

1 Plaintiffs' claims stem from a hit and run accident that took place on December 18, 2009.
2 On that day, Plevin was driving his Harley Davidson motorcycle westbound on Geary Boulevard
3 with Torres as his passenger. Dkt. No. 65, Joint Statement of Undisputed Facts ("JSF") ¶1. Plevin
4 — who was a member of the Bay Riders Motorcycle Club ("Bay Riders") — was wearing a leather
5 vest with the Bay Riders' insignia on the back, commonly referred to as the club's "colors." JSF
6 ¶¶2, 3. Plevin attempted to "veer" his motorcycle into an open lane on his right-hand side when a
7 southbound truck "blew" a stop sign and turned directly into the lane that Plevin was headed. JSF
8 ¶¶5, 6. Plevin did not enter the right-hand lane and instead turned his motorcycle back into his
9 original lane. JSF ¶8. The truck continued westbound at a faster speed than Plevin, but he was
10 eventually able to catch up with it. JSF ¶¶9, 10. Plevin pulled up next to the truck driver and
11 essentially signaled to him through hand gestures to "watch where [he] was going." JSF ¶11. In
12 response to Plevin's gestures, the truck driver gave him a "dirty look" and swerved the truck into
13 Plevin's lane, striking the motorcycle and causing it and Plaintiffs to fall. JSF ¶13. The truck driver
14 then fled the scene and turned off of Geary Boulevard at the next intersection. JSF ¶14. After
15 Plevin and bystanders assisted Torres to the sidewalk, Plevin remounted his motorcycle and pursued
16 the truck driver. JSF ¶¶15, 16. He was unsuccessful in locating the truck and returned to the scene
17 within five minutes. JSF ¶17.

18 Navarro and his partner, Officer Christine Magayanes, were dispatched to the scene of the
19 accident. JSF ¶20. Navarro was responsible for conducting the investigation and writing the report
20 of the incident. JSF ¶21. Upon arriving, Navarro interviewed witness Hui Cha Leung, while his
21 partner interviewed witnesses Abigail O'Leary and Vida Lamastra. JSF ¶22. Navarro testified that
22 he also recalls interviewing an older woman who appeared intoxicated. JSF ¶23. The parties
23 dispute whether the witnesses provided the Officers with one or two potential license plate numbers
24 for the truck driver. Plaintiffs claim that Navarro obtained one plate number from the intoxicated
25 woman and Magayanes obtained a more reliable plate number from O'Leary, which Navarro learned
26 about since he reviewed Magayanes' notes before writing his report. *See* Motion at 8-9. Defendants
27 claim that Navarro incorrectly believes that he learned about a plate number from the intoxicated
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1 woman, when in fact there was only one plate number that he knew about (the one provided by
2 O’Leary), which was conveyed to him through Magayanes. *See* Reply at 5-6.

3 Plaintiffs refused medical attention at first, but were eventually taken by ambulance to San
4 Francisco General Hospital. JSF ¶24.² Because Navarro was unable to interview Plaintiffs at the
5 scene, he traveled to the hospital to talk with them. JSF ¶27. Before doing so, Navarro, using his
6 patrol car’s mobile computer, performed two searches in the DMV database on the potential license
7 plate number of the truck that he had received. JSF ¶38. Both queries were saved and memorialized
8 in the Computer Aided Dispatch (“CAD”) event history for the incident. JSF ¶39.

9 At the hospital, Navarro obtained Plevin’s version of the incident and his contact
10 information. JSF ¶29. Plevin asked Navarro if the Officers had obtained a license plate number for
11 the truck. JSF ¶29. According to Plevin, Navarro asked him questions about the Bay Riders, but
12 Plevin cannot recall anything specific about those questions. JSF ¶30.³ Navarro then interviewed
13 Torres, who also provided him with an account of the accident and her contact information. JSF
14 ¶¶35, 37. Torres testified that Navarro told her “Don’t worry. We have the plate. We are going to
15 get him.” JSF ¶37.

16 During the interview, Plevin was holding onto his Bay Riders vest or “colors.” JSF ¶31.
17 Plevin testified that Navarro reached for the vest “not in a rough way but in a ‘here let me grab that’
18 manner.” JSF ¶32. Plevin believed that the way Navarro touched the vest, that if he were to let go
19 of it, Navarro would have grabbed it. JSF ¶32. Because Bay Riders members do not let non-club
20 members take their “colors,” Plevin refused to hand over his vest. JSF ¶33. Navarro took his hands
21 off the vest and made no further attempt to take it. JSF ¶34.

22 After leaving the hospital, Navarro “played around” with the earlier license plate number by
23 transposing a letter and number and then doing one more DMV search on his mobile computer. JSF
24 ¶40. The search returned results that “didn’t make sense” to Navarro. JSF ¶40. This query was also

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26 ² Plevin testified that he had roadrash on his thigh and pain in his hip, leg, and back. JSF
27 ¶25. Torres testified that she had pain in her right leg. JSF ¶26.

28 ³ Before speaking with Navarro, Plevin was medicated with morphine. JSF ¶28.

1 saved and memorialized in the CAD event history. JSF ¶41. Navarro then wrote the official report
2 for the incident. JSF ¶42. Navarro included the accounts of the three witnesses interviewed by
3 himself and Magayanes. JSF ¶43. But he did not list any license plate numbers in his report. *See*
4 Dkt. No. 58, Navarro Decl., Ex. A. Navarro explained that because the invalid licence plate number
5 was preserved in the CAD and since it did not provide any useful information (even after he “played
6 around” with the number), he elected not to include the license plate number in his report. JSF ¶44.

7 After the accident, Plaintiffs obtained a copy of the incident report and reviewed it. JSF ¶54.
8 They did not conduct an independent investigation into the identity of the truck driver. JSF ¶58.
9 They also did not contact Navarro to ask about the incident report or whether he had a license plate
10 number for the truck driver. JSF ¶55. Nor did they contact the SFPD to ask whether it had the
11 license plate number. JSF ¶55. It was not until December 30, 2011 — more than one year after
12 Plaintiffs first initiated this action and nearly one month after the FAC was filed — that Plaintiffs,
13 for the first time, requested documents and information from Defendants about a potential license
14 plate number for the truck driver. JSF ¶¶61, 62. On February 7, 2012, Defendants provided to
15 Plaintiffs the CAD event history of the incident, which contained documentation of Navarro’s
16 searches with respect to the plate number. JSF ¶63.

17 Plaintiffs never filed a state court action against the unidentified truck driver (and the statute
18 of limitations for any such claim has expired). JSF ¶60. Instead, Plaintiffs initiated this Section
19 1983 lawsuit against Defendants. Specifically, they alleged that due to their affiliation with the Bay
20 Riders, Defendants conducted an inadequate investigation of the accident and destroyed any clues
21 about the truck driver’s identity, particularly any potential license plate number. This violated their
22 First Amendment rights by denying them access to the courts and chilling their rights to freedom of
23 expression and freedom of expressive association. Plaintiffs’ Fourth Amendment rights were
24 allegedly infringed by Navarro’s attempt to seize Plevin’s vest. Lastly, Plaintiffs claimed that their
25 Fourteenth Amendment rights were violated since Defendants treated them differently due to their
26 Bay Riders membership.

27 **III. LEGAL STANDARD FOR SUMMARY JUDGMENT**

1 Summary judgment is appropriate only when there is no genuine dispute of material fact and
2 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party
3 bears both the initial burden of production as well as the ultimate burden of persuasion to
4 demonstrate that no genuine dispute of material fact remains. *Nissan Fire & Marine Ins. Co., Ltd. v.*
5 *Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party meets its initial
6 burden, the nonmoving party is required “to go beyond the pleadings and by [its] own affidavits, or
7 by the depositions, answers to interrogatories, and admissions on file, designate specific facts
8 showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)
9 (internal quotations and citations omitted). On summary judgment, courts are required to view the
10 evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v.*
11 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If a reasonable jury could return a verdict in favor of
12 the nonmoving party, summary judgment is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477
13 U.S. 242, 248 (1986).

14 IV. DISCUSSION

15 The Court analyzes each of Plaintiffs’ claims in turn below.

16 A. First Amendment Claim

17 1. Right to Access Courts

18 One of the protections offered by the First Amendment is the right to meaningfully access the
19 courts. *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998). This not only protects an
20 individual’s right to physically enter the courthouse, “but also insures that access to courts will be
21 adequate, effective and meaningful.” *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir.
22 1997) (internal quotations and citation omitted). “Therefore, if a party engages in actions that
23 effectively cover-up evidence and this action renders a plaintiff’s state court remedy ineffective, they
24 [sic] have violated his right of access to the courts.” *Id.* at 1262; *see also Delew*, 143 F.3d at 1222
25 (citing *Swekel* and explaining that a right of access claim is “established where a party engages in
26 pre-filing actions which effectively covers-up evidence and actually renders any state court remedies
27 ineffective”).

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1 Defendants argue that Plaintiffs’ right of access claim is not actionable because they never
2 attempted to file a lawsuit against the truck driver. Because Plaintiffs never pursued a remedy under
3 state law, they cannot now assert that Defendants rendered their state court remedy ineffective.
4 Defendants point out that *Swekel* noted the following: “Before filing an ‘access to courts’ claim, a
5 plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess
6 whether such access was in fact ‘effective’ and ‘meaningful’?” 119 F.3d at 1264. Plaintiffs, on the
7 other hand, argue that a right of access claim does not include a per se threshold that requires a party
8 to first pursue the underlying action. Plaintiffs contend that *Swekel* created an exception to this by
9 recognizing that “in some instances it would be completely futile for a plaintiff to attempt to access
10 the state court system.” 119 F.3d at 1264 n. 2.

11 The Court agrees with Plaintiffs’ position that under certain circumstances, albeit rare, a
12 party should not be required to first bring the underlying action before being allowed to initiate a
13 right of access claim. This includes the scenario where a cover-up is so pervasive that it would
14 prevent a party from successfully litigating any underlying action.⁴ But the Court finds that the
15 undisputed facts presented here do not warrant the application of this rare exception. The purpose
16 behind a right of access claim is to provide a remedy for a party who was actually prohibited from
17 obtaining relief from a court. This means that the party must in fact attempt to access or get relief
18 from a court for its underlying claim. *See Swekel*, 119 F.3d at 1264 (denying the plaintiff’s right of
19 access claim because “none of the evidence before this court establishes that Swekel even attempted
20 to go to the state court in [the] first instance” and consequently “there is no evidence that the
21 defendants’ actions actually rendered any available state court remedy ineffective”). In other words,
22 the Court finds that it would be improper to allow a party to claim that they were denied access to a
23 court when they never even attempted to access that court.

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25 ⁴ This view is supported by the United States Supreme Court’s decision in *Christopher v.*
26 *Harbury*, a case that neither party cites in their briefs. 536 U.S. 403 (2002). The *Christopher* court,
27 in a footnote, appears to approve of the Court of Appeals decision to reject a rule that would require
28 a plaintiff to first initiate an action on the underlying claim before bringing a right of access claim, if
such an underlying suit would be futile. *Id.* at 416 n. 14.

1 Plaintiffs argue that any attempt on their part to file a claim against the truck driver would
2 have been futile since Navarro destroyed all evidence with respect to the “second license plate
3 number,” thereby negating any chance of locating the truck driver. This argument, however, is
4 misleading. Plaintiffs could have only fully developed their theory about the “second license plate
5 number” after the statute of limitations for filing a claim against the truck driver had run. *See* JSF ¶¶
6 61-63 (providing that Plaintiffs did not request information about a potential license plate number
7 from SFPD until December 2011, more than two years after the accident).⁵ Thus, Plaintiffs contend
8 that they were prevented from filing a claim against the truck driver because Navarro destroyed
9 evidence, even though they did not do anything to attempt to file such a claim and only definitively
10 learned what happened with respect to the license plate number after the statute of limitations for
11 their underlying claim had expired. Under such circumstances, the Court finds that Plaintiffs never
12 attempted to exercise their rights under the First Amendment to access the courts and therefore this
13 right could not have been infringed by Defendants. Defendants’ motion on this ground is
14 consequently GRANTED.

15 2. Freedom of Expressive Conduct

16 The First Amendment protects some forms of expressive conduct. *Spence v. State of*
17 *Washington*, 418 U.S. 405, 409 (1974). The parties devote a significant portion of their briefs
18 debating whether Plaintiffs can establish that Plevin’s wearing of his “colors” constituted expressive
19 conduct, pursuant to the two-part test set out in *Texas v. Johnson*. 491 U.S. 397, 404 (1989)
20 (explaining that the court must examine whether a plaintiff intended to convey a particularized
21 message and whether there was a great likelihood that this message would be understood by those
22 who viewed it). The Court, however, does not need to analyze this issue because even if there was
23 expressive conduct, Plaintiffs have presented no evidence that Defendants actually “chilled” their
24 speech, which both parties agree is a necessary element of any First Amendment claim.

25 In their opposition, Plaintiffs argue that their speech was “chilled” because Plevin is no
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27 ⁵ Plaintiffs did not even depose Navarro until August 2012.
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1 longer a member of the Bay Riders due to the treatment he received from Defendants, which also
2 deterred Torres from ever becoming a member. Plaintiffs cite to Plevin’s deposition where he
3 explained that he was constantly harassed by the SFPD for his association with the Bay Riders,
4 including Navarro’s handling of the hit and run accident. Plaintiffs, however, were never prohibited
5 from associating with the Bay Riders by Defendants. In other words, this matter is different from a
6 case where the government prohibits a motorcycle club, such as the Hells Angels, from wearing their
7 “colors” at a town festival or a restaurant. *See Villegas v. City of Gilroy*, 363 F.Supp.2d 1207, 1217-
8 18 (N.D. Cal. 2005); *Kohlman v. Village of Midlothian*, 833 F.Supp.2d 922, 936 (N.D. Ill. 2011). In
9 *Kohlman*, members of the Hells Angels brought an action against city officials and police officers
10 alleging that their First Amendment rights to expressive conduct were violated when the officers
11 ordered local restaurants and bars to not serve any Hells Angels members wearing the club’s
12 “colors.” *Id.* at 926. *Kohlman* noted that “even if the defendants in fact harassed the plaintiffs due
13 to their membership in the Hells Angels . . . , there is no constitutional right to be free from
14 harassment by state officials.” *Id.* at 939-40. More importantly, Plevin conceded at his deposition
15 that he chose to disassociate with the Bay Riders on his own volition. He explained that he “just
16 didn’t want to be in the club. I decided to go and do other things with my life.” Dkt. No. 55-4,
17 Plevin Depo. at 197-98.⁶ Based on the above, the Court finds that Plaintiffs have not presented any
18 evidence that their right to expressive conduct was chilled by Defendants. Thus, Defendants’
19 motion on this claim is GRANTED.

20 3. Freedom of Expressive Association

21 The First Amendment also protects the right to freedom of expressive association. *Villegas*,
22 484 F.3d at 1141. As with all protections under the First Amendment, any alleged restriction must

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24 ⁶ To the extent that Plaintiffs try to limit the damage of Plevin’s deposition testimony by
25 citing to his subsequent declaration in which he claims that he quit the Bay Riders due to
26 Defendants’ harassment, the Court is not persuaded by such a self-serving declaration. *See Kennedy*
27 *v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996). Moreover, the declaration does not change
28 the fact that Plevin voluntarily resigned his membership and there is no evidence that Defendants
forced him to do so.

1 “affect or impede” the plaintiff’s ability to freely associate with an expressive association. *Boy*
2 *Scouts of America v. Dale*, 530 U.S. 640, 650 (2000). As explained above, Plaintiffs have not
3 presented any persuasive evidence that their right to freely associate with the Bay Riders was
4 “chilled” by Defendants, especially since Plaintiffs voluntarily chose to walk away from their
5 association with the club. Without such evidence, this also cannot withstand summary judgment and
6 Defendants’ motion on it is GRANTED.

7 **B. Fourth Amendment Claim**

8 The Fourth Amendment protects “against unreasonable searches and seizures.” U.S. Const.,
9 Amend. IV. A “seizure” of property occurs when there is some “meaningful interference” with an
10 individual’s possessory interest in that property. *United States v. Jacobsen*, 466 U.S. 109, 113
11 (1984); *see also United States v. Va Lerie*, 424 F.3d 694, 702-706 (8th Cir. 2005) (explaining that
12 the Fourth Amendment prohibits government “conversion” of an individual’s private property — as
13 opposed to the “mere technical trespass” of such property — and therefore the police do not seize
14 property every time they simply handle it). In *Scott v. City of Couer D’Alene*, the court evaluated
15 what constitutes meaningful interference when it analyzed the plaintiffs’ claims that police officers
16 violated their Fourth Amendment rights by attempting to seize their camcorder. 2010 WL 3735679
17 (D. Id. Aug. 6, 2010). Because the police officers only attempted to take the camcorder and did not
18 actually seize it, *Scott* held that “no meaningful interference with Plaintiffs’ possessory interest in
19 the video camera occurred, [thus] the camera was not ‘seized’ within the meaning of the Fourth
20 Amendment.” *Id.* at *3-4, 13 (emphasis added).

21 Based on the above case law, Plaintiffs’ claim that their Fourth Amendment rights were
22 violated when Navarro attempted to seize Plevin’s vest cannot withstand summary judgment. At the
23 hospital, Navarro only momentarily touched the vest when he was considering whether to take it as
24 evidence, and when Plevin objected, Navarro complied with his request, let go of the vest, and did
25 not seize it. JSF ¶¶ 32-34. This “mere technical trespass” does not amount to a meaningful
26 interference with respect to Plevin’s possessory interest in the vest and consequently, similar to the
27 holding in *Scott*, there is no Fourth Amendment violation. Defendants’ motion is therefore
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1 GRANTED with respect to Plaintiffs' Fourth Amendment claim.⁷

2 **C. Fourteenth Amendment Claim**

3 The Equal Protection Clause of the Fourteenth Amendment commands that no state shall
4 deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV.
5 The Amendment is "essentially a direction that all persons similarly situated should be treated
6 alike." *City of Cleburne v. Cleburne Living Ctr.*, 474 U.S. 432, 439 (1985) (quoting *Plyer v. Doe*,
7 457 U.S. 202, 216 (1982)). To survive summary judgment on such a claim, "a plaintiff must come
8 forward with facts showing that 1) the state treated him differently than other similarly situated
9 individuals and 2) that there is no rational basis for the different treatment." *Kohlman*, 833
10 F.Supp.2d at 933 (analyzing an equal protection claim brought by members of the Hells Angels
11 motorcycle club). In *Kohlman*, the court granted summary judgment to the defendants because the
12 plaintiffs did not offer any evidence or identify any other specific similarly situated individuals who
13 were treated differently than them. *Id.* at 934-35 ("Therefore, to establish that members of the Hells
14 Angels and other motorcycle clubs are materially similar, the plaintiffs must point to members of
15 other motorcycle clubs with a similar record of interaction with Midlothian officials and show that
16 they were treated differently. Because the plaintiffs have not identified any specific similarly
17 situated people who were treated differently, let alone people who are similarly situated in all
18 material respects, their 'class of one' equal protection claim fails.") (internal citation omitted).

19 Here, Plaintiffs' opposition only devotes one paragraph in response to Defendants' argument
20 that the Fourteenth Amendment claim cannot withstand summary judgment. Plaintiffs explain that
21 their equal protection claim is based on Defendants treating them differently due to their association
22 with the Bay Riders. Opp. at 19. For evidentiary support of this claim, Plaintiffs cite to Plevin's
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24 ⁷ Plaintiffs base this claim on essentially the same allegations that were found insufficient by
25 the Court when it granted Defendants' motion to dismiss. In that order, the Court explained that
26 Plaintiffs' unreasonable seizure claim was not actionable since Navarro never meaningfully
27 interfered with Plevin's possessory interest in the vest and there was no indication that Torres had
28 any possessory interest in his vest. Dkt. No. 31. Plaintiffs' opposition to Defendants' motion for
summary judgment, which does not even address the viability of how Torres can assert a claim with
respect to Plevin's vest, does nothing to alter the Court's earlier analysis.

1 declaration that he felt that he was discriminated against, Navarro’s brief confrontation with Plevin
2 at the hospital with respect to his vest, and Navarro’s failure to include in his report the “second
3 license plate number” provided by Magayanes. *Id.* at 19. Plaintiffs argue that “[b]ecause Navarro
4 did not author the report until after visiting the hospital, and thus after the confrontation in which
5 Plevin refused to give Navarro his vest, it is reasonable to infer that the subsequent concealment or
6 destruction of the second license plate number was done without any rational basis, but instead was
7 carried out with an intent to discriminate against plaintiffs solely because they were members and
8 associates of the Bay Riders.” *Id.* at 19.

9 Plaintiffs, however, do not identify any similarly situated individuals who were treated
10 differently than them, as the *Kohlman* court required for an equal protection claim to be viable.
11 Moreover, Plaintiffs’ claim essentially only rests on speculative inferences that Defendants acted
12 with discriminatory intent without providing any specific evidence of such discrimination. *See, e.g.,*
13 JSF ¶53 (“Plevin testified that he has heard of unspecified members of the Bay Riders being
14 detained on an unspecified number of occasions by unspecified SFPD members on unspecified
15 dates.”). Due to these reasons, the Court finds that Plaintiffs’ Fourteenth Amendment claim fails as
16 a matter of law and Defendants’ motion on this ground is GRANTED.⁸

17 V. CONCLUSION

18 Because the Court finds that there are no triable issues of fact with respect to any alleged
19 constitutional violations by Defendants, it does not need to consider whether Navarro is entitled to
20 qualified immunity.⁹ Similarly, since Plaintiffs have not set forth an actionable claim for any

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22 ⁸ As explained earlier, *Kohlman* also pointed out that “even if the defendants in fact harassed
23 the plaintiffs due to their membership in the Hells Angels . . . , there is no constitutional right to be
24 free from harassment by state officials.” 833 F.Supp.2d at 939-40.

25 ⁹ In determining whether qualified immunity applies, the Court must consider (1) whether the
26 alleged facts “make out a violation of a constitutional right,” and (2) if so, whether the right “was
27 ‘clearly established’ at the time of defendant’s alleged misconduct.” *Pearson v. Callahan*, 555 U.S.
28 223, 232 (2009). The Court may consider these two steps in any order. *Id.* at 236; *see also Roska v.*
Sneddon, 437 F.3d 964, 971 (10th Cir. 2006) (“To overcome a qualified immunity defense, a
plaintiff must first establish a violation of a constitutional or statutory right and then show that the

1 violation of their constitutional rights, they cannot attach municipal liability against CCSF under
2 *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).¹⁰ Accordingly,
3 Defendants’ motion for summary judgment is GRANTED in its entirety.

4 **IT IS SO ORDERED.**

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6 Dated: December 4, 2012

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9 Maria-Elena James
10 United States Magistrate Judge
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25 right was clearly established.”).

26 ¹⁰ See *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Scott v. Henrich*, 39 F.3d 912,
27 916 (9th Cir. 1994) (“While the liability of municipalities doesn’t turn on the liability of individual
28 officers, it is contingent on a violation of constitutional rights. Here, the municipal defendants
cannot be held liable because no constitutional violation occurred.”).