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

DONALD CLOYCE WAGDA,
Plaintiff,
v.
TOWN OF DANVILLE, et al.,
Defendants.

Case No. [16-cv-00488-MMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART COUNTY
DEFENDANTS' MOTION TO DISMISS;
GRANTING STATE DEFENDANTS'
MOTION TO DISMISS; DENYING
PLAINTIFF'S MOTION TO CONVERT**

Re: Dkt. Nos. 51, 53, 67

Before the Court are two motions to dismiss plaintiff Donald Cloyce Wagda's ("Wagda") First Amended Complaint, the first said motion, filed April 12, 2016, by defendants Town of Danville ("Town"), County of Contra Costa ("County"), David O. Livingston ("Livingston"), Steve Simpkins ("Simpkins"), Mike Jimenez ("Jimenez"), Emily Neabeack ("Neabeack"), Tom Rossberg ("Rossberg"), and Steven Stapleton ("Stapleton") (collectively, "County defendants"),¹ and the second, filed May 9, 2016, by defendants Edmund G. Brown, Jr., and Kamala D. Harris (collectively, "State defendants"). Both motions are brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.

¹ Also before the Court is Wagda's motion, filed April 17, 2016, pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, to convert County defendants' motion to a motion for summary judgment. As the Court has not relied on the assertion challenged thereby, or on any of the challenged documents for the truth of the matters contained therein, the motion to convert is hereby DENIED.

1 **BACKGROUND²**

2 **A. The Parties**

3 Wagda is an attorney who, at all relevant times, has been a resident of Town,
4 which, in turn, is located in County.

5 Livingston is the County Sheriff and is sued solely in his official capacity. Simpkins
6 is the Town Chief of Police and is sued solely in his official capacity. Jimenez is a police
7 sergeant employed by Town and County and is sued in his individual capacity.
8 Neabeack, Rossberg, and Stapleton are police officers employed by Town and County
9 and are sued in their individual capacities.³

10 Edmund G. Brown, Jr., is the Governor of the State of California ("Governor
11 Brown"), and Kamala D. Harris is the Attorney General of the State of California
12 ("Attorney General Harris"). Both said defendants are sued solely in their official
13 capacities.

14 **B. The Events**

15 On August 16, 2014, in anticipation of the passage of Proposition 47 ("Prop 47"),
16 Wagda formed a corporation to provide legal services to individuals expected to become
17 eligible to reduce certain felony convictions to misdemeanors. (See id. ¶ 21.)

18 On October 15, 2014, at the Town police station,⁴ Wagda was arrested for driving
19 under the influence ("DUI"), pursuant to § 23152(f) of the California Vehicle Code
20 ("Vehicle Code"),⁵ and for being under the influence of a controlled substance, pursuant

21 _____
22 ² The factual allegations herein are taken from the operative complaint, the First
Amended Complaint ("FAC"), filed March 29, 2016.

23 ³ In addition to the above-named County defendants, Wagda has sued a number
24 of "Doe" defendants. As no challenge has been brought on behalf of any of the Doe
25 defendants, the Court does not address herein the sufficiency of the claims brought
against them.

26 ⁴ In a separate filing, Wagda explains that he went to the police station "as a
27 citizen seeking police assistance." (See PI.'s Req. for Jud. Notice at 2 & Ex. A.)

28 ⁵ Section 23152(f) makes it unlawful "for a person who is under the combined
influence of any alcoholic beverage and drug to drive a vehicle." See id.

1 to § 11550 of the California Health & Safety Code ("Health & Safety Code") (the "October
2 arrest"). (See id. ¶ 23.) According to Wagda, Jimenez and Neabeack, prior to his arrest,
3 interrogated him "extensive[ly]," notwithstanding repeated invocations of his right to
4 remain silent and an invocation of his right to counsel. (See id. ¶¶ 24, 26–28.)
5 Additionally, Wagda alleges, Jimenez "expressed extreme moral disapproval with [his]
6 professional and other First Amendment activity in connection with Prop 47" (see id. ¶ 31;
7 see also id. ¶¶ 33–36), "revealing a deep personal animus toward [him]" (see id. ¶ 34).
8 Wagda further alleges that Jimenez and Neabeack, motivated by such animus, disclosed
9 to the State Bar of California ("State Bar") police reports relating to his October arrest
10 (see id. ¶ 37) and, rather than exercising their discretion to cite and release him at the
11 police station, instead booked him into jail at the Martinez Detention Facility ("MDF") (see
12 id. ¶ 38), where he was subjected to misconduct including threats of extended
13 confinement (see id. ¶¶ 55–56), placement in solitary confinement (see id. ¶ 57), coercion
14 in answering booking questions (see id. ¶ 60), denial of lunch (see id. ¶ 61), forced
15 signing of a statement regarding jailhouse rules (see id. ¶ 62), and delayed release (see
16 id. ¶ 63).

17 Subsequently, on December 4, 2004, the Contra Costa County District Attorney's
18 Office ("D.A.'s Office") charged Wagda with a drug-related DUI, pursuant to § 23152(e) of
19 the Vehicle Code, and with being under the influence of a controlled substance, pursuant
20 to § 11550(a) of the Health & Safety Code. (See id. ¶ 64.) On or before December 8,
21 2014, the D.A.'s Office provided Wagda with laboratory results showing his blood tested
22 "negative for alcohol and positive for certain CNS [central nervous system] stimulants."
23 (See id. ¶ 65.)

24 Approximately two weeks later, on December 22, 2014, while driving in Danville,
25 Wagda was again arrested, on this occasion for driving under the influence of drugs,
26 pursuant to § 23152(e) (the "December arrest"). (See id. ¶ 83.) According to Wagda,
27 Rossberg initially pulled him over for speeding (see id. ¶ 68) on a section of roadway that,
28 under state law, constituted a speed trap (see id. ¶ 66) and, after learning of his prior DUI

1 arrest, questioned him about such arrest, notwithstanding his renewed invocation of his
 2 right to remain silent and explanation that he had "an open court case" (see id. ¶¶ 69, 71;
 3 see also id. ¶¶ 72–73). Wagda further alleges that, after Stapleton arrived on the scene,
 4 Rossberg took Wagda's pulse without his consent while Stapleton questioned him about
 5 the October arrest "with the intent to drive up [his] heart rate" (see id. ¶ 80–81), and that
 6 Rossberg arrested him after he declined to perform field sobriety tests ("FSTs") (see id.
 7 ¶ 83). Thereafter, Stapleton transported Wagda to the police station. (See id. ¶ 87.)

8 Subsequently, Wagda alleges, Rossberg, rather than citing and releasing him at
 9 the police station, booked him into MDF because of his refusal to answer questions and
 10 consent to a blood draw (see id. ¶¶ 90, 92, 94), and, in support of a search warrant for his
 11 blood, executed a "false and misleading" affidavit (see id. 30:24) containing "material
 12 misrepresentations and omissions" (see id. ¶ 96) with respect to his speed, pulse rate
 13 measurements, and ability to make decisions and answer questions (see id. ¶¶ 97–103)
 14 (the "affidavit"). In addition, Wagda alleges, Rossberg used his statements about the
 15 October arrest, his refusal to answer questions about such arrest, and his refusal to
 16 consent to the blood draw and FSTs both in the affidavit (see id. ¶¶ 74, 106) and in a
 17 police report the D.A.'s Office "relied upon . . . in its decision to file charges in connection
 18 with the December [a]rrest" (see id. ¶¶ 75, 106). Wagda further alleges that Rossberg
 19 and Jimenez, both motivated by retaliation, made disclosures to the State Bar regarding
 20 both the October and December arrests (see id. ¶ 107) and that Rossberg also "initiated"
 21 two Department of Motor Vehicles ("DMV") proceedings against him (see id. ¶ 108),
 22 namely, an "APS proceeding" (see id. ¶ 109) and a "Priority Re-Examination" (see id.
 23 ¶¶ 110–112).

24 On March 12, 2015, the D.A.'s Office charged Wagda with a drug-related DUI,
 25 pursuant to § 23152(e), and being under the influence of a controlled substance,
 26 pursuant to § 11550(a). (See id. ¶ 119.) That same day, the D.A.'s Office also provided
 27 Wagda with laboratory results showing his blood tested "negative for alcohol and positive
 28 for CNS stimulant." (See id.)

1 On October 8, 2015, pursuant to a "global plea agreement," Wagda, in connection
2 with the October arrest, pleaded "no contest" to one count of reckless driving involving
3 alcohol, pursuant to § 23103 of the Vehicle Code,⁶ at which time all pending charges
4 stemming from both arrests were dismissed. (See id. ¶ 120.)

5 Subsequently, on October 25, 2015, while Wagda was driving to a supermarket,
6 "an SUV marked Contra Costa County Sheriff" followed him; waited in the parking lot
7 while he went inside; and, when he returned to his car, "pulled around and confronted
8 [him]," at which time the "officer" inside "stared [him] down." (See id. ¶ 122.)

9 **C. Wagda's Claims**

10 Based on the above allegations, Wagda asserts in the FAC seventeen claims: (1)
11 a federal claim under 42 U.S.C. § 1983 for violation of his First Amendment rights in
12 connection with the October arrest ("First Claim") (id. ¶¶ 124–127); (2) a federal claim
13 under § 1983 for violation of his Fourteenth Amendment rights in connection with the
14 October arrest ("Second Claim") (id. ¶¶ 128–132); (3) a federal claim under § 1983 for
15 violation of his Fourth Amendment rights in connection with the October arrest ("Third
16 Claim") (id. ¶¶ 133–137); (4) a federal claim under § 1983 for violation of his First
17 Amendment rights in connection with the December arrest ("Fourth Claim") (id. ¶¶ 138–
18 141); (5) a federal claim under § 1983 for violation of his Fourth Amendment rights in
19 connection with the December arrest ("Fifth Claim") (id. ¶¶ 142–146); (6) a federal claim
20 under § 1983 for violation of his Fifth Amendment rights in connection with both the
21 October and December arrests/prosecutions ("Sixth Claim") (id. ¶¶ 147–150); (7) a
22 federal claim under § 1983 for violation of his Sixth Amendment rights in connection with
23 the October arrest/prosecution ("Seventh Claim") (id. ¶¶ 151–154); (8) a federal claim
24 under § 1983 for violation of his Fourteenth Amendment rights in connection with the
25 December arrest ("Eighth Claim") (id. ¶¶ 155–158); (9) a federal claim under § 1983 for
26

27 ⁶ Pursuant to § 23103.5, the prosecution may agree to accept a no contest plea to
28 a "violation of § 23103 in place of a charge for violation of § 23152." See id.

1 violation of the Doctrine of Unconstitutional Conditions ("Ninth Claim") (id. ¶¶ 159–162);
2 (10) a federal claim under § 1983 for violation of "civil rights" based on municipal policies,
3 customs, and/or practices ("Tenth Claim") (id. ¶¶ 163–166); (11) a state claim for false
4 arrest ("Eleventh Claim") (id. ¶¶ 167–170); (12) a state claim for false imprisonment
5 ("Twelfth Claim") (id. ¶¶ 171–174); (13) a state claim for invasion of privacy ("Thirteenth
6 Claim") (id. ¶¶ 175–182); (14) a state claim for negligence ("Fourteenth Claim") (id.
7 ¶¶ 183–187); (15) a state claim for violation of civil rights under California Civil Code
8 §52.1(b) based on searches and seizures in connection with the October and December
9 arrests ("Fifteenth Claim") (id. ¶¶ 188–193); (16) a state claim for violation of civil rights
10 under California Civil Code §52.1(b) based on a municipal pattern, practice, or policy
11 ("Sixteenth Claim") (id. ¶¶ 194–198); and (17) a federal claim under 28 U.S.C. § 2201 for
12 declaratory and injunctive relief based on enforcement of § 11550 of the Health & Safety
13 Code and a "continuing pattern" of depriving "citizens of Town and County" of their
14 constitutional rights (see FAC ¶ 200) ("Seventeenth Claim") (id. ¶¶ 199–203).

15 By their motion to dismiss, County defendants seek an order dismissing as to each
16 of them "the majority of claims asserted." (See County Reply at 1.) By their motion to
17 dismiss, State defendants seek an order dismissing all claims asserted against them.

18 LEGAL STANDARD

19 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be
20 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
21 under a cognizable legal theory." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
22 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of
23 the claim showing that the pleader is entitled to relief.'" See Bell Atlantic Corp. v.
24 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a
25 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
26 allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his
27 entitlement to relief requires more than labels and conclusions, and a formulaic recitation
28 of the elements of a cause of action will not do." See id. (internal quotation, citation, and

1 alteration omitted).

2 In analyzing a motion to dismiss, a district court must accept as true all material
3 factual allegations in the complaint, and construe them in the light most favorable to the
4 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).⁷ “To
5 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted
6 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S.
7 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations must be
8 enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S. at 555.
9 Courts “are not bound to accept as true a legal conclusion couched as a factual
10 allegation.” See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

11 DISCUSSION

12 As discussed below, County defendants challenge Wagda's First through Eighth,
13 Tenth, Thirteenth, and Seventeenth Claims.⁸ State defendants challenge Wagda's
14 Seventeenth Claim, the sole claim Wagda brings against them. The Court addresses
15 each challenged claim in turn.⁹

16 A. § 1983 Claims Arising Out of Wagda's October Arrest

17 As noted, Wagda's First through Third Claims arise out of the October arrest.

18
19 ⁷ Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider
20 any material beyond the complaint. See Hal Roach Studios, Inc. v. Richard Feiner & Co.,
21 Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). A district court may, however, consider
22 documents that are subject to judicial notice. See Mack v. South Bay Beer Distrib., Inc.,
23 798 F.2d 1279, 1282 (9th Cir. 1986). Here, Wagda's unopposed Request for Judicial
24 Notice, filed May 23, 2016, is hereby GRANTED as to the following three documents: (1)
25 "Detailed History for Police Incident #P142880066," relating to Wagda's first arrest (Ex.
26 A); (2) Wagda's prescription drug record, as compiled by the California Department of
27 Justice (Ex. B); and (3) a page from the Attorney General's website describing a course
28 for law enforcement officers titled "Drug Influence—11550 H&S" (Ex. C).

⁸ County defendants do not challenge Wagda's Ninth, Eleventh, Twelfth, or
Fourteenth through Sixteenth Claims.

⁹ The Court notes that, although the Court has endeavored to do so, it is difficult to
analyze many of Wagda's claims, given the way he has structured the FAC. Most of the
claims discussed herein contain multiple subparts, assert violations of multiple rights, and
are brought against multiple defendants, without specifying, for any given subpart, the
particular right, particular defendant(s), or underlying behavior on which Wagda relies.

1 County defendants contend the various acts alleged in support thereof do not establish a
2 § 1983 claim against either Jimenez or Neabeack.

3 To state a claim under § 1983, a plaintiff must allege two essential elements: (1)
4 that a right secured by the Constitution or laws of the United States was violated, and (2)
5 that the alleged violation was committed by a person acting under color of state law. See
6 West v. Atkins, 487 U.S. 42, 48 (1988).

7 "An officer's liability under section 1983 is predicated on his integral participation in
8 the alleged violation." Blankenhorn v. City of Orange, 485 F.3d 463, 481 n.12 (9th Cir.
9 2007) (internal quotation and citation omitted). "Under Section 1983, supervisory officials
10 are not liable for actions of subordinates on any theory of vicarious liability." Hansen v.
11 Black, 885 F.2d 642, 645–46 (9th Cir. 1989). Rather, "each Government official, his or
12 her title notwithstanding, is only liable for his or her own misconduct." Iqbal, 556 U.S. at
13 677.

14 **1. First Claim: "Violation of First Amendment Rights—October Arrest—**
15 **42 U.S.C. § 1983"**

16 In his First Claim, Wagda alleges Jimenez and Neabeack violated his First
17 Amendment rights by depriving him of his "right to freedom of speech including, without
18 limitation, freedom of thought, freedom from compelled speech, freedom from compelled
19 listening, freedom from a chilling effect on speech, the right to petition the government for
20 a redress of grievances and the right to be free of police action motivated by retaliatory
21 animus." (FAC ¶ 125.) Based on said allegation, Wagda brings eleven separate
22 subclaims.

23 **a. Interrogating Wagda (FAC ¶ 125(a))**

24 In his FAC, Wagda alleges Jimenez and Neabeack unlawfully interrogated him,
25 "including systematically interrupting and interfering with his speech asserting Fifth
26 Amendment rights" (FAC ¶ 125(a)), which, Wagda alleges, has "a chilling effect upon
27 [his] future speech asserting his Fifth Amendment rights during police detentions" (id.
28 ¶ 29). In his opposition, however, Wagda states only that the above-referenced

1 interrogation violated his "Fifth, Sixth, and Fourteenth Amendment Rights." (See Pl.'s
2 Opp'n to County MTD at 6.) Wagda does not argue, let only cite any authority to support
3 a finding, and the Court is aware of none, that the above-referenced conduct would
4 constitute a violation of the First Amendment. Under the circumstances, it appears that
5 Wagda is no longer relying on such conduct to support his First Amendment claim.

6 **b. Berating and shaming Wagda (FAC ¶ 125(b))**

7 Wagda alleges defendants "[b]erat[ed] and sham[ed]" him regarding his
8 "professional and other First Amendment activity in connection with Prop 47 and other
9 matters of public concern" and "prescrib[ed] what shall be orthodox regarding such
10 matters." (FAC ¶ 125(b).) In particular, Wagda asserts, Jimenez "expressed extreme
11 moral disapproval" with such activities and "sharply condemned the content and
12 viewpoints of [] Wagda's political speech." (See id. ¶ 31; see also id. ¶¶ 33–36.)

13 Such "[b]erating" and "shaming" (see id. ¶ 125(b)) is not, however, cognizable as a
14 First Amendment violation. See, e.g., Nunez v. City of Los Angeles, 147 F.3d 867, 875
15 (9th Cir. 1998) (holding "harsh words" not sufficient to support First Amendment claim;
16 explaining "[i]t would be the height of irony . . . if mere speech, in response to speech,
17 could constitute a First Amendment violation"). Further, as to Neabeack, Wagda's claim
18 fails for the additional reason that he does not allege any facts showing Neabeack's
19 participation or involvement in such alleged misconduct. See Blankenhorn, 485 F.3d at
20 481 n.12.

21 **c. Booking Wagda into MDF (FAC ¶ 125(c))**

22 Wagda alleges Jimenez and Neabeack, in retaliation for his First Amendment
23 activity, "book[ed] [him] into MDF instead of citing and releasing him at the police station."
24 (FAC ¶ 125(c); see also id. ¶ 38.) In their reply, County defendants, for purposes of the
25 instant motion, concede such booking "can be a basis" for a § 1983 First Amendment
26 claim. (See County Reply at 4:2–3.)

27 **d. Disclosing October arrest to State Bar (FAC ¶ 125(d))**

28 Wagda alleges Jimenez and Neabeack, in retaliation for his First Amendment

1 activity, disclosed to the State Bar information regarding his October arrest. (See FAC
2 ¶¶ 37, 125(d).) County defendants contend, inter alia, such reporting does not constitute
3 a retaliatory action and that Wagda has not alleged any harm or chilling effect resulting
4 from such disclosure.

5 "To bring a First Amendment retaliation claim, the plaintiff must allege that (1) [he]
6 engaged in constitutionally protected activity; (2) the defendant's actions would chill a
7 person of ordinary firmness from continuing to engage in the protected activity; and (3)
8 the protected activity was a substantial motivating factor in the defendant's conduct."
9 Arizona Students' Ass'n v. Arizona Board of Regents, 824 F.3d 858, 867 (9th Cir. 2016)
10 (internal quotation and citation omitted). The "chill" test is "generic and objective";
11 "[w]hether [plaintiff] himself was, or would have been, chilled is not the test." O'Brien v.
12 Welty, 818 F.3d 920, 933 (9th Cir. 2016).

13 Although, under certain circumstances, reporting a professional to an organization
14 responsible for discipline may well be cognizable as a retaliatory action, the facts alleged
15 here are insufficient to show the disclosure at issue would have the requisite chilling
16 effect, given the lack of any allegations as to what consequences, if any, ordinarily would
17 be expected to occur from such a report.¹⁰

18 **e. Events occurring at MDF (FAC ¶ 125(e)–(k))**

19 With respect to events occurring at MDF, Wagda alleges defendants threatened to
20 withhold his release (see FAC ¶ 125(e)), threatened him with death (see id. ¶ 125(f)),
21 placed him in solitary confinement (see id. ¶ 125(g)), held him longer than necessary
22 (see id. ¶ 125(h)), coerced him into responding to booking questions (see id. ¶ 125(i)),
23

24
25 ¹⁰ Moreover, under California law, "the district attorney, city attorney, or other
26 prosecuting agency shall notify the Office of the State Bar of California of the pendency of
27 an action against an attorney charging a felony or misdemeanor immediately upon
28 obtaining information that the defendant is an attorney[,] [which] notice shall identify the
attorney and describe the crimes charged and the alleged facts." See Cal. Bus. & Prof.
Code § 6101(b). The FAC lacks any explanation as to how an additional report providing
the same or similar information would have a deterrent effect on a person of ordinary
firmness.

1 coerced him into executing an acknowledgment and endorsement of jailhouse rules (see
2 id. ¶ 125(j)), and denied him food (see id. ¶ 125(k)).

3 The FAC contains no allegations indicating Jimenez or Neabeack had any
4 involvement in the above-referenced events, all of which occurred at MDF. Rather, the
5 FAC identifies various "Doe" defendants in connection with such events. (See FAC
6 ¶¶ 51–63, 125(e)–(k).) Consequently, the FAC fails to state a claim against Jimenez and
7 Neabeack with respect to such events. See Blankenhorn, 485 F.3d at 481 n.12.

8 **f. Conclusion**

9 With respect to Wagda's First Claim, for the reasons stated above, subparts (a),
10 (b), and (d) are DISMISSED in their entirety, subparts (e)–(k) are DISMISSED with
11 respect to defendants Jimenez and Neabeack, and, with the exception of subpart (b),
12 Wagda is granted leave to amend.¹¹ See Fed. R. Civ. P. 15(a)(2) (permitting amendment
13 of complaint with leave of court; providing leave should be afforded "when justice so
14 requires"); Janicki Logging Co. v. Mateer, 42 F.3d 561, 566 (9th Cir. 2004) (noting
15 Federal Rule of Civil Procedure 15(a)'s "direction that it is to be applied liberally in favor
16 of amendments"). As to subpart (b), leave to amend is denied for the reason that, as a
17 matter of law, berating and shaming are not cognizable as First Amendment violations
18 and, thus, amendment of said subpart would be futile. See Janicki Logging Co., 42 F.3d
19 at 566 (holding leave to amend need not be granted where amendment of complaint
20 would "constitute[] an exercise in futility") (internal quotation and citation omitted).

21 **2. Second Claim: "Violation of Fourteenth Amendment Rights—October**
22 **Arrest—42 U.S.C. § 1983"**

23 In his Second Claim, Wagda alleges Jimenez and Neabeack violated his

24
25 ¹¹ Although County defendants oppose leave to amend with respect to the
26 disclosure of the October arrest (subpart (d)), the Court finds leave to amend appropriate,
27 as Wagda has amended his complaint only once and it is not clear such claim could not
28 be saved by amendment. See United States v. Corinthian Colleges, 655 F.3d 984, 995
(9th Cir. 2011) (holding "[d]ismissal without leave to amend is improper unless it is clear
... that the complaint could not be saved by any amendment" (internal quotation and
citation omitted)).

1 Fourteenth Amendment rights by depriving him of the "right not to be deprived of
2 personal liberty or property without due process of law, the right not to be punished
3 without an adjudication of guilt, the right to be free of arbitrary, capricious, conscience-
4 shocking and/or improperly motivated action of the government, and the right to equal
5 protection under the laws." (FAC ¶ 129.) Based on said allegation, Wagda brings twelve
6 separate subclaims.

7 **a. Interrogating Wagda (FAC ¶ 129(a))**

8 Wagda alleges Jimenez and Neabeack interrogated him in violation of his Fifth
9 Amendment rights against self-incrimination (see id. ¶ 129(a)) and that their interrogation
10 techniques "shock the conscience and are arbitrary, capricious, and offensive to a
11 civilized system of justice" (id. ¶¶ 25, 28). In particular, he alleges that: (1) prior to his
12 arrest, despite repeatedly invoking his right to remain silent, Jimenez and Neabeack
13 "systematically interrupted," "ignored," and/or "further aggressive[ly] question[ed]" him
14 (see id. ¶ 24); and (2) after his arrest, despite reasserting his right to remain silent and
15 invoking his right to counsel, Jimenez continued to question him (see id. ¶¶ 26–28), "at
16 least partially" in Neabeack's presence (see id. ¶ 28), and Jimenez "misleadingly
17 assured" him that they were "talking off the record" (see id.).

18 While claims for coercive interrogation can be brought under the Fourteenth
19 Amendment as substantive due process claims, the standard for showing a substantive
20 due process violation is "quite demanding." See Stoot v. City of Everett, 582 F.3d 910,
21 928 (9th Cir. 2009) (noting Supreme Court has "refer[red] to police torture or other abuse
22 as actionable under the Fourteenth Amendment") (internal quotation and citation
23 omitted). In particular, a substantive due process claim is "cognizable only if the alleged
24 abuse of power shocks the conscience and violates the decencies of civilized conduct."
25 Id. (internal quotation and citation omitted). For "abusive executive action," which
26 includes police conduct, "only the most egregious official conduct can be said to be
27 arbitrary in the constitutional sense." County of Sacramento v. Lewis, 523 U.S. 833,
28 846–47, 849 (1998) (defining "arbitrary" as "conscience shocking" and explaining that

1 "conduct intended to injure in some way unjustifiable by any government interest is the
2 sort of official action most likely to rise to the conscience-shocking level") (internal
3 quotation and citation omitted).

4 Wagda's allegations of persistent questioning, punctuated, when he invoked his
5 rights, by unspecified "verbal interruption[s]," "audible gasp[s]," and an "audible sigh" (see
6 FAC ¶ 24), and one assurance of being off the record do not meet the demanding
7 standard for a substantive due process claim. Compare Stoot, 582 F.3d at 928 (holding
8 improper promises of leniency and threats of heightened punishment did not rise to level
9 of Fourteenth Amendment violation), with Martinez v. City of Oxnard, 337 F.3d 1091,
10 1092 (9th Cir. 2003) (holding allegations that officer "brutally and incessantly questioned"
11 suspect with multiple gunshot wounds, interfered with medical treatment while suspect
12 was screaming in pain, and continued questioning after suspect pleaded with him to stop
13 sufficient to support due process claim), and Cooper v. Dupnik, 963 F.3d 1220, 1248–50
14 (9th Cir. 1992) (holding conduct shocked conscience where police coerced statements
15 from suspect by "hours of mistreatment and . . . sophisticated psychological torture," in
16 plan to keep suspect from testifying in own defense at trial and to curtail his right to
17 present insanity defense), overruled on other grounds by Chavez v. Martinez, 538 U.S.
18 760, 773 (2003).

19 **b. Berating and shaming Wagda (FAC ¶ 129(b))**

20 Wadga alleges his claim that defendants "berat[ed] and sham[ed]" him and
21 "prescrib[ed] what shall be orthodox" states a Fourteenth Amendment violation. (See
22 FAC ¶ 129(b).) As with his First Amendment claim based thereon, see supra part A.1.b.,
23 Wagda's Fourteenth Amendment claim fails because he has not shown such conduct
24 constitutes a cognizable wrong under § 1983. See Oltarzewski v. Ruggiero, 830 F.2d
25 136, 139 (9th Cir. 1987) (noting "[v]erbal harassment or abuse . . . is not sufficient to state
26 a constitutional deprivation" under § 1983) (internal quotation and citation omitted); see
27 also Stoot, 582 F.3d at 928 (requiring, for substantive due process violation, conduct that
28 "shocks the conscience") (internal quotation and citation omitted). Lastly, as discussed

1 earlier, Wagda's claim fails as to Neabeack for the additional reason that he does not
2 allege her participation or involvement in such conduct.

3 **c. Booking Wagda into MDF (FAC ¶ 129(c))**

4 In support of his Fourteenth Amendment claim, Wagda again relies on his
5 allegations that Jimenez and Neabeack chose to book him into jail rather than cite and
6 release him. (See FAC ¶¶ 38, 129(c); see also supra part A.1.c.) Such allegations,
7 however, do not meet the standard for a substantive due process violation, particularly
8 given Wagda's allegation that said defendants had the "statutory discretion" to book him.
9 (See FAC ¶ 38; see also Stoot, 582 F.3d at 928.)

10 **d. Disclosing October arrest to State Bar (FAC ¶ 129(d))**

11 In support of his Fourteenth Amendment claim, Wagda also relies on his above-
12 referenced allegations regarding the disclosure of his arrest to the State Bar. (See FAC
13 ¶¶ 37, 129(d); see also supra part A.1.d.) Such allegations do not meet the standard for
14 a substantive due process violation. See Stoot, 582 F.3d at 928.

15 **e. Targeting enforcement of drug laws (FAC ¶ 129(e))**

16 Wagda alleges defendants "[s]electively and pretextually target[ed] enforcement of
17 the drug laws" against him due to their "perception of him as an addict." (FAC ¶ 129(e).)
18 In particular, he alleges Jimenez manifested such a perception by saying "[y]ou've got a
19 drug problem" (see id. ¶ 40) and made "comments suggesting that Town, County, and he
20 engage in a custom, pattern and practice of targeting enforcement of facially neutral drug
21 laws at people perceived to [be] addicted to controlled substances, as a pretext for
22 punishing such people for property crimes they are assumed to be committing, but for
23 which the police do not have probable cause or reasonable suspicion" (see id. ¶ 41)
24 (emphasis omitted). Wagda alleges such conduct deprived him of equal protection. (See
25 id. ¶ 42.)¹²

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27 ¹² Although Wagda also asserts the above-referenced conduct deprived him of due
28 process (see id.), he fails to elaborate as to such assertion or cite to any authority
suggesting such conduct would support a due process claim.

1 To state an equal-protection claim under § 1983, a plaintiff must show the
 2 defendant "acted with an intent or purpose to discriminate against the plaintiff based
 3 upon membership in a protected class." Lee v. City of Los Angeles, 250 F.3d 668, 686
 4 (9th Cir. 2001) (internal quotation and citation omitted). Selective prosecution claims are
 5 judged "according to ordinary equal protection standards," under which the plaintiff has
 6 the burden of showing the government's selective enforcement: (1) had a discriminatory
 7 effect; and (2) was motivated by a discriminatory purpose. Wayte v. United States, 470
 8 U.S. 598, 608 (1985). The decision whether to prosecute may not be "deliberately based
 9 upon an unjustifiable standard such as race, religion, or other arbitrary classification,
 10 including the exercise of protected statutory and constitutional rights." Id. (internal
 11 quotation and citation omitted).

12 Here, the FAC does not allege membership in a protected class. Although the
 13 FAC asserts perceived drug addicts "may . . . represent a suspect class entitled to
 14 heightened scrutiny" (FAC ¶ 42),¹³ the authority is to the contrary. See, e.g., Ball v.
 15 Massanari, 254 F.3d 817, 824 (9th Cir. 2001) (holding alcoholics are "not . . . a suspect,
 16 or a quasi-suspect class for purposes of equal protection analysis").

17 In any event, Wagda has failed to show the requisite discriminatory motive.
 18 Nothing in the FAC supports Wagda's allegation that Jimenez, or any other defendant,
 19 targeted him for enforcement of drug laws because he was perceived as a drug addict,
 20 rather than for his Prop 47 activities. (See, e.g., FAC ¶¶ 37–38.) Indeed, Wagda is not
 21 even the type of drug user he alleges defendants are targeting, i.e., people who need to
 22 commit property crimes to support their addiction. (See id. ¶ 33 (alleging Jimenez's
 23 knowledge of Wagda's profession); ¶ 41 (quoting comments by Jimenez about going
 24 after "junkies on the street," as opposed to "good people" or "high end" people, because

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 26 ¹³ Wagda's reliance on Robinson v. California, 370 U.S. 660 (1962), is not
 27 persuasive, as Robinson addressed a provision criminalizing the status of addiction to
 28 narcotics. See id. at 660, 666–67 (holding provision making it illegal to "be addicted to
 the use of narcotics" unconstitutional as "a cruel and unusual punishment in violation of
 the Fourteenth Amendment").

1 "[i]t's the junkies on the street that are causing most of the problems") (emphasis
2 omitted).)

3 **f. Events occurring at MDF (FAC ¶ 129(f)–(l))**

4 Wagda's allegations as to events occurring at MDF are similar to those set forth in
5 his First Claim. (See FAC ¶ 129(f)–(l); see also ¶ 125(e)–(k).) As discussed above, the
6 FAC fails to state a claim against Jimenez and Neabeack with respect to such events,
7 because it does not allege any facts showing their participation or involvement therein.
8 See Blankenhorn, 485 F.3d at 481 n.12.

9 **g. Conclusion**

10 With respect to Wagda's Second Claim, for the reasons stated above, subparts
11 (a)–(e) are DISMISSED in their entirety, subparts (f)–(l) are DISMISSED with respect to
12 defendants Jimenez and Neabeack, and, with the exception of subpart (b), Wagda is
13 granted leave to amend.¹⁴ As to subpart (b), leave to amend is denied for the reason
14 that, as a matter of law, berating and shaming are not cognizable wrongs under § 1983
15 and, thus, amendment of said subpart would be futile. See Janicki Logging Co., 42 F.3d
16 at 566.

17 **3. Third Claim: "Violation of Fourth Amendment Rights—October
18 Arrest—42 U.S.C. § 1983"**

19 In his Third Claim, Wagda alleges Jimenez and Neabeack violated his Fourth
20 Amendment rights by depriving him of his "right to be free of unreasonable searches and
21 seizures, unlawful imprisonment and unreasonable force." (FAC ¶ 134.) Based on said
22 allegation, Wagda brings four separate subclaims.

23 **a. Booking Wagda into MDF (FAC ¶ 134(a))**

24 In support of his Fourth Amendment claim, Wagda again relies on his retaliatory-
25 booking allegations against Jimenez and Neabeack. (See id. ¶¶ 38, 134(a).) As noted

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27 ¹⁴ Although County defendants oppose leave to amend with respect to Wagda's
28 interrogation (subpart (a)), the Court finds leave to amend appropriate. As noted above,
Wagda has amended his complaint only once, and it is not clear such claim could not be
"saved by any amendment." See Corinthian Colleges, 655 F.3d at 995.

1 above, County defendants, for purposes of the instant motion, have conceded said
2 allegations state a claim under the First Amendment. As County defendants have not
3 addressed the sufficiency of said allegations to support a claim under the Fourth
4 Amendment, the Court does not further address such additional claim herein.

5 **b. Events occurring at MDF (FAC ¶ 134(b)–(d))**

6 In support of his Fourth Amendment claim, Wagda relies on allegations as to
7 essentially the same events at MDF (see id. ¶ 134(b)–(d)) as those alleged in support of
8 his First Claim (see id. ¶ 125(g)–(h)) and Second Claim (see id. ¶ 129 (h)–(i), (l)). As
9 discussed above, the FAC fails to state any claim against Jimenez and Neabeack based
10 on such events, in that there is no allegation supporting their participation or involvement
11 therein. See Blankenhorn, 485 F.3d at 481 n.12.

12 **c. Conclusion**

13 With respect to Wagda's Third Claim, for the reasons stated above, defendants
14 Jimenez and Neabeack are DISMISSED as to subparts (b)–(d), and Wagda is granted
15 leave to amend said subparts.

16 **B. § 1983 Claims Arising Out of Wagda's December Arrest**

17 As noted, Wagda's Fourth through Eighth Claims arise out of the December arrest.
18 County defendants contend all such claims should be dismissed, with the exception of
19 the Fifth Claim, which "should be limited." (See County MTD at 11.)

20 The Court first addresses County defendants' challenges to the inclusion of certain
21 defendants in the above-referenced claims.

22 **1. Defendants Jimenez, Neabeack, and Stapleton**

23 At the outset, County defendants contend Wagda has failed to allege any facts
24 showing Jimenez and Neabeack "participat[ed] . . . in any constitutional violations relating
25 to the December . . . arrest" and thus should be dismissed from the "December arrest
26 Section 1983 claims" in their entirety. (See County MTD at 11.) Similarly, County
27 defendants contend Stapleton should be dismissed from the Fourth, Sixth, Seventh, and
28 Eighth Claims.

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a. Jimenez

As to the Fourth through Eighth Claims, with the exception of the subparts based on alleged retaliatory disclosure (see FAC ¶¶ 139(b), 143(f)), the FAC alleges only that Jimenez was the "immediate supervisor in connection with all events occurring in the geographical area of Town" (see id. ¶ 11) and that, "[i]n the course of [Wagda's] detention and arrest," Rossberg "communicated with" him by radio (see id. ¶ 87). Such general allegations are insufficient to plead Jimenez's participation or involvement in any alleged wrongdoing. See Blankenhorn, 485 F.3d at 481 n.12; Hansen, 885 F.3d at 646 (holding supervisor may be held liable under § 1983 based on personal involvement in constitutional deprivation or "a sufficient causal connection" between supervisor's wrongful conduct and constitutional deprivation; further holding "vague allegation" that police chief was involved in "conspiracy to deprive [plaintiff] of her rights" was inadequate for supervisory liability).

b. Neabeack

With the exception of a single subpart based on Neabeack's alleged failure to communicate Wagda's October assertion of his right to counsel (see FAC ¶ 148(d); see also id. ¶ 27), the FAC alleges only that Rossberg "communicated with" Neabeack by radio and that said defendant was "present at the scene of the arrest at or about the time thereof." (See id. ¶ 87.) Such general allegations do not suffice to plead Neabeack's participation or involvement in any alleged wrongdoing other than the above-referenced failure to communicate. See Blankenhorn, 485 F.3d at 481 n.12.

c. Stapleton

With the exception of the subpart based on Stapleton's involvement in taking Wagda's pulse (see FAC ¶ 143(c)), the FAC's allegations as to Stapleton, namely, that Rossberg "communicated with" him by radio and that he was present at the scene of the arrest (see id. ¶ 87) are, as discussed above, too general to plead Stapleton's "integral participation" in any alleged violation. See Blankenhorn, 485 F.3d at 481 n.12 (internal quotation and citation omitted).

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d. Conclusion

Accordingly, with the limited exceptions identified above, the Fourth through Eighth Claims are DISMISSED as to defendants Jimenez, Neabeack, and Stapleton, and Wagda is granted leave to amend those claims with respect to said defendants.

2. Fourth Claim: "Violation of First Amendment Rights—December Arrest—42 U.S.C. § 1983"

In his Fourth Claim, Wagda alleges Jimenez, Rossberg, and Neabeack violated his First Amendment rights by depriving him of all of the rights set forth in his First Claim. (See FAC ¶ 139.) Based on said allegation, Wagda brings six separate subclaims.

a. Booking Wagda into MDF (FAC ¶ 139(a))

Wagda alleges Rossberg and a Doe defendant "book[ed] [him] into MDF instead of citing and releasing him," in retaliation for exercising his Fourth Amendment right to a warrant for the blood draw and his Fifth Amendment right to remain silent. (See id. ¶ 139(a); see also id. ¶¶ 90–92, 94–95.) County defendants contend Wagda "has pled himself out of this claim" by alleging Rossberg's "standard practice" was to send anyone with a second DUI to MDF. (See County Reply at 7–8 (quoting FAC ¶ 94).)¹⁵

The FAC alleges: (1) Rossberg gave Wagda the "choice" of being cited and released at the police station if he "cooperate[d] with police questioning and consent[ed] to a blood draw," or being booked into MDF if he "continue[d] to assert" his Fourth and Fifth Amendment rights (see FAC ¶ 90); (2) Wagda rejected Rossberg's offer (see id. ¶ 92); and (3) Rossberg then booked him into MDF (see id. ¶¶ 92, 94). Such allegations are sufficient to plead a First Amendment retaliation claim (see supra part A.1.d; see also Arizona Students' Ass'n, 824 F.3d at 867 (setting forth elements of First Amendment retaliation claim), and given the above-alleged conversation, Wagda's reference to Rossberg's "standard practice" does not suffice to defeat it.

¹⁵ Initially, County defendants argued Rossberg was obligated by statute to book Wagda into custody. In their reply, County defendants concede state law gave Rossberg "discretion" as to whether to book or cite persons arrested for DUI. (See County Reply at 8.)

1 **b. Disclosing October and December arrests to State Bar (FAC**
2 **¶ 139(b))**

3 Wagda alleges defendants Rossberg and Jimenez, each with different retaliatory
4 motives, disclosed information in December regarding both his October and December
5 arrests to the State Bar. (See FAC ¶¶ 107, 139(b).)

6 For the reasons stated above in part A.1.d., regarding the first disclosure to the
7 State Bar, the Court finds Wagda has also failed to state a claim for retaliatory disclosure
8 with respect to the above-referenced December disclosure. In particular, the FAC lacks
9 any allegations as to the anticipated consequences of such a report or how such a report
10 would have a chilling effect on future conduct.

11 **c. Omitting information from affidavit (FAC ¶ 139(c))**

12 Wagda alleges Rossberg's search-warrant affidavit "omitt[ed] . . . information that
13 was required to make the affidavit not misleading," in retaliation for his assertion of his
14 Fifth Amendment rights. (See id. ¶ 139(c); see also id. 30:24–25.) Although the
15 omissions on which this subclaim is based are not clearly identified, the Court assumes
16 Wagda is relying on his earlier allegations as to "jack[ing] up [his] pulse rate" at the
17 December arrest (see id. ¶ 100) and his lower pulse rates at the time of the October
18 arrest (see id. ¶ 102). County defendants contend, inter alia, Wagda has not alleged
19 facts showing the contents of the affidavit had any effect on his future conduct.

20 As noted above, one of the elements of a First Amendment retaliation claim is that
21 the plaintiff show the defendant's conduct would "chill a person of ordinary firmness from
22 continuing to engage in the protected activity." Arizona Students' Ass'n, 824 F.3d at 867
23 (internal quotation and citation omitted); see also Ford v. City of Yakima, 706 F.3d 1188,
24 1193 (9th Cir. 2013) (per curiam) (requiring plaintiff to show police conduct "would chill a
25 person of ordinary firmness from future First Amendment activity"). Thus, while Wagda is
26 correct that a First Amendment retaliation claim does not require him to show he
27 personally was deterred from engaging in protected activity, the complaint nonetheless
28 must allege facts sufficient to meet the above-cited objective standard. See O'Brien, 818
F.3d at 933. Here, the FAC fails to meet such standard, as it lacks any facts to support a

1 finding that a person of ordinary firmness would be chilled by the alleged omissions. The
2 FAC does not contain, for example, any allegations indicating when, or even if, a suspect
3 would learn of such omissions, nor any allegations as to the sufficiency of the affidavit to
4 support issuance of the search warrant had such information not been omitted. See
5 generally FAC ¶¶ 96–106.)¹⁶

6 **d. Including statements declining consent in affidavit and police**
7 **reports (FAC ¶ 139(d))**

8 Wagda alleges Rossberg retaliated against him for exercising his Fourth
9 Amendment rights by "[i]ncluding extensive discussion," in his affidavit and police reports,
10 of Wagda's refusals to consent to a blood draw and field sobriety tests. (See FAC
11 ¶ 139(d); see also id. ¶ 106.)

12 Such claim fails because Wagda's allegations do not plead conduct rising to the
13 level of a constitutional violation. See, e.g., Nunez, 147 F.3d at 875 (rejecting First
14 Amendment retaliation claim; finding plaintiff did not suffer cognizable "adverse" action
15 where claim based on "bad-mouth[ing]").

16 **e. Initiating DMV Priority Re-Examination (FAC ¶ 139(e))**

17 Wagda alleges Rossberg retaliated against him by "[i]nitiating a DMV Priority Re-
18 Examination." (See FAC ¶ 139(e); see also id. ¶¶ 108, 110–12.) County defendants
19 argue such claim fails because state law permits officers to initiate such examinations.
20 As Wagda points out, however, for purposes of stating a First Amendment retaliation
21 claim, he is not required to show police conduct is otherwise unlawful. See O'Brien, 818
22 F.3d at 932 (holding "[o]therwise lawful government action may nonetheless be unlawful
23 if motivated by retaliation for having engaged in activity protected under the First
24 Amendment").

25 Wagda's claim nonetheless fails, because his allegations are insufficient to show

26 ¹⁶ As noted, Wagda, earlier in the FAC, alleges the affidavit contained both
27 "misrepresentations and omissions." (See FAC ¶ 96.) Wagda does not refer, in this
28 subpart, to any alleged misrepresentations. Nonetheless, the Court notes its analysis
appears equally applicable to a challenge based on misrepresentations.

1 initiation of such an examination is likely to have the requisite chilling effect. In particular,
2 the FAC does not explain the significance of such an examination, e.g., what the
3 examination entails and what consequences it might carry for an individual's driving
4 privileges.

5 **f. Targeting surveillance of Wagda (FAC ¶ 139(f))**

6 Wagda alleges defendants "[t]arget[ed]" him with "electronic and automotive
7 surveillance . . . using automatic license plate reader technology." (FAC ¶ 139(f); see
8 also id. ¶ 122.) Said claim fails as against any named defendant because the FAC
9 contains no allegations indicating any such defendant's participation or involvement
10 therein. (See id. ¶ 122); Blankenhorn, 485 F.3d at 481 n.12.

11 **g. Conclusion**

12 With respect to Wagda's Fourth Claim, for the reasons stated above, subparts (b)–
13 (e) are DISMISSED in their entirety, subpart (f) is DISMISSED as to defendants Jimenez,
14 Rossberg, and Neabeack, and Wagda is granted leave to amend such subparts.¹⁷

15 **3. Fifth Claim: "Violation of Fourth Amendment Rights—December**
16 **Arrest—42 U.S.C. § 1983"**

17 In his Fifth Claim, Wagda alleges Jimenez, Rossberg, Neabeack, and Stapleton
18 violated his Fourth Amendment rights by depriving him of all of the rights set forth in his
19 Third Claim. (See FAC ¶ 143.) Based on said allegation, Wagda brings ten separate
20 subclaims.

21 **a. Initiating traffic stop (FAC ¶ 143(a))**

22 Wagda alleges Rossberg violated his Fourth Amendment rights by "[i]nitiating a
23 traffic stop . . . without probable cause and in violation of the Speed Trap Statute." (Id.
24 ¶ 142(a).) In particular, Wagda alleges the section of roadway on which he was stopped

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27 ¹⁷ County defendants oppose leave to amend with respect to the December
28 disclosure of Wagda's arrests (subpart (b)). The Court again finds leave to amend
appropriate; Wagda has amended his complaint only once, and it is not clear said claim
could not be saved by amendment. See Corinthian Colleges, 655 F.3d at 995.

1 qualified as a "speed trap" under state law,¹⁸ based on a speed survey establishing a
 2 higher speed than the posted speed limit, and thus that Rossberg was "prohibited from
 3 prosecuting" him "on that portion of road for any violation involving the speed of a
 4 vehicle." (See id. ¶ 66.) County defendants contend a violation of the speed trap law
 5 does not negate probable cause.

6 Under the Fourth Amendment, "[a] traffic stop for a suspected violation of the law
 7 is a seizure" for which "officers need only reasonable suspicion—that is, a particularized
 8 and objective basis for suspecting the particular person stopped of breaking the law."
 9 Heien v. North Carolina, 135 S.Ct. 530, 536 (2014) (internal quotation and citation
 10 omitted).

11 Here, regardless of whether Rossberg's stop violated state speed-trap laws,¹⁹
 12 Wagda's claim fails because he does not allege Rossberg lacked reasonable suspicion to
 13 stop him for speeding. See, e.g., People v. Hardacre, 116 Cal. App. 4th 1292, 1300–01
 14 (2004) (holding reasonable suspicion supported stop where facts and circumstances
 15 known to officer at time indicated defendant was exceeding posted speed limit,
 16 notwithstanding later finding portion of road in question constituted speed trap). Notably,
 17 the FAC alleges the posted speed limit was 30 mph (see FAC ¶ 66) and that Rossberg
 18 "suggested to [] Wagda that he had been speeding" (id. ¶ 68). The FAC does not allege
 19 the speed at which Wagda was driving or that such speed was under the posted limit.
 20 Rather, it merely challenges Rossberg's assertion that he "locked" Wagda's speed on
 21 radar. (See id. ¶ 97.)

22 **b. Prolonging traffic stop (FAC ¶ 143(b))**

23 Wagda alleges Rossberg violated his Fourth Amendment rights by "[p]rolonging"
 24

25 ¹⁸ Cal. Vehicle Code §§ 40801–40805.

26 ¹⁹ A violation of state law does not itself suffice to show Rossberg violated
 27 Wagda's federal constitutional rights. See, e.g., Baker v. McCollan, 443 U.S. 137, 146
 28 (1979) (holding "Section 1983 imposes liability for violations of rights protected by the
 Constitution, not for violations of duties of care arising out of tort law").

1 his traffic stop, without reasonable suspicion, for a period longer than needed to enforce
2 the speed limit laws. (See id. ¶ 143(b).) County defendants contend Wagda does not
3 allege facts indicating the stop was longer than needed to investigate whether Wagda
4 was driving under the influence.

5 Under the Fourth Amendment, "the tolerable duration of police inquiries in the
6 traffic-stop context is determined by the seizure's mission—to address the traffic violation
7 that warranted the stop . . . and attend to related safety concerns." Rodriguez v. United
8 States, 135 S.Ct. 1609, 1614 (2015) (internal quotation and citation omitted).
9 Nonetheless, an officer "may conduct certain unrelated checks" during a traffic stop, see
10 id. at 1615: (1) "so long as [unrelated] inquiries do not measurably extend the duration of
11 the stop," see id. (alteration in original) (internal quotation and citation omitted); or (2) if
12 there is "reasonable suspicion" to justify further detention, see id.

13 Here, Wagda's claim fails because the FAC does not allege facts sufficient to
14 support his assertion that Rossberg improperly prolonged the stop. (See FAC ¶ 69
15 (alleging Rossberg questioned Wagda about his prior arrest "even though the time
16 necessary to effectuate the purported purpose of the traffic stop . . . had expired")); see
17 Iqbal, 556 U.S. at 678 (holding "courts are not bound to accept as true a legal conclusion
18 couched as a factual allegation"). Wagda does not allege, for example, how long the
19 stop lasted, the sequence of events that took place during that time, or how Rossberg's
20 unrelated DUI inquiry "measurably extend[ed]," see Rodriguez, 135 S.Ct. at 1615, the
21 stop. Moreover, the FAC fails to allege facts showing Rossberg lacked reasonable
22 suspicion to further detain him, and thus prolong the stop, in order to investigate whether
23 he was driving under the influence. Cf. id. at 1616–17 (remanding for resolution of
24 "question whether reasonable suspicion of criminal activity justified detaining [defendant]
25 beyond completion of the traffic infraction investigation"). Wagda does not allege, for
26 example, that he had not taken any drugs, nor facts sufficient to support a finding that he
27 lacked any symptoms suggesting he was under the influence of a drug.

28 **c. Taking Wagda's pulse (FAC ¶ 143(c))**

1 Wagda alleges Rossberg and Stapleton violated his Fourth Amendment rights by
2 taking his pulse without his consent. (See FAC ¶ 142(c).) In particular, the FAC alleges
3 Rossberg took his pulse, at his wrist, while Stapleton and Rossberg were questioning him
4 about his prior arrest and that Stapleton acted "with the intent to drive up [his] heart rate."
5 (See id. ¶ 81.) County defendants contend taking Wagda's pulse was "'reasonable'
6 and[,] thus, legal under the Fourth Amendment." (See County MTD at 15.)

7 As an initial matter, the Court notes there is no dispute that taking Wagda's pulse
8 constituted a search and that Rossberg did not have a warrant for such search.²⁰ The
9 parties do, however, dispute whether reasonable suspicion or probable cause is the
10 applicable standard for assessing the legality of such search.

11 Under the Fourth Amendment, a search is prohibited only if it is "unreasonable."
12 See Birchfield v. North Dakota, 136 S.Ct. 2160, 2173 (2016). "Usually, Fourth
13 Amendment reasonableness means that a search . . . must be supported by probable
14 cause, though pat-downs and similar minor intrusions need only be supported by
15 reasonable suspicion." United States v. Scott, 450 F.3d 863, 868 (9th Cir. 2005). Here,
16 Wagda, citing a case involving a blood draw, contends pulse-taking constitutes "a kind of
17 'invasion of bodily integrity [that] implicates an individual's most personal and deep-rooted
18 expectations of privacy.'" (Pl.'s Opp'n to County MTD at 19 (alteration in original)
19 (quoting Missouri v. McNeely, 133 S.Ct. 1552 (2013)).) The Court, however, finds such
20 action, which involved no more than a brief physical contact with light pressure on the
21 wrist, is akin to the type of physical intrusions the Supreme Court has treated as minimal.
22 See, e.g., Birchfield, 136 S.Ct. at 2177–78, 2184 (distinguishing blood tests from

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²⁰ Contrary to Wagda's contention, Dubner v. City and County of San Francisco, 266 F.3d 959, 965 (9th Cir. 2001), does not stand for the proposition that a plaintiff can make out a prima facie case for a Fourth Amendment violation "simply by alleging that a search was conducted without a valid warrant." (Pl.'s Opp'n to County MTD at 19.) Dubner concerned the requisite evidentiary showing and burden-shifting applicable at trial to prove a Fourth Amendment violation, see id., not pleading standards applicable to a motion to dismiss. The Court also notes such analysis is equally applicable to Wagda's invocation of Dubner with respect to his unlawful arrest claim. See infra part B.3.d.

1 swabbing inside of check and scraping underneath fingernails; noting "significantly"
 2 greater intrusion entailed in former); Hayes v. Florida, 470 U.S. 811, 814 (1985)
 3 (characterizing fingerprinting as "a much less serious intrusion upon personal security
 4 than other types of searches"). Accordingly, the Court finds the standard applicable to
 5 the taking of Wagda's pulse is reasonable suspicion.

6 Reasonable suspicion for a search must be based on "specific and articulable
 7 facts which, taken together with rational inferences from those facts, reasonably warrant
 8 that intrusion." See Terry v. Ohio, 392 U.S. 1, 21 (1968). Here, as noted above, Wagda
 9 does not allege he was not under the influence of drugs at the time he was driving, nor
 10 that he lacked any symptoms suggesting such influence. (See, e.g., FAC ¶¶ 66–67, 69,
 11 71–73, 78–79).²¹ In the absence of facts sufficient to show Rossberg and Stapleton
 12 lacked reasonable suspicion to take his pulse, Wagda's allegations as to pulse-taking fail
 13 to support a Fourth Amendment claim.²² See Iqbal, 556 U.S. at 678.

14 **d. Arresting Wagda (FAC ¶ 143(d))**

15 The FAC alleges Rossberg violated his Fourth Amendment rights by arresting him
 16 "without a warrant, without probable cause and in violation of the [s]peed [t]rap [s]tatute."
 17 (FAC ¶ 142(d).) As noted, Rossberg arrested Wagda on a charge of driving under the
 18 influence of drugs, pursuant to Cal. Vehicle Code § 23152(e). (See id. ¶ 83.)

19 Under the Fourth Amendment, "a warrantless arrest . . . is reasonable . . . where
 20 there is probable cause to believe that a criminal offense has been or is being
 21 committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004). "The test for whether

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 23 ²¹ Contrary to Wagda's contention that the FAC suffices because it "contains no
 24 facts establishing the existence of probable cause (or even reasonable suspicion) prior to
 25 the pulse taking" (Pl.'s Opp'n to County MTD at 20), Wagda "bears the burden" of proving
 the absence thereof. See, e.g., Beck v. City of Upland, 527 F.3d 583, 864 (9th Cir.
 2008).

26 ²² In light of such ruling, the Court need not reach at this time County defendants'
 27 contention that exigent circumstances justified taking Wagda's pulse. The Court notes,
 28 however, and as Wagda points out, even if the effect of drugs dissipates over time, such
 circumstance, standing alone, does not suffice to establish exigent circumstances. See
McNeely, 133 S.Ct. at 1563.

1 probable cause exists is whether at the moment of arrest the facts and circumstances
2 within the knowledge of the arresting officers and of which they had reasonably
3 trustworthy information were sufficient to warrant a prudent [person] in believing that the
4 petitioner had committed or was committing an offense." Blankenhorn, 485 F.3d at 471
5 (alteration in original) (internal quotation and citation omitted).

6 Here again, Wagda's claim fails because, as discussed above, the FAC does not
7 allege facts sufficient to support his assertion that Rossberg arrested him without
8 probable cause. See Iqbal, 556 U.S. at 678. As noted above, Wagda does not allege he
9 was not under the influence of drugs at the time he was driving, nor that he lacked any
10 symptoms suggesting such influence. Rather, he raises a number of other allegations
11 that could bear on, but do not suffice to allege, the absence of probable cause. (See,
12 e.g., FAC ¶¶ 78–79 (alleging Rossberg did not find any contraband on his person or in
13 his car), ¶¶ 80–81, 99 (alleging Rossberg and Stapleton manipulated his pulse rate).)

14 **e. Booking Wagda into MDF (FAC ¶ 143(e))**

15 In support of his Fourth Amendment claim, Wagda again relies on his retaliatory-
16 booking allegations. (See id. ¶ 143(e); see also id. ¶¶ 90–92, 94–95.) As noted, County
17 defendants concede that similar allegations regarding Wagda's October arrest state a
18 claim under the First Amendment, and, as County defendants do not address the
19 sufficiency of such allegations to support a claim under the Fourth Amendment, the Court
20 does not further address such additional claim herein.

21 **f. Disclosing October and December arrests to State Bar (FAC**
22 **¶ 143(f))**

23 In support of his Fourth Amendment claim, Wagda again relies on his allegations
24 of retaliatory disclosure to the State Bar. (See id. ¶ 143(f).)

25 The Fourth Amendment forbids "unreasonable searches and seizures." See U.S.
26 Const. amend. IV; Terry, 392 U.S. at 8–9. As the FAC contains no allegations indicating
27 the above-referenced disclosure constitutes a search or a seizure, the Court finds a claim
28 based on such disclosure is not cognizable under the Fourth Amendment.

1 **g. Ordering blood draw (FAC ¶ 143(g))**

2 Wagda alleges Rossberg violated his Fourth Amendment rights by "[o]rdering" a
3 blood draw, "in bad faith reliance upon" a search warrant he procured based on his "false
4 and misleading affidavit." (See FAC ¶ 143(g).) As County defendants have offered no
5 argument directed to this basis of Wagda's Fourth Amendment claim, the Court does not
6 further address such subpart herein.

7 **h. Including statements declining consent in affidavit and police**
8 **reports (FAC ¶ 143(h))**

9 Wagda characterizes as a Fourth Amendment violation his claim that Rossberg
10 retaliated against him by including in Rossberg's affidavit and police reports "extensive
11 discussion" of his refusal to consent to testing. (See id. ¶ 143(h); see also id. ¶ 106.)
12 Wagda's Fourth Amendment claim fails to the extent it is based on such allegation as
13 Wagda has not shown Rossberg's inclusion of such information constitutes a cognizable
14 wrong.

15 **i. Restraining Wagda by forcing him to sit (FAC ¶ 143(i))**

16 Wagda alleges defendants "unreasonably restrain[ed] [him] at MDF by forcing him
17 to endure extremely long-term confinement in a seated position in a chair (i.e., for
18 substantially all of his time at MDF)." (FAC ¶ 143(i).)²³

19 At the outset, the Court finds the above-referenced conduct insufficient to support
20 a Fourth Amendment claim against any of the named defendants, as the FAC contains
21 no facts showing any such defendant's participation or involvement therein. See
22 Blankenhorn, 485 F.3d at 481 n.12. Moreover, as the only fact alleged in connection with
23 such restraint is lengthy seating, the FAC lacks sufficient detail to support a finding of a
24 constitutional violation. See Gibson v. County of Washoe, 290 F.3d 1175, 1197 (9th Cir.
25 2002), overruled on other grounds by Castro v. County of Los Angeles, ___ F.3d ___,
26 2016 WL 4268955 (9th Cir. 2016) (holding, with respect to claim of excessive force in

27 ²³ Earlier in the FAC, Wagda alleges he was "held in custody" at MDF and
28 released "approximately 16 hours after the initiation of the subject traffic stop." (See id.
¶ 92.)

1 connection with restraint, determination as to reasonableness "requires a careful
2 balancing of the nature and quality of the intrusion on the individual's Fourth Amendment
3 interests against the countervailing government interests at stake"; explaining analysis
4 requires "careful attention to the facts and circumstances in each particular case,"
5 assessed "from the viewpoint of the reasonable officer on the scene") (internal quotations
6 and citations omitted).

7 **j. Targeting surveillance of Wagda (FAC ¶ 143(j))**

8 In support of his Fourth Amendment claim, Wagda again relies on his allegations
9 of improper surveillance. (See FAC ¶ 143(j); see also id. ¶ 122.) As discussed above in
10 part B.2.f., such claim fails as against the named defendants, no facts as to any such
11 individual's participation or involvement in the challenged activity having been alleged.

12 **k. Conclusion**

13 With respect to Wagda's Fifth Claim, for the reasons stated above, subparts (a)–
14 (d), (f), and (h) are DISMISSED in their entirety, subparts (i)–(j) are DISMISSED as to
15 defendants Jimenez, Rossberg, Neabeack, and Stapleton, and Wagda is granted leave
16 to amend said subparts.²⁴

17 **4. Sixth Claim: "Violation of Fifth Amendment Rights—42 U.S.C. § 1983"**

18 Wagda's Sixth Claim is based on the police interrogation that he alleges occurred
19 in the course of the December stop, which interrogation, Wagda alleges, violated his Fifth
20 Amendment right not to be compelled to be a witness against himself. (See FAC ¶ 148.)

21 The Fifth Amendment provides a "right against self-incrimination," see Arizona v.
22 Roberson, 486 U.S. 675, 685 (1988), that bars "mak[ing] the declarant a witness against
23 himself in a criminal proceeding," see Stoot, 582 F.3d at 925. "[M]ere coercion,"
24 however, does not create a cause of action under § 1983 for a violation of the Self-
25 Incrimination Clause, absent use of the compelled statement in a criminal case." Crowe

26
27 ²⁴ Although County defendants also oppose leave to amend to the extent the
28 Fourth Amendment claim is based on either the pulse-taking (subpart (c)) or arrest
(subpart (d)), the Court, for the reasons stated earlier, finds leave to amend appropriate.

1 v. County of San Diego, 608 F.3d 406, 427 (9th Cir. 2010).

2 Here, Wagda alleges, as against Jimenez, Rossberg, Neabeack, and Stapleton,
3 three separate subclaims based on the above-referenced interrogation.

4 **a. Interrogating Wagda about October arrest (FAC ¶ 148(a)–(b))²⁵**

5 Wagda alleges Rossberg "compell[ed] him to be a witness against himself in the
6 [October] case" by interrogating him in December about the October arrest, despite: (1)
7 his prior invocations, in October, of his right to remain silent and his right to counsel; and
8 (2) his contemporaneous invocations, in December, of his right to remain silent and his
9 statement that he had an open case regarding the October arrest. (See FAC ¶ 148(a)–
10 (b); see also id. ¶¶ 24, 26–28 (October arrest), id. ¶¶ 69–76 (December arrest).)

11 The above-referenced claim fails, however, because the FAC does not include any
12 facts alleging the use of Wagda's December statements in the October case. See
13 Crowe, 608 F.3d at 427. Indeed, the only statements Wagda alleges he made to
14 Rossberg were that he had a prior arrest for DUI (see id. ¶ 69), which was allegedly for
15 drugs (see id. ¶ 72), and that he was being prosecuted in connection with such arrest
16 (see id. ¶¶ 71, 73), all of which information was on Rossberg's computer (see id. ¶ 72;
17 see also Pl.'s Opp'n to County MTD at 9 (asserting December interrogation "did not result
18 in any statements that were incriminating with respect to [the October] case")).

19 **b. Using statements in December proceedings (FAC ¶ 148(c))**

20 Wagda alleges defendants violated his Fifth Amendment rights by using
21 statements from the December interrogation against him in his December case, namely,
22 in the affidavit for the search warrant and in a police report the D.A.'s Office "relied upon"
23 in deciding to file charges. (See FAC ¶ 148(c); see also id. ¶¶ 74–75.) In that regard, he
24 alleges Rossberg included in such documents his "statements regarding the October
25 [a]rrest (and the fact of his refusals to answer other questions regarding that arrest)." (Id.

26
27 ²⁵ In light of Wadga's explanation that the claim set forth in subpart (b) is an
28 elaboration of the claim in subpart (a) (see Pls.' Opp'n to County MTD at 7 n.4), the Court
treats subparts (a) and (b) together as a single claim.

1 ¶ 74; see also id. ¶ 75.)

2 As with the above-referenced two subparts, such claim fails because there are no
3 facts alleged to support a finding that any of those statements were used against him. In
4 particular, none of the statements about the October arrest provided any information
5 other than that already a matter of record, see Stoot, 582 F.3d at 925 n.15 (holding "the
6 Fifth Amendment has been violated only when government officials use an incriminating
7 statement to initiate or prove a criminal charge"), and there are no facts showing his
8 refusal to answer questions played any role in the decision to prosecute him or thereafter
9 to prove any charge against him. There are no facts, for example, showing the judge
10 who reviewed the affidavit for the search warrant would not have approved the issuance
11 of such warrant in the absence of any statement or refusal by Wagda, nor facts showing
12 the D.A.'s Office, in "rely[ing] upon" the police report, considered any such statement or
13 refusal significant when making its decision to file charges.

14 **c. Failing to record and communicate October assertions of Fifth**
15 **Amendment rights (FAC ¶ 148(d))**

16 Wagda alleges defendants violated his Fifth Amendment rights by "[c]ontributing to
17 the foregoing by failing to adequately record and communicate" his October assertions of
18 his Fifth Amendment rights. (See FAC ¶ 148(d).)²⁶ Such claim necessarily fails because
19 it is derivative of the preceding three subparts, which, as discussed above, fail to state a
20 claim.

21 **d. Conclusion**

22 For the reasons stated above, Wagda's Sixth Claim is DISMISSED in its entirety,
23 and Wagda is granted leave to amend said claim.

24
25
26 ²⁶ In connection with this subpart, Wagda, in his opposition, makes reference to
27 both Jimenez and Neabeack, the two officers who made the October arrest (see Pl.'s
28 Opp'n to County MTD at 9); in the FAC, however, Wagda alleges that, during the October
arrest, Neabeack "failed to communicate" his verbal assertion of his right to counsel,
which assertion Wagda alleges he made while Jimenez was not present (see FAC ¶ 27).

1 **5. Seventh Claim: "Violation of Sixth Amendment Rights—42 U.S.C. § 1983"**

2 In his Seventh Claim, Wagda alleges Jimenez, Rossberg, Neabeack, and
3 Stapleton violated his Sixth Amendment right to assistance of counsel in his October
4 case by the manner in which he was interrogated during the December stop. (See id.
5 ¶ 152; Pl.'s Opp'n to County MTD at 6.) In particular, Wagda alleges he was "repeatedly
6 interrogat[ed] . . . about the October [a]rrest . . . , in the absence of already-appointed
7 counsel, despite [his] then-present verbal admonition that he had 'an open court case'
8 regarding the October [a]rrest." (See FAC ¶ 152.) County defendants contend Wagda's
9 Sixth Amendment claim fails because, inter alia, the FAC shows Wagda did not disclose
10 any information that might have been used to his detriment in the October case.

11 "Once a defendant's Sixth Amendment right to counsel has attached, the
12 government is forbidden from 'deliberately eliciting' incriminating statements from the
13 defendant." Randolph v. People of the State of Cal., 380 F.3d 1133, 1143 (9th Cir. 2004)
14 (quoting Massiah v. United States, 377 U.S. 201, 206 (1964)). Such right to counsel
15 "covers pretrial interrogations to ensure that police manipulation does not render counsel
16 entirely impotent" and includes "the deliberate elicitation by law enforcement officers . . .
17 of statements pertaining to the charge." Kansas v. Ventris, 566 U.S. 586, 590–91 (2009).

18 Here, although the FAC alleges Rossberg questioned Wagda about the October
19 arrest, after charges based thereon had been filed and counsel appointed (see FAC
20 ¶¶ 70–73), the FAC includes no facts showing Rossberg elicited any information other
21 than matters of existing record that were known to Rossberg from his computer. (See id.
22 ¶¶ 71–73.) Under such circumstances, Wagda has not established a violation of his
23 Sixth Amendment right to counsel. See Randolph, 380 F.3d at 1143; cf. United States v.
24 Bagley, 641 F.2d 1235, 1239 (9th Cir. 1981) (rejecting Sixth Amendment Massiah claim
25 where government learned "nothing more . . . than appellant's description of the charges
26 that brought him into custody").

27 Accordingly, Wagda's Seventh Claim is DISMISSED in its entirety, and Wagda is
28 granted leave to amend such claim.

1 **6. Eighth Claim: Violation of Fourteenth Amendment Rights—December**
2 **Arrest—42 U.S.C. § 1983"**

3 In his Eighth Claim, Wagda alleges Jimenez, Rossberg, Neabeack, and Stapleton
4 violated his Fourteenth Amendment rights by depriving him of all of the rights set forth in
5 his Second Claim. (FAC ¶ 156.) Based on said allegation, Wagda brings six separate
6 subclaims.

7 County defendants contend the basis of Wagda's Eighth Claim is "unclear" and
8 that Wagda "may not assert a Fourteenth Amendment violation where another, more
9 specific constitutional amendment applies." (See County MTD at 13.)

10 **a. Committing unspecified acts and omissions (FAC ¶ 156(a))**

11 In subpart (a), Wagda purports to "incorporate[] by reference" the "acts and
12 omissions enumerated in Paragraphs 138 through 154." (FAC ¶ 156(a).) The Court
13 finds such claim overly broad and ambiguous. Paragraphs 138–54 of the FAC
14 encompass Wagda's Fourth, Fifth, Sixth, and Seventh Claims, which assert, respectively,
15 numerous violations of his First, Fourth, Fifth, and Sixth Amendment rights. Given the
16 breadth of such allegations, the Court cannot determine what conduct Wagda seeks to
17 challenge under the Fourteenth Amendment, nor the particular basis for any such
18 challenge(s). Accordingly, to the extent Wagda's Fourteenth Amendment claim is based
19 thereon, such claim fails.

20 **b. Manipulating, misrepresenting, or fabricating evidence (FAC**
21 **¶ 156(b))**

22 Wagda next alleges defendants "[m]anipulat[ed], misrepresent[ed] and/or
23 fabricat[ed] evidence that was used to support [his] criminal and administrative
24 prosecutions." (See FAC ¶ 156(b).)

25 Such subclaim likewise fails as ambiguous. First, as to "criminal . . .
26 prosecutions," the Court cannot determine the stage of the December arrest proceedings
27 to which Wagda is referring, nor the particular conduct on which he seeks to rely. It is
28 unclear, for example, whether Wagda means to base such subclaim on events occurring
 after charges were brought against him by the D.A.'s Office, and/or on events occurring

1 prior to the institution of court proceedings.

2 Similarly, with respect to "administrative prosecutions," the Court cannot determine
3 the particular proceeding(s) to which Wagda is referring, nor the particular conduct he is
4 challenging in connection therewith. Further, to the extent Wagda seeks to base such
5 claim on his allegation that, in a "DMV APS hearing," Rossberg "conjured a boilerplate
6 description of a nervous suspect and . . . falsely applied that hypothetical description to
7 [him]" (FAC ¶ 105), the Court finds such conclusory allegation insufficient to state a claim.
8 See Iqbal, 556 U.S. at 678.

9 **c. Making false/misleading statements in affidavit (FAC ¶ 156(c))**

10 Wagda alleges defendants "made false and misleading statements under oath" in
11 the "affidavit set forth in support of a search warrant used in [his] prosecution." (FAC
12 ¶ 156(c).) As noted above, Wagda alleges Rossberg obtained a search warrant for his
13 blood and that the supporting affidavit Rossberg submitted to a state court judge
14 contained "material misrepresentations and omissions." (See id. ¶96.)

15 Government investigators can be held "liable for violating the Fourth Amendment
16 when they submit false and material information in a warrant affidavit." See Galbraith v.
17 County of Santa Clara, 307 F.3d 1119, 1126 (9th Cir. 2002); see also Chism v.
18 Washington State, 661 F.3d 380, 386 (9th Cir. 2011) (setting forth elements of "judicial
19 deception claim" under Fourth Amendment). "[I]f a constitutional claim is covered by a
20 specific constitutional provision, such as the Fourth . . . Amendment, the claim must be
21 analyzed under the standard appropriate to that specific provision, not under the rubric of
22 substantive due process." Lewis, 523 U.S. at 843 (internal quotation and citation
23 omitted); see, e.g., Graham v. Connor, 490 U.S. 386, 395 (1989) (holding claim of
24 unreasonable seizure arises under Fourth Amendment, not substantive due process).

25 Accordingly, to the extent Wagda alleges Rossberg's misrepresentations in the
26 search warrant affidavit violated his right to substantive due process, such claim fails.

27 **d. Making false/misleading statements in police reports (FAC**
28 **¶ 156(d))**

1 Wagda's allegation that defendants made "false and misleading statements in
2 police reports" that the D.A.'s Office "relied upon . . . in its decision to file charges" (FAC
3 ¶ 156(d)) likewise falls within the ambit of the Fourth Amendment and, accordingly, fails
4 to state a Fourteenth Amendment claim for violation of substantive due process. See,
5 e.g., Galbraith, 307 F.3d at 1126–27 (holding "Fourth Amendment principles, and not
6 those of due process, govern," where plaintiff alleged intentional falsification of autopsy
7 report played material role in false arrest and prosecution). Moreover, even if such claim
8 could be brought under the Fourteenth Amendment, it is unclear from the FAC what
9 statements provide the basis for any such claim. Cf. Devereaux v. Abbey, 263 F.3d
10 1070, 1074–75 (9th Cir. 2001) (en banc) (acknowledging, in context of § 1983 action
11 against county social workers alleged to have knowingly obtained false evidence of child
12 abuse, "due process right not to be subjected to criminal charges on the basis of false
13 evidence that was deliberately fabricated by the government"; noting, without reference
14 to Fourth Amendment, all claims against law enforcement officers had been resolved by
15 settlement).

16 **e. Deactivating recording devices (FAC ¶ 156(e))**

17 Wagda alleges defendants "[d]eactivat[ed] recording devices to cover up [their]
18 wrongdoing." (FAC ¶ 156(e).) In particular, he alleges, Rossberg deactivated an audio
19 recorder after his arrest (see id. ¶¶ 86, 94), which created a "gap" in the recordings of
20 "certain events" at the scene of the arrest and at the police station (see id. ¶ 89), and that
21 Rossberg "falsely claimed" such gap was caused by equipment failure (see id.; see also
22 id. ¶ 100); Wagda alleges the unrecorded events included his consent to breath testing
23 (see id. ¶ 89), Rossberg's original citation-and-release offer (see id. ¶¶ 90, 94), the
24 second pulse-taking (see id. ¶ 100), and "provocative comments [by Rossberg] . . .
25 suggesting that [] Wagda's pulse readings were being manipulated" (see id.).

26 Wagda, however, has not cited any authority to support his claim that, standing
27 alone, deactivating a recording device, which essentially amounts to a failure to collect
28 unfavorable evidence, is cognizable as a constitutional violation.

1 **f. Making false/misleading statements in DMV proceedings (FAC**
2 **¶ 156(f))**

3 Wagda alleges Rossberg made "false and misleading verbal statements, including
4 under oath, in a DMV administrative proceeding." (FAC ¶ 156(f).) For the same reasons
5 set forth in part B.6.b, the Court finds such allegations too ambiguous to support a
6 constitutional claim.

7 **g. Conclusion**

8 For the reasons stated above, Wagda's Eighth Claim is DISMISSED in its entirety,
9 and Wagda is granted leave to amend said claim.

10 **C. Tenth Claim: "Violation of Civil Rights—42 U.S.C. § 1983—Monell"**

11 In his Tenth Claim, Wagda alleges Town, County, Livingston, and Simpkins are
12 liable for violations of his civil rights by reason of eight alleged policies, customs, and/or
13 practices. (See FAC 51:24–25, ¶ 164.)

14 A local government may be sued under § 1983 where an allegedly unconstitutional
15 action "implements or executes" a government policy or custom. See Monell v.
16 Department of Social Services of the City of New York, 436 U.S. 658, 690–91 (1978).
17 Liability cannot be based, however, on a respondeat superior theory. See id. at 691.
18 Thus, to establish Monell liability, a plaintiff must show: "(1) that [he] possessed a
19 constitutional right of which [he] was deprived; (2) that the municipality had a policy; (3)
20 that this policy amounts to deliberate indifference to the plaintiff's constitutional right;
21 and[] (4) that the policy is the moving force behind the constitutional violation." See
22 Dougherty v. City of Covina, 654 F.3d 892, 900 (9th Cir. 2011). "Absent a formal
23 governmental policy, [a plaintiff] must show a longstanding practice or custom which
24 constitutes the standard operating procedure of the local government entity." Trevino v.
25 Gates, 99 F.3d 911, 918 (9th Cir. 1996) (internal quotation and citation omitted).

26 County defendants contend Wagda has failed to include in the FAC sufficient
27 factual allegations to support a Monell claim against any of the above-referenced
28 defendants.

1 **1. Defendants Livingston and Simpkins**

2 To the extent Wagda is suing Livingston and Simpkins solely in their official
3 capacities (see FAC 1:18–19, ¶¶ 9–10), such claim fails because Wagda has also named
4 Town and County as defendants, and, consequently, both said officials are redundant
5 defendants. See Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept.,
6 533 F.3d 780, 799 (9th Cir. 2008) ("When both a municipal officer and a local government
7 entity are named, and the officer is named only in an official capacity, the court may
8 dismiss the officer as a redundant defendant.").

9 To the extent Wagda is suing Livingston and Simpkins in their individual capacity,
10 such claim fails because the FAC does not allege any specific misconduct by either said
11 defendant in connection with the instant case. Rather, it merely alleges that Livingston
12 and Simpkins are, respectively, the County sheriff and Town police chief (see FAC ¶¶ 9–
13 10); that they are final policymakers "charged with the actions," respectively, of County's
14 and Town's law enforcement officers (see id.); and that each Doe defendant acted with
15 the "actual or implied permission, consent, authorization, and approval" of Livingston
16 and/or Simpkins (see id. ¶ 15). Such general and conclusory allegations do not suffice to
17 state a claim. See Iqbal, 556 U.S. at 678; see also Hansen, 885 F.2d at 646.²⁷

18 The Court next turns to the sufficiency of the Monell claims as alleged against
19 Town and County.

20 **2. Not giving effect to assertions of Fifth and Sixth Amendment rights**
21 **(FAC ¶ 164(a))**

22 Wagda alleges defendants have a "custom or practice of law enforcement officers
23 . . . deliberately and systematically interrupting, ignoring and/or otherwise failing to give

24 ²⁷ Wagda's only response to County defendants' argument as to the lack of facts
25 regarding either Livingston or Simpkins is that he has "incorporated by reference" the
26 allegations of retaliation made against Livingston by another plaintiff in another case,
27 Howard v. County of Contra Costa, 13-cv-03626 (N.D. Cal. 2013). (See Pl.'s Opp'n to
28 County MTD at 6; FAC ¶¶ 22(b), 164(e).) As set forth below, see infra note 29, such
attempted incorporation is improper and, in any event, Wagda fails to explain how
Livingston's alleged retaliation against the alleged whistleblower in Howard is relevant
here.

1 constitutionally proper effect to detainees' assertions" of the right to remain silent under
 2 the Fifth Amendment and right to counsel under the Fifth and Sixth Amendments,
 3 "including through a failure to procure and implement computer database and information
 4 technology systems necessary to properly record and distribute information regarding the
 5 same." (FAC ¶ 164(a).) For the reasons discussed below, the FAC fails to satisfy either
 6 the first or second elements of a Monell claim.²⁸

7 First, as the Court has found the FAC does not adequately allege a violation of
 8 Wagda's Fifth or Sixth Amendment rights (see supra parts B.4., B.5.), a Monell claim
 9 based on either such violation necessarily fails. See Villegas v. Gilroy Garlic Festival
 10 Ass'n, 541 F.3d 950, 957 (9th Cir. 2008) (holding "[b]ecause there is no constitutional
 11 violation, there can be no municipal liability").

12 Second, Wagda has failed to allege facts sufficient to support the above-quoted
 13 conclusory allegation that either Town or County has a custom or practice of not giving
 14 effect to detainees' assertions of Fifth or Sixth Amendment rights. The most Wagda
 15 alleges is that, during both the October and December arrests, the officers at the scene
 16 continued to question him after he invoked his right to remain silent (see, e.g., FAC
 17 ¶¶ 24, 28, 71–73), which allegations do not suffice to show conduct "so persistent and
 18 widespread" that it "has become a traditional method of carrying out policy," see Trevino,
 19 99 F.3d at 918,²⁹ and Wagda's allegation that Town and County have failed to procure

21 ²⁸ Under such circumstances, the third and fourth elements, namely, deliberate
 22 indifference and causation, are not implicated. The Court notes, however, that the FAC's
 23 formulaic allegations as to those elements are insufficient. See Dougherty, 654 F.3d at
 24 900–01.

25 ²⁹ Wagda requests the Court "take judicial notice" of "all docketed materials" in
 26 several unrelated cases and purports to "incorporate[]" by reference all allegations set
 27 forth in the complaint . . . of each of those cases . . ." (FAC ¶ 22) to support his allegation
 28 that Town and County "have engaged in a pervasive pattern of civil rights violations" (id.)
 and a "pattern of constitutional violations" (id. ¶ 165). Wagda cites no authority for such a
 broad request, nor does he submit any of the referenced materials, including the
 complaints whose allegations he purports to incorporate, let alone cite any authority
 suggesting the content of such documents can be judicially noticed for the truth of the
 matters stated therein. Accordingly, the Court DENIES said request for judicial notice.
 Moreover, his attachment of what he describes as "informal allegations of police
 misconduct" (see FAC ¶ 22(c) & Ex. A), comprising rhetorical questions, opinions, and

1 and implement necessary technology is wholly unsupported by any underlying factual
2 allegations.

3 **3. Targeting perceived addicts for arrest (FAC ¶ 164(b))**

4 Wagda alleges defendants have a "custom or practice of targeting for arrest
5 people perceived to be addicted to the use of controlled substances, as a pretext for
6 punishing them for property crimes" that defendants, without probable cause or
7 reasonable suspicion, assume they are committing. (See FAC ¶ 164(b) (emphasis
8 omitted).)

9 Here, again, the FAC fails to establish the first two elements of a Monell claim.
10 First, as discussed above, see supra part A.2.e., Wagda has failed to allege facts
11 showing he was deprived of a constitutional right. See Villegas, 541 F.3d at 957.

12 Second, although the FAC alleges Jimenez made comments about wanting to send
13 "junkies" to jail because they commit property crimes to support their habit (see FAC
14 ¶ 41), such allegations do not suffice to show conduct "so persistent and widespread"
15 that it "has become a traditional method of carrying out policy." See Trevino, 99 F.3d at
16 918.³⁰

17 **4. Not releasing detainees during overnight hours (FAC ¶ 164(c))**

18 Wagda alleges defendants have a "policy, custom or practice of not releasing
19 certain detainees from MDF during the overnight hours, out of regard for the wishes [of
20 the] City of Martinez and notwithstanding their constitutional rights and the purposes for
21 which they are being detained." (FAC ¶ 164(c).) In particular, he alleges that: (1) during

22
23 essentially anonymous hearsay statements, are not sufficiently factual to be considered
24 for the truth of any matters referenced therein, and, in any event, the relevance of any
25 such material remains unclear.

26 ³⁰ The Court is not persuaded, however, by County defendants' contention that
27 Wagda lacks standing because he was never charged with a property crime. Wagda
28 claims defendants target perceived drug addicts for arrest on the assumption they are
committing property crimes and as a way to either punish them for or prevent them from
committing such crimes. (See FAC ¶ 164(b); see also id. 15:2–5 & ¶ 41.) Such claim
does not depend on whether or not Wagda was actually charged with a property crime.

1 his detention, in the evening, an officer told the occupants of his cell "they would all be
2 processed and released" (see id. ¶ 63); (2) "an inmate experienced in such matters" told
3 him that, "at MDF, County has a policy or practice of not releasing inmates during the
4 overnight hours, unless an inmate has been bailed out or is otherwise to be released
5 pursuant to court order, because the City of Martinez does not want inmates released
6 onto its streets at times when public transportation is not available" (see id.); (3) his
7 release "did not occur until approximately 24 hours after his original detention" at the
8 police station (see id.); and (4) his release was "delayed pursuant to" said overnight-
9 detention policy or practice (see id. 21:7–8).

10 As noted, Wagda has not alleged, as against a named defendant, a violation
11 based on the length of his detention. Even assuming Wagda can allege such a violation
12 by a later-named Doe defendant, however, Wagda has failed to allege facts sufficient to
13 establish the second Monell element, the existence of a municipal policy or practice. He
14 does not allege any facts indicating Town has such a policy or practice (see FAC ¶ 63),
15 and, as to County, Wagda's allegations are insufficient, as he relies exclusively on the
16 unsubstantiated hearsay remarks of an unidentified inmate (see id.).

17 **5. Requiring detainees to remain seated (FAC ¶ 164(d))**

18 Wagda alleges defendants have a "policy requiring detainees of the Holding Cell
19 at MDF to remain seated in chairs for extremely and unreasonably long periods of time,
20 as evidenced by a wall sign in such cell stating a rule substantially similar to 'REMAIN
21 SEATED AT ALL TIMES.'" (Id. ¶ 164(d).)

22 Wagda has failed, however, to allege facts sufficient to show he was thereby
23 deprived of a constitutional right during either his October or December detentions at
24 MDF. See Villegas, 541 F.3d at 957. Notably, the FAC makes only broadly framed
25 references to the circumstances under which Wagda was required to remain seated.
26 (See, e.g., FAC ¶ 63 (alleging Wagda "generally was required to remain seated in the
27 Holding Cell"); id. ¶ 143(i) (alleging Wagda was "forc[ed] . . . to endure extremely long-
28 term confinement in a seated position in a chair (i.e., for substantially all of his time at

1 MDF).") As discussed above, see supra part B.3.i., given the absence of any factual
2 allegation beyond lengthy seating, the FAC fails to plead a constitutional violation.

3 Moreover, although Wagda has not identified who was responsible for the sign,
4 even assuming it was Town or County, Wagda has not alleged facts sufficient to meet the
5 third and fourth elements, deliberate indifference and causation, as the FAC contains no
6 facts indicating defendants had reason to expect the sign would be enforced in such a
7 way as to rise to the level of a constitutional violation.

8 **6. Being deliberately indifferent to suspects' constitutional rights (FAC**
9 **¶ 164(e))**

10 Wagda alleges defendants have a "custom or practice of general deliberate
11 indifference to suspects' constitutional rights." (FAC ¶ 164(e).) In support thereof, Wagda
12 points to other cases and incidents that he alleges demonstrate "widespread misconduct
13 among many patrol officers of Town" and "personal misconduct" by Livingston. (See id.)

14 Wagda has failed to allege facts sufficient to show either Town or County has any
15 custom or practice of general deliberate indifference to suspects' constitutional rights. As
16 discussed above, the Court has denied Wagda's improper request to incorporate all
17 docketed materials in the cases he cites, and, in any event, Wagda's conclusory
18 descriptions of the content of such materials fail to show any municipal policy or practice
19 was the "moving force" behind the misconduct asserted. See Dougherty, 654 F.3d at
20 900–01.

21 **7. Not using technology for information regarding speed trap locations**
22 **(FAC ¶ 164(f))**

23 Wagda alleges defendants have failed "to procure and implement computer
24 database and information technology systems necessary to properly record and distribute
25 information regarding the location of statutory 'speed traps'" (FAC ¶ 164(f).) The
26 claim is deficient on two grounds.

27 First, Wagda has failed to allege facts sufficient to show he was deprived of a
28 constitutional right; thus, he cannot establish municipal liability. See Villegas, 541 F.3d at
957. As discussed above, see supra part B.3.a., Rossberg's stop did not violate Wagda's

1 Fourth Amendment rights, and Wagda has identified no other event on which this
2 subclaim may be based.

3 Second, the subclaim fails because it is wholly unsupported by any underlying
4 factual allegations. The FAC lacks any factual description of the then-existing manner of
5 record-keeping or any facts showing any such system was inadequate. Wagda merely
6 notes that a "Traffic Engineering Associate employed by Town is one custodian of the
7 survey" for the part of the roadway where he was stopped (see FAC ¶ 66 n.8.), and his
8 allegation that Rossberg did not personally know the "timing and repository of [that]
9 survey" (see id. ¶ 164(f)) does not suffice to show the existence of any deficient municipal
10 policy or practice with respect to the distribution of such information.

11 **8. Disregarding the law in exercising booking discretion (FAC ¶ 164(g))**

12 Wagda alleges defendants have a "custom or practice of disregarding California
13 law and constitutional precedent in exercising discretion to book an arrestee into jail." (Id.
14 ¶ 164(g).) In support thereof, Wagda points to: (1) Rossberg and a Doe defendant's
15 "attempt[] to use such discretion as leverage to induce [] Wagda's waiver of his Fourth
16 and Fifth Amendment rights" (id.); and (2) Rossberg's "standard practice" of sending
17 "anybody with their second DUI or more" to MDF (id.).

18 Wagda has failed to allege facts sufficient to show either Town or County has the
19 alleged booking custom or practice. All of Wagda's factual allegations go to the acts of
20 two individual officers, Rossberg and a Doe defendant (see id. 27:20–21 & ¶¶ 90–92, 94–
21 95); there is nothing in the FAC to suggest a broader custom of or practice by either
22 Town or County.

23 **9. Using non-compliant DUI search warrant forms (FAC ¶ 164(h))**

24 Wagda alleges defendants have a "practice or custom of using a DUI search
25 warrant form not in compliance with the requirements of Cal. Penal Code Section
26 1524(a)(13) and/or the Fourth Amendment." (Id. ¶ 164(h).) In that regard, Wagda
27 alleges the form "misstates the probable cause requirement . . . and does not particularly
28 describe the place to be searched, authorize a bodily intrusion search or specify a

1 particular medical procedure." (Id. ¶ 116.)³¹

2 Wagda has failed to allege facts sufficient to show he was deprived of a
3 constitutional right and, consequently, he cannot establish municipal liability. See
4 Villegas, 541 F.3d at 957. First, to the extent this subclaim is based on an alleged
5 violation of state law, the claim fails as such a violation does not suffice to show a
6 violation of a federal constitutional right. See Baker, 443 U.S. at 146–47. Second, to the
7 extent the subclaim is based on an alleged violation of the Fourth Amendment, Wagda
8 again fails to plead an underlying constitutional violation, as Wagda expressly limits his
9 constitutional challenge to the form's "boilerplate content," not its "customized content[]"
10 (Pl.'s Opp'n to County MTD at 23–24), and has not included any facts showing the form
11 was intended to be used alone, nor explained how any alleged deficiency therein had any
12 bearing on the judge's decision to issue the warrant in its final form.

13 **10. Conclusion**

14 For the reasons stated above, the Tenth Claim is DISMISSED in its entirety, and
15 Wagda is granted leave to amend said claim.

16 **D. Thirteenth Claim: "Invasion of Privacy"**

17 In his Thirteenth Claim, which pertains to his December arrest, Wagda alleges
18 Jimenez, Rossberg, and Stapleton invaded his privacy with respect to his "bodily
19 integrity, personal medical information and information contained in his confidential arrest
20 reports regarding the December [a]rrest." (See FAC ¶ 176–77.) In particular, Wagda
21 alleges said defendants invaded his privacy when: (1) Rossberg, with Stapleton's
22 participation, took his pulse (see id. ¶ 178); (2) Rossberg directed a technician to draw
23

24 ³¹ The subject form, titled "Search Warrant: DUI Blood Draw," was used by
25 Rossberg to request Wagda's blood draw. (See County Defs.' Req. for Jud. Notice, Ex.
26 E.) The Court hereby GRANTS County defendants' request for judicial notice as to said
27 form, as the FAC refers to its contents and Wagda does not contest its authenticity. (See
28 Pl.'s Mot. to Convert at 8; see also Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152,
1160 (9th Cir. 2012) (holding, on motion to dismiss, courts may consider "documents
whose contents are alleged in a complaint and whose authenticity no party questions")
(internal quotation and citation omitted).)

1 his blood and directed County personnel to test it for drug and alcohol content (see id.
2 ¶ 179); and (3) Rossberg and Jimenez disclosed to the State Bar "the arrest report
3 relating to the December [a]rrest" (see id. ¶ 180). He also alleges Town and County are
4 liable, under § 815.2 of the California Government Code, for the above-referenced
5 invasions of privacy.

6 To state a claim for invasion of privacy under the California constitution, a plaintiff
7 must establish: "(1) a legally protected privacy interest; (2) a reasonable expectation of
8 privacy in the circumstances; and (3) conduct by defendant constituting a serious
9 invasion of privacy." Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 39–40 (1994).

10 **1. Pulse Taking and Blood Draw**

11 With respect to Wagda's body and personal medical information, County
12 defendants' sole contention is that the basis for any claim predicated thereon is "unclear."
13 (See County MTD at 20.) The Court disagrees. As to "bodily integrity," the FAC
14 sufficiently identifies two bodily intrusions: the taking of Wagda's pulse (see FAC ¶¶ 80–
15 81, 178) and the drawing of his blood (see id. ¶ 179). As to Wagda's "personal medical
16 information," to the extent Wagda is relying on the testing of his blood (see id. ¶ 179), the
17 basis for Wagda's claim likewise is sufficiently clear; to the extent Wagda seeks to rely on
18 any other conduct, however, the Court finds Wagda has not adequately pled such basis.

19 **2. Disclosure of December Arrest Report**

20 With respect to Wagda's December arrest report, County defendants contend
21 "[a]ny disclosure to the State Bar is privileged under the 'common interest' privilege."
22 (See County MTD at 21.)

23 Under the common interest privilege, "[a] privileged publication or broadcast is one
24 made . . . [i]n a communication, without malice, to a person interested therein, (1) by one
25 who is also interested, or (2) by one who stands in such a relation to the person
26 interested as to afford a reasonable ground for supposing the motive for the
27 communication to be innocent, or (3) who is requested by the person interested to give
28 the information." Cal. Civ. Code § 47(c); Kashian v. Harriman, 98 Cal. App. 4th 892, 914

1 (2002) (noting "Civil Code section 47, subdivision (c) codifies the common law privilege of
2 common interest"). "Application of the privilege involves a two-step analysis," whereby
3 "[t]he defendant has the initial burden of showing" the statement in question "was made
4 on a privileged occasion," after which the burden shifts to the plaintiff to show the
5 statement was made with malice. See Kashian, 98 Cal. App. 4th at 915.

6 Here, defendants have failed to meet their initial burden, as the facts pleaded in
7 the FAC do not support a finding that the common interest privilege is applicable.³²
8 Accordingly, this subclaim is not subject to dismissal on such ground. See id.

9 **E. Seventeenth Claim: "Injunctive Relief and Declaratory Relief"**

10 In his Seventeenth Claim, Wagda seeks injunctive and declaratory relief, on two
11 different but potentially related bases, against Jimenez, Rossberg, Neabeack, Stapleton,
12 Town, County, Governor Brown, and Attorney General Harris. (See FAC 59:18–21.) In
13 particular, Wagda asserts that: (1) defendants, excepting Governor Brown and Attorney
14 General Harris, have a "continuing pattern" of depriving citizens of Town and County of
15 various constitutional rights, which pattern is "enforced by deliberate supervisory
16 indifference to the officers' foreseeable constitutional consequences" (see id. ¶ 200); and
17 (2) the "continuing threat of enforcement by [d]efendants" of § 11550's "criminal
18 prohibition on 'being under the influence' of certain controlled substances . . . is chilling
19 the exercise" of his and others' First Amendment rights (see id. ¶ 201). As relief, Wagda
20 seeks: (1) a declaration that § 11550's prohibition on "being under the influence" of
21 certain controlled substances is facially unconstitutional under the First Amendment (see
22 id. at 61:15–18);³³ (2) an injunction prohibiting defendants "from enforcing or threatening

24 ³² In light of such conclusion, the Court does not reach County defendants'
argument that Wagda cannot show Rossberg or Jimenez acted with malice.

25 ³³ In relevant part, section 11550 bars a person from "us[ing], or be[ing] under the
26 influence of any controlled substance [referenced therein] except when administered by
27 or under the direction of a person licensed by the state to dispense, prescribe, or
administer controlled substances." Cal. Health & Safety Code § 11550(a). Wagda
28 challenges only § 11550's prohibition on "being under the influence," not the "use," of
such controlled substances. (See Pl.'s Opp'n to State MTD at 12.)

1 to enforce" such statutory prohibition (see id. at 61:19–23); and (3) "[o]ther injunctive
2 relief as requested herein"³⁴ (see id. at 61:24).

3 County and State defendants both invoke standing, albeit on different grounds, to
4 challenge Wagda's Seventeenth Claim. Additionally, State defendants challenge said
5 claim under the Eleventh Amendment.

6 At the outset, the Court notes that only a limited number of claims against County
7 defendants are going forward at this time. Accordingly, aside from his facial challenge to
8 § 11550, Wagda may seek declaratory and injunctive relief only with respect to those
9 surviving or unchallenged claims.

10 **1. Standing**

11 County defendants challenge Wagda's standing on the basis that his allegations
12 fail to show "he is realistically threatened with future constitutional violations." (See
13 County MTD at 20 (internal quotation and citation omitted).) State defendants contend
14 Wagda's allegations are "directed only at local law enforcement" (see State MTD at 8)
15 and, consequently, that Wagda lacks standing to sue either Governor Brown or Attorney
16 General Harris.

17 To establish Article III standing, "[t]he plaintiff must have (1) suffered an injury in
18 fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is
19 likely to be redressed by a favorable decision." Spokeo, Inc. v. Robins, 136 S.Ct. 1540,
20 1547 (2016). An injury in fact is one that is "concrete, particularized, and actual or
21 imminent." Clapper v. Amnesty Internat'l, USA, 133 S.Ct. 1138, 1147 (2013) (internal
22 quotation and citation omitted). "[A]t the pleading stage, the plaintiff must clearly . . .
23 allege facts demonstrating each element" of standing. Spokeo, Inc., 135 S.Ct. at 1547
24 (internal quotation and citation omitted).

25 In general, with respect to the first element, a "threatened injury must be certainly
26 impending to constitute injury in fact[;] . . . [a]llegations of possible future injury are not

27
28 ³⁴ Wagda does not specify what any such "other" injunctive relief would be.

1 sufficient." Clapper, 133 S.Ct. at 1147 (internal quotation, citation, and emphasis
 2 omitted),³⁵ see City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (holding plaintiff
 3 must allege "threat of injury" that is "real and immediate, not conjectural or hypothetical"
 4 (internal quotation and citation omitted)). In the First Amendment context, however, the
 5 Supreme Court "has dispensed with rigid standing requirements," Human Life of
 6 Washington Inc. v. Brumsickle, 624 F.3d 990, 1000 (9th Cir. 2010) (internal quotation and
 7 citation omitted), and has recognized a plaintiff's "self-censorship" as a sufficient injury
 8 "as long as it is based on an actual and well-founded fear that the challenged statute will
 9 be enforced" against such plaintiff, id. at 1001.

10 Wagda alleges that, until the requested relief is granted, he "has reason to believe
 11 that his rights . . . will continue to be threatened and [he] will suffer serious and
 12 irreparable injury by the threat of loss of his fundamental Constitutional rights." (FAC
 13 ¶ 202.) In particular, he alleges that he lives within County's jurisdiction and is
 14 "frequent[ly] presen[t]" in Town and County (see id.), and, consequently, that: (1) he "is
 15 likely to be subject to traffic stops and attendant interrogation" by Town and County law
 16 enforcement "in the ordinary course, including lawfully initiated traffic stops where he has
 17 not engaged in any culpable conduct" (see id.); and (2) his speech "is being chilled and is
 18 likely to continue being chilled," by various past experiences and the "continuing
 19 enforceability" of § 11550's prohibition against "being under the influence,"
 20 notwithstanding his compliance with such statute (see id.).

21 With respect to his fear of being stopped again, and, in the course thereof,
 22 subjected to various violations of his constitutional rights, Wagda's allegations are
 23 conjectural and thus insufficient to show he faces imminent injury. See, e.g., Lyons, 461
 24 F.3d at 104–05 (holding plaintiff's fear of again being subjected to chokehold insufficient
 25

26 ³⁵ The Supreme Court has acknowledged that its cases "do not uniformly require"
 27 plaintiffs to show "it is literally certain that the harms they identify will come about," noting
 28 "[i]n some instances, we have found standing based on a substantial risk that the harm
 will occur." See Clapper, 133 S.Ct. at 1150 n.5 (internal quotation and citation omitted).

1 to warrant either declaratory or injunctive relief; finding plaintiff failed to show "real and
 2 immediate threat" that he would be stopped again for traffic violation, or any other
 3 offense, by any officer who would choke him). Notably, Wagda does not allege he has
 4 even been stopped by a Town or County law enforcement officer since his arrest in
 5 December 2014, and his allegation that County defendants have a "continuing pattern" of
 6 "depriving [citizens] of their [constitutional] rights" (see FAC ¶ 200) adds nothing of
 7 substance to the FAC. See Lyons, 461 F.3d at 105 (holding "additional allegation" that
 8 police "routinely apply chokeholds" in situations where they are not lawfully allowed "falls
 9 far short of the allegations that would be necessary" for Article III standing).

10 Second, Wadga's allegations of current and "likely" future chilled speech, whether
 11 related to his past experiences or the continuing enforceability of § 11550, likewise are
 12 insufficient to show he faces imminent injury. The paragraphs of the FAC Wagda
 13 identifies as supporting this claim do not plead a realistic threat of future harm. (See Pl.'s
 14 Opp'n to County MTD at 24; FAC ¶ 29 (alleging defendants' "unlawful interrogation
 15 techniques . . . are likely to continue to have . . . a chilling effect upon [] Wagda's future
 16 speech); id. ¶ 49 (alleging Wagda's "speech was chilled" in February 2016, when he
 17 decided not to report to police "a suspicious person," because he feared being detained
 18 and arrested "due to the possibility that his reporting activity could be misinterpreted as
 19 indicating an abnormal mental state (even though [he] was in compliance with the terms
 20 of Section 11550)"); id. ¶ 93 (alleging, with respect to MDF booking questions in
 21 December, Wagda did not invoke his Fifth Amendment right against self-incrimination
 22 due to his October experience of retaliation for not answering such questions).) As a
 23 result, such allegations do not establish the imminent injury required for standing. See
 24 Lyons, 461 U.S. at 107 n.8 ("It is the reality of the threat of repeated injury that is relevant
 25 to the standing inquiry, not the plaintiff's subjective apprehensions.") (emphasis in
 26 original).

27 Moreover, § 11550, as noted, prohibits a person's use and/or being under the
 28 influence of a controlled substance for which such individual does not have a prescription

1 from a licensed provider. Here, Wagda acknowledges he has a prescription for the
2 covered medication he takes, and the FAC contains no allegations to support a finding
3 that, under such circumstances, he is likely to be arrested or prosecuted for a violation of
4 said statute.

5 Accordingly, the Court finds Wagda lacks standing to assert the Seventeenth
6 Claim.³⁶

7 **2. Eleventh Amendment Immunity**

8 In light of the above finding with respect to standing, the Court does not address
9 herein State defendants' arguments in support of dismissal under the Eleventh
10 Amendment, with the exception of said defendants' arguments with respect to Governor
11 Brown, which the Court finds persuasive. See Ex parte Young, 209 U.S. 123, 157 (1908)
12 (holding Eleventh Amendment bars claim for injunctive relief against state officer unless
13 state officer has "some connection with the enforcement" of allegedly unconstitutional
14 statute); see also Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729
15 F.3d 937, 943 (9th Cir. 2013) (holding, where plaintiffs sought to enjoin enforcement of
16 allegedly unconstitutional statute, Governor Brown "entitled to Eleventh Amendment
17 immunity because his only connection to [statute] [was] his general duty to enforce
18 California law").

19 **3. Conclusion**

20 For the reasons stated above, Wagda's Seventeenth Claim is DISMISSED, and,
21 with the exception of Governor Brown, and with the additional exception of Livingston and
22 Simpkins to the extent each is sued in his official capacity, see Janicki Logging Co., 42
23 F.3d at 566, Wagda is granted leave to amend.

24 //

25 //

26

27 ³⁶ In light of such finding, the Court need not address the parties' respective
28 arguments as to the merits of Wagda's facial challenge to § 11550.

1 **CONCLUSION**

2 For the reasons stated above,

3 1. County defendants' motion to dismiss is GRANTED in part and DENIED in
4 part as set forth above.

5 2. State defendants' motion to dismiss is GRANTED.

6 3. Wagda's motion to convert is DENIED.

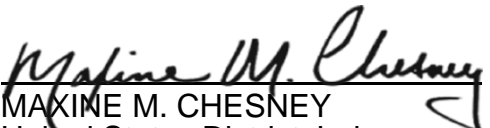
7 4. Leave to amend is granted as set forth above. In any amended complaint,
8 rather than incorporating all preceding factual allegations, Wagda shall identify, in each
9 numbered claim, or, if a claim is divided into subparts, in each such subpart, the specific
10 clause of any constitutional amendment on which he relies, as well as the specific facts
11 on which such claimed violation is based, and the particular defendant(s) alleged to have
12 committed such violation.

13 5. Wagda's Second Amended Complaint, if any, shall be filed no later than
14 November 14, 2016. In any Second Amended Complaint, Wagda may amend to cure the
15 deficiencies noted above but may not add new claims or defendants without first
16 obtaining leave of court. See Fed. R. Civ. P. 15(a)(2); Fed. R. Civ. P. 16(b)(4).

17 6. If Wagda does not file a Second Amended Complaint within the time
18 provided, the instant action will proceed on the remaining claims in the First Amended
19 Complaint.

20 **IT IS SO ORDERED.**

21
22 Dated: October 24, 2016

23 
24 MAXINE M. CHESNEY
25 United States District Judge

United States District Court
Northern District of California