

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
 4
 5 ELICIA HOLLAND,

6 Plaintiff,

NO. C10-2603 TEH

7 v.

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS

8 CITY OF SAN FRANCISCO, et al.,

9 Defendants.

10
 11 This matter came before the Court on October 18, 2010, on Defendants' motion to
 12 dismiss. For the reasons set forth below, Defendants' motion is GRANTED IN PART and
 13 DENIED IN PART.

14
 15 **BACKGROUND**

16 This lawsuit arises from the May 26, 2009 arrest and search of Plaintiff Elicia R.
 17 Holland ("Holland") by employees of the City and County of San Francisco ("City").¹
 18 Holland contends that these events violated federal and state law. At issue on this motion is
 19 whether some of Holland's claims must be dismissed because the search was lawful or
 20 because defendants are not liable for the unlawful search under federal and state immunity
 21 doctrines.

22 The evening of her arrest, Holland was protesting the California Supreme Court's
 23 ruling upholding Proposition 8, a same-sex marriage ballot initiative, in San Francisco,
 24 California.² As Holland stepped into a crosswalk to cross the street, officers of the San

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 26 ¹ In her complaint, Holland names the City of San Francisco and County of San
 Francisco as separate entities. This order recognizes that they are a single entity.

27 ² On a motion to dismiss, the Court must accept as true all material factual allegations
 28 in the complaint, as well as any reasonable inferences to be drawn from them. *Ashcroft v.*
Iqbal, – U.S. –, 129 S. Ct. 1937, 1949-50 (2009); *Broam v. Brogan*, 320 F.3d 1023, 1028

1 Francisco Police Department hoisted her up and slammed her to the ground on her face,
2 chest, and stomach. One of the officers put his knee on Holland's neck, and two sat on her
3 back. Other officers held her feet and legs. She was kicked in the shins. She emerged bruised
4 and battered.

5 The officers arrested Holland for misdemeanor battery on a police officer, Cal. Pen.
6 Code § 243(b), refusal to comply with a lawful order, Veh. Code § 2800(a), and being a
7 pedestrian outside of a crosswalk, Veh. Code § 21954(a). She was taken to San Francisco
8 County Jail, where unnamed deputies strip searched her.³ Holland cried and complained of
9 menstrual cramps, but the deputies continued the search. After the search, Holland was put in
10 a cell marked with a sign that read: "Inmate to be housed alone." Pl.'s Compl. At 7: 23-24.
11 Twelve to fourteen hours after her arrest, Holland was released. She was never charged with
12 a crime or placed in the jail's general population.

13 Holland filed this action on June 14, 2010, against multiple defendants involved in her
14 arrest and search. Relevant to this motion are claims arising from the search, which allege
15 that the City, Sheriff Hennessey, and unnamed deputies (collectively "Defendants") violated
16 federal and state law. Holland brings federal causes of action under 42 U.S.C. section 1983
17 ("section 1983"), alleging unlawful search, failure to supervise the persons who conducted
18 the unlawful search, and causation of an unlawful search by the enforcement of a blanket
19 policy. Holland brings state causes of action under California Civil Code section 52.1,
20 alleging interference with her exercise and enjoyment of rights, and California Penal Code
21 section 4030(f), alleging violations of the state's strip search laws. Finally, Holland alleges
22 that the City, Sheriff Hennessey, and unnamed deputies are liable for assault, battery,
23 negligence, negligent infliction of emotional distress, and negligent training and supervision.

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26 (9th Cir. 2003).

27 ³ Whether a search constitutes a strip search can be a legal question. *See Edgerly v.*
28 *City and County of San Francisco*, 599 F.3d 946, 957-58 (9th Cir. 2010). Because
Defendants do not challenge whether Holland pleaded sufficient facts relating to her search,
this Court assumes that she was strip searched.

1 Defendants filed a motion to dismiss these claims on August 26, 2010, and this motion is
2 now before the Court.

3

4 **LEGAL STANDARD**

5 Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6) when a
6 plaintiff’s allegations fail “to state a claim upon which relief can be granted.” In ruling on a
7 motion to dismiss, the Court must “accept all material allegations of fact as true and construe
8 the complaint in a light most favorable to the non-moving party.” *Vasquez v. L.A. County*,
9 487 F.3d 1246, 1249 (9th Cir. 2007). Courts are not, however, “bound to accept as true a
10 legal conclusion couched as a factual allegation.” *Iqbal*, 129 S. Ct. at 1949-50.

11 A Rule 12(b)(6) dismissal “can be based on the lack of a cognizable legal theory or
12 the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica*
13 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To survive a motion to dismiss, a plaintiff
14 must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic*
15 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility does not equate to probability, but
16 it requires “more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129
17 S. Ct. at 1949. “A claim has facial plausibility when the plaintiff pleads factual content that
18 allows the court to draw the reasonable inference that the defendant is liable for the
19 misconduct alleged.” *Id.* Dismissal of claims that fail to meet this standard should be with
20 leave to amend unless it is clear that amendment could not possibly cure the complaint’s
21 deficiencies. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998).

22

23 **DISCUSSION**

24 Defendants ask the Court to dismiss the following state and federal claims relating to
25 Holland’s strip search: (1) unlawful search under section 1983 (fifth cause of action); (2)
26 failure to supervise the persons who conducted the unlawful search under section 1983 (sixth
27 cause of action); (3) causation of an unlawful search by the enforcement of a blanket policy
28 under section 1983 (seventh cause of action); (4) interference with the exercise and

1 enjoyment of rights under California Civil Code section 52.1 (eighth cause of action); (5)
2 assault (ninth cause of action); (6) battery (tenth cause of action); (7) negligence (twelfth
3 cause of action); (8) negligent infliction of emotional distress (thirteenth cause of action); (9)
4 violation of the strip search regulations in California Penal Code section 4030(f) (fourteenth
5 cause of action); and (10) negligent training and supervision (fifteenth cause of action).
6 Defendants argue that their conduct does not violate federal or state law, and if it does,
7 federal and state immunity laws bar certain claims. They also argue that Holland should not
8 be granted leave to amend dismissed claims.

9
10 **I. Federal Claims**

11 Defendants move to dismiss Holland’s fifth, sixth, and seventh causes of action, all of
12 which allege that the strip search of Holland was unconstitutional pursuant to the Fourth and
13 Fourteenth Amendments to the United States Constitution and is therefore actionable under
14 section 1983. At issue on each of these claims is whether Holland alleges a constitutional
15 violation, and if she does, whether her claims are nonetheless barred by qualified immunity.

16
17 **A. Constitutionality of the Search**

18 Whether a search is constitutional turns upon the need for the particular search
19 weighed against the invasion of rights the search entails. *Bell v. Wolfish*, 441 U.S. 520, 558-
20 59 (1979). Under this balancing test, a court must consider the scope of the particular
21 intrusion, the manner in which it is conducted, the justification for initiating it, and the place
22 in which it is conducted. *Bell*, 441 U.S. at 559; *Bull v. City and County of San Francisco*, 595
23 F.3d 964, 974-75 (9th Cir. 2010). Where the policy or practice of a prison or jail is at issue,
24 courts must also look to the test articulated in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987).
25 *Turner* directs courts to consider whether any infringement on a prisoner’s Fourth
26 Amendment rights is reasonably related to legitimate penological interests. *Bull*, 595 F.3d at
27 973. This analysis requires consideration of (1) whether there is a valid, rational connection
28 between the prison regulation and the legitimate governmental interest put forward to justify

1 it; (2) the impact the accommodation of the asserted constitutional right will have on guards
2 and other inmates, and on the allocation of prison resources generally; and (3) the absence of
3 ready alternatives. *Id.*

4 In *Edgerly v. City and County of San Francisco*, the Ninth Circuit explained Fourth
5 Amendment balancing as it is applied in the strip search context:

6 [W]e first held in *Giles v. Ackerman* that arrestees charged with
7 minor offenses may be subjected to a strip search only if jail
8 officials possess a reasonable suspicion that the individual
9 arrestee is carrying or concealing contraband. *Giles v. Ackerman*,
10 746 F.2d 614, 617 (9th Cir. 1984), *overruled by Bull*[, 595 F.3d
11 964]. We have repeatedly applied this rule in cases following
12 *Giles*. *E.g.*, *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-72
13 (9th Cir. 1993); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th
14 Cir. 1991). We recently carved out an exception to this rule in
15 *Bull v. City and County of San Francisco*, in which we overruled
16 *Giles* and held that such an arrestee could be strip searched
17 without individualized suspicion if the arrestee would be
18 introduced into the general jail population. *Bull*, at 977. In those
19 circumstances, the institutional need to prevent arrestees from
20 bringing contraband into the jail justified the invasion of personal
21 rights that the search entails. *Bull* (citing *Bell*, 441 U.S. at 559).
22 *Bull*, however, left undisturbed our line of precedent requiring
23 reasonable suspicion to strip search arrestees charged with minor
24 offenses who are not housed in the general jail population. *Bull*,
25 at 972-73.

26 599 F.3d at 957 (internal quotations omitted).

27 Holland alleges that she was never placed in the general jail population, and the sign
28 next to her cell, “Inmate to be housed alone,” indicates that jail authorities never intended to
house her there. Compl. 7:23-24. As a result, Defendants needed individualized reasonable
suspicion in order to strip search Holland. *See Edgerly*, 599 F.3d at 957. On this motion,
Defendants argue that Holland’s arrest for misdemeanor battery on a police officer, by itself,
provided jail officials with reasonable suspicion. The relevant cases, however, show that
Holland’s alleged offense, without more, does not support reasonable suspicion.

The Ninth Circuit has noted that “in some cases, the charge itself may give rise to
reasonable suspicion.” *Way v. County of Ventura*, 445 F.3d 1157, 1161 (9th Cir. 2006). The
panel’s example of this, and the only example presented in the parties’ briefs, is found in
Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989). In that case, the Ninth

1 Circuit upheld the strip search of an inmate in part because the charge against him – grand
2 theft auto – gave rise to reasonable suspicion. *Id.* at 1447. The charge was “sufficiently
3 associated with violence to justify a visual strip search,” the court reasoned. *Id.* Defendants
4 argue that misdemeanor battery on a police officer is also a “crime of violence,” and
5 therefore gives rise to reasonable suspicion. Defs.’ Mot. 3:12-14. *Thompson* is
6 distinguishable from the instant case, however. First, the *Thompson* court emphasized that its
7 decision was “extremely narrow” and only applied to “theft of an automobile.” *Id.* at n.6.
8 This narrow decision did not prevent a later panel from finding that the charge of grand theft
9 did not support reasonable suspicion. *See Kennedy v. Los Angeles Police Dep’t*, 901 F.2d
10 702, 716 (9th Cir. 1990), *implied overruling on other grounds recognized by Act*
11 *Up!/Portland*, 971 F.2d 298. Second, the inmate searched in *Thompson* was housed in the
12 general population of the jail. *Thompson*, 885 F.2d at 1447. At the time *Thompson* was
13 decided, the fact that an inmate was housed in the general jail population did not, by itself,
14 justify a strip search. The *Thompson* panel noted this, and concluded that the nature of the
15 grand theft auto charge justified the search. *Id.* While the court did not expressly say that its
16 analysis would have been different if the inmate had not been classified for housing in the
17 general population, the court refers to this as “a factor [which] by itself cannot justify a strip
18 search.” *Id.* That it was a “factor” in the balancing test distinguishes *Thompson* from the
19 instant case, where Holland was not housed in the general population. Finally, even if
20 *Thompson* could be read to support the idea that the charge alone, irrespective of where an
21 inmate is to be housed, can give rise to reasonable suspicion, Holland’s alleged offense is not
22 one of them. Holland was arrested for misdemeanor battery on a police officer under Penal
23 Code section 243(b) (“section 243(b)”). For the purposes of section 243(b), battery is defined
24 as “any willful and unlawful use of force or violence upon the person of another.” Cal. Pen.
25 Code § 242. In *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006)⁴, the Ninth

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27 ⁴ At oral argument, Defendants argued that immigration and criminal cases analyzing
28 whether California’s battery statutes are “crimes of violence” are inapplicable here because
of the high standards of proof involved in those cases. Assuming that is true, these cases are
nonetheless instructive regarding the kind of conduct outlawed by California’s battery

1 Circuit noted that the phrase “use of force or violence” “is a term of art, requiring neither a
2 force capable of hurting or causing injury nor violence in the usual sense of the term.” *Id.* at
3 1016. State court decisions bear this out. The California Supreme Court in *People v.*

4 *Colantuono* explained that

5 [i]t has long been established, both in tort and criminal law, that
6 the least touching may constitute battery. In other words, *force*
7 against the person is enough, it need not be violent or severe, it
need not cause bodily harm or even pain, and it need not leave
any mark.

8 7 Cal. 4th 206, 214 n.4 (1994) (emphasis in original) (internal quotations omitted). Another
9 California court noted that because the “least touching” may constitute battery, “[t]he word
10 violence [in the statute] has no real significance.” *People v. Mansfield*, 200 Cal. App. 3d 82,
11 87-88 (1988). As the relevant California jury instruction explains, “[t]he slightest touching
12 can be enough to commit a battery if it is done in a rude or angry way. Making contact with
13 another person, including through his or her clothing, is enough. The touching does not have
14 to cause pain or injury of any kind.” Judicial Council of California, Criminal Jury
15 Instructions 945. These sources make clear that the offense of misdemeanor battery on a
16 police officer is not “sufficiently associated with violence to justify a visual strip search.” *See*
17 *Thompson*, 885 F.2d at 1447. Therefore *Thompson* does not apply to this case.

18 This conclusion is supported by other Ninth Circuit cases. In *Way*, the Ninth Circuit
19 held that the strip search of a woman after she was booked into jail on a misdemeanor charge
20 of being under the influence of drugs was unconstitutional. 445 F.3d at 1158-59. In *Kennedy*,
21 the court held that a strip search of a woman arrested for grand theft, a felony, after she took
22 some of her roommate’s belongings to settle a debt, was unconstitutional. 901 F.2d at 704.
23 Both cases cite *Thompson* and acknowledge that in some cases, the charge alone may give
24 rise to reasonable suspicion. *Way*, 445 F.3d at 1161; *Kennedy*, 901 F.2d at 716. In neither
25 case does the court follow *Thompson*, however. They conclude that the charges in those
26 cases – being under the influence of drugs in *Way* and grand theft in *Kennedy* – do not give

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28 statutes.

1 rise to reasonable suspicion. *Way*, 445 F.3d at 1162; *Kennedy*, 901 F.2d at 716. While neither
2 case explains why *Thompson* is distinguishable, *Bull* suggests one of the aforementioned
3 reasons – *Way* and *Kennedy* involved “searches of arrestees who were not classified for
4 housing in the general jail or prison population.” *Bull*, 595 F.3d at 981.

5 *Way* and *Kennedy* show that where *Thompson* does not apply, the circumstances of
6 the offense determine reasonable suspicion. Both cases cite *Giles*, 746 F.2d 614, which
7 emphasized that “[r]easonable suspicion may be based on such factors as the nature of the
8 offense, the arrestee’s appearance and conduct, and the prior arrest record.” *Id.* at 617. In
9 *Kennedy*, the court characterized the offense as “an ordinary disagreement between two
10 roommates.” *Kennedy*, 901 F.2d at 716. In *Way*, the court noted that the plaintiff “was under
11 the control of the arresting officer from the time she was taken into custody at work until
12 booking. The officer perceived no indication that she was carrying drugs or contraband.” 445
13 F.3d at 1162. The circumstances of Holland’s arrest show that they, too, did not give rise to
14 reasonable suspicion. Holland alleges that she was crossing the street legally while engaging
15 in a street protest. While she does not explicitly deny battering a police officer, she notes that
16 she was released twelve to fourteen hours after she had been arrested, and was never charged
17 with a crime. The fact that Holland was never charged raises an inference that her conduct
18 was not violent. Furthermore, her other alleged offenses – refusal to comply with a lawful
19 order and a crosswalk infraction – are minor. This Court has no reason to believe that the
20 officer who searched Holland had reasonable suspicion that she was carrying drugs or
21 contraband. While questions remain as to what went on during the street protest leading to
22 Holland’s arrest, these ambiguities are resolved in her favor on a motion to dismiss.

23 The analyses in *Way* and *Kennedy* confirm the rule in *Edgerly* – if an inmate arrested
24 on a minor offense is not classified for housing in a jail’s general population, jail officials
25 must have individualized reasonable suspicion before conducting a strip search. *See* 599 F.3d
26 at 957. Here the offense was minor and it does not appear that the officers had reasonable
27 suspicion that Holland was carrying or concealing contraband. Therefore, this Court finds
28 that Holland’s allegations are sufficient to state a claim of illegal search under section 1983,

1 and Defendants’ motion to dismiss Holland’s section 1983 claims on the basis that Holland’s
2 constitutional rights were not violated is DENIED.

3
4 **B. Qualified Immunity**

5 Even if the strip search of Holland was unconstitutional, dismissal of her section 1983
6 claims against Sheriff Hennessey is appropriate if he is entitled to qualified immunity.⁵
7 Qualified immunity applies if the unlawfulness of Holland’s strip search was not clearly
8 established at the time it was conducted. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001). A
9 law is clearly established where “it would be clear to a reasonable officer that his conduct
10 was unlawful in the situation he confronted.” *Id.* “[O]fficials can still be on notice that their
11 conduct violates established law even in novel factual circumstances.” *Hope v. Pelzer*, 536
12 U.S. 730, 731 (2002).

13 This Court concludes that Sheriff Hennessey is not entitled to qualified immunity for
14 the strip search of Holland. Arguing otherwise, Defendants contend that under *Thompson* and
15 *Kennedy*, it was not clearly unlawful to conduct a jail strip search of a person arrested for a
16 crime of violence. That may be true, but Defendants offer no authority other than *Thompson*
17 to show that misdemeanor battery on a police officer is a crime of violence. As the above
18 analysis shows, the “least touching” is a crime under section 243(b). *See People v. Mansfield*,
19 200 Cal. App. 3d 82, 87-88 (1988). The phrase “use of force or violence” in the definition of
20 battery “is a term of art” *Ortega-Mendez*, 450 F.3d at 1016. “The word violence [in the
21 statute] has no real significance.” *Mansfield*, 200 Cal. App. 3d at 87-88. Thus the offense of
22 misdemeanor battery on a police officer is clearly not “sufficiently associated with violence
23 to justify a visual strip search.” *Thompson*, 885 F.2d at 1447. It is a minor offense, and as the
24 panel in *Edgerly* noted in its analysis of qualified immunity, “it was clearly established in
25 1989 ‘that it is unlawful to strip search an arrestee brought to a jail facility on charges of
26 committing a minor offense, unless the officer directing the search possesses “a reasonable

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28 ⁵ No other Defendant has invoked qualified immunity with respect to Holland’s
section 1983 claims.

1 suspicion that the individual arrestee is carrying or concealing contraband.”” 599 F.3d at
2 958 (quoting *Act Up!/Portland*, 988 F.2d at 871-72 (quoting *Giles*, 746 F.2d at 617)).

3 This is especially true in light of *Kennedy*, where the charge of grand theft belied “an
4 ordinary disagreement between two roommates.” 901 F.2d at 718. Together with *Way*, these
5 cases clearly show that where *Thompson* does not apply, the circumstances of the offense
6 determine reasonable suspicion. *Id.*; *Way*, 445 F.3d at 1161-62. The circumstances as
7 Holland describes them indicate that “[n]o weapons, no drugs, no contraband, no violent acts
8 of any kind were involved.” *See Kennedy*, 901 F.2d at 716. She challenges her arrest as
9 unlawful, claiming that police officers “hoisted [her] off the ground as she stepped into a
10 crosswalk to cross the street.” Compl. 7:5-7. Any ambiguity about what else occurred
11 between Holland and the officers must be resolved in Holland’s favor on a motion to dismiss.
12 Thus the circumstances of Holland’s arrest, like the circumstances in *Kennedy* and *Way*,
13 clearly do not give rise to individualized reasonable suspicion. In light of the nature of
14 Holland’s offense and the circumstances of her arrest, no reasonable officer could have
15 believed that the strip search of Holland was lawful.

16 Defendants contend that *Bull* favors qualified immunity in this case. 595 F.3d 964.
17 *Bull* was decided in 2010, too late to have put Defendants on notice of the unlawfulness of
18 their conduct. Even so, *Bull* reinforces the above analysis. It distinguishes *Way* and *Kennedy*
19 from cases like *Thompson*, making clear that if an arrestee is not classified for housing in the
20 general jail population, individualized reasonable suspicion is the rule. *Bull*, 595 F.3d at 981.

21 For the foregoing reasons, strip searching Holland on the basis of her arrest for
22 misdemeanor battery on a police officer was clearly unlawful such that its unlawfulness
23 would have been clear to a reasonable officer. As a result, Defendants’ motion to dismiss
24 Holland’s section 1983 claims against Sheriff Hennessey based upon the doctrine of
25 qualified immunity is DENIED.

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1 **II. State Claims**

2 Holland brings her eighth cause of action against Defendants under California Civil
3 Code section 52.1 (“section 52.1”), and her fourteenth cause of action under California Penal
4 Code section 4030(f) (“section 4030(f”). She also alleges that Defendants are liable for
5 assault (ninth cause of action), battery (tenth cause of action), negligence (twelfth cause of
6 action), negligent infliction of emotional distress (thirteenth cause of action), and negligent
7 training and supervision (fifteenth cause of action). The Court will first analyze the
8 substantive claims and turn to state immunities.

9
10 **A. Section 52.1**

11 Section 52.1 authorizes a cause of action where

12 a person or persons, whether or not acting under color of law,
13 interferes by threats, intimidation, or coercion, or attempts to
14 interfere by threats, intimidation, or coercion, with the exercise or
15 enjoyment by any individual or individuals of rights secured by
the Constitution or laws of the United States, or of the rights
secured by the Constitution or laws of this state . . .

16 Cal. Civil Code § 52.1(a). Defendants contend that to state a claim for relief, Holland must
17 show both that her rights were violated, and that the violation was “accompanied by a threat
18 of violence.” Defs. Mot. At 5:11-12. Defendants cite no authority construing section 52.1 to
19 require a threat of violence, nor do they cite authority holding that the threat of a strip search,
20 or the effectuation of a strip search, is not a threat, intimidation, or coercion under section
21 52.1. In light of the fact that Holland states a claim for the violation of her constitutional
22 rights, Defendants’ motion to dismiss Holland’s claim under section 52.1 on the grounds that
23 the statute was not violated is DENIED.

24
25 **B. Section 4030(f)**

26 California Penal Code section 4030(f) provides that

27 no person arrested and held in custody on a misdemeanor or
28 infraction offense, except those involving weapons, controlled
substances or violence ... , shall be subjected to a strip search or

1 visual body cavity search prior to placement in the general jail
2 population, unless a peace officer has determined there is
3 reasonable suspicion based on specific and articulable facts to
4 believe such person is concealing a weapon or contraband, and a
strip search will result in the discovery of the weapon or
contraband.

5 Defendants' sole argument for dismissing Holland's cause of action under section
6 4030(f) is that she was arrested for a crime of violence, and thus the statute did not prohibit
7 her strip search. However, Defendants have not shown that the offense of misdemeanor
8 battery on a police officer is a crime of violence. Therefore Defendants' motion to dismiss on
9 the grounds that section 4030(f) was not violated is DENIED.

10 **C. Tort Claims**

11 Defendants contend that because a jailer may lawfully conduct a full body search of a
12 prisoner at the time the prisoner is booked into jail, *People v. Maher*, 17 Cal. 3d 196, 200-01
13 (1976), all common law torts arising from a strip search incident to booking are foreclosed.
14 Defendants correctly cite *Maher* for the principle that some full body searches are lawful.
15 However, *Maher* itself recognizes that some are not – “a full body search incident to arrest is
16 impermissible when the person is arrested for an offense for which he will merely be cited or
17 released on bail.” *Id.* at 199. Furthermore, in *Edgerly*, another strip search case, the Ninth
18 Circuit reinstated various state tort claims against defendants. *Edgerly*, 599 F.3d at 691.
19 Defendants fail to persuade the Court that Holland's tort claims must fail, and their motion to
20 dismiss on the basis of California common law is DENIED.

22 **D. Immunity for the City**

23 Defendants argue that the City is immune from all claims of injury to Holland under
24 California Government Code section 844.6 (“section 844.6”), which provides that
25 “[n]otwithstanding any other provision of this part, except as provided in this section and in
26 Sections 814, 814.2, 845.4, and 845.6, or in Title 2.1 (commencing with Section 3500) of
27

1 Part 3 of the Penal Code, a public entity is not liable for . . . [a]n injury to any prisoner.” A
2 “prisoner” is defined as

3 an inmate of a prison, jail, or penal or correctional facility. For
4 the purposes of this chapter, a lawfully arrested person who is
5 brought into a law enforcement facility for the purpose of being
6 booked, as described in Section 7 of the Penal Code, becomes a
prisoner, as a matter of law, upon his or her initial entry into a
prison, jail, or penal or correctional facility, pursuant to penal
processes.

7 Cal. Gov’t Code § 844. At issue is whether Holland is a prisoner, and if so, whether her state
8 claims nonetheless survive immunity under section 844.6.

9

10 *1. Whether Holland is a Prisoner*

11 The parties submitted supplemental briefing on the question of whether Holland is a
12 prisoner under section 844.6. Plaintiff contends that a person cannot be a prisoner unless she
13 was lawfully arrested, and that because Holland challenges the lawfulness of her arrest, it
14 would be premature to label her a prisoner for the purposes of government immunity.
15 Defendants argue that a person who has been booked into jail, regardless of whether that
16 person was lawfully arrested, is a prisoner for the purposes of immunity under section 844.6.

17 The Court is persuaded that a person need not be lawfully arrested to qualify as a
18 prisoner under section 844.6. According to the plain language of the statute, prisoners
19 include inmates as well as lawfully arrested persons brought into jail for booking. *Black’s*
20 *Law Dictionary* defines “inmate” as “a person confined in a prison, hospital, or similar
21 institution.” *Black’s Law Dictionary* 803 (8th ed. 1999). *Webster’s New World Dictionary*
22 uses a similar definition, which describes an inmate as “a person . . . confined with others in
23 a prison or mental institution.” *Webster’s New World Dictionary* 696 (3d college ed. 1991).
24 These definitions do not suggest that to be considered an inmate, and therefore a prisoner, a
25 person must have been lawfully arrested.

26 The legislative history of section 844.6 supports this view. The first sentence of the
27 statutory definition of “prisoner,” which provides that a prisoner is “an inmate of a prison,
28 jail, or penal or correctional facility,” Cal Gov’t Code § 844, was part of the original

1 California Tort Claims Act of 1963. 1963 Cal. Stat. 3277. This sentence makes no mention of
2 the lawfulness of the arrest leading to an inmate’s confinement. The goal of immunity in the
3 jail context, according to a report that resulted in the California Tort Claims Act, is to shield
4 public entities from liability for their custodial activities. *Teter v. City of Newport Beach*, 30
5 Cal. 4th 446, 453 (2003). The report “observed that ‘no tort liability should be admitted for
6 damages sustained as a consequence of *conditions which are common to all inmates* and
7 which simply represent a reasonable application of general policy determinations by
8 responsible prison or jail authorities with respect to the administration of such institutions.’”
9 *Id.* (quoting the commission report) (emphasis in *Teter*). Holland alleges that her strip search
10 was conducted pursuant to jail policy. She does not contend that jail officials deviated from
11 routine intake procedure, or did anything other than process a person presented to jail
12 officials as a lawful arrestee.

13 The second sentence of section 844 was enacted in 1996. *Teter*, 30 Cal. 4th at 455. It
14 adds that “a lawfully arrested person who is brought into a law enforcement facility for the
15 purpose of being booked . . . becomes a prisoner, as a matter of law, upon his or her initial
16 entry into a prison, jail, or penal or correctional facility, pursuant to penal processes.” Cal.
17 Gov’t Code § 844. This amendment was sponsored by the California State Sheriffs’
18 Association in response to a court opinion holding that an arrestee injured at a jail facility
19 was not a prisoner because her booking process was not yet complete. *Teter*, 30 Cal. 4th at
20 455. The amendment “clarified that a lawfully arrested person who is brought into a law
21 enforcement facility for the purpose of being booked becomes a prisoner, as a matter of law,
22 upon his initial entry into the facility.” *Id.* The intent was to restore the definition of
23 “prisoner,” not add limitations to it.

24 Cases considering whether a person is a prisoner focus on forced confinement rather
25 than lawful arrest. In *Lawson v. Superior Court*, the Court of Appeal held that a woman in a
26 community-based facility for women prisoners with young children was a prisoner under
27 section 844.6, but that her child was not. 180 Cal. App. 4th 1372, 1384, 1387 (4th Dist.
28 2010). The court held that because the child “was not confined in the facility under any legal

1 compulsion,” she was not a prisoner under section 844.6. *Id.* at 1387. Holland was legally
2 compelled to remain in jail until released. She was “being held in pretrial detention . . .
3 attendant upon enforcement of a criminal statute,” and was therefore a prisoner. *Teter*, 30
4 Cal. 4th at 455 (internal quotations omitted).

5 In support of her position, Holland cites *Sullivan v. County of Los Angeles*, 12 Cal. 3d
6 710, in which the Supreme Court of California held that section 844.6 did not bar the false
7 imprisonment action of an inmate confined in jail for several days beyond the end of his
8 sentence. *Id.* at 713, 717. The inmate was not a prisoner, the court held, limiting its reasoning
9 to the tort of false imprisonment. *Id.* at 716-17. It noted that in false imprisonment cases, “the
10 ‘injury’ suffered by an individual is the illegal confinement itself rather than any detriment
11 occurring after imprisonment; in other words, false imprisonment is not an ‘injury to a
12 prisoner’ but instead is an injury to a non-prisoner which converts him into a prisoner.” *Id.* at
13 716. No false imprisonment claim is at issue on this motion.⁶ Thus Holland is a prisoner
14 pursuant to section 844.6.

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16 2. *Whether the City is Immune*

17 In her briefs, Holland makes no argument as to the viability of her section 52.1 and
18 state tort claims in light of section 844.6. She contends that her claim under section 4030(f)
19 survives because it was enacted after section 844.6. She points out that section 4030(p)
20 provides that “[a]ny person who suffers damage or harm as a result of a violation of this
21 section may bring a civil action” Because section 4030 explicitly grants detainees the
22 right to sue, Holland argues, section 844.6 “could not reasonably be applied to wipe out the
23 very cause of action 4030 later defined as viable.” Pl.’s Opp. At 8:8-10.

24 Holland’s reading of these statutes is unpersuasive. By its own language, section
25 844.6 immunity applies “[n]otwithstanding any other provision of this part, except as
26 provided in this section and in Sections 814, 814.2, 845.4, and 845.6, or in Title 2.1

27 ⁶ Plaintiff brings a claim of false imprisonment, but based upon the facts recited in the
28 the Complaint, it appears to challenge her unlawful arrest rather than her jail confinement.
Defendants did not challenge this claim on this motion to dismiss.

1 (commencing with Section 3500) of Part 3 of the Penal Code” Section 4030(f) is not
2 listed among these statutory sections. Just as the California Legislature was capable of
3 passing section 4030, it was capable of amending the immunity provisions of section 844.6 to
4 exempt the new law. The canon of statutory interpretation *expressio unius est exclusio*
5 *alterius* supports the conclusion that if the legislature had intended to exclude section 4030
6 from section 844.6, it would have done so. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149,
7 168 (2003) (explaining that the canon applies where the items listed are members of an
8 associated group, justifying the inference that the items not listed were excluded
9 deliberately). It has not done so, and this Court interprets the legislature’s inaction as
10 preserving section 844.6’s general immunity provisions, rendering them effective against
11 section 4030(f).⁷

12 Applying section 844.6 to suits brought under section 4030 does not “wipe out” the
13 causes of action created by section 4030, as Holland contends. Instead, immunity under
14 section 844.6 forecloses causes of action against one type of defendant – public entities –
15 while leaving intact other kinds of suits, including those against public officials. This result
16 does not unreasonably frustrate the goals of the statute, as Holland argues. Therefore,
17 Defendants’ motion is GRANTED as to Holland’s eighth, ninth, tenth, twelfth, thirteenth,
18 fourteenth, and fifteenth causes of action, which are DISMISSED against the City, insofar as
19 they arise from the strip search of Holland.

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26 ⁷Another district court reached the opposite result. *Bull v. City and County of San*
27 *Francisco*, C03-01840 (N.D. Cal. Sept. 22, 2005), overruled on other grounds in *Bull*, 595
28 F.3d 964. The court reasoned that because section 4030 does not limit suits against particular
classes of defendants, immunity under section 844.6 does not apply. *Contra Moyle v. Contra*
Costa County, 2007 WL 4287315 (N.D. Cal Dec. 5, 2007).

1 **E. Immunity for Sheriff Hennessey**

2 Defendants contend that Sheriff Hennessey is not liable under Holland’s state law
3 claims because he is immune under Government Code section 820.2 (“section 820.2”), which
4 provides that “a public employee is not liable for an injury resulting from his act or omission
5 where the act or omission was the result of the exercise of the discretion vested in him,
6 whether or not such discretion be abused.” Holland alleges that Sheriff Hennessey is liable
7 for adopting the policy under which she was strip searched, as well as for his negligent
8 failure to supervise his employees and for his employees’ failure to establish reasonable
9 suspicion prior to searching her.⁸

10 In her opposition to Defendants’ motion, Holland seems to concede that insofar as she
11 is pursuing claims against Sheriff Hennessey as a policymaker, he is immune from those
12 claims. However, Holland contends that Sheriff Hennessey is directly liable for his deputies’
13 failure to establish reasonable suspicion before strip searching Holland because section 820.2
14 does not immunize the ministerial implementation of a policy. *See Johnson v. California*, 69
15 Cal. 2d 782, 797 (1968). In *Johnson*, the California Supreme Court held that “a basic policy
16 decision . . . may be discretionary and hence warrant governmental immunity, [but]
17 subsequent ministerial actions in the implementation of that basic decision still must face
18 case-by-case adjudication” Holland argues that because the ministerial actions
19 undertaken to carry out Sheriff Hennessey’s policy are not immunized, Sheriff Hennessey is
20 liable for those ministerial actions. However, in *Johnson*, the court held the ministerial actor,
21 not the policymaker, liable for the challenged ministerial actions. *Id.* Here Holland does not
22 allege that Sheriff Hennessey had any role in Holland’s strip search beyond setting the
23 policy. Sheriff Hennessey’s deputies implemented the policy, according to Holland. Thus

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25 ⁸ Holland submitted supplemental briefing on the question of discretionary immunity
26 under section 820.2. However, the Court’s October 25, 2010 order, which allowed the parties
27 to submit supplemental briefs, explicitly limited the content of these briefs to “whether the
28 absence of probable cause to arrest Plaintiff would render Government Code section 844.6
immunity inapplicable to Plaintiff’s strip search claims.” The portions of Plaintiff’s
supplemental brief dealing with immunity under section 820.2 are untimely and clearly
beyond the scope of the Court’s order, and will not be considered. *See Lujan v. National
Wildlife Federation*, 497 U.S. 871, 894-95(1990).

1 while Holland may be correct that the deputies who searched her are not immune under
2 section 820.2, she cites no authority that would withdraw immunity from the policymaker
3 simply because his or her policy was carried out. To do so would nullify policymaker
4 authority in all cases in which a policy was implemented. Holland cites no authority in
5 support of this result.

6 Holland also contends that policymaker immunity under section 820.2 does not
7 immunize Sheriff Hennessey from liability under her cause of action for negligent failure to
8 supervise. She cites no authority in support of this argument, however, and levels of training
9 and supervision would seem to fall within the realm of policymaking, as Defendants contend.

10 For the foregoing reasons, Defendants' motion to dismiss is GRANTED as to
11 Holland's eighth, ninth, tenth, twelfth, thirteenth, fourteenth, and fifteenth causes of action,
12 which are DISMISSED against Sheriff Hennessey insofar as they arise from the strip search.

14 **III. Leave to Amend**

15 Defendants argue that Holland should not be granted leave to amend her claims.
16 However, dismissal of claims should be with leave to amend unless it is clear that
17 amendment could not possibly cure the deficiencies leading to dismissal. *Steckman*, 143 F.3d
18 at 1296. Defendants have not shown that Holland could plead no set of facts to cure the
19 deficiencies described above. Therefore, their motion for denial of leave to amend is
20 DENIED.

22 **CONCLUSION**

23 For the reasons set forth above, Defendants' motion to dismiss is GRANTED IN
24 PART and DENIED IN PART. Holland's eighth, ninth, tenth, twelfth, thirteenth, fourteenth,
25 and fifteenth causes of action against the City and Sheriff Hennessey, relating to the strip
26 search of Holland, are DISMISSED with leave to amend. The motion to dismiss is denied,
27 however, as to Holland's fifth, sixth, and seventh causes of action under section 1983, and as
28 to Holland's state law claims against defendants other than the City and Sheriff Hennessey.

1 Holland's amended complaint, should she choose to amend, shall be filed no later than
2 January 28, 2011.

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4 **IT IS SO ORDERED.**

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6 Dated: 12/7/10



THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

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