18 be based on a specific constitutional right). The motion is therefore granted with prejudice and  
19 without leave to amend as to this claim.

20 The Fourteenth Amendment’s equal protection clause, on the other hand, provides  
21 an adequate basis for a § 1983 claim of malicious prosecution. See, e.g., *Awabdy*, 368 F.3d  
22 at 1070. The equal protection clause protects every person within a State’s jurisdiction from  
23 intentional or arbitrary discrimination, including by a State’s agents. *Village of Willowbrook v.*  
24 *Olech*, 528 U.S. 562, 564 (2000) (per curiam) (citing *Sioux City Bridge Co. v. Dakota Cnty.*, 260  
25 U.S. 441, 445 (1923)). When considering a claim for violation of the Fourteenth Amendment’s  
26 equal protection clause, the court’s first step is to identify the classification that gave rise to the  
27 alleged discrimination; the type of classification dictates how closely the court scrutinizes its  
28 justification. See, e.g., *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008);

1 *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004). One of three specific levels of  
2 scrutiny normally applies: strict scrutiny, intermediate scrutiny, or the default test, rational basis  
3 review. *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 543 (9th Cir. 2004). Strict scrutiny and  
4 intermediate scrutiny are applicable to claims of discrimination on the basis of a suspect  
5 classification or when a plaintiff alleges deprivation of fundamental rights. *See, e.g.*,  
6 *Kahawaiolaa*, 386 F.3d at 1277. Otherwise the court considers whether the classification in  
7 question is rationally related to a legitimate state interest. *See, e.g., Dallas v. Stanglin*, 490 U.S.  
8 19, 23 (1989). “Under this standard, a ‘State may not rely on a classification whose relationship  
9 to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.’” *Lazy Y*  
10 *Ranch*, 546 F.3d at 589 (quoting *City of Cleburne v. Cleburne Living Cntr.*, 473 U.S. 432, 446  
11 (1985)).

12           Here, the complaint does not clearly allege the basis of any classification. Its  
13 Fourteenth Amendment claim invokes only due process, not equal protection. *See* Compl. at 25.  
14 The motion must therefore be granted. Nevertheless, the complaint’s allegations are generally  
15 consistent with both a theory of classification on the basis of political association, *see, e.g.*,  
16 Compl. ¶¶ 83–85 (the defendants, all associated with the District Attorney’s office, discriminated  
17 against Santana because he was not part of their circle), and a theory of racial discrimination, *see,*  
18 *e.g., id.* ¶ 82 (Santana was a “prominent Hispanic lawyer”). The motion is therefore granted with  
19 leave to amend.

20           The defendants correctly note that political association is not a suspect  
21 classification. *See, e.g., Pagan v. Calderon*, 448 F.3d 16, 36 (1st Cir. 2006) (citing *Vieth v.*  
22 *Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion)); *R.A.V. v. City of St. Paul, Minn.*, 505  
23 U.S. 377, 406 (1992) (White, J., concurring in the judgment) (“A defamation statute that drew  
24 distinctions on the basis of political affiliation . . . would unquestionably fail rational-basis  
25 review.”). But the fact that a plaintiff lacks membership in a suspect class calls for rational basis  
26 review, not dismissal. Rational basis review is “the most relaxed and tolerant form of judicial  
27 scrutiny,” *Dallas*, 490 U.S. at 26, but it is a meaningful standard nonetheless. The Ninth Circuit  
28 has held that when a defendant provides the court with no rational basis for the classification, a

1 motion to dismiss must be denied, even if the defendant articulates reasons for the decision itself.  
2 *See Lazy Y Ranch*, 546 F.3d at 590. In any event, the viability of an as-yet-unpleaded claim is  
3 better tested in a later motion to dismiss. *See, e.g., SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F.  
4 Supp. 2d 1081, 1086 (S.D. Cal. 2002).

5 The Fourteenth Amendment claims are dismissed with leave to amend as  
6 described above.

7 (2) Fourth Amendment—Seizure

8 “The Fourth Amendment safeguards ‘[t]he right of the people to be secure in their  
9 persons, houses, papers, and effects, against unreasonable searches and seizures.’” *Atwater v.*  
10 *City of Lago Vista*, 532 U.S. 318, 326 (2001) (quoting U.S. Const. am. IV). It goes without  
11 saying that an unreasonable search or seizure is an element of any § 1983 claim for violation of  
12 the right to be free from unreasonable searches and seizures. *See Karam v. City of Burbank*,  
13 352 F.3d 1188, 1193 (9th Cir. 2003).

14 A prosecution intended to deny a person of his right to be free from unreasonable  
15 searches and seizures may also serve as the basis for a claim under § 1983. *See, e.g., Awabdy*,  
16 368 F.3d at 1069. The plaintiff must allege the defendants prosecuted him with malice, without  
17 probable cause, and for the purpose of denying him of his Fourth Amendment right, *see id.* at  
18 1066, and that a Fourth Amendment seizure occurred, *Yousefian v. City of Glendale*, 779 F.3d  
19 1010, 1015 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 135 (2015). Malicious prosecution actions  
20 are not limited to prosecutors; others who wrongly cause charges to be filed may also be liable.  
21 *Awabdy*, 368 F.3d at 1066.

22 Here, it is unclear whether Santana and Vasquez allege a search or seizure ever  
23 occurred.<sup>14</sup> Santana and Vasquez do not allege they were ever held in custody, arrested,  
24 incarcerated, or even restrained. To shed light on this omission, the defendants request the court  
25

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26  
27 <sup>14</sup> The complaint might also be read to assert a claim founded on an allegedly unlawful  
28 search, but the plaintiffs provide no argument to support this theory. The court therefore  
expresses no view on the viability of such a claim.

1 take notice of the Yuba County Superior Court’s records in the underlying criminal case. *See*  
2 Elliott Req. J. Not., Ex. B, ECF No. 11-2. The court grants the unopposed request for judicial  
3 notice of these records. *See* Fed. R. Evid. 201(b); *United States v. S. Cal. Edison Co.*, 300 F.  
4 Supp. 2d 964, 973 (E.D. Cal. 2004) (“Federal courts may ‘take notice of proceedings in other  
5 courts, both within and without the federal judicial system, if those proceedings have a direct  
6 relation to the matters at issue.’” (quoting *U.S. ex rel Robinson Rancheria Citizens Council v.*  
7 *Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)). But judicial notice does not establish the truth  
8 of these records’ content. *See, e.g., M/V Am. Queen v. San Diego Marine Const. Corp.*, 708 F.2d  
9 1483, 1491 (9th Cir. 1983); *Cactus Corner, LLC v. U.S. Dep’t of Agric.*, 346 F. Supp. 2d 1075,  
10 1100 (E.D. Cal. 2004), *aff’d*, 450 F.3d 428 (9th Cir. 2006).

11           The Yuba County Superior Court’s records suggest Santana and Vasquez  
12 remained at liberty on their own recognizance throughout the prosecution. *See* Elliott Req. J.  
13 Not., Ex. B, ECF No. 11-2. The Ninth Circuit recently declined to decide whether a defendant  
14 who faces felony charges in California has been subjected to a “seizure” under the Fourth  
15 Amendment if he remains always at liberty on his own recognizance. *Yousefian*, 779 F.3d at  
16 1015 n.6 (citing *Karam*, 352 F.3d at 1193–94). Several years ago, however, in *Karam*, the circuit  
17 court found that a defendant who faced misdemeanor charges and who remained at liberty on her  
18 own recognizance could not succeed in a Fourth Amendment case because she had not been  
19 “seized.” 352 F.3d at 1193–94. In reaching this decision, the court considered several facts: the  
20 defendant had not been charged with a felony, she was not required to report to anyone, and she  
21 was required only to make court appearances and obtain the court’s permission if she wanted to  
22 leave the state. *Id.* at 1194. Any seizure was therefore “de minimis,” and she could not state a  
23 Fourth Amendment claim. *Id.* A clear majority of federal circuit courts have similarly concluded  
24 that “a pre-arraignment, non-felony summons requiring no more than a later court appearance  
25 does not constitute a Fourth Amendment seizure.” *Burg v. Gosselin*, 591 F.3d 95, 99–101 (2d  
26 Cir. 2010) (collecting authority on this point from the First, Third, Sixth, Seventh, Eighth, Ninth,  
27 Tenth, and Eleventh Circuits).

28 ////



1           This case mirrors *Karam* but for one important detail: Santana and Vasquez faced  
2 felony charges, not misdemeanor charges. “The contours of the holding in *Karam* are not entirely  
3 defined as to the significance, by itself, of the felony charge.” *McCabe v. Hart*, 357 F. App’x  
4 151, 153 (9th Cir. 2009). The provenance of the distinction between those who face  
5 misdemeanor charges and felony charges is likely Justice Ginsburg’s concurrence in *Albright v.*  
6 *Oliver*, 510 U.S. 266 (1994); several circuit opinions cite that concurrence as persuasive  
7 authority. *See e.g., Burg*, 591 F.3d at 97–98; *Karam*, 352 F.3d at 1194; *see also DePiero v. City*  
8 *of Macedonia*, 180 F.3d 770, 789 (6th Cir. 1999). In *Albright*, Justice Ginsburg wrote as follows:

9           A person facing serious criminal charges is hardly freed from the  
10 state’s control upon his release from a police officer’s physical grip. He is  
11 required to appear in court at the state’s command. He is  
12 often subject, as in this case, to the condition that he seek formal  
13 permission from the court (at significant expense) before exercising  
14 what would otherwise be his unquestioned right to travel outside  
15 the jurisdiction. Pending prosecution, his employment prospects  
16 may be diminished severely, he may suffer reputational harm, and  
17 he will experience the financial and emotional strain of preparing a  
18 defense.

19           A defendant incarcerated until trial no doubt suffers greater  
20 burdens. That difference, however, should not lead to the  
21 conclusion that a defendant released pretrial is not still “seized” in  
22 the constitutionally relevant sense. Such a defendant is scarcely at  
23 liberty; he remains apprehended, arrested in his movements, indeed  
24 “seized” for trial, so long as he is bound to appear in court and  
25 answer the state’s charges. He is equally bound to appear, and is  
26 hence “seized” for trial, when the state employs the less strong-arm  
27 means of a summons in lieu of arrest to secure his presence in  
28 court.

29           510 U.S. at 278–79 (Ginsburg, J., concurring). No other justice joined Justice Ginsburg in this  
30 reasoning, however, and several federal circuit courts disagree. *See, e.g., Bielanski v. Cnty. of*  
31 *Kane*, 550 F.3d 632, 638 (7th Cir. 2008); *Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir. 1997),  
32 *abrogated on other grounds, Wilkins v. Gaddy*, 559 U.S. 34 (2010); *Kingsland v. City of Miami*,  
33 382 F.3d 1220, 1236 (11th Cir. 2004); *see also Mata v. Anderson*, 685 F. Supp. 2d 1223, 1251  
34 (D.N.M. 2010) (collecting authority), *aff’d*, 635 F.3d 1250 (10th Cir. 2011); *cf. United States v.*  
35 *Scott*, 450 F.3d 863, 872 (9th Cir. 2006) (“People released pending trial . . . have suffered no  
36 judicial abridgment of their constitutional rights.”).

37           /////

1           For example, despite considering Justice Ginsberg’s arguments in *Albright*, the  
2 First Circuit determined that categorizing “standard conditions of pretrial release” as a Fourth  
3 Amendment seizure would be “much too ambitious a view of the law.” *Nieves v. McSweeney*,  
4 241 F.3d 46, 55–56 (1st Cir. 2001). The court based its decision on the Supreme Court’s holding  
5 in *Brower v. County of Inyo*, 489 U.S. 593 (1989), which emphasized the concepts of “physical  
6 control” and “termination of freedom of movement” as requirements for a Fourth Amendment  
7 seizure. *Id.* at 56 (internal citations omitted). The First Circuit refused to find a seizure absent  
8 any arrest, detention, restriction of travel, or other “deprivation of . . . liberty.” *Id.*

9           Another judge of this district has concluded that “[t]he fact of a felony charge, of  
10 itself, is not determinative of a seizure in violation of the Fourth Amendment. It is the fact of the  
11 felony charge with other restrictions that is important.” *Fenters v. Chevron*, No. 05-1630, 2010  
12 WL 5477710, at \*23 (E.D. Cal. Dec. 30, 2010). In *Fenters*, the plaintiff was charged with felony  
13 embezzlement. *Id.* at \*19. She was booked, fingerprinted, and released on her own recognizance,  
14 although she was required to appear at all times and places the court ordered, and she could not  
15 leave the state without the court’s permission. *Id.* at \*19, 21. The district court found this was  
16 not a seizure, so the defendants were granted summary judgment. *Id.* at \*21.

17           This court agrees a felony charge cannot alone remove Santana and Vasquez from  
18 the logical bounds of *Karam*. But neither does the fact that Santana and Vasquez faced felony  
19 charges alone establish their seizure. Whether they were seized depends not on the charges filed  
20 against them, but on the restrictions they faced as a result. *See, e.g., Karam*, 352 F.3d at 1193–94  
21 (pretrial release conditions were not a seizure because the plaintiff had been required only to  
22 make court appearances and obtain the court’s permission if she wanted to leave the state); *Evans*  
23 *v. Ball*, 168 F.3d 856, 860–61 (5th Cir. 1999) (pretrial release conditions amounted to a seizure  
24 because the plaintiff was required to appear in court, obtain permission before leaving the state,  
25 report regularly to pretrial services, sign a personal recognizance bond, and give financial and  
26 other identifying information to officers), *abrogated on other grounds, Castellano v. Fragozo*,  
27 352 F.3d 939 (5th Cir. 2003); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222–23 (3d Cir. 1998)  
28 (although it was a “close question,” a seizure occurred when the plaintiff was required to pay a

1 bond, attend court hearings, contact pretrial services weekly, and was prohibited from traveling  
2 outside New Jersey and Pennsylvania); *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997)  
3 (pretrial release conditions subjected the plaintiff to a seizure because he could not leave the state  
4 and was required to appear in court many times); *Nieves*, 241 F.3d at 56 (no seizure occurred  
5 when plaintiffs were charged with multiple felonies and required to appear in court, but released  
6 on their own recognizance, not required to post a monetary bond, not restricted in their travel, or  
7 “otherwise exposed to any significant deprivation of liberty”).

8 As these examples show, the inquiry is a factual one wherein the court looks to  
9 what particular restrictions Santana and Vasquez faced. Because the complaint includes no  
10 allegation that an unreasonable search or seizure occurred, the motion must be granted. As the  
11 deficiency could be cured by sufficient additional factual allegations, the motion will be granted  
12 with leave to amend unless amendment would be futile for some other reason.

13 (3) Fourth Amendment—Probable Cause

14 The defendants argue any amendment would be futile because the charges and  
15 prosecution were founded on probable cause. “[P]robable cause is an absolute defense to  
16 malicious prosecution.” *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054–55 (9th Cir. 2009).  
17 The Yuba County defendants do not argue directly they had probable cause to believe Santana  
18 and Vasquez had committed a crime. Rather, they cite previous state court decisions to that effect  
19 and argue Santana and Vasquez are collaterally estopped or precluded from relitigating the issue.  
20 If this were true, then amending the Fourth Amendment claim would be futile.

21 “In determining the collateral estoppel effect of a state court judgment, federal  
22 courts must, as a matter of full faith and credit, apply that state’s law of collateral estoppel.” *In re*  
23 *Bugna*, 33 F.3d 1054, 1057 (9th Cir. 1994). In California, collateral estoppel bars relitigation of  
24 issues argued and decided in prior proceedings. *Lucido v. Super. Ct.*, 51 Cal. 3d 335, 341 (1990).  
25 A state court’s finding of probable cause may preclude later litigation of the same question in  
26 federal court, including when raised in a malicious prosecution claim under § 1983. *Wige v. City*  
27 *of L.A.*, 713 F.3d 1183, 1184–85 (9th Cir. 2013) (citing *McCutchen v. City of Montclair*, 73 Cal.

28 /////

1 App. 4th 1138 (1999)); *Awabdy*, 368 F.3d at 1068. A court looks to five “threshold  
2 requirements”:

3 First, the issue sought to be precluded from relitigation must be  
4 identical to that decided in a former proceeding. Second, this issue  
5 must have been actually litigated in the former proceeding. Third,  
6 it must have been necessarily decided in the former proceeding.  
7 Fourth, the decision in the former proceeding must be final and on  
the merits. Finally, the party against whom preclusion is sought  
must be the same as, or in privity with, the party to the former  
proceeding.

8 *Lucido*, 51 Cal. 3d at 341. In a case like this one, a common rejoinder is that the evidence the  
9 defendants had when they decided to arrest or prosecute was different from the evidence  
10 presented to the state court that found probable cause. *See, e.g., Wige*, 713 F.3d at 1186; *Awabdy*,  
11 368 F.3d at 1068; *McCutchen*, 73 Cal. App. 4th at 1147. For example, if the evidence presented  
12 at the preliminary hearing was discovered only after an arrest was made, if the evidence presented  
13 to the state court was fabricated, or if the prosecutors lied or their conduct was otherwise  
14 “wrongful,” collateral estoppel does not apply. *Awabdy*, 368 F.3d at 1068; *see also Wige*, 731  
15 F.3d at 1186.

16 *Awabdy* illustrates these rules well. In that case, the plaintiff, Mr. Awabdy, was a  
17 former member of the city council. 368 F.3d at 1065. While he was on the city council he butted  
18 heads with other municipal officials. *Id.* He alleged that a cabal of two other city  
19 councilmembers, a police officer, and the city manager was formed to falsely claim he embezzled  
20 public funds so as to torpedo his reelection campaign. *Id.* The group also allegedly made it  
21 known they intended to “get” Awabdy because he was of “Arabic extraction.” *Id.* Charges were  
22 brought two weeks before the election, and Awabdy was defeated, while the other incumbents  
23 were reelected. *Id.* at 1065–66. The next month he was held to answer on embezzlement  
24 charges, although the district attorney later dismissed the charges in the interests of justice. *Id.* at  
25 1066. Awabdy then brought an action in federal court, alleging claims under § 1983 for  
26 malicious prosecution to deprive him of his rights under the First, Thirteenth, and Fourteenth  
27 Amendments. *Id.* at 1065. The district court granted the defendants’ motion to dismiss. *Id.* On  
28 appeal, the Ninth Circuit reversed. *See id.* at 1068. It held that collateral estoppel did not bar

1 litigation of probable cause because *Awabdy* had alleged the charges against him were based on  
2 fraud, false accusations, and wrongful conduct. *Id.* In other words, relitigation of probable cause  
3 was not precluded because the plaintiff alleged the earlier probable cause determination was  
4 wrongfully obtained.

5 Here, Santana and Vasquez cite *Awabdy* to argue any state court decision on  
6 probable cause has no preclusive effect. In reply, the defendants protest only the complaint's lack  
7 of detail. *See, e.g.*, Yuba Reply Dismiss at 6 ("Plaintiffs continuously fail to be specific about  
8 what exactly was fraudulent, corrupt or fabricated. Further, they fail to allege or explain that  
9 absent the unidentified fabricated evidence or false statement, the remaining information would  
10 not have been sufficient to support probable cause."); Marysville Reply at 6 ("Plaintiffs do not  
11 contend that either of their appeals was tainted by fabricated evidence or other prosecutorial  
12 misconduct.").

13 The complaint's allegations go beyond conclusory statements of wrongful  
14 conduct: Green was a friend of the defendants and a former district attorney. The defendants  
15 intended to prevent Santana from becoming a judge. They met and spoke about Santana's  
16 candidacy, Green's candidacy, and a possible criminal case against Santana. The defendants  
17 agreed not to prosecute Griesa so they could pursue the case against Santana and Vasquez, and  
18 Judge Scrogin empaneled the grand jury in Santana's case despite recusing herself from several  
19 earlier cases in which Santana appeared as counsel. This is not to say the complaint plausibly  
20 alleges the defendants lacked probable cause, *cf. infra* pages 56–57; rather, the allegations of  
21 wrongful conduct simply remove the complaint from the preclusive shadow of previous state  
22 court decisions. Moreover, the court considers here only whether amendment would be futile.

23 A careful reading of *Awabdy* also confirms this is the correct result. The relevant  
24 passage is phrased in the conjunctive: "[C]ollateral estoppel does not apply when the decision to  
25 hold a defendant to answer was made [1] on the basis of fabricated evidence presented at the  
26 preliminary hearing or [2] as the result of other wrongful conduct by state or local officials."  
27 368 F.3d at 1068. In other words, collateral estoppel does not apply if the previous decision was  
28 allegedly the result of "wrongful conduct by state or local officials," even if the plaintiff does not

1 point out specific fabrications. *Id.* The circuit court’s statement of Mr. Awabdy’s allegations  
2 also supports this reading: it listed no specific statements other than to note the embezzlement  
3 charge was, generally, false. *See id.* at 1065–66. In fact, the record on appeal contained no  
4 details about the embezzlement charge at all, and the court listed them only in the margin,  
5 apparently for context. *See id.* at 1065 n.1.

6 Finally, no information on the record here shows the California state courts’  
7 previous decisions weighed the possibility of the defendants’ false accusations or wrongful  
8 conduct. *See generally*, Marysville & Elliott Req. J. Not. Ex. C, ECF No. 11-2.<sup>15</sup> The court  
9 therefore concludes that amendment would not be futile, and leave to amend is granted on the  
10 claims premised on the Fourth Amendment right to be free from unreasonable searches and  
11 seizures.

#### 12 (4) Municipal Liability

13 Municipalities may be held liable as “persons” under 42 U.S.C. § 1983. *Monell v.*  
14 *Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). A plaintiff who seeks to impose liability on a  
15 municipality under § 1983 must “identify a municipal ‘policy’ or ‘custom’ that caused the  
16 plaintiff’s injury.” *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 403 (1997). “Locating a  
17 ‘policy’ ensures that a municipality is held liable only for those deprivations resulting from the  
18 decisions of its duly constituted legislative body or of those officials whose acts may fairly be  
19 said to be those of the municipality.” *Id.* at 403–04.

20 In general, no heightened pleading standard applies to § 1983 claims, *Leatherman*  
21 *v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), but to  
22 plead a *Monell* claim and withstand a Rule 12(b)(6) motion to dismiss, allegations in a complaint  
23 “may not simply recite the elements of a cause of action, but must contain sufficient allegations of  
24 underlying facts to give fair notice and to enable the opposing party to defend itself effectively.”

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27 <sup>15</sup> The court grants the unopposed request for judicial notice of this document. *See supra*  
28 note 1.

1 *AE* ex rel. *Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012) (quoting *Starr v.*  
2 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)).

3 Here, the complaint includes no allegation of the County’s policy or practice and  
4 gives the defendants no notice of how the plaintiffs intend to prove the County’s liability.  
5 Santana and Vasquez cite *Karim-Panahi v. Los Angeles Police Department* for the proposition  
6 that “a claim of municipal liability under § 1983 is sufficient to withstand a motion to dismiss  
7 when the claim is nothing more than a bare allegation that conduct conformed to official policy,  
8 custom, or practice.” Opp’n Yuba Dismiss at 4 (citing 839 F.2d 621, 624 (9th Cir. 1988)). But  
9 this rule no longer reflects federal law, which now requires sufficient factual allegations to  
10 “plausibly suggest an entitlement to relief” for all aspects of a plaintiff’s claim under *Monell* and  
11 § 1983. See, e.g., *Hernandez*, 666 F.3d at 637; *Starr*, 652 F.3d at 1216.

12 In their opposition brief, Santana and Vasquez also argue the County had a policy  
13 of keeping the judicial bench racially homogenous. Opp’n Yuba Mot. Dismiss 14. They did not  
14 allege these facts in their complaint. The motion is granted on this claim, but with leave to  
15 amend.

## 16 2. State Law Claims

17 The court now turns to the complaint’s state law claims against the Yuba County  
18 Defendants. They argue several state-law immunities protect them from liability.

19 In California, “[a] public employee is not liable for injury caused by his instituting  
20 or prosecuting any judicial or administrative proceeding within the scope of his employment,  
21 even if he acts maliciously and without probable cause.” Cal. Gov’t Code § 821.6. This section’s  
22 “principal function” is to defuse claims of malicious prosecution. *Blankenhorn v. City of Orange*,  
23 485 F.3d 463, 487–88 (9th Cir. 2007) (citing *Kayfetz v. California*, 156 Cal. App. 3d 491 (1984)),  
24 but courts must construe it broadly, see, e.g., *Gillan v. City of San Marino*, 147 Cal. App. 4th  
25 1033, 1048 (2007). The immunity associated with section 821.6 protects “all employees of a  
26 public entity,” even non-attorneys and those without legal training. *Asgari v. City of L.A.*, 15 Cal.  
27 4th 744, 756–57 (1997) (citation and quotation marks omitted). It applies equally “to actions  
28 taken in preparation for formal proceedings,” including investigations, which are “an essential

1 step toward the institution of formal proceedings.” *Catsouras v. Dep’t of Cal. Hwy. Patrol*, 181  
2 Cal. App. 4th 856, 889 (2010) (citations and quotation marks omitted). And it encompasses  
3 claims for negligence and emotional distress. *See, e.g., Amylou R. v. Cnty. of Riverside*, 28 Cal.  
4 App. 4th 1205, 1211 (1994); *Johnson v. City of Pacifica*, 4 Cal. App. 3d 82, 86–87 (1970). The  
5 section includes no exception for claims of a conspiracy. *Citizens Capital Corp. v. Spohn*, 133  
6 Cal. App. 3d 887, 889 (1982).

7 California law also protects a “privileged publication or broadcast . . . [i]n any  
8 (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized  
9 by law, or (4) in the initiation or course of any other proceeding authorized by law . . . .” Cal.  
10 Civ. Code § 47(b). This protection does not apply to claims of malicious prosecution, but it  
11 extends to any communication, whether or not a “publication,” as long as the communication is  
12 “required or permitted by law in the course of a judicial proceeding to achieve the objects of the  
13 litigation, even though the publication is made outside the courtroom and no function of the court  
14 or its officers is involved.” *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). “The usual  
15 formulation is that the privilege applies to any communication (1) made in judicial or quasi-  
16 judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the  
17 objects of the litigation; and (4) that have some connection or logical relation to the action.” *Id.*  
18 Like section 821.6, section 47(b) is construed broadly. *See, e.g., Thornton v. Cal. Unemp’t. Ins.*  
19 *Appeals Bd.*, 204 Cal. App. 4th 1403, 1418 (2012).

20 Here, these sections combine to immunize the Yuba County defendants from the  
21 state law claims. First, the Yuba County defendants’ actions were all undertaken in connection  
22 with the criminal case, including their investigation. As section 821.6 provides, it is irrelevant  
23 whether the defendants’ actions were undertaken maliciously or without probable cause, and as  
24 noted above, section 821.6 guards against claims of negligence and for emotional distress.  
25 Second, the defendants’ testimony in the criminal trial falls squarely within the confines of  
26 section 47(b). *See Silberg*, 50 Cal. 3d at 213 (“The principal purpose of section [47(b)] is to  
27 afford litigants and witnesses the utmost freedom of access to the courts without fear of being  
28 harassed subsequently by derivative tort actions.” (citations and internal quotation marks



1 omitted)). The plaintiffs' only response is that the Yuba County defendants did not act as  
2 prosecutors. Opp'n Yuba Dismiss at 17. As noted above, section 821.6 applies equally to non-  
3 lawyers.

4 The motion is granted as to the state law claims against the Yuba County  
5 defendants. Because the motion is granted as to each claim against the individual defendants, the  
6 claims against the County must also be dismissed. The plaintiffs are granted leave to amend if  
7 possible within the confines of Federal Rule of Civil Procedure 11.

8 3. Motion for a More Definite Statement

9 Finally, the Yuba County defendants move for a more definite statement under  
10 Federal Rule of Civil Procedure 12(e). Rule 12(e) allows such a motion if the complaint "is so  
11 vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e).  
12 Whether to grant a motion under Rule 12(e) is a matter of discretion. *Griffin v. Cedar Fair, L.P.*,  
13 817 F. Supp. 2d 1152, 1154 (N.D. Cal. 2011).

14 Here, the complaint tells a long and complicated story, and could very likely have  
15 been drafted more elegantly, but it is not so confusing as to call for a wholesale reworking.  
16 Should Santana and Vasquez file an amended complaint, however, the court admonishes them to  
17 carefully distinguish which claims they advance against each defendant, in which capacity, and  
18 on what grounds. The motion for a more definite statement is denied.

19 D. City of Marysville and Randall Elliott

20 As a preliminary matter, the Marysville defendants have informed the court that  
21 the parties had stipulated to the dismissal of the federal claims against the City of Marysville.  
22 Notice of Mot. at 3, ECF No. 11. The parties also reached a stipulation that should the court  
23 dismiss the state claims against the City, the plaintiffs would not seek leave to amend. *Id.* The  
24 parties confirmed this stipulation at hearing. The federal claims against the City are therefore  
25 dismissed with prejudice. Similarly, the City of Marysville and its Police Department are sued  
26 duplicatively. *See, e.g., Brouwer v. City of Manteca*, No. 07-1362, 2008 WL 2825099, at \*3  
27 (E.D. Cal. July 21, 2008). The Marysville Police Department is therefore dismissed with  
28 prejudice.

1           With respect to the federal claims, Elliott advances many of the same arguments as  
2 the Yuba County defendants. For the reasons described above,

- 3           • The motion is granted with prejudice as to any malicious prosecution claim under  
4 the Fourteenth Amendment substantive due process clause, but Santana and  
5 Vasquez are granted leave to amend to allege claims under the Fourteenth  
6 Amendment’s equal protection clause, *see supra* page 24;
- 7           • The motion is granted with leave to amend to allow Santana and Vasquez to allege  
8 facts to support their broad allegations of unreasonable search or seizure, *see supra*  
9 pages 31–35; and
- 10          • Amendment of the Fourth Amendment claims would not be futile, despite  
11 previous state court decisions finding the defendants had probable cause, *see supra*  
12 pages 35–38.

13           This leaves the applicability of state law immunities to the Marysville  
14 Defendants.<sup>16</sup> As noted above, California Government Code section 821.6 provides, “A public  
15 employee is not liable for injury caused by his instituting or prosecuting any judicial or  
16 administrative proceeding within the scope of his employment, even if he acts maliciously and  
17 without probable cause.” This immunity protects “all employees of a public entity,” even non-  
18 attorneys and those without legal training, such as Elliott. *Asgari*, 15 Cal. 4th at 757 (citation and  
19 quotation marks omitted). It applies to investigations. *Catsouras*, 181 Cal. App. 4th at 889. And  
20 it encompasses claims for negligence and emotional distress. *See, e.g., Amylou R.*, 28 Cal. App.  
21 4th at 1211; *Johnson*, 4 Cal. App. 3d at 86–87. And it includes no exception for claims of a  
22 conspiracy. *Citizens Capital Corp.*, 133 Cal. App. 3d at 889.

23           To review, the complaint alleges Elliott met with Acevedo and her family and  
24 heard Acevedo relate her claims of physical and sexual abuse by Griesa. Compl. ¶¶ 34, 49–50.

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25  
26           <sup>16</sup> Because the federal claims are dismissed with leave to amend in part, the court does not  
27 reach the question of federal qualified immunity, a context-specific doctrine not subject to general  
28 propositions. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other*  
*grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

1 He saw sexual text messages from Griesa on Acevedo’s phone, but nonetheless expressed his  
2 belief her claims would lead to no prosecution because the case would devolve into a credibility  
3 contest. *Id.* ¶¶ 35–36, 51. Elliott then called Griesa to tell him about Acevedo’s allegations, gave  
4 Griesa citations to relevant Penal Code sections, and advised him to make no statement. *Id.* ¶ 52.  
5 Elliott also told Vasquez, Griesa’s lawyer, about the charges he was investigating. *Id.* ¶ 53. After  
6 one of Acevedo’s sisters called to alert him that Griesa had begun removing files from his office,  
7 Elliott refused to obtain a search warrant. *Id.* ¶ 56. The complaint alleges Elliott did this despite  
8 his belief that he had sufficient information to send the case to the district attorney’s office. *Id.*  
9 ¶ 59.

10 Before Elliott filed any report, he heard about the civil settlement from Vasquez.  
11 *Id.* ¶ 60. Elliott told Vasquez this “might be a good resolution.” *Id.* ¶ 61. Elliott also heard from  
12 Santana that Acevedo preferred a civil resolution and wanted to put the matter behind her. *Id.*  
13 ¶ 63. This was unsurprising to him because he understood victims of sexual assault prefer not to  
14 face their accusers or testify in court. *Id.* ¶ 64. At some point, Elliott also heard directly from  
15 Griesa that Griesa had agreed to pay \$100,000, and Elliott told Griesa to seek a second opinion.  
16 *Id.* ¶ 76.

17 Santana and Vasquez allege Elliott supported Green’s candidacy and did not want  
18 Santana to become a judge. *Id.* ¶¶ 83–85. The complaint alleges generally that Elliott was a part  
19 of a conspiracy against Santana, *see id.* ¶¶ 83–85, 88, but does not allege his presence at a  
20 meeting at which the alleged co-conspirators discussed their plan, *see id.* ¶ 87. The complaint  
21 alleges generally that Elliott fabricated evidence and withheld exonerating evidence, but does not  
22 specify Elliott’s role in the part of the conspiracy that actually brought about the trial. *See id.*  
23 ¶ 105.

24 The complaint alleges conduct within the protections of section 821.6: actions  
25 undertaken by a public employee in the scope of his employment in preparation for a criminal  
26 prosecution. That section also applies to all the complaint’s state law claims: malicious  
27 prosecution, negligence, and intentional infliction of emotional distress. *See, e.g., Blankenhorn v.*  
28

1 *City of Orange*, 485 F.3d at 487–88; *Amylou R.*, 28 Cal. App. 4th at 1211; *Johnson*, 4 Cal. App.  
2 3d at 86–87.

3           Santana and Vasquez’s only argument to the contrary is that Marysville may be  
4 liable under California Government Code section 815.2(a). Marysville Opp’n at 18. That section  
5 provides, “A public entity is liable for injury proximately caused by an act or omission of an  
6 employee of the public entity within the scope of his employment if the act or omission would,  
7 apart from this section, have given rise to a cause of action against that employee or his personal  
8 representative.” Cal. Gov’t Code § 815.2(a). But under the same section, “a public entity is not  
9 liable for an injury resulting from an act or omission of an employee of the public entity where  
10 the employee is immune from liability.” *Id.* § 815.2(b).

11           As to the City, based on the parties’ stipulation, the state law claims are dismissed  
12 without leave to amend. As to Elliott, the same claims are dismissed with leave to amend if  
13 possible consonant with Federal Rule of Civil Procedure 11.

14           E.     Judge Scrogin

15           Judge Scrogin’s motion is founded on three arguments. She challenges the court’s  
16 subject matter jurisdiction over the claims against her, contends she is immune under the doctrine  
17 of judicial absolute immunity, and argues that even if the court were to reach the merits of the  
18 claims against her, the complaint states no claim upon which relief can be granted.

19           1.     Subject Matter Jurisdiction

20           A federal court cannot adjudicate the merits of any claim over which it lacks  
21 subject matter jurisdiction. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Judge  
22 Scrogin argues both that the plaintiffs lack standing to bring claims against her and that this  
23 action is barred by the Eleventh Amendment.

24           a)     Standing

25           “Standing is the threshold issue of any federal action,” *Employers-Teamsters*  
26 *Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 923 (9th  
27 Cir. 2007), and functions as a limitation on the court’s judicial power, *see Valley Forge Christian*  
28 *College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

1 The requirement of Article III standing imposes three specific constraints: (1) the plaintiff must  
2 suffer a concrete and particularized “injury in fact;” (2) the injury and conduct complained of  
3 must be causally connected, and the injury must be traceable to the defendant’s challenged  
4 actions; and (3) the injury must be “likely” to be resolved by resolution favorable to the plaintiff.  
5 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). “The party invoking federal  
6 jurisdiction bears the burden of establishing these elements.” *Id.* at 561. At this early stage, it is  
7 enough for the plaintiffs to allege these three elements are satisfied. *See id.*

8 Here, the complaint’s allegations make out a case or controversy between and  
9 among Santana, Vasquez, and Scrogin. They allege she and the other defendants conspired to  
10 prosecute them and allege their reputations have been ruined. They allege Judge Scrogin  
11 participated in this conspiracy by, among other things, seating a grand jury to indict them. And  
12 they allege Judge Scrogin is civilly liable and must compensate them by paying money damages.  
13 Cases like *Grant v. Johnson*, 15 F.3d 146 (9th Cir. 1994), or *In re Justices of Supreme Court of*  
14 *Puerto Rico*, 695 F.2d 17 (1st Cir. 1982), are distinguishable. In those cases, the plaintiffs lacked  
15 standing because they challenged laws the defendant judges had no role in passing and no ability  
16 to repeal. Here, in contrast, no statute’s constitutionality is at issue and no judge is “adjudicating  
17 cases pursuant to state law.” *Grant*, 15 F.3d at 147. The plaintiffs have standing.

18 b) Eleventh Amendment

19 Under the Eleventh Amendment, federal courts have no jurisdiction over claims  
20 against states, state agents, and state instrumentalities. *See Regents of the Univ. of Cal. v. Doe*,  
21 519 U.S. 425, 429 (1997). Several years ago, the Ninth Circuit held,

22 [S]tate case law and constitutional provisions make clear that the  
23 Court is a State agency. The official name of the court is the  
24 Superior Court of the State of California; its geographical location  
25 within any particular county cannot change the fact that the court  
26 derives its power from the State and is ultimately regulated by the  
State. Judges are appointed by California’s governor, and their  
salaries are established and paid by the State. We conclude that a  
suit against the Superior Court is a suit against the State, barred by  
the eleventh amendment.

27 *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987). In  
28 addition, the Supreme Court has held that “an official-capacity suit is, in all respects other than

1 name, to be treated as a suit against the entity.” *Graham*, 473 U.S. at 166. The court therefore  
2 concludes that to the extent the complaint alleges claims against Judge Scrogin in her official  
3 capacity, the court lacks subject matter jurisdiction to address them. *See, e.g., Holland v.*  
4 *Andrews*, No. 11-01733, 2011 WL 6838642, at \*3 (C.D. Cal. Sept. 7, 2011) (dismissing official-  
5 capacity claims against a Los Angeles Superior Court judge for lack of subject matter  
6 jurisdiction), *report and recommendation adopted*, 2011 WL 6838640 (C.D. Cal. Dec. 22, 2011).  
7 The Eleventh Amendment does not bar claims against state officials in their personal capacity,  
8 however. *See, e.g., Hafer*, 502 U.S. at 31; *Graham*, 473 U.S. at 166. The court therefore turns to  
9 those claims.

## 10 2. Judicial Absolute Immunity

11 “It is well settled that judges are generally immune from civil liability under  
12 section 1983.” *Meek v. Cnty. of Riverside*, 183 F.3d 962, 965 (9th Cir. 1999) (citing *Mireles v.*  
13 *Waco*, 502 U.S. 9, 9–10 (1991) (per curiam)). The Supreme Court has carefully guarded judicial  
14 immunity, reasoning that “a judicial officer, in exercising the authority vested in him, shall be  
15 free to act upon his own convictions, without apprehension of personal consequences to himself.”  
16 *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). A judge’s errors should be corrected on appeal, not  
17 by subsequent civil litigation. *In re Thomas*, 508 F.3d 1225, 1227 (9th Cir. 2007) (per curiam).  
18 Civil liability, if imposed, “would contribute not to principled and fearless decisionmaking but to  
19 intimidation.” *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

20 Judicial immunity is not withdrawn for actions undertaken in bad faith or with  
21 malice. *Mireles*, 502 U.S. at 11. Neither does “grave procedural error[ ]” defeat judicial  
22 immunity. *Stump v. Sparkman*, 435 U.S. 349, 359 (1978). This immunity remains intact despite  
23 unfair, controversial, and callous decisions, *see id.* at 363–64, and applies even in the face of  
24 allegations the judge acted corruptly, *Pierson*, 386 U.S. at 554; *see also Ashelman v. Pope*, 793  
25 F.2d 1072, 1078 (9th Cir. 1986) (en banc) (“[A] conspiracy between judge and prosecutor to  
26 predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not  
27 pierce the immunity extended to judges and prosecutors.”).

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1           Judicial immunity may be overcome in only two circumstances: first, when the  
2 plaintiff alleges damages arising from “actions not taken in the judge’s judicial capacity,” and  
3 second, if the judge acted “in the complete absence of all jurisdiction.” *Mireles*, 502 U.S.  
4 at 11–12.<sup>17</sup>

5           Here, Santana and Vasquez argue Judge Scrogin acted in clear absence of all  
6 jurisdiction. Opp’n Scrogin at 4. They cite the California Court of Appeal’s decision in  
7 Santana’s appeal, which set aside his indictment because it found the trial court had acted without  
8 “fundamental jurisdiction.” *See id.*; *Santana*, 2012 WL 1777801, at \*10. They argue the Court of  
9 Appeal’s phrase, “without fundamental jurisdiction,” is a synonym of “in clear absence of all  
10 jurisdiction,” and therefore Judge Scrogin is not protected by judicial absolute immunity. Opp’n  
11 Scrogin Mot. at 4.

12           The phrase “without fundamental jurisdiction” has a specific meaning: “A court  
13 lacks jurisdiction in a fundamental sense when it has no authority at all over the subject matter or  
14 the parties, or when it lacks any power to hear or determine the case.” *People v. Ford*, 61 Cal. 4th  
15 282, 286 (2015) (citations and quotation marks omitted). The absence of fundamental jurisdiction  
16 is distinct from a second type of jurisdictional flaw: “When a trial court has fundamental  
17 jurisdiction but fails to act in the manner prescribed, it is said to have acted ‘in excess of its  
18 jurisdiction.’” *Id.* at 287. One difference between these jurisdictional faults is their effect on the  
19 resulting order or ruling. If a court lacks fundamental jurisdiction, its ruling is void, whereas a  
20 ruling in excess of jurisdiction is “valid until set aside.” *Id.* at 286–87.

21           In *Christie v. City of El Centro*, the state court of appeal considered whether the  
22 disqualification of a judge deprived him of fundamental jurisdiction, such that any ruling by that  
23 judge is void. *See* 135 Cal. App. 4th 767, 776–80 (2006). Although the court noted some  
24 uncertainty in the case law, it concluded that “the orders of disqualified judges are void and must  
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26           <sup>17</sup> The Supreme Court appears to use the phrases “complete absence of all jurisdiction”  
27 and “clear absence of all jurisdiction” interchangeably. *Compare, e.g., Mireles*, 502 U.S. at 12  
28 (“complete absence”), *with, e.g., Stump*, 435 U.S. at 356–57 (“clear absence” (quoting *Bradley*,  
80 U.S. at 336)).

1 be vacated.” *Id.* at 779 (citing, *inter alia*, *Giometti v. Etienne*, 219 Cal. 687, 688–89 (1934) (per  
2 curiam)). It was for this holding that the *Santana* court cited *Christie* and quoted the phrase  
3 “without fundamental jurisdiction.” *See* 2012 WL 1777801, at \*10 & nn. 17–18.

4 This leaves the question of the relationship between an “absence of fundamental  
5 jurisdiction” under California law and a “clear” or “complete absence of all jurisdiction” under  
6 federal law. At first glance, the California Supreme Court’s distinction between judicial actions  
7 undertaken without “fundamental jurisdiction” and actions taken “in excess of jurisdiction,” *see*  
8 *Ford*, 61 Cal. 4th at 286–87, seems to parallel the difference the United States Supreme Court  
9 identifies between actions in “clear absence of all jurisdiction” and “in excess of [the judge’s]  
10 authority,” *see Sparkman*, 435 U.S. at 356–57 & n.7. For example, as noted above, the *Ford*  
11 court describes actions in excess of jurisdiction by explaining that although a judge may have  
12 fundamental jurisdiction, she may act outside her authority by ignoring limitations imposed by  
13 “the Constitution, a statute, or relevant case law.” 61 Cal. 4th at 286–87. And the *Bradley* and  
14 *Sparkman* Courts drew a distinction between a probate judge who tries a criminal case and a  
15 judge of the criminal court who convicts a defendant of a nonexistent crime. *See* 435 U.S. at 357  
16 n.7 (citing 80 U.S. at 352). If this analogy were to hold, then by acting without fundamental  
17 jurisdiction, Judge Scrogin would have acted in clear absence of all jurisdiction, and would not be  
18 protected by absolute judicial immunity.

19 Although the relationship between the “absence of fundamental jurisdiction” and  
20 the “clear absence of all jurisdiction” is facially plausible, on closer examination, the federal test  
21 proves more demanding. Two Ninth Circuit decisions show why. First, in *Rosenthal v. Justices*  
22 *of the Supreme Court of California*, the court considered whether a disbarred lawyer could bring  
23 claims against a justice of the California Supreme Court. 910 F.2d 561, 563–64 (9th Cir. 1990).  
24 The plaintiff argued the defendant justice was not protected by judicial absolute immunity  
25 because the justice had signed his name to an order after recusing himself earlier in the case. *Id.*  
26 at 565. The Ninth Circuit was unpersuaded, and reasoned that to the extent the justice erred by  
27 signing the later order, the error was harmless. *Id.* at 565–66. The Ninth Circuit recognized the  
28 order was void if the justice in fact should have recused himself, citing *Giometti v. Etienne*,



1 *supra. Id.* at 565 (citing 219 Cal. at 688–89). As noted above, *Giometti* is the decision the  
2 *Christie* court relied on to hold, in 2006, that because a disqualified judge acts without  
3 fundamental jurisdiction, “the orders of disqualified judges are void and must be vacated.”  
4 135 Cal. App. 4th at 779. Yet in *Rosenthal*, the Ninth Circuit concluded, “A judge is immune  
5 from suit under 42 U.S.C. § 1983 for acts in excess of his jurisdiction, so long as the acts  
6 themselves were judicial.” 910 F.2d at 565–66 (citing *Sparkman*, 435 U.S. at 355–57, and  
7 *Bradley*, 80 U.S. at 351). This reasoning suggests the lack of fundamental jurisdiction is not  
8 dispositive.

9           Second, in *Sadoski v. Mosley*, a former criminal defendant sued the state court  
10 judge who had sentenced her. 435 F.3d 1076, 1078–79 (9th Cir. 2006). She argued the defendant  
11 judge had acted in clear absence of all jurisdiction because the state supreme court held on appeal  
12 that the defendant judge “did not have jurisdiction.” *Id.* Again the Ninth Circuit was  
13 unpersuaded. It quoted *Sparkman*: “[a] judge will not be deprived of immunity because the  
14 action he took was in error, was done maliciously, or was in excess of his authority . . . .” *Id.* at  
15 1079 (quoting 435 U.S. at 356). Therefore the defendant judge was entitled to absolute  
16 immunity, and again, the lack of jurisdiction was not dispositive.

17           Very rarely are judges found to have acted in clear absence of all jurisdiction.  
18 This case does not fit any exception. For example, in *Maestri v. Jutkofsky*, a town justice  
19 exercised jurisdiction over a non-adjoining town in clear violation of state law. 860 F.2d 50, 51–  
20 52 (2d Cir. 1988). It was undisputed that the judge knew he lacked territorial jurisdiction. *Id.*  
21 at 53. The Second Circuit summarized, “For a judge to assume authority outside the geographic  
22 bounds of his office is the kind of clear judicial usurpation which cannot be condoned by any  
23 grant of immunity. No public policy would be served by granting immunity for such arrogant  
24 excesses of authority.” *Id.*

25           Moreover, the core of Santana’s and Vasquez’s complaint concerns Judge  
26 Scrogin’s alleged bias against Santana. *See* Compl. ¶¶ 98–107; Opp’n Scrogin Mot. at 4–7. In a

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1 virtual phalanx, federal courts have concluded that allegations of bias or a conflict of interest do  
2 not deprive a judge of absolute immunity.<sup>18</sup> Perhaps most starkly, in *Lopez v. Vanderwater*, the  
3 Seventh Circuit held the defendant judge had not acted in clear absence of all jurisdiction even  
4 though he allegedly “had an interest in the case,” “prejudged the case,” and “proceeded to  
5 judgment despite his knowledge of fundamental constitutional infirmities in the procedure that  
6 was followed.” 620 F.2d at 1234. The defendant judge did, however, act in excess of all  
7 jurisdiction by acting as a de facto prosecutor, not to mention that his actions were, more  
8 importantly, nonjudicial. *See id.* at 1235–36 & n.13.

9 Here, the motion is granted as to the federal claims against Judge Scrogin.  
10 However, because the complaint alleges in conclusory manner that Judge Scrogin also acted as  
11 investigator or prosecutor, *see, e.g.*, Compl. ¶¶ 84–86, the motion is granted with leave to add  
12 factual allegations showing Judge Scrogin’s actions were nonjudicial, if possible under Rule 11.<sup>19</sup>

### 13 3. State Law Claims and Immunities

14 The California Government Claims Act regulates claims against public entities.  
15 *DiCampli-Mintz v. Cnty. of Santa Clara*, 55 Cal. 4th 983, 989 (2012). If a person does not  
16 present a claim at the time and manner prescribed by that Act, he or she may not file a lawsuit  
17 against a California public entity. *Id.* at 989–90 (citing Cal. Gov’t Code §§ 905, 911.2, and  
18 945.4). “Even if the public entity has actual knowledge of facts that might support a claim, the

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20 <sup>18</sup> *See, e.g.*, *Prater v. City of Philadelphia Family Ct.*, 569 F. App’x 76, 79 (3d Cir. 2014),  
21 *cert. denied*, 135 S. Ct. 1157, *reh’g denied*, 135 S. Ct. 1587 (2015); *Guttman v. Khalsa*, 446 F.3d  
22 1027, 1033 (10th Cir. 2006); *Lopez v. Vanderwater*, 620 F.2d 1229, 1234 (7th Cir. 1980); *Pett v.*  
23 *Crandall*, No. 14-682, 2014 WL 3105821, at \*3 (N.D.N.Y. July 7, 2014); *Muhammad v. Bethel-*  
24 *Muhammad*, No. 11-0690, 2013 WL 5531395, at \*4 (S.D. Ala. Oct. 7, 2013); *Zahl v. Kosovsky*,  
25 No. 08 8308, 2011 WL 779784, at \*9 (S.D.N.Y. Mar. 3, 2011) *aff’d*, 471 F. App’x 34 (2d Cir.  
26 2012); *Langella v. Cercone*, No. 09-312E, 2010 WL 2402940, at \*7 (W.D. Pa. June 10, 2010);  
*Wall v. Wall*, No. 09-527, 2009 WL 3110208, at \*4 (M.D. Ala. Sept. 24, 2009); *Sylvester v.*  
*Sorrell*, No. 08-88, 2009 WL 819383, at \*3 (D. Vt. Mar. 25, 2009); *Retzler v. Bristol Twp.*,  
No. 08-3269, 2009 WL 632934, at \*3 (E.D. Pa. Mar. 9, 2009); *Scott v. Cent. Maine Power Co.*,  
709 F. Supp. 1176, 1188 (D. Me. 1989); *Schuler v. City of Chambersburg, Pa.*, 641 F. Supp. 657,  
659 (M.D. Pa. 1986).

27 <sup>19</sup> Because the court concludes the complaint does not establish any exception to the bar of  
28 judicial absolute immunity, it does not reach the substantive adequacy of any federal claims  
against Judge Scrogin. Neither does the court address the effect of any statute of limitations.

1 claims statutes still must be satisfied.” *Id.* at 990. The rule applies equally to actions litigated in  
2 federal court. *Young v. City of Visalia*, 687 F. Supp. 2d 1141, 1152 (E.D. Cal. 2009). A federal  
3 court complaint must therefore include allegations that either demonstrate or excuse compliance  
4 with the Act, otherwise the complaint must be dismissed. *Id.*

5 California Government Code section 915(c) applies to claims against a “judicial  
6 branch entity.” Cal. Gov’t Code § 915(c); *see also J. Council of Cal. v. Super. Ct.*, 229 Cal. App.  
7 4th 1083, 1095 (2014). That section provides that claims “against a superior court or a judge”  
8 must be delivered or mailed to “the court executive officer.” Cal. Gov’t Code § 915(c)(1). Under  
9 section 915(e), a claim is “deemed to have been presented in compliance with [section 915] even  
10 though it is not mailed or provided as in [that] section,” if the claim is “actually received by the  
11 court executive officer, court clerk/administrator, court clerk, or secretariat of the judicial branch  
12 entity.” *Id.* § 915(e)(4).

13 Here, Santana and Vasquez allege they “presented a written claim for damages  
14 with the State of California defendant, Yuba County Superior Court Judge Julia Scrogin, pursuant  
15 to California Government Code Section 910 et seq.” Compl. ¶ 11. They do not allege  
16 compliance with section 915(c), *i.e.*, presentation of a claim to the court executive officer. When  
17 Judge Scrogin identified this omission in her motion to dismiss, Santana and Vasquez responded,  
18 that “On October 22, 2014, plaintiffs presented their Notice of Claim to Scrogin by filing it with  
19 the Victims Compensation and Government Claims Board.” Opp’n Scrogin at 19 (citing Compl.  
20 ¶ 11). They argue this was sufficient under Government Code section 915(e)(2). This fact does  
21 not appear in the complaint, and the court construes it as a request for leave to amend; however,  
22 amendment on this ground would be futile. The California Court of Appeal recently rejected an  
23 identical argument after a careful construction of section 915(e)(2), concluding that the legislature  
24 intended notice to be provided as described in section 915(e)(4). *See J. Council*, 229 Cal. App.  
25 4th at 1096–97, 1100–01. Because amendment would not cure the presentation defect, the  
26 motion is granted with prejudice and without leave to amend as to the state-law claims.

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1 F. Timothy Evans

2 Evans first challenges this court’s subject matter jurisdiction, and second moves to  
3 dismiss for failure to state a claim upon which relief can be granted.

4 1. Subject Matter Jurisdiction

5 Federal district courts have subject matter jurisdiction over all “civil actions  
6 arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. District  
7 courts also have subject matter jurisdiction over any civil action “authorized by law to be  
8 commenced by any person . . . [t]o recover damages or to secure equitable or other relief under  
9 any Act of Congress providing for the protection of civil rights . . . .” 28 U.S.C. § 1343. Here,  
10 because the complaint alleges claims under § 1983 for violations of federal constitutional rights,  
11 the court has subject matter jurisdiction over those federal claims.

12 The complaint also alleges claims under state law, and the court must have subject  
13 matter jurisdiction over each. *See Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008);  
14 *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 66 n.1 (1996). Evans argues that because he and the  
15 plaintiffs are all residents of California and because the complaint includes no federal claims  
16 against him, the court cannot exercise subject matter jurisdiction over the claims against him.  
17 Evans Mot. Dismiss at 7–8. This argument overlooks the effect of 28 U.S.C. § 1367, which  
18 provides that if this court has original jurisdiction over a particular civil action, it also has  
19 jurisdiction “over all other claims that are so related to claims in the action . . . that they form part  
20 of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C.  
21 § 1367(a). A state law claim is part of the same case or controversy if it and the federal claim  
22 together “derive from a common nucleus of operative fact, such that the relationship between the  
23 federal claim and the state claim permits the conclusion that the entire action before the court  
24 comprises but one constitutional case.” *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156,  
25 165 (1997) (citations, alterations, and quotation marks omitted).

26 The state law claims against Evans are part of the same case or controversy as the  
27 federal claims against the other defendants. As summarized above, the complaint alleges Evans  
28 participated in the same conspiracy to prosecute Santana. He, like the other defendants, allegedly

1 supported Green for the judicial appointment, disfavored Santana, and believed a criminal  
2 prosecution would undermine Santana’s application. Santana and Vasquez allege he helped to  
3 plan the prosecution, fabricated evidence, and withheld exonerating evidence. The court  
4 therefore has supplemental jurisdiction over the state law claims against Evans under  
5 28 U.S.C. § 1367(a).

6 A district court may nevertheless decline to exercise supplemental jurisdiction  
7 over a claim in four instances: “(1) the claim raises a novel or complex issue of State law, (2) the  
8 claim substantially predominates over the claim or claims over which the district court has  
9 original jurisdiction, (3) the district court has dismissed all claims over which it has original  
10 jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining  
11 jurisdiction.” *Id.* § 1367(c). These four circumstances are the exclusive means by which a  
12 district court may decline supplemental jurisdiction. *Executive Software N. Am., Inc. v. U.S. Dist.*  
13 *Court for Cent. Dist. of Cal.*, 24 F.3d 1545, 1556 (9th Cir. 1994), *overruled on other grounds by*  
14 *Cal. Dep’t of Water Res. v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008).

15 None of the exceptions listed in § 1367(c) applies to this case. The parties have  
16 identified no novel or complex questions of California law, the claims against Evans do not  
17 predominate, and the court has allowed the plaintiffs leave to amend. Finally, the court is aware  
18 of no compelling reason to decline jurisdiction, and the efficient resolution of this action will  
19 more likely be accomplished in this forum, as a whole. *See also Colo. River Water Conservation*  
20 *Dist. v. United States*, 424 U.S. 800, 817 (1976) (federal courts have a “virtually unflagging  
21 obligation . . . to exercise the jurisdiction given them”).

## 22 2. State Law Claims

23 Evans argues the complaint lacks sufficient factual allegations to support each of  
24 the claims against him, especially because the complaint alleges his involvement began only after  
25 the investigation was underway. *See* Evans Mot. at 9–11. Santana and Vasquez respond that  
26 (1) additional facts obtained after the complaint was filed show Evans was involved in this case  
27 before the investigation began; and (2) Evans is liable because he was part of a conspiracy to  
28 investigate and prosecute them. *See* Opp’n Evans at 12–14.

1 As to the first argument, on a motion to dismiss, the court does not consider  
2 evidence outside the complaint unless it is subject to judicial notice or can be incorporated by  
3 reference. These rules do not allow the court to consider the additional factual information  
4 Santana and Vasquez identify in their briefing in opposition to Evans’s motion.

5 The second argument calls for closer inspection. A conspiracy indeed “renders  
6 each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from  
7 the wrong[,] regardless of the degree of his activity.” *Berg & Berg Enterprises, LLC v. Sherwood*  
8 *Partners, Inc.*, 131 Cal. App. 4th 802, 823 (2005) (citation and quotation marks omitted). The  
9 elements of a claim for civil conspiracy under California law are (1) “the defendant had  
10 knowledge of and agreed to both the objective and the course of action that resulted in the  
11 injury”; (2) “there was a wrongful act committed pursuant to that agreement”; and (3) the  
12 plaintiffs sustained damages as a result. *Berg & Berg Enterprises, LLC v. Sherwood Partners,*  
13 *Inc.*, 131 Cal. App. 4th 802, 823 (2005).

14 Evans argues conspiracy claims are uniformly subject to a “heightened pleading  
15 standard” in federal court. Reply at 2 (citing *Harris v. Roderick*, 126 F.3d 1189, 1195 (9th Cir.  
16 1997); *Burns v. Cnty. of King*, 883 F.2d 819, 821 (9th Cir. 1989); and *Woodrum v. Woodward*  
17 *Cnty.*, 866 F.2d 1121, 1126 (9th Cir. 1989)). This is incorrect. First, the cases cited do not  
18 support Evans’s statement. *Harris* addressed the pleading standard in *Bivens*<sup>20</sup> actions. 126 F.3d  
19 at 1195. *Burns* and *Woodrum* addressed alleged violations of federal civil rights statutes, *see*  
20 *Burns*, 883 F.2d at 821; *Woodrum*, 866 F.2d at 1126; here, however, the complaint alleges no  
21 federal claims against Evans. Second, in holding that a heightened pleading standard applies to  
22 *Bivens* actions, *Harris* relied on *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991), which decision  
23 was expressly overruled in 2002, *see Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1121 (9th  
24 Cir. 2002). The *Harris* court also relied on *Buckey v. County of Los Angeles*, 968 F.2d 791, 794

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27 <sup>20</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

1 (9th Cir. 1992), which like *Burns* and *Woodrum* concerned conspiracy to violate 42 U.S.C.  
2 § 1983.

3           Rather, in federal court, when a plaintiff alleges a defendant was party to a state-  
4 law civil conspiracy, Rule 9(b) raises the pleading standard when “the object of the alleged  
5 conspiracy is fraudulent.” *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 991 (9th  
6 Cir. 2006); *accord Intel Learning Tech., Inc. v. Beijing Kaidi Educ.*, No. 06-7541, 2007 WL  
7 2288329, at \*4 (N.D. Cal. Aug. 9, 2007) (“[I]t is true that courts have applied a heightened  
8 pleading standard to claims of civil conspiracy—but generally only with respect to claims of civil  
9 conspiracy to commit fraud.”). Here, other than formulaic allegations the defendants “acted with  
10 fraud, oppression, and/or malice” unsupported by any factual allegation, *see* Compl. ¶¶ 33, 147,  
11 the complaint alleges no fraud or misrepresentation. Elsewhere the complaint makes clear the  
12 object of this alleged conspiracy was not to defraud Santana or Vasquez, but to smear Santana  
13 and to prevent his appointment. Rule 8, not Rule 9(b), therefore governs the complaint’s  
14 allegations.

15           The complaint’s factual allegations support a plausible claim of civil conspiracy.  
16 The complaint alleges Evans, a friend of the other defendants and supporter of Green’s judicial  
17 appointment, met with the other defendants to “discuss[ ] the filing of unfounded criminal charges  
18 against Jesse Santana to scuttle his judicial appointment.” Compl. ¶¶ 87, 91. He knew about the  
19 defendants’ plan to fabricate charges against Santana and Vasquez and agreed with their goal. *Id.*  
20 ¶¶ 91–92. He took part in this plan by arranging for Griesa, his client, to waive his attorney-client  
21 privilege so that the conspirators could obtain Vasquez’s files. *Id.* ¶ 95. It also appears beyond  
22 any reasonable dispute Evans testified as an expert before the grand jury that indicted Santana.  
23 *See Santana v. Superior Court*, 2012 WL 1777801 at \*7. Evans’s interpretation of these  
24 allegations as innocuous may be equally plausible, but the Ninth Circuit has held, “If there are  
25 two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both  
26 of which are plausible, plaintiff’s complaint survives a motion to dismiss under Rule 12(b)(6).”  
27 *Starr*, 652 F.3d at 1216. Only if the “defendant’s plausible alternative explanation is so  
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1 convincing that plaintiff’s explanation is *implausible*” will the complaint be dismissed. *Id.*  
2 (emphasis in original).

3 The complaint’s allegations are sufficient at this stage to state a claim of civil  
4 conspiracy. This leaves the substantive viability of each state-law claim.

5 a) Malicious Prosecution

6 “To establish a cause of action for malicious prosecution, a plaintiff must  
7 demonstrate that the prior action (1) was initiated by or at the direction of the defendant and  
8 legally terminated in the plaintiff’s favor, (2) was brought without probable cause, and (3) was  
9 initiated with malice.” *Siebel v. Mittlesteadt*, 41 Cal. 4th 735, 740 (2007). As noted above,  
10 because the complaint alleges the prosecution was part of a civil conspiracy, “[e]ach member of  
11 the conspiracy becomes liable for all acts done by others pursuant to the conspiracy, and for all  
12 damages caused thereby.” *Berg & Berg*, 131 Cal. App. 4th at 823. Here, the first and third  
13 elements present no difficult questions: Santana’s prosecution was the conspiracy’s main event,  
14 the co-conspirators were the prosecutors and investigators, Santana and Vasquez were acquitted,  
15 and the prosecution’s goal was to prevent Santana’s judicial appointment.

16 Whether the defendants had probable cause is another matter.<sup>21</sup> Probable cause is  
17 an objective standard. *Paiva v. Nichols*, 168 Cal. App. 4th 1007, 1018 (2008). It is applied to the  
18 facts available to the defendant at the time he or she decided to prosecute the earlier case. *Id.*  
19 “[P]robable cause to bring an action does not depend upon it being meritorious, as such, but upon  
20 it being arguably tenable, *i.e.*, not so completely lacking in apparent merit that no reasonable  
21 attorney would have thought the claim tenable.” *Wilson v. Parker, Covert & Chidester*, 28 Cal.  
22 4th 811, 824 (2002) (emphasis omitted).

23 Here, Santana and Vasquez allege the prosecution lacked probable cause because  
24 it was based on fabricated evidence wrongfully obtained. *See, e.g.*, Compl. ¶ 88. The complaint  
25 does not specify which evidence was fabricated or wrongfully obtained. In light of the

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27 <sup>21</sup> As above, the court concludes previous state court decisions do not preclude litigation  
28 of this issue here. *See supra* pages 35–38.



1 complaint's other allegations, for example that the defendants knew Griesa had paid \$50,000 and  
2 Acevedo had agreed not to testify against him, a conclusory allegation of fabricated evidence is  
3 insufficient to state a plausible claim. The motion is granted as to this claim.

4 b) Negligence

5 The well-known elements of a negligence action are the defendant's duty, breach  
6 of that duty, proximate cause, and damages. *See, e.g., Merrill v. Navegar, Inc.*, 26 Cal. 4th 465,  
7 477 (2001). For reasons similar to those described immediately above, the complaint does not  
8 plausibly allege the defendants breached any duty because an "obvious alternative explanation"  
9 for their alleged misconduct makes the complaint's theory implausible, *see Twombly*, 550 U.S.  
10 at 567: the defendants had probable cause to believe Santana and Vasquez had committed bribery  
11 and had obstructed justice. They could not have breached any duty by prosecuting Santana and  
12 Vasquez for crimes supported by probable cause, even if the prosecution would also effectively  
13 lock in Green's judicial appointment. The motion is granted as to this claim.

14 c) Intentional Infliction of Emotional Distress

15 A complaint states a claim for intentional infliction of emotional distress when it  
16 alleges (1) the defendant's conduct was outrageous; (2) the defendant either intended to cause  
17 emotional distress or acted with reckless disregard to the probability of causing emotional  
18 distress; (3) the plaintiff suffered severe emotional distress; and (4) the defendant's conduct  
19 actually and proximately caused that emotional distress. *Nally v. Grace Cmty. Church*, 47 Cal. 3d  
20 278, 300 (1988). The defendant's conduct is sufficiently "outrageous" when it is "so extreme as  
21 to exceed all bounds of that usually tolerated in a civilized community." *Davidson v. City of*  
22 *Westminster*, 32 Cal. 3d 197, 209 (1982). Here, again, the complaint's allegations do not  
23 plausibly allege the defendants lacked probable cause to prosecute. The defendants did not act  
24 outside the bounds of all decency by advancing a cause they believed was supported by probable  
25 cause. The motion is granted as to this claim.

26 3. Leave to Amend

27 Each of the deficiencies noted in this section may be cured in an amended  
28 complaint; the motion is granted with leave to amend, if possible within the confines of Rule 11.

1 *But cf.* Cal. Civ. Code § 47(b); *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 137  
2 Cal.App.4th 1, 5 (2006) (Code of Civil Procedure section 425.16 and Civil Code section 47(b) are  
3 construed similarly and broadly). Because the claims against Evans are dismissed with leave to  
4 amend, the court does not reach the viability of any hypothetical federal claims. These claims, if  
5 alleged in an amended pleading, are more properly tested in a later motion to dismiss. *See, e.g.*,  
6 *SAES Getters*, 219 F. Supp. 2d at 1086.

7 IV. CONCLUSION

8 1. The complaint is DISMISSED. Leave to amend is granted as follows:

- 9 a. Leave to amend is granted to allege claims under 42 U.S.C. § 1983 against  
10 McGrath, Bendorf, Vacek, Barr, Stober, and Elliott arising from non-prosecutorial and  
11 non-testimonial actions undertaken in their personal capacities and based on alleged  
12 deprivations of the plaintiffs' rights under the Fourth Amendment and the Fourteenth  
13 Amendment equal protection clause, including as founded on claims of malicious  
14 prosecution;
- 15 b. Leave to amend is granted to allege claims under 42 U.S.C. § 1981 to the extent  
16 these claims are not barred by the immunities discussed in this order;
- 17 c. Leave to amend is granted to allege claims against Yuba County under 42 U.S.C.  
18 § 1983 arising from an alleged policy of keeping the judicial bench racially homogenous;
- 19 d. Leave to amend is granted to allege state law claims against Yuba County,  
20 McGrath, Bendorf, Vacek, Barr, Stober, and Elliott for which they are not immune under  
21 California Government Code section 821.6 and California Civil Code section 47(b);
- 22 e. Leave to amend is granted as to claims under 42 U.S.C. § 1983 against Judge  
23 Scrogin, to allow the addition of any factual allegations showing her actions were  
24 nonjudicial;
- 25 f. Leave to amend is granted as to all claims against Evans, state or federal; and
- 26 g. In all other respects the complaint is dismissed with prejudice and without leave to  
27 amend.

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1 2. The special motions to strike are GRANTED IN PART to the extent they are based on the  
2 legal deficiencies described in this order. To the extent the special motions to strike are based on  
3 factual deficiencies, however, the motions are DENIED IN PART WITHOUT PREJUDICE.

4 3. The Yuba County defendants' motion for a more definite statement is DENIED.

5 4. This order resolves ECF Nos. 8, 11, 15, 16, 19, and 20.

6 IT IS SO ORDERED.

7 DATED: March 31, 2016.

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UNITED STATES DISTRICT JUDGE