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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HEIDE VELARDE,
Plaintiff,
v.
COUNTY OF ALAMEDA, *et al.*,
Defendants.

Case No. [15-cv-03323-SI](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND GRANTING LEAVE TO AMEND

Re: Dkt. No. 33

Defendants' motion to dismiss the first amended complaint is scheduled for a hearing on April 22, 2016. Pursuant to Civil Local Rule 7-1(b), the Court determines that this matter is appropriate for resolution without oral argument and hereby VACATES the hearing. For the reasons set forth below, the Court GRANTS in part and DENIES in part defendants' motion to dismiss the first amended complaint and GRANTS plaintiff leave to amend. The amended complaint is due by **April 29, 2016**. **The case management conference scheduled for April 22, 2016 at 2:30 pm remains on calendar.**

BACKGROUND

This lawsuit arises out of plaintiff's pretrial detention at the Santa Rita Jail from June 16, 2014 until her release on July 2, 2014. On June 15, 2014, police arrested plaintiff Heide Velarde on a misdemeanor violation of Cal. Penal Code § 245, assault with a deadly weapon. First Amended Compl. ("FAC") Dkt. No. 25 at ¶ 20. Velarde was taken to the Fremont Jail before being transported to Santa Rita Jail the next day. *Id.* Plaintiff alleges that her cell at Santa Rita Jail was "very cold" and that the "air blowing out of air vents was freezing." *Id.* at ¶ 21. Plaintiff

1 alleges that when she was locked in her cell, defendant Doe 5, a deputy, told plaintiff she would
2 not be given a blanket, and that plaintiff then heard defendant Doe 5 state that plaintiff was “being
3 punished.” *Id.* Plaintiff also claims that from the time of her arrest until she was fed breakfast the
4 next day, over thirty-six hours passed. *Id.* at ¶¶ 22-23.

5 Plaintiff alleges that the next day, two deputies spoke with her and told her that she was
6 going to be punished by being placed in solitary confinement,¹ or “the hole,” for having made a
7 “scene” at court. *Id.* at ¶ 24. The complaint alleges that “Plaintiff demurred, stating she had never
8 caused a disturbance, but that she had simply requested a different judge as was her right.” *Id.*²
9 Plaintiff also alleges that a deputy later informed her “that she heard that Plaintiff wrote a book
10 criticizing the Oakland Police Department,” and that plaintiff “understood this to mean that
11 anyone who criticized the police or peace officers would be punished, and that the deputies
12 believed plaintiff to be deserving of punishment.” *Id.* at ¶ 35. Plaintiff claims that if she “verbally
13 protested or questioned the treatment she received, she was told that she would be further
14 maltreated if she persisted in her verbal protests.” *Id.* at ¶ 2.

15 Plaintiff claims that despite repeated requests, she was never provided with toilet paper
16 while in administrative isolation. *Id.* at ¶ 24. Plaintiff also alleges that she was never given the
17 opportunity to bathe during her detention at Santa Rita Jail. *Id.* at ¶ 29. Plaintiff alleges that she
18 was never afforded the opportunity to launder her clothes because she was never provided a
19 writing instrument with which to fill out a laundry form. *Id.* at ¶ 30. She admits, however, that
20 she never actually verbally or otherwise requested a writing instrument, but plaintiff alleges she
21 did not make these requests because she did not want to anger the deputies. *Id.* According to

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23 ¹ Defendants state that Santa Rita Jail has “administrative isolation,” “which is likely what
24 Plaintiff is referring to in her Complaint as ‘solitary confinement.’” Dkt. 33 at 4 n. 2. This order
will use the term administrative isolation.

25 ² Defendants assert that Judge Saunders of the Alameda County Superior Court ordered
26 that plaintiff be placed into administrative isolation, and therefore that plaintiff’s placement in
27 administrative isolation was not punitive. In support of this assertion, defendants seek judicial
28 notice of the Clerks Docket and Minutes dated June 18, 2014. That document states that plaintiff
was present for a court appearance on June 18, 2014, and states “Previous order of 6-16-14,
defendant held at zero bail, is to not have any communications, no visitors and no telephone calls,
(Has not accepted P.O.) remains in effect.” Dkt. No. 34-1 at 2. The Court addresses the parties’
arguments about plaintiff’s placement in administrative segregation *infra*.

1 plaintiff, she was never allowed to call her attorney or anyone else during her time in
2 administrative isolation. *Id.* at ¶¶ 32-33.

3 Plaintiff alleges that on days when she went to court, she was segregated from other
4 detainees. *Id.* at ¶ 34. Upon return from court on July 1, 2014, plaintiff alleges she was subjected
5 to a strip and body cavity search by defendant Jane Doe 6 in a cell with the door open. *Id.* at ¶ 37.
6 Specifically, plaintiff alleges,

7 37 . . . The search was conducted in a cell with the door wide open, which allowed
8 the search to be viewed by all individuals and other guards, male and female, who
9 passed by the open door while the strip search and body cavity search was being
conducted.

10 38. Plaintiff was ordered to remove all of her clothing and stand there naked. She
11 was required to display and shake each of the pieces of clothing. These articles of
12 clothing were clearly very soiled, given that Plaintiff had had no access to personal
sanitation products, including the basics such as toilet paper, and had not been
provided an opportunity since her incarceration, to shower or have access to a clean
change of clothing.

13 39. After removing all of her clothing, she was required to stand there naked and
14 open her mouth and lift her tongue, lift her breasts, run her hands through her hair
and shake her head of hair.

15 40. Continuing, while standing there naked, Plaintiff was then required to stand on
16 one foot while lifting one leg so defendant Doe 6 could to examine the sole of
17 Plaintiff's foot. This procedure was repeated with the opposite foot. Plaintiff was
then forced to turn around, bend over in a squat position and spread her buttock
while coughing three times.

18 *Id.* at ¶¶ 37-40.

19 On July 2, 2014, plaintiff again went to court, and on that day the charges against her were
20 dismissed. *Id.* at ¶ 42. Plaintiff alleges that she was not immediately released and was instead
21 “kept . . . handcuffed and shackled, and maintained . . . in the isolation cage . . . for an additional 4
22 or more hours, until Plaintiff was forcibly returned to Santa Rita Jail.” *Id.* Upon returning to
23 Santa Rita Jail, plaintiff was subjected to a second strip and body cavity search by defendant Jane
24 Doe 7. *Id.* Plaintiff alleges,

25 43. The strip search and body cavity searches ordered by defendant Jane Doe 7
26 was conducted in the identical manner as the strip search and body cavity search
27 conducted as the strip search and body cavity search the day before. Defendant
Jane Doe 7 also kept the door in the cell in a fully opened position so that this
28 second strip and body cavity search was also observed by all persons, male and
female, who walked by the door of the cell.

1 *Id.* ¶ 43. The complaint does not state the amount of time that passed between the time charges
2 were dismissed and plaintiff’s release.

3 Plaintiff has sued defendants Gregory J. Ahern, Sheriff for Alameda County; Brett M.
4 Keteles, Assistant Sheriff for Alameda County in charge of the Detentions and Corrections Unit in
5 that county; Carla Kennedy, second in command for Detention and Corrections; David Brady and
6 C. Staysa, captains of the Alameda County Sheriff’s Office; and the County of Alameda. *See id.*
7 at ¶¶ 10-14. The named defendants are sued in their official capacities. *Id.* Plaintiff also sues
8 Does 5-50, who were all Sheriff’s deputies assigned to detentions and corrections and were on
9 duty between June 16, 2014 and July 3, 2014. *Id.* at ¶ 15. The Doe defendants are sued in their
10 official and individual capacities. *Id.* at ¶ 16.

11 The FAC alleges the following claims pursuant to 42 U.S.C. § 1983 and state law: (1)
12 violation of the Eighth Amendment’s prohibition against cruel and unusual punishment based on
13 the deprivations she suffered while in custody; (2) violation of the Eighth and Fourteenth
14 Amendments based on her placement in administrative isolation; (3) retaliation based upon the
15 exercise of her First Amendment rights; (4) violation of the Fourth Amendment and Equal
16 Protection clause of the Fourteenth Amendment with respect to the timing and location of the strip
17 and body cavity searches; (5) violation of Article 1, § 1 of the California Constitution and
18 California Civil Code § 51.7; (6) violation of the Fourth, Eighth, and Fourteenth Amendments
19 based on defendants’ failure to immediately release plaintiff after the charges against her were
20 dismissed; (7) violation of California Civil Code § 52.1; and (8) negligence.³ Plaintiff requests
21 monetary damages as well as injunctive relief requiring defendants to provide the putative class of
22 “female individuals who are arrested and placed in the custody of the Alameda County Sheriff’s
23 Office . . . jail and held by the Sheriff in solitary confinement in Santa Rita Jail while under
24 pretrial detention” with “constitutionally adequate” cells and conditions of incarceration or
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26 ³ Plaintiff filed her complaint on behalf of herself and as representative of a putative class
27 of “female individuals who are arrested and placed into the custody of the Alameda County
28 Sheriff’s Office (“Sheriff”) jail facility and held by the Sheriff in solitary confinement in Santa
Rita Jail while under pretrial detention.” Dkt. No. 25 at ¶ 1.

1 detention, a halt to “abusive behavior and conduct,” the cessation of First Amendment retaliation
2 against those speak out against “defendants’ unlawful treatment,” and an end to administrative
3 isolation of pretrial detainees. *Id.* at ¶¶ 1, 6-7.

4 Now before the Court is defendants’ motion to dismiss the FAC.⁴

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LEGAL STANDARD

7 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
8 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
9 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
10 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard
11 requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant
12 has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require
13 “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to
14 relief above the speculative level.” *Twombly*, 550 U.S. at 555, 570.

15 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
16 court must assume that the plaintiff’s allegations are true and must draw all reasonable inferences
17 in the plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).
18 However, the court is not required to accept as true “allegations that are merely conclusory,
19 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536
20 F.3d 1049, 1055 (9th Cir. 2008). Furthermore, a court need not “accept as true allegations that
21 contradict matters properly subject to judicial notice or by exhibit.” *Sprewell v. Golden State*
22 *Warriors*, 266 F.3d 979, 988 (9th Cir.) *opinion amended on denial of reh’g*, 275 F.3d 1187 (9th
23 Cir. 2001). If the Court dismisses the complaint, it must then decide whether to grant leave to
24 amend. The Ninth Circuit has “repeatedly held that a district court should grant leave to amend
25 even if no request to amend the pleading was made, unless it determines that the pleading could
26 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th

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28 ⁴ Plaintiff filed the original complaint *pro se*, and then she obtained an attorney who filed the first amended complaint.

1 Cir. 2000) (citations and internal quotation marks omitted).

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DISCUSSION

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I. Claim 1: Violation of the Eighth Amendment

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Plaintiff alleges that the deprivations she suffered while detained at Santa Rita Jail amount to cruel and unusual punishment in violation of the Eighth Amendment. Dkt. No. 25 at ¶ 59. Plaintiff alleges that she was deprived of “basic human hygiene needs including toilet paper, soap, clean clothing, clean underwear, showers and other accoutrements of a minimum of personal hygiene and cleanliness.” *Id.* at ¶ 60. Defendants move to dismiss this claim, arguing that the Eighth Amendment applies only to convicted prisoners.

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Plaintiff alleges that she was a pretrial detainee throughout her June - July 2014 detention. When a pretrial detainee challenges conditions of his confinement, the proper inquiry is whether the conditions amount to punishment in violation of the Due Process Clause of the Fourteenth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). “[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent guarantee is the Due Process Clause of the Fourteenth Amendment.” *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977)).

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Accordingly, the Court GRANTS defendants’ motion to dismiss Velarde’s Eighth Amendment claim. However, the Court grants plaintiff leave to amend the complaint to allege a claim for violation of her rights under the Fourteenth Amendment. *See generally Bell*, 441 U.S. at 538 (discussing “useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word”); *Demery v. Arpaio*, 378 F.3d 1020, 1028-29 (9th Cir. 2004); *Keenan v. Hall*, 83 F.3d 1083, 1090-91 (9th Cir. 1996), *amended*, 135 F.3d 1318 (9th Cir. 1998); *Toussaint v. McCarthy*, 597 F. Supp.

1 1388, 1411 (N.D. Cal. 1984), *aff'd in part and vacated in part*, 801 F.2d 1080 (9th Cir. 1986).⁵

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3 **II. Claim 2: Violation of Eighth and Fourteenth Amendments**

4 Velarde alleges that she was placed in administrative isolation as punishment based on her
5 request for a different judge in Judge Saunders' courtroom. Dkt. No. 25 at ¶ 24. She alleges that
6 two deputies told her she would be punished for having made a "scene" in court, and that she
7 would be placed in "the hole." *Id.*

8 Defendants move to dismiss this claim, arguing that plaintiff's allegations are "clearly
9 contradicted" by the Superior Court's Clerks Docket and Minutes document dated June 18, 2014,
10 which states: "Previous order of 6-16-14, defendant held at zero bail, is to not have any
11 communications, no visitors and no telephone calls, (Has not accepted P.O.) remains in effect."
12 Dkt. No. 34-1 at 2. Defendants assert that the proposed protective order was pursuant to
13 California Penal Code § 136.2, which "allows criminal courts to issue protective orders to protect
14 witnesses and victims of domestic abuse."⁶ Dkt. No. 33 at 9:21-10:1, n.3. Defendants do not
15 provide any evidence in support of this assertion except for the Docket and Minutes document.

16 As discussed *supra*, as a pretrial detainee, plaintiff cannot bring this claim under the Eighth
17 Amendment, and instead she must bring it under the Fourteenth Amendment.⁷ *Lee*, 250 F.3d at

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19 _____
20 ⁵ In addition, the Court notes that the complaint does not specify which causes of action
are brought against which defendants. Plaintiff is directed to provide such clarification in the
amended complaint.

21 ⁶ Defendants do not cite the specific subsection of Cal. Penal Code § 136.2 to which they
22 refer. Based upon defendants' arguments, it appears that they are referring to subsection
(a)(1)(D), which states:

23 Upon a good cause belief that harm to, or intimidation or dissuasion of, a
24 victim or witness has occurred or is reasonably likely to occur, a court with
jurisdiction over a criminal matter may issue orders, including, but not limited to,
the following:

25
(D) An order that a person described in this section shall have no
26 communication whatsoever with a specified witness or a victim, except through an
attorney under reasonable restrictions that the court may impose.

27 Cal. Penal Code § 136.2.

28 ⁷ In her Opposition, Velarde requested leave to amend to allege a claim under the Fifth
Amendment in place of the Eighth Amendment. Dkt. No. 35 at 5:4-6. However, "[w]here the

1 686. Pretrial detainees may not be placed in disciplinary segregation without a due process
2 hearing. *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996). Here, Velarde alleges that she was
3 placed in “the hole” by defendants in order to punish plaintiff for making a “scene” in court. The
4 Clerks Docket and Minutes do not “clearly contradict” plaintiff’s allegations such that dismissal at
5 the pleading stage is appropriate. The Court cannot draw the inference that the restrictions ordered
6 by Judge Saunders -- that plaintiff was “not have any communications, no visitors and no
7 telephone calls” -- necessarily meant placing plaintiff in administrative segregation. Accordingly,
8 the Court concludes that plaintiff has stated a claim for violation of her rights under the Fourteenth
9 Amendment. Defendants’ motion to dismiss plaintiff’s second cause of action is GRANTED to
10 the extent that plaintiff alleges a violation of her rights under the Eighth Amendment, and
11 DENIED to the extent plaintiff alleges a violation of her rights under the Fourteenth Amendment.

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14 **III. Claim 3: Violation of First Amendment - Retaliation**

15 Plaintiff alleges that defendants retaliated against her by punishing her while she was in
16 custody in response to her speaking up in court, inquiring about the rules of the Santa Rita Jail,
17 requesting food and other basic necessities, and criticizing the actions and policies of government
18 actors. Dkt. No. 25 at ¶ 69. Defendants argue that Velarde has not alleged sufficient facts to
19 allege retaliation, and that her allegations of mistreatment at the hands of defendants are
20 insufficient under current law.

21 To prove retaliation in violation of the First Amendment and to recover under 42 U.S.C.
22 § 1983, a plaintiff must show:

- 23 (1) [that] he engaged in constitutionally protected activity; (2) as a result, he was
24 subjected to adverse action by the defendant that would chill a person of ordinary
25 firmness from continuing to engage in the protected activity; and (3) there was a
26 substantial causal relationship between the constitutionally protected activity and
27 the adverse action.

28 State seeks to impose punishment without such an adjudication, the pertinent constitutional
guarantee is the Due Process Clause of the Fourteenth Amendment.” *Bell*, 441 U.S. at 441 U.S. at
5 n.16.

1 *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010); *Skoog v. Cnty. of Clackamas*, 469
2 F.3d 1221, 1232 (9th Cir. 2006) (applying same test, but with two instead of three elements). To
3 rise to a constitutional violation, the defendant’s adverse action “must be of a nature that would
4 stifle someone from speaking out.” *Blair*, 608 F.3d at 544. Examples of adverse actions are
5 “‘exercise[s] of governmental power’ that are ‘regulatory, proscriptive, or compulsory in nature’
6 and have the effect of punishing someone for his or her speech.” *Id.* (quoting *Laird v. Tatum*, 408
7 U.S. 1, 11 (1972)). Furthermore, direct or circumstantial evidence can demonstrate that a
8 defendant intended to inhibit free speech. *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d
9 1283, 1300-01 (9th Cir. 1999) (internal citations and quotations marks omitted). Verbal
10 harassment or abuse is “not sufficient to state a constitutional deprivation under 42 U.S.C. §
11 1983.” *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987).

12 Plaintiff alleges that Santa Rita Jail deputies retaliated against her because she spoke up in
13 court and because of her criticism of Oakland police. *See* Dkt. No. 25 at ¶ 69. Defendants argue
14 that Velarde has not alleged sufficient facts to allege a retaliation claim “because no adverse action
15 was taken against her as a result of her free speech,” and her allegations of mistreatment at the
16 hands of defendants are insufficient under current case law. The Court finds that plaintiff has
17 alleged an adverse action, namely placement in the “hole,” as a result of her speech in Judge
18 Saunders’ courtroom. *Blair*, 608 F.3d at 543.

19 The Court finds that plaintiff’s remaining allegations of retaliation are insufficient.
20 Plaintiff generally alleges that she was “verbally abused, punished and denied the basics of
21 humanitarian treatment.” Dkt. No. 25 at ¶¶ 2, 26, 30. For example, plaintiff alleges that

22 [w]hile at the beginning [of her detention], Plaintiff made one or two requests [for
23 soap] of the sheriff deputies, it was soon made amply clear to Plaintiff, that any
24 requests she made was treated as a form of ‘non-cooperation’, and all requests
25 provoked the anger of sheriff’s deputies, which resulted in some additional form of
26 deprivation or punishment. Therefore, Plaintiff quickly learned not to make any
27 requests and to initiate few, if any verbal communications with the sheriff’s
28 deputies.

Id. at ¶ 26. Plaintiff has not alleged with any specificity how the deputies retaliated against her in
response to her requests for soap (or anything else). Further, to the extent that plaintiff alleges

1 retaliation in the form of verbal mistreatment, those allegations do not state a constitutional
2 violation. *See Oltarzewski*, 830 F.2d at 139.

3 The Court therefore DENIES defendants’ motion to dismiss the retaliation claim to the
4 extent this claim is based on plaintiff’s her placement in administrative isolation, and GRANTS
5 defendants’ motion to dismiss the balance of the retaliation claim. The Court GRANTS plaintiff
6 leave to amend the retaliation claim in order to allege specific facts showing that there was an
7 adverse action taken against her by the deputies as a result of her exercise of free speech. *See*
8 *Blair*, 608 F.3d at 543.

9
10 **IV. Claim 4: Violation of the Fourth and Fourteenth Amendments**

11 The fourth claim for relief alleges that defendants’ “policies, practices, and customs
12 regarding the strip and visual body cavity searches complained of herein violated the rights of
13 Plaintiff . . . under the Fourth Amendment to be free from unreasonable searches and seizures
14 [and violated plaintiff’s right] to due process and privacy under the Fourteenth Amendment.” Dkt.
15 No. 25 at ¶ 73.

16 Defendants argue that this claim fails as a matter of law because strip searching upon
17 returning a detainee to administrative isolation is constitutional. In support of this argument,
18 defendants cite Supreme Court and the Ninth Circuit cases upholding strip and body cavity search
19 policies as reasonable. *See Florence v. Bd. of Chosen Freeholders of City. of Burlington*, 132 S.
20 Ct. 1510 (2012); *Bull v. San Francisco*, 595 F.3d 964, 974-75 (9th Cir. 2010) (en banc);
21 *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988); *Rickman v. Avanti*, 854 F.2d 327, 328
22 (9th Cir. 1988); *but see Lopez v. Youngblood*, 609 F. Supp. 2d 1125, 1139-40 (E.D. Cal. 2009)
23 (granting summary judgment in favor of plaintiffs, finding a policy of strip searching detainees
24 ordered released by a court upon return to jail violates the Fourth Amendment); *Craft v. City of*
25 *San Bernardino*, 468 F. Supp. 2d 1172, 1179 (C.D. Cal. 2006) (holding on summary judgment that
26 a blanket policy of strip searching all detainees upon return from court, including detainees
27 ordered released, violated the Fourth Amendment).

28 The Court concludes that plaintiff has stated a claim to challenge the strip searches. To

1 determine whether a strip search is constitutional, courts must consider *inter alia* the scope,
2 manner and justification for the search. *Bull*, 595 F.3d at 974–75. This evaluation necessarily
3 involves an examination of the factual context, and the Court notes that the cases cited by
4 defendants were all decided at summary judgment on a full factual record. At the pleadings stage,
5 the Court cannot assess the reasonableness of the challenged strip searches. Defendants may
6 renew their arguments, including regarding qualified immunity, on a fuller factual record.

7 Defendants also argue that the named defendants, including the County, may not be held
8 vicariously liable for the strip searches because they were performed by Doe defendants (Jane
9 Does 6 and 7). Supervisors may be held liable in an individual capacity for their own culpable
10 action or inaction in the training, supervision, or control of their subordinates. *Menotti v. City of*
11 *Seattle*, 409 F.3d 1113, 1149 (9th Cir. 2005). Plaintiffs may hold a municipality liable if action
12 pursuant to official municipal policy caused the plaintiff’s injuries. *Connick v. Thompson*, 131
13 S.Ct. 1350, 1359 (2011). Here, the complaint alleges that the named defendants were policy
14 makers with regard to the challenged conditions and policies at the jail.

15
16 **V. Claim 5: Violation of California Civil Code § 51.7 (Ralph Civil Rights Act)**

17 Plaintiff’s fifth claim for relief alleges a violation of California Civil Code § 51.7.⁸ Dkt.
18 No. 25 at ¶¶ 74-77. The complaint incorporates all of the previous factual allegations, and alleges
19 that

20 Defendants’ above-described violated Plaintiff’s and class members’ right to
21 privacy as guaranteed by Article 1 § 1 of the California Constitution. At all
22 relevant times, Defendants’ and more particularly Jane Does 6 and 7’s individual
23 and/or concerted conduct was unreasonable and without any lawful justification
24 and done with a conscious, callous and deliberate indifference to Plaintiff[s] . . .
constitutional right to due process. In addition, the Jane Does were acting with
reckless disregard . . . by conducting a demeaning . . . strip and visual body cavity
search that may be viewed by those outside the room.

25 *Id.* at ¶ 76.

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27 ⁸ The fifth claim for relief also alleges a violation of the California Constitution Article 1,
§1 Right to Privacy. Defendants’ motion to dismiss does not specifically address this aspect of the
28 fifth cause of action, except to assert that defendants are immune from liability on the state law
claims. *See* Part VIII, *infra*.

1 Defendants move to dismiss plaintiff’s claim for failure to state the elements of a § 51.7
2 claim. California Civil Code § 51.7 states that persons within California have the right to be free
3 from any “violence, or intimidation by threat of violence, committed against their persons or
4 property because of political affiliation, or on account of any characteristic listed or defined in
5 subdivision (b) or (e) of Section 51” Cal. Civ. Code § 51.7(a). At the time of plaintiff’s
6 detention, Section 51(b) provided that all people in California “are free and equal, and no matter
7 what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic
8 information, marital status, or sexual orientation. . . .” Cal. Civ. Code § 51.⁹ When claiming a
9 violation of § 51.7, a plaintiff must show: “(1) the defendant threatened or committed violent acts
10 against the plaintiff; (2) the defendant was motivated by his perception of plaintiff’s [protected
11 characteristic]; (3) the plaintiff was harmed; and (4) the defendant’s conduct was a substantial
12 factor in causing the plaintiff’s harm. *Knapps v. City of Oakland*, 647 F. Supp. 2d 1129, 1167
13 (N.D. Cal. 2009), *amended in part* (Sept. 8, 2009) (citing *Austin B. v. Escondido Union Sch. Dist.*,
14 149 Cal. App. 4th 860, 880-81 (2007).

15 Defendants argue that plaintiff has not alleged “that any of the Defendants, including
16 Sheriff Ahern, the Defendant Deputies or Doe deputies threatened Plaintiff with violent acts or
17 committed violent acts against Plaintiff. Plaintiff merely alleges, generally, that she was verbally
18 abused, punished, or ignored.” Dkt. No. 33 at 23:1-4. Defendants also contend that “[t]he alleged
19 verbal harassment by the Doe deputies, even if taken as true, does not amount to threatening or
20 committing a violent act sufficient to state a claim under” § 51.7. *Id.* at 23:4-6.

21 Plaintiff’s opposition argues that she “pled that all of her requests (for basic sanitation such
22 as toilet paper) provoked ‘the anger of sheriff’s deputies, which resulted in additional deprivation
23 and punishment.’ . . . In this situation, where plaintiff is under the complete physical control of
24 defendants, and where defendants have clearly informed her that they are punishing her and will
25 punish her further, constitutes intimidation by threat of violence.” Dkt. No. 35 at 5:22-26 (internal
26 citation omitted). Plaintiff argues that the verbal abuse and threat of punishment were not “mere
27

28 ⁹ Section 51(b) was amended on January 1, 2016 to add to its list of protected groups
people of any “citizenship, primary language, or immigration status.”

1 coercion of arrest, but intimidation by threat of violence” that she interpreted as a threat that the
2 conditions of her detention would worsen. Dkt. No. 35 at 6:3-5.

3 The Court finds that plaintiff has failed to allege a violation of § 51.7. Plaintiff does not
4 allege any facts regarding specific threats of violence made against her. Plaintiff has not alleged
5 that Doe defendants 6 and 7 threatened her with any violence when conducting the strip and body
6 cavity searches. With respect to the other defendants, plaintiff has not alleged any particular
7 threats of violence, and instead the complaint generally alleges that defendants interpreted any
8 requests from her as “non-cooperation,” and that her requests “provoked the anger of sheriff’s
9 deputies,” which would lead to some unspecified “additional form of deprivation or punishment.”
10 Dkt. No. 25 at ¶ 26. These allegations are insufficient to show a specific threat of violence.
11 *Compare Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1290 (9th Cir. 2001)
12 (holding statement “chick, you better walk faster or I am going to hurt you again” constituted a
13 threat of violence under § 51.7) *with Ramirez v. Wong*, 188 Cal. App. 4th 1480, 1482, 1486 (2010)
14 (no threat of violence when a landlord entered two female tenants’ apartment in their absence to
15 sniff their underwear because “[t]here can be no ‘threat of violence’ without some expression of
16 intent to injure or damage plaintiffs or their property . . .”).

17 Accordingly, the Court GRANTS defendants’ motion to dismiss the § 51.7 claim with
18 leave to amend. If plaintiff amends the § 51.7 claim, plaintiff must also allege the other elements
19 of a § 51.7 claim, including that defendants were motivated by a perception of plaintiff’s protected
20 characteristic (as well as what that protected characteristic is). *See Knapps*, 647 F. Supp. 2d at
21 1167.

22

23 **VI. Claim 6: Violation of Fourth and Fourteenth Amendments**

24 Plaintiff alleges that defendants violated her Fourth and Fourteenth Amendment rights by
25 not releasing her immediately after the charges against her were dismissed.¹⁰ Dkt. No. 25 at ¶¶

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27 _____
28 ¹⁰ Plaintiff also brings this claim under the Eighth Amendment. For reasons previously
discussed, this is improper and the Court dismisses this claim to the extent plaintiff alleges a
violation of the Eighth Amendment.

1 80-82. Specifically, plaintiff alleges:

2 80. Defendants’ policies, practices and customs regarding the release of pre-trial
3 detainees who have been ordered release by the court, either through their Own
4 Recognizance (OR), or dismissal of the pending charges or other basis, whereby
5 instead of releasing said pre-trial detainees forthwith, force all pre-trial detainees to
6 wait at court, sometimes for long periods of time, and then return to Santa Rita Jail,
handcuffed, or shackled, or otherwise bound, is without any lawful justification and
done with a conscious, callous and deliberate indifference to Plaintiff and class
member’s constitutional right to due process.

7 81. Defendants’ policies, practices and customs regarding the release of pre-trial
8 detainees who have been ordered release by the court, either through their Own
9 Recognizance (OR), or dismissal of the pending charges or other basis, whereby all
pre-trial detainees, upon returning to Santa Rita jail, instead of being processed
forthwith and immediately released, are forced to undergo an unnecessary and
unreasonable strip search and/or visual body cavity search.

10 *Id.* ¶¶ 81-82.

11 Defendants’ motion to dismiss this claim focuses solely on plaintiff’s allegations regarding
12 strip and body cavity searches. *See* Dkt. No. 33 at 19-20. For the reasons set forth above, the
13 Court finds that plaintiff has stated a claim with regard to the searches. As defendants do not
14 challenge the balance of this cause of action, the Court does not address those allegations.

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16 **VII. Claim 7: Violation of California Civil Code § 52.1 (Bane Civil Rights Act)**

17 Plaintiff’s seventh cause of action alleges a violation of California Civil Code § 52.1.
18 Section 52.1 provides that an injured individual may bring a claim against a person who
19 “interferes by threats, intimidation, or coercion, or attempts to interfere by threat, intimidation, or
20 coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the
21 Constitution or laws of the United States, or of the rights secured by the Constitution or laws of
22 this state.” Cal. Civ. Code § 52.1(a)-(b). Section 52.1 does not require a showing that a defendant
23 intended to discriminate, nor does it require a plaintiff to be part of a protected class. *Venegas v.*
24 *Cnty. of Los Angeles*, 32 Cal. 4th 820, 841-42 (2004). To demonstrate a violation of § 52.1, a
25 plaintiff must show: “(1) Defendants interfered with Plaintiffs’ constitutional or statutory rights;
26 and (2) that interference was accompanied by actual or attempted threats, intimidation, or
27 coercion.” *Campbell v. Feld Entm’t, Inc.*, 75 F. Supp. 3d 1193, 1211 (N.D. Cal. 2014). However,
28 a plaintiff “need not allege that defendants acted with discriminatory animus or intent, so long as

1 those acts were accompanied by the requisite threats, intimidation, or coercion.” *Venegas*, 32 Cal.
2 4th at 843. Courts have held that where a defendant’s actions are intentional, the Bane Act does
3 not require threats, coercion, or intimidation independent from those inherent in the alleged
4 constitutional or statutory violation. *Cuviello v. City & Cnty. of San Francisco*, 940 F. Supp. 2d
5 1071, 1102 (N.D. Cal. 2013); *DV v. City of Sunnyvale*, 65 F. Supp. 3d 782, 787-88 (N.D. Cal.
6 2014); *Bass v. City of Fremont*, No. C 12–4943 TEH, 2013 WL 891090, at *5-6 (N.D. Cal. 2013);
7 *Holland v. City of San Francisco*, No. C 10-2603 TEH, 2013 WL 968295, at *10 (N.D. Cal. Mar.
8 12, 2013).

9 Plaintiff does not specify in her complaint what conduct she alleges violated § 52.1. The
10 complaint realleges and incorporates by reference paragraphs 1 through 87, and then alleges that
11 “defendants’ above-described conduct constituted interference, and attempted interference, by
12 threats, intimidation and coercion, with plaintiffs’ enjoyment of rights secured by the Constitution
13 and laws of the United States and the State of California, violating California Civil Code section
14 52.1.” Dkt. No. 25 at ¶¶ 84-85. In her opposition, plaintiff describes the basis for this claim as her
15 “wrongful” placement in solitary confinement and defendants’ “meting out the treatment she
16 received.” Dkt. No. 35 at 6:19-20.

17 Defendants contend that plaintiff cannot base the Bane Act claim on her placement in
18 administrative isolation because Judge Saunders ordered that placement. For the reasons stated
19 above, the Court cannot conclude at this stage of the litigation that plaintiff’s placement in
20 administrative segregation was legal. Plaintiff alleges that her placement was punitive, and as
21 such, the Court finds that plaintiff has stated a claim under the Bane Act. However, the Court also
22 finds that to the extent plaintiff wishes to challenge other conduct by defendants in support of her
23 Bane Act claim, plaintiff must specify that conduct and allege that that the conduct was intentional
24 or accompanied by threats, coercion or intimidation. Accordingly, the Court GRANTS in part and
25 DENIES in part defendants’ motion to dismiss the § 52.1 claim with leave to amend.

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1 **VIII. Immunities for State Law Claims**

2 **A. County Immunity under California Government Code § 844.6**

3 Defendant County asserts it is immune from liability under plaintiff’s fifth, seventh and
4 eighth causes of action¹¹ under Cal. Gov’t. Code § 844.6. “Government Code section 844.6(a)(2),
5 subject to stated exceptions, provides that a public entity is not liable for ‘[a]n injury to any
6 prisoner.’” *Teter v. City of Newport Beach*, 30 Cal. 4th 446, 448 (2003); Cal. Gov’t. Code §§
7 844.6(a)-(a)(2), § 845.4, § 845.6. For purposes of § 844.6, a “prisoner” includes a pretrial
8 detainee. Cal. Gov’t. Code § 844.

9 Plaintiff argues that her claim is covered under an exception to § 844.6, which provides:

10 Neither a public entity nor a public employee acting within the scope of his
11 employment is liable for interfering with the right of a prisoner to obtain a judicial
12 determination or review of the legality of his confinement; but a public employee,
13 and the public entity where the employee is acting within the scope of his
14 employment, *is liable for injury proximately caused by the employee's intentional
and unjustifiable interference with such right, but no cause of action for such injury
shall be deemed to accrue until it has first been determined that the confinement
was illegal.*

15 Cal. Gov’t. Code § 845.4 (emphasis added). However, as defendants note, plaintiff does not
16 allege that her arrest leading to her confinement was illegal, and thus this exception to § 844.6
17 immunity does not apply. *See Ortiz v. Cty. of Sonoma*, No. 14-CV-00322-JSC, 2014 WL
18 1351843, at *2 (N.D. Cal. Apr. 4, 2014) (holding plaintiff must first establish that confinement
19 was illegal before § 845.4 can apply); *see also Holland*, No. C 10-2603 TEH, 2010 WL 5071597,
20 at *10-11 (holding § 844.6 provided immunity to City of San Francisco from the plaintiff’s state
21 law claims challenging strip search policy).

22 Accordingly, the complaint as currently framed does not establish any basis for finding
23 that an exception to § 844.6 immunity applies. As such, the Court finds that the County is entitled
24 to immunity under § 844.6 to plaintiff’s state law claims. If plaintiff is able to allege a factual
25 basis for an exception to such immunity, plaintiff may do so in the amended complaint.

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28 ¹¹ In addition to the fifth and seventh causes of action discussed *supra*, the complaint
alleges an eighth cause of action for negligence.

B. Sheriff Ahern and Defendant Deputies' Immunity under California Government Code § 820.2 and § 820.8

Defendants contend that Sheriff Ahern and the defendant deputies are immune from liability under plaintiff's state law claims pursuant to California Government Code §§ 820.2 and 820.8 because plaintiff does not allege that these individual defendants personally engaged in any threats, intimidation or coercion of plaintiff, nor does plaintiff allege that these defendants were personally involved in the strip searches. Government Code § 820.2 provides immunity for discretionary, policymaking acts, and Government Code § 820.8 provides immunity for actions of other public employees, including subordinates. *See Holland*, No. C 10-2603 TEH, 2010 WL 5071597, at *11-12 (holding defendant sheriff immune from liability under state law under section 820.2 where "Holland does not allege that Sheriff Hennessey had any role in Holland's strip search beyond setting the policy. . . . Thus, while Holland may be correct that the deputies who searched her are not immune under section 820.2, she cites no authority that would withdraw immunity from the policymaker simply because his or her policy was carried out."); *Weaver v. State of Cal.*, 63 Cal. App. 4th 188, 202 (1998) ("Government Code section 820.8 affords [CHP Commissioner] immunity from liability based on the acts of his subordinates, Johnson and Flores.").

Plaintiff's opposition does not specifically address most of defendants' arguments. Plaintiff argues that Cal. Penal Code § 4030¹² overrides § 820.2 immunity, and that the facts of the complaint demonstrate that defendants violated § 4030. She is mistaken. In *Caldwell*, the court found that "where the immunity provided by section 820.2 would otherwise apply, that immunity cannot be abrogated by a statute which simply imposes a general legal duty or liability on persons including public employees." 10 Cal. 4th at 986. Furthermore, even if an employee was liable under the statute for his or her actions, the immunity granted by § 820.2 does not disappear, because this "effect can only be achieved by a clear indication of legislative intent that statutory immunity is withheld or withdrawn in the particular case." *Id.*; *see Holland*, No. C 10-2603 TEH,

¹² Cal. Penal Code § 4030(l) provides that strip and body cavity searches "shall be conducted in an area of privacy so that the search cannot be observed by persons not participating in the search."

1 2010 WL 5071597, at *11-12 (dismissing claim for violation of strip search regulations brought
2 under Cal. Penal Code § 4030(l) against city and sheriff based on immunity); *see also Bull*, 758 F.
3 Supp. 2d at 935 (finding public entity is immune from liability based on an illegal strip search).

4 Accordingly, the Court finds that as currently pled, the named individual defendants are
5 entitled to immunity under California Government Code §§ 820.2 and 820.8 because plaintiff does
6 not allege that these individual defendants personally engaged in any threats, intimidation or
7 coercion of plaintiff, nor does plaintiff allege that these defendants were personally involved in the
8 strip searches. If plaintiff is able to allege that any of the named individual defendants were
9 personally involved in the alleged violations, plaintiff may do so in the amended complaint.¹³

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CONCLUSION

12 For the foregoing reasons and for good cause shown, the Court hereby GRANTS in part
13 and DENIES in part defendants' motion to dismiss and GRANTS plaintiff leave to file an
14 amended complaint consistent with this order no later than **April 29, 2016**.

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IT IS SO ORDERED.

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Dated: April 20, 2016



SUSAN ILLSTON
United States District Judge

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28 ¹³ In light of this disposition, the Court finds it unnecessary to address the parties' remaining arguments regarding immunity.