

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

3  
4 FRANCISCO VALDEZ, et al.,

No. C 09-0176 CW

5                                    Plaintiffs,

ORDER DENYING  
MOTION FOR CLASS  
CERTIFICATION

6                                    v.

(Docket No. 118);

7 CITY OF SAN JOSE, et al.,

GRANTING IN PART

8                                    Defendants.

AND DENYING IN

PART MOTION FOR

SUMMARY JUDGMENT

(Docket No. 127)

9 \_\_\_\_\_/  
10                                    Plaintiffs Francisco Valdez, Ricardo Vasquez, Daniel

11 Martinez, and Jamil Stubbs bring this action against the City of  
12 San Jose, San Jose Police Chief Robert Davis, and San Jose Police  
13 Officers R. Agamau, Martin, Rickert, Wallace, and Orlando.<sup>1</sup>

14 Plaintiffs now move for class certification. Defendants oppose  
15 the motion and move for summary judgment. Plaintiffs oppose the  
16 motion for summary judgment. Having considered the parties'  
17 papers and oral argument, the Court denies Plaintiffs' motion for  
18 class certification and grants in part and denies in part  
19 Defendants' motion for summary judgment.

20                                    BACKGROUND

21                                    All four Plaintiffs were arrested for violating section  
22 647(f) of the California Penal Code, also known as California's  
23

24  
25 \_\_\_\_\_  
26                                    <sup>1</sup> Agamau is named in the operative complaint as "R. Agaman"  
27 but indicates in his declaration that his true name is Agamau.  
28 Declaration of Ryan Amagau ¶ 1. Plaintiffs also seem to address  
claims against two other officers, Michael Panighetti and Gustavo  
Perez, neither of whom were named as defendants in the operative  
complaint.

1 public intoxication law. Under that provision, a person is guilty  
2 of disorderly conduct, a misdemeanor, if he or she

3 is found in any public place under the influence of  
4 intoxicating liquor, any drug, controlled substance,  
5 toluene, or any combination of any intoxicating liquor,  
6 drug, controlled substance, or toluene, in a condition  
7 that he or she is unable to exercise care for his or her  
8 own safety or the safety of others, or by reason of his  
9 or her [intoxication], interferes with or obstructs or  
10 prevents the free use of any street, sidewalk, or other  
11 public way.

12 Cal. Penal Code § 647(f).

13 Plaintiffs, all of whom are either African-American or  
14 Latino,<sup>2</sup> were arrested by the San Jose Police Department (SJPD) in  
15 downtown San Jose between 2007 and 2008. The following sections  
16 describe their arrests in greater detail.

17 A. Plaintiff Martinez's Arrest

18 On the evening of February 1, 2007, Martinez went to a  
19 nightclub in downtown San Jose with his friend, Shana Stewart, and  
20 his cousin. Declaration of M. Jeffrey Kallis, Ex. B, Deposition  
21 of D. Martinez, at 19:21-20:2; Declaration of Shana Stewart ¶ 2.  
22 About an hour after they arrived, a group of women assaulted  
23 Stewart and stole her purse while she was waiting in line for the  
24 bathroom. Stewart Decl. ¶ 3; Martinez Depo. 44:21-:23. Although  
25 Martinez and his cousin did not see the incident, Stewart told  
26 them about it immediately afterward and described her assailants  
27 to them. Stewart Decl. ¶¶ 3-4, 7; Declaration of Daniel Martinez  
28 ¶ 4, Ex. A, at 1.

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<sup>2</sup> All Plaintiffs identify as Latino, except Plaintiff Stubbs, who identifies as African-American.

1 A short while later, Martinez saw a security guard in front  
2 of the nightclub speaking to a woman who resembled one of  
3 Stewart's attackers. Martinez Decl., Ex. A, at 1; Martinez Depo.  
4 45:3-:6; Stewart Decl. ¶ 7. He approached the woman and asked her  
5 to go speak with the police, who had just arrived at the nightclub  
6 a few minutes earlier. Martinez Depo. 43:23-44:4. The woman  
7 refused and began to flee. Id. 62:6-:15. Martinez then tried to  
8 tell one of the SJPD officers at the scene that the woman was  
9 getting away but the officer ignored him. Id. 61:23-62:17.  
10 Instead of pursuing the woman, the officer, who was speaking to  
11 Stewart at the time, told Martinez to leave them alone. Id.  
12 62:12-:17.

13 Martinez then approached another officer to report that  
14 Stewart's attacker was fleeing. Id. 63:5-:14. According to  
15 Martinez, the officer responded by asking Martinez to step toward  
16 the curb. Id. 65:19-:24; Martinez Decl., Ex. A, at 1.  
17 Disappointed that the officer refused to pursue Stewart's  
18 attacker, Martinez called the officer an "asshole"; he states,  
19 however, that despite his frustration, he still complied with the  
20 officer's instructions to walk towards the curb. Martinez Depo.  
21 61:18-:22, 73:3-:15. At that moment, as he began walking toward  
22 the curb, Martinez claims that the officer "grabbed [his] right  
23 hand and twisted it behind [his] back." Id. 73:1-:15. The  
24 officer then placed him under arrest and put him inside a police  
25 van. Martinez Decl. ¶ 2, Ex. A, at 2. When Martinez asked the  
26 officer why he was being arrested, the officer told him that it  
27 was because he was drunk. Id., Ex A, at 2; Martinez Depo.  
28 73:3-:15. Martinez admits that he had a rum-and-coke and part of

1 a beer earlier in the night but denies that he was drunk when he  
2 was arrested. Martinez Depo. 29:18-:20, 55:4-:8; Martinez Decl.,  
3 Ex. A, at 2.

4 Officer Wallace, who made the arrest, disputes this account  
5 and states that Martinez appeared "very drunk" to him.  
6 Declaration of Martin Wallace ¶ 8. He asserts that Martinez had  
7 bloodshot eyes, an unsteady gait, and emitted "a strong odor of  
8 alcohol." Id. ¶ 8. Wallace also asserts that Martinez had been  
9 wandering around in the street prior to his arrest and harassing  
10 various officers. Id. ¶ 7. Based on these observations, Wallace  
11 believed that "Martinez was unable to care for his safety" and  
12 decided to arrest him under section 647(f). Id. Wallace, who is  
13 African-American, asserts that he "gave no consideration to the  
14 fact that Mr. Martinez is Hispanic in making the decision to  
15 arrest him." Id. ¶ 10.

16 Stewart, who is white, was arrested by another SJPD officer,  
17 Officer Martin, shortly thereafter. Stewart Decl. ¶¶ 12-13. She  
18 asserts that she, too, was sober at the time of her arrest. Id.  
19 ¶ 10.

20 B. Plaintiffs Valdez and Vasquez's Arrests

21 On June 27, 2008, Valdez and Vasquez drove together from  
22 Freedom, California, where they reside, to San Jose. Kallis  
23 Decl., Ex. D, Deposition of R. Vasquez, at 9:2-:14. They arrived  
24 in the early evening and parked at a downtown 7-Eleven on Santa  
25 Clara Street. Id., Ex. C, Deposition of F. Valdez, at 14:1-:8.  
26 After spending a "few hours" in the downtown area, the two  
27 returned to the 7-Eleven to drive back to Freedom. Id.  
28 15:25-16:4; Vasquez Depo. 8:17-:20. Neither recalls exactly where

1 they went or how long they spent in the downtown area but both  
2 assert that they did not purchase any alcohol while they were  
3 there. Valdez Depo. 16:5-:9; Vasquez Depo. 11:7-:12, 12:3-:5,  
4 23:4-:10.

5 When they returned to the truck that evening, Vasquez entered  
6 the 7-Eleven to buy some snacks and non-alcoholic beverages for  
7 the drive home. Vasquez Depo. 16:18-:22. Valdez waited for him  
8 in the parking lot near the truck. Id. 16:6-:17; Valdez Depo.  
9 20:2-:13. According to Valdez, several SJPD officers -- he does  
10 not recall the exact number -- approached him while he was  
11 standing in the parking lot and began questioning him about why he  
12 was there. Valdez Depo. 20:11-:20, 23:2-:4, 23:15-:19. When he  
13 replied that he was waiting for his friend, one of the officers  
14 went inside the store to find Vasquez. Id. Valdez asserts that  
15 while he was speaking to the officers in the parking lot, one of  
16 them told him, "We don't want your kind here." Id. 24:6-:8.

17 Meanwhile, the officer who went into the 7-Eleven quickly  
18 found Vasquez and escorted him towards the parking lot with the  
19 other officers. Vasquez Depo. 16:18-:25. Vasquez testified at  
20 his deposition that the officer grabbed his hand and twisted it as  
21 they left the store. Id. 17:1-:7. He also testified that the  
22 officers refused to respond to him and Valdez when they asked why  
23 they were being questioned. Id. 17:16-:20, 18:19-19:8.

24 Once Valdez and Vasquez were both in the parking lot, the  
25 police zip-tied their hands, placed them under arrest, and put  
26 them in a police van. Vasquez Depo. 18:19-19:5; Valdez Depo.  
27 24:2-:14. The two were then detained in police custody until  
28 early the next morning. Valdez Depo. 24:24-:25; Vasquez Depo.

1 29:5-:6. Although Valdez admits to having consumed some whiskey  
2 that he brought from Freedom earlier in the evening, both he and  
3 Vasquez assert that they were not intoxicated when they were  
4 arrested. Valdez Depo. 17:11-:20, 36:11-37:1; Vasquez Depo.  
5 26:13-:18, 35:22-:23.

6 The SJPD officers who arrested Valdez and Vasquez dispute  
7 their claims of sobriety. In a report detailing the circumstances  
8 of Vasquez's arrest, Officer Panighetti states that Vasquez had  
9 "red blood shot watery eyes, slurred speech, [and] staggered  
10 gait." Declaration of Michael Panighetti ¶ 5, Ex. B, at 2.  
11 Officer Amagau's report, which documents the circumstances of  
12 Valdez's arrest, similarly states that Valdez had "bloodshot eyes,  
13 staggering gait, [and] slurred speech." Kallis Decl., Ex. J, Pre-  
14 Booking Information Sheet for F. Valdez. It also states that  
15 Valdez was "in the middle of 10th [Street] . . . walking in  
16 circles" when Amagau first encountered him. Id. The officers  
17 assert that they arrested Vasquez and Valdez for public  
18 intoxication based on their observations of the pair's behavior at  
19 the 7-Eleven that night. Panighetti Decl. ¶ 6; Amagau Decl. ¶¶ 7-  
20 8. The officers also assert that the arrests were based solely on  
21 these observations and not on Valdez or Vasquez's race or  
22 ethnicity. Panighetti Decl. ¶ 6; Amagau Decl. ¶ 8.

23 C. Plaintiff Stubbs' Arrest

24 On September 6, 2008, Stubbs and his friend, Leon Shirley,  
25 drove together from Newark, California, to San Jose to attend a  
26 couple of live musical performances. Kallis Decl., Ex. A,  
27 Deposition of J. Stubbs, at 16:1-:9. They parked in a public  
28 garage on Third Street at about 9:00 p.m. Id. 19:2-:10;

1 Declaration of Leon Shirley ¶ 3. After attending a couple of  
2 performances at two downtown nightclubs, Stubbs and Shirley walked  
3 back to the garage at around 1:00 a.m. to drive back to Newark.  
4 Stubbs Depo. 27:20-28:3; Shirley Decl. ¶ 4.

5 When they returned to the garage, they encountered two SJPD  
6 officers near Shirley's car. Shirley Decl. ¶ 8; Stubbs Depo.  
7 32:6-:8. According to Stubbs, one of the officers approached him  
8 as Stubbs was putting out a cigarette beside the car; the other  
9 officer approached Shirley. Stubbs Depo. 28:11-:14, 29:15-:19,  
10 32:6-:21. Stubbs testified at his deposition that, although he  
11 could not hear exactly what Shirley was saying to the officer, it  
12 sounded like Shirley "was getting smart" with him. Id. 32:18-:21.  
13 While Shirley was speaking to that officer, the other officer  
14 "pulled [Stubbs] to the side" and accused him of urinating on the  
15 wall of the parking garage, a charge that Stubbs immediately  
16 denied. Id. 36:5-:17. After some further discussion, the  
17 officers placed both Shirley, who is white, and Stubbs under  
18 arrest. Id. 32:11-:12; Shirley Decl. ¶¶ 9-10. Although Stubbs  
19 admits that he had a few drinks at a nightclub earlier in the  
20 evening, both he and Shirley assert that he was not exhibiting any  
21 signs of intoxication or defiance when they were arrested.<sup>3</sup>

22 Stubbs Depo. 57:16-58:9; Shirley Decl. ¶ 11.

23 Officer Orlando, who arrested Stubbs, disputes these claims.  
24 He states in his declaration that Stubbs first caught his  
25 attention "because he was urinating on the wall in the garage."

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26 <sup>3</sup> Although Shirley is not a plaintiff in this lawsuit, he  
27 asserts that he, too, was sober when he was arrested. Shirley  
28 Decl. ¶ 5 ("During the entire time in San Jose that night, I did  
not consume any alcohol.").

1 Declaration of Brandon Orlando ¶ 5. Orlando further asserts that  
2 Stubbs' "eyes were bloodshot," his breath smelled of alcohol, and  
3 "he was verbally combative and would not listen to commands." Id.

4 ¶ 6. According to Orlando's police report, he decided to arrest  
5 Stubbs for public intoxication based on these observations.

6 Kallis Decl., Ex. J., Pre-Booking Information Sheet for J. Stubbs.

7 Orlando asserts that neither he nor Officer Perez, who arrested  
8 Shirley, based their decisions on Stubbs' or Shirley's race.

9 Orlando Decl. ¶ 9.

10 D. Procedural Background

11 Plaintiffs filed this putative class action lawsuit against  
12 the City of San Jose and several SJPD officers on January 14,  
13 2009. Docket No. 1. They filed a second amended complaint (2AC)  
14 on July 14, 2009. Docket No. 27.<sup>4</sup> In their 2AC, they assert  
15 sixteen causes of action: (1) a claim under 42 U.S.C. § 1983 and  
16 Monell v. Department of Social Services, 436 U.S. 658 (1978),  
17 against the City based on an alleged policy, custom and long-  
18 standing practice of wrongfully arresting individuals for  
19 violations of Penal Code section 647(f), infringing on Plaintiffs'

20 \_\_\_\_\_  
21 <sup>4</sup> Plaintiffs apparently intended to amend the 2AC to add  
22 Panighetti and Perez as defendants but, to date, have not actually  
23 done so. On November 19, 2009, they filed a document entitled,  
24 "Amendment to Complaint to Identify Does by True Names and  
25 Capacities." Docket No. 30. Plaintiffs filed that document  
26 without obtaining leave to amend the complaint or a stipulation  
27 from Defendants permitting such an amendment. The document did  
28 not include a copy of the proposed third amended complaint, as  
required by the local rules, Civil L.R. 10-1 ("Any party filing or  
moving to file an amended pleading must reproduce the entire  
proposed pleading and may not incorporate any part of a prior  
pleading by reference."), nor was it served on Panighetti and  
Perez. Accordingly, the Court treats Plaintiffs' 2AC as the  
operative complaint.



1 First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights;  
2 (2) a Monell claim under § 1983 against Chief Davis based on his  
3 actions as a final policy maker; (3) a Monell claim under § 1983  
4 against Chief Davis based on his actions ratifying police  
5 misconduct; (4) a Monell claim under § 1983 against the City for  
6 failure to train police officers as to the rights secured by the  
7 First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments;  
8 (5) a claim under § 1983 against Chief Davis for "supervisory  
9 liability based on the misconduct of subordinates"; (6) a claim  
10 under § 1983 against Agamau, Martin, Rickert, Wallace and Orlando  
11 for falsely detaining, arresting, and incarcerating Plaintiffs in  
12 violation of their First and Fourth Amendment rights, as well as  
13 depriving them of their Fifth, Sixth, and Eighth Amendment rights  
14 and enforcing section 647(f) in a discriminatory manner in  
15 violation of the Fourteenth Amendment; (7) a claim against all  
16 Defendants for conspiracy under 42 U.S.C. § 1985; (8) a claim for  
17 false arrest against Agamau, Martin, Rickert, Wallace and Orlando;  
18 (9) a claim for false imprisonment against the same officers;  
19 (10) a claim for battery against the same; (11) a claim against  
20 all Defendants for violation of the Ralph Act, California Civil  
21 Code section 51.7; (12) a claim against all Defendants for  
22 violation of the Bane Act, California Civil Code section 52.1(b);  
23 (13) a claim against all Defendants for civil conspiracy to  
24 violate civil rights and commit torts; (14) a claim against all  
25 Defendants for aiding and abetting civil rights violations and the  
26 commission of torts; (15) a claim for negligence against all  
27 Defendants; and (16) a claim for injunctive relief against all  
28 Defendants.

1 On May 29, 2012, Plaintiffs moved to certify a class  
2 consisting of

3 [a]ll individuals who between January 14, 2006 and the  
4 present were arrested for violation of section 647(f)  
5 where the Affidavit of Probable Cause fails to present  
6 objective facts, other than the four subjective  
7 symptoms, sufficient to demonstrate a violation of Penal  
8 Code § 647(f).

9 Pls.' Mot. Class Cert. 5. They also seek to certify a subclass  
10 defined as

11 [a]ll racial minorities who between January 14, 2006 and  
12 the present were subjected to unequal and discriminatory  
13 enforcement of Penal Code 647(f) based upon their race  
14 as demonstrated in Penal Code § 647(f) police paperwork  
15 and the statistical analysis.

16 Id. at 5-6. Defendants filed an opposition and moved for summary  
17 judgment on June 8, 2012.

#### 18 DISCUSSION

#### 19 I. Defendants' Motion for Summary Judgment

##### 20 A. Legal Standard

21 Summary judgment is properly granted when no genuine and  
22 disputed issues of material fact remain, and when, viewing the  
23 evidence most favorably to the non-moving party, the movant is  
24 clearly entitled to prevail as a matter of law. Fed. R. Civ.  
25 P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
26 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
27 1987).

28 The moving party bears the burden of showing that there is no  
material factual dispute. Therefore, the court must regard as  
true the opposing party's evidence, if supported by affidavits or  
other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,  
815 F.2d at 1289. The court must draw all reasonable inferences

1 in favor of the party against whom summary judgment is sought.  
2 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
3 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952  
4 F.2d 1551, 1558 (9th Cir. 1991).

5 Material facts which would preclude entry of summary judgment  
6 are those which, under applicable substantive law, may affect the  
7 outcome of the case. The substantive law will identify which  
8 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.  
9 242, 248 (1986). Where the moving party does not bear the burden  
10 of proof on an issue at trial, the moving party may discharge its  
11 burden of production by either of two methods:

12 The moving party may produce evidence negating an  
13 essential element of the nonmoving party's case, or,  
14 after suitable discovery, the moving party may show that  
15 the nonmoving party does not have enough evidence of an  
16 essential element of its claim or defense to carry its  
17 ultimate burden of persuasion at trial.

18 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d  
19 1099, 1106 (9th Cir. 2000).

20 If the moving party discharges its burden by showing an  
21 absence of evidence to support an essential element of a claim or  
22 defense, it is not required to produce evidence showing the  
23 absence of a material fact on such issues, or to support its  
24 motion with evidence negating the non-moving party's claim. Id.;  
25 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);  
26 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If  
27 the moving party shows an absence of evidence to support the non-  
28 moving party's case, the burden then shifts to the non-moving  
party to produce "specific evidence, through affidavits or

1 admissible discovery material, to show that the dispute exists.”  
2 Bhan, 929 F.2d at 1409.

3 If the moving party discharges its burden by negating an  
4 essential element of the non-moving party’s claim or defense, it  
5 must produce affirmative evidence of such negation. Nissan, 210  
6 F.3d at 1105. If the moving party produces such evidence, the  
7 burden then shifts to the non-moving party to produce specific  
8 evidence to show that a dispute of material fact exists. Id.

9 If the moving party does not meet its initial burden of  
10 production by either method, the non-moving party is under no  
11 obligation to offer any evidence in support of its opposition.  
12 Id. This is true even though the non-moving party bears the  
13 ultimate burden of persuasion at trial. Id. at 1107.

14 B. Federal Claims against Defendants Wallace, Agamau, and  
15 Orlando

16 1. Fourth Amendment Claims

17 The Fourth Amendment requires police officers to have  
18 probable cause before making a warrantless arrest. Ramirez v.  
19 City of Buena Park, 560 F.3d 1012, 1023 (9th Cir. 2008) (citing  
20 Michigan v. Summers, 452 U.S. 692, 700 (1981)). “Probable cause  
21 to arrest exists when officers have knowledge or reasonably  
22 trustworthy information sufficient to lead a person of reasonable  
23 caution to believe that an offense has been or is being committed  
24 by the person being arrested.” United States v. Lopez, 482 F.3d  
25 1067, 1072 (9th Cir. 2007).

26 Defendants move for summary judgment on the grounds that the  
27 individual officers who arrested Plaintiffs had probable cause to  
28 believe that Plaintiffs had violated section 647(f). Because

1 disputed issues of material fact remain with respect to each  
2 Plaintiff's arrest, summary judgment must be denied.

3 a. Officer Wallace

4 Wallace and Martinez offer conflicting accounts of the events  
5 surrounding Martinez's arrest. Most significantly, they dispute  
6 whether Martinez was drunk when he was arrested. Martinez asserts  
7 that he had less than two drinks on the evening of his arrest,  
8 Martinez Depo. 29:18-:20, 55:4-:8, while Wallace asserts that he  
9 appeared "very drunk" to him, Wallace Decl. ¶ 8.

10 In addition to disputing Martinez's sobriety, Martinez and  
11 Wallace dispute whether Martinez defied Wallace's instructions  
12 that night. Wallace states in his declaration that he "asked Mr.  
13 Martinez, more than once, to move to the sidewalk for his safety  
14 but he did not." Wallace Decl. ¶ 7. During his deposition,  
15 however, Martinez testified that he followed Wallace's  
16 instructions to walk towards the curb. Martinez Depo. 73:3-:6.

17 These factual disputes are central to the question of whether  
18 or not Wallace had probable cause to arrest Martinez under section  
19 647(f). Accordingly, the Fourth Amendment claims against Wallace  
20 cannot be resolved by summary judgment.

21 b. Officer Agamau

22 Amagau and Valdez dispute several relevant facts regarding  
23 the circumstances of Valdez's arrest. Agamau asserts in his  
24 declaration that he found Valdez "walking in circles on 10th  
25 Street." Agamau Decl. ¶ 5. Valdez, in contrast, during his  
26 deposition expressly denied walking in the middle of the street.  
27 Valdez Depo. 31:15-:25. Agamau states that, when he encountered  
28 Valdez that night, "it was readily apparent he was highly

1 intoxicated." Agamau Decl. ¶ 6. Valdez, however, testified at  
2 his deposition that, other than the small bit of whiskey he had  
3 consumed a "few hours" earlier, he "wasn't drinking" on the night  
4 he was arrested. Valdez Depo. 15:25-16:9, 16:24-17:23, 36:11-37:1  
5 (stating that at "the time I was arrested I know for myself I  
6 wasn't under the influence whatsoever"). Agamau asserts that  
7 Valdez was staggering unsteadily as he walked, Agamau Decl. ¶ 6;  
8 Valdez testified that he had no trouble walking and never felt  
9 dizzy or unsteady. Valdez Depo. 36:11-:19. These factual  
10 disputes are all material to whether Wallace had probable cause to  
11 arrest Valdez under section 647(f) and, thus, preclude summary  
12 judgment on this claim.

13 c. Officer Orlando

14 As with Valdez and Martinez, the circumstances surrounding  
15 Stubbs' arrest are disputed. Orlando states that he arrested  
16 Stubbs after witnessing him urinate on a parking garage wall.  
17 Orlando Decl. ¶¶ 5-6. He asserts that it was "evident that  
18 [Stubbs] was intoxicated" from his bloodshot eyes and the smell of  
19 alcohol on his breath. Id. ¶¶ 5-6. Orlando also states that  
20 Stubbs was "verbally combative" and defiant. Id. ¶ 6.

21 This account contradicts that of Stubbs and his friend,  
22 Shirley. Shirley states in his declaration that he never saw  
23 Stubbs urinating in the garage nor did he see Stubbs "having  
24 difficulty walking, staggering, slurring his speech or otherwise  
25 acting drunk." Shirley Decl. ¶¶ 6-7. Stubbs himself testified at  
26 his deposition that he had consumed only a few drinks that night  
27 and was not exhibiting any signs of inebriation when he was  
28 arrested. Stubbs Depo. 24:4-:12, 57:16-58:9. He also testified

1 that he never urinated in the parking garage and that he complied  
2 with Orlando's commands prior to his arrest. Id. 36:24-:25, 40:5-  
3 :11. Based on these disputes of material fact, summary judgment  
4 must be denied.

5 2. Fourteenth Amendment Claims

6 Plaintiffs allege that each of officers who arrested them did  
7 so with a racially discriminatory purpose in violation of the  
8 Fourteenth Amendment's equal protection clause. Thus, to survive  
9 summary judgment on this claim, Plaintiffs must present evidence  
10 to support an inference that each officer's arrest decision was  
11 racially motivated. United States v. Armstrong, 517 U.S. 456, 465  
12 (1996).

13 The only evidence Plaintiffs offer of discriminatory intent  
14 here is the comment that Vasquez and Valdez heard Agamau make  
15 while they were being arrested. Although neither remembers  
16 Agamau's exact words, both assert that they heard the comment.  
17 Valdez testified at his deposition that the officer said something  
18 to the effect of "We don't want your kind here." Valdez Depo.  
19 26:6-:9. Vasquez similarly testified that the officer said, "We  
20 don't want you guys to come back. We don't like you people."  
21 Vasquez Depo. 18:5-:6.

22 Defendants argue that, even if Valdez and Vasquez's  
23 allegations are true, an isolated comment like this is  
24 insufficient to establish discriminatory intent for the purposes  
25 of Fourteenth Amendment liability. They cite two cases from this  
26 circuit for support: Merrick v. Farmers Ins. Group, 892 F.2d 1434,  
27 1438 (9th Cir. 1990), and Rodriguez v. John Muir Medical Center,  
28 2010 WL 3448567, at \*7-\*8 (N.D. Cal.), which relies on Merrick.

1 In both these cases, the courts held that the plaintiff had to  
2 produce more than just an isolated derogatory comment by the  
3 defendant to support an inference of discriminatory intent on  
4 summary judgment.

5 Neither Merrick nor Rodriguez is analogous here because they  
6 specifically address workplace discrimination claims. In that  
7 context, where the plaintiff has necessarily had a continuous  
8 employment relationship with the defendant, isolated comments  
9 offer only limited insight into the defendant's motives. See  
10 Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor,  
11 J., concurring) (discussing the limited evidentiary value of  
12 "stray remarks in the workplace" in a Title VII disparate  
13 treatment case). In contrast, Amagau's decision to arrest Valdez  
14 here was based on his brief interaction with Valdez moments before  
15 the arrest. In the space of that brief interaction, Amagau's  
16 isolated comment is potentially quite probative of his underlying  
17 motives, especially since it remains disputed whether Amagau had  
18 probable cause to make the arrest. See, e.g., Carroll v. Village  
19 of Homewood, 2001 WL 1467708, at \*14 (N.D. Ill.) ("If there was no  
20 probable cause and [the defendant] indeed called [the plaintiff] a  
21 'loud mouth nigger' upon his arrest (a disputed fact), this is  
22 sufficient to support an inference of discriminatory intent.").

23 Because the parties dispute whether Amagau actually made this  
24 comment to Valdez, Amagau is not entitled to summary judgment on  
25 Plaintiffs' equal protection claim. All other individual  
26 Defendant officers, however, are entitled to summary judgment on  
27 this claim.

28



1                   3.     Claims arising under § 1985 and the First, Fifth,  
2                                 Sixth, and Eighth Amendments

3             Defendants do not appear to have raised any arguments in  
4 support of their motion with respect to Plaintiffs' First, Fifth,  
5 Sixth, and Eighth Amendment claims or their § 1985 claim.  
6 Accordingly, they have not met their initial burden and summary  
7 judgment must be denied with respect to these claims. See Nissan,  
8 210 F.3d at 1107. Although these claims remain to be tried, the  
9 Court notes that Plaintiffs have not, thus far, provided an  
10 evidentiary basis to support most of these claims.

11                   C.     Federal Claims against Defendants Martin and Rickert

12             Plaintiffs have not provided any evidence that Martin or  
13 Rickert actually participated in their arrests. Still, they  
14 contend that Martin and Rickert are liable for failing to prevent  
15 the alleged constitutional violations committed by their fellow  
16 officers. Because Plaintiffs' evidence does not support an  
17 inference of liability under this failure-to-prevent theory,  
18 Martin and Rickert are entitled to summary judgment here.

19             The Ninth Circuit has recognized that a defendant may be held  
20 liable under § 1983 even if the defendant does not personally  
21 participate in committing an unconstitutional act. To establish  
22 liability under this theory, the plaintiff must show that the  
23 defendant "omit[s] to perform an act which he is legally required  
24 to do which causes the deprivation of the plaintiff's federally  
25 protected rights." Stevenson v. Koskey, 877 F.2d 1435, 1439 (9th  
26 Cir. 1989) (citing Johnson v. Duffy, 588 F.2d 740, 743-44 (9th  
27 Cir. 1978)). Generally, a defendant will be liable for an  
28 omission under § 1983 "only when there is an extremely high degree

1 of culpability for inaction." Lenard v. Argento, 699 F.2d 874,  
2 885 (7th Cir. 1983).

3 Plaintiffs have not provided sufficient evidence to support  
4 an inference of liability under this standard. As the cases they  
5 cite illustrate, courts typically only impose § 1983 liability for  
6 an omission when dealing with a supervisor's "ratification of a  
7 subordinate's misconduct." Stevenson, 877 F.2d at 1439 n.6; see  
8 also Beverly v. Morris, 470 F.2d 1356, 1357 (5th Cir. 1972)

9 (noting that the plaintiff's suit rested "on the theory that [the  
10 defendant] was negligent in failing to train properly the  
11 auxiliary officer, to supervise his patrol duties, and to provide  
12 a regular police officer on duty the night of the assault"). In  
13 the present case, Plaintiffs have not presented any evidence that  
14 Martin and Rickert held supervisory authority over the officers  
15 who actually arrested Plaintiffs. Thus, it is unlikely that they  
16 can be held liable under § 1983 for failing to prevent their  
17 fellow officers' actions.

18 More importantly, Plaintiffs have failed to produce any  
19 evidence that Martin and Rickert were even capable of preventing  
20 their fellow officers' allegedly unconstitutional conduct. Even  
21 assuming that Martin and Rickert had a clear legal duty to prevent  
22 their peers from arresting Plaintiffs -- and Plaintiffs have not  
23 pointed to any specific duty here -- they could only satisfy that  
24 duty if they knew that their fellow officers' conduct threatened  
25 Plaintiffs' constitutional rights. Plaintiffs' evidence does not  
26 support such an inference here.

27 For instance, the mere allegation that "Rickert was with  
28 Orlando when Stubbs was arrested" does not, on its own, support an

1 inference that Rickert knew that Orlando might lack probable cause  
2 for the arrest. See Opp. Summ. J. 20. According to Plaintiffs'  
3 own evidence, Orlando was the only officer to have had direct  
4 contact with Stubbs, which would have made it difficult, if not  
5 impossible, for any other officer to assess the constitutionality  
6 of his arrest decision.<sup>5</sup> Stubbs Depo. 32:4-:21. Plaintiffs'  
7 evidence similarly indicates that Martin was not able to assess  
8 the constitutionality of Wallace's decision to arrest Martinez.  
9 Martinez Depo. 62:2-:5. According to Martinez's own deposition  
10 testimony, Martin was preoccupied at the time of the arrest  
11 because he was speaking to another individual. Id. 62:2-:5,  
12 65:12-:13.

13 Without producing any evidence that Rickert or Martin  
14 actually had the capacity to stop their fellow officers from  
15 making unconstitutional arrests, Plaintiffs cannot establish that  
16 these officers are liable for omissions under § 1983.  
17 Accordingly, Rickert and Martin are entitled to summary judgment  
18 on all of Plaintiffs' claims against them.

19 D. Federal Claims against Defendants Panighetti and Perez

20 As noted above, Plaintiffs have not named Panighetti and  
21 Perez as defendants in this lawsuit. If they wish to substitute  
22

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23 <sup>5</sup> It is not clear that Rickert was even present during  
24 Stubbs' arrest, as Plaintiffs contend in their brief. None of  
25 Plaintiffs' evidence actually identifies Rickert as the second  
26 officer present during Stubbs' arrest and their complaint asserts  
27 only that he was present during Martinez's arrest. See Compl.  
28 ¶ 57. In any event, even accepting arguendo that Rickert was  
present during Stubbs' arrest, none of Plaintiffs' evidence  
indicates that Rickert actually had the capacity to assess the  
constitutionality of Orlando's conduct.

1 these officers for Doe Defendants, they must file and notice a  
2 motion for leave to amend their complaint. Their delay in doing  
3 so will weigh against them.

4 E. Federal Claims against Municipal Defendants

5 In addition to their claims against the individual arresting  
6 officers, Plaintiffs also assert claims for municipal liability  
7 against the City of San Jose and SJPD Chief Davis.

8 "Plaintiffs who seek to impose liability on local governments  
9 under § 1983 must prove that 'action pursuant to official  
10 municipal policy' caused their injury." Connick v. Thompson, 131  
11 S. Ct. 1350, 1359 (2011) (citing Monell, 436 U.S. at 691).

12 "Official municipal policy includes the decisions of a  
13 government's lawmakers, the acts of its policymaking officials,  
14 and practices so persistent and widespread as to practically have  
15 the force of law." Id.

16 A city may not be held vicariously liable for the  
17 unconstitutional acts of its employees on the basis of an  
18 employer-employee relationship with the tortfeasor. Monell, 436  
19 U.S. at 691-92. The Ninth Circuit has held that Monell liability  
20 can be established in one of three ways. Specifically, the  
21 plaintiff must prove (1) "that a city employee committed the  
22 alleged constitutional violation pursuant to a formal governmental  
23 policy or a longstanding practice or custom which constitutes the  
24 standard operating procedure of the local governmental entity;"  
25 (2) "that the individual who committed the constitutional tort was  
26 an official with final policy-making authority;" or (3) "that an  
27 official with final policy-making authority ratified a  
28 subordinate's unconstitutional decision or action and the basis

1 for it." Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir.  
2 1992).

3 Here, Plaintiffs do not point to a specific written policy  
4 encouraging SJPD officers to make section 647(f) arrests without  
5 probable cause. Nor do they point to any written policy  
6 encouraging SJPD officers to consider race when making these  
7 arrests. Rather, Plaintiffs argue that there is such a widespread  
8 practice among SJPD officers of making racially motivated section  
9 647(f) arrests without probable cause that it amounts, in effect,  
10 to an unwritten municipal policy. Plaintiffs also contend that  
11 the City had knowledge of this practice but nevertheless failed to  
12 correct it in its training of SJPD officers. These arguments are  
13 addressed below.

14 1. Fourth Amendment Claims under Monell

15 Plaintiffs allege that there is a widespread, unwritten  
16 practice among SJPD officers of arresting people under section  
17 647(f) without probable cause in violation of the Fourth  
18 Amendment. They argue that this practice effectively functions as  
19 SJPD's standard operating procedure for public intoxication  
20 arrests.

21 For support, Plaintiffs rely on various reports and documents  
22 obtained from SJPD, which allegedly show that SJPD officers often  
23 lack valid reasons for making section 647(f) arrests. They point  
24 specifically to SJPD's "Pre-Booking Information Sheets,"  
25 "Affidavits re Probable Cause and Bail Setting," and "Police  
26 Reports." Declaration of Andrew V. Stearns, Exs. C & E. These  
27 documents provide a space for officers to describe their reasons  
28 for making a public intoxication arrest. Plaintiffs have

1 submitted more than two thousand of these documents -- all  
2 completed by SJPDP officers between 2007 and 2010 -- as evidence  
3 that the department's officers routinely fail to identify a  
4 legitimate source of probable cause for their section 647(f)  
5 arrests. See id. Plaintiffs also provide an analysis of these  
6 documents by Jessica Giron, who reviewed 350 of the reports and  
7 concluded that "probable cause was lacking in 71.43%" of them.  
8 Declaration of Jessica Giron ¶ 1. Giron asserts that her criteria  
9 for determining whether or not an officer had probable cause was  
10 "whether the officer included details as to why the person was a  
11 danger to themselves or others." Id. ¶ 2. According to  
12 Plaintiffs, Giron's analysis demonstrates that SJPDP officers  
13 frequently arrest individuals who may be intoxicated but who do  
14 not show signs that they are "unable to exercise care" for  
15 themselves or others, as the statute requires. See Cal. Penal  
16 Code § 647(f). This analysis does not support an inference that  
17 SJPDP's arrest practices systematically violate the Fourth  
18 Amendment.

19 Giron's analysis is limited for several reasons. First,  
20 Giron fails to state whether the reports she reviewed constitute a  
21 representative cross-section of all SJPDP reports for section  
22 647(f) reports. She does not explain how these reports were  
23 selected or why her analysis is limited to 350 reports when  
24 Plaintiffs had access to over a thousand other reports. Second,  
25 Giron fails to identify her qualifications or explain her  
26 methodology. In fact, her entire analysis is less than a hundred  
27 words long. Third, and most importantly, her analysis rests on  
28 the faulty assumption that symptoms of intoxication alone can

1 never justify an officer's decision to arrest someone under  
2 section 647(f). This assumption ignores the possibility that  
3 certain symptoms of intoxication can also provide an officer with  
4 reason to believe that someone is unable to care for him or  
5 herself. Plaintiffs' own evidence includes several SJPD arrest  
6 reports featuring written observations of arrestee behavior that  
7 satisfy both criteria. See, e.g., Stearns Decl., Ex. C, File 6,  
8 Affidavit of Probable Cause for C. Moreno, at 001327 (citing "poor  
9 balance" and "poor time/situational awareness" as evidence of both  
10 intoxication and inability to care for one's self).

11 In sum, Plaintiffs' evidence does not support an inference  
12 that SJPD officers follow a "standard operating procedure" or  
13 "longstanding practice" of systematically ignoring considerations  
14 that bear on probable cause under section 647(f). Gillette, 979  
15 F.2d at 1346. The evidence is also insufficient to support an  
16 inference that any SJPD officer with "policy-making authority,"  
17 such as Chief Davis, participated in making an unconstitutional  
18 arrest or "ratified" a subordinate's decision to do so. Id.  
19 Plaintiffs do not even appear to allege, let alone offer evidence,  
20 that the officers who arrested them had policy-making authority or  
21 consulted a supervisor before making the arrest. Accordingly,  
22 municipal Defendants are entitled to summary judgment on  
23 Plaintiffs' Fourth Amendment claims under Monell.

24 2. Fourteenth Amendment Claims under Monell

25 Plaintiffs allege that SJPD enforces section 647(f) in a  
26 racially discriminatory manner in violation of the Fourteenth  
27 Amendment. Specifically, they contend that SJPD targets Latinos  
28 for public intoxication arrests so often that the practice

1 effectively functions as the department's standard operating  
2 procedure.<sup>6</sup> To survive summary judgment on this claim, Plaintiffs  
3 must produce evidence to support an inference that SJPD maintained  
4 a policy, custom, or longstanding practice of intentionally  
5 discriminating against Latinos. Navarro v. Block, 72 F.3d 712,  
6 716 (9th Cir. 1995); Gillette, 979 F.2d at 1346.

7 Discriminatory intent may be proved by indirect evidence,  
8 including whether the challenged state action has a  
9 disproportionate "impact" on a particular group. Arlington  
10 Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). The  
11 Supreme Court has cautioned, however, that "impact alone is not  
12 determinative" and, absent a clear pattern of discrimination,  
13 courts must look to other evidence when adjudicating equal  
14 protection claims. Id. The critical inquiry in assessing  
15 statistical evidence of discriminatory impact is "whether that  
16 impact is sufficiently gross or stark that a court must infer that  
17 it was intended by the defendant." Gay v. Waiters' & Dairy  
18 Lunchmen's Union, 694 F.2d 531, 552 (9th Cir. 1982). Cases where  
19 statistical evidence alone is sufficient to establish equal  
20 protection liability are rare. Id. ("'Discriminatory impact,' as  
21 shown by statistical evidence, is a starting point, and an  
22 important starting point, to that inquiry, but is rarely  
23 sufficient of itself."); Arlington Heights, 429 U.S. at 266.

24 Here, Plaintiffs rely principally on statistical evidence to  
25 support their discrimination claim. They provide an analysis by

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26 <sup>6</sup> Although one of the four Plaintiffs in this suit is  
27 African-American, Plaintiffs' claims against municipal Defendants  
28 here are based solely on discrimination against Latinos. 2AC  
¶ 119.



1 Ann Kalinowski which identifies a statistically significant<sup>7</sup>  
2 disparity between the proportion of San Jose's population that  
3 identifies as Latino (thirty-three percent) and the proportion of  
4 people arrested for public intoxication who are Latino (fifty-  
5 seven percent). Declaration of Ann Kalinowski ¶¶ 8-9 (focusing on  
6 statistics for the year 2007). Kalinowski's analysis also  
7 compares the rate at which Latinos were arrested for public  
8 intoxication in San Jose (eighty-five arrests per 10,000 Latinos)  
9 to their arrest rates in Oakland (forty-nine arrests per 10,000  
10 Latinos) and San Diego (twenty-two arrests per 10,000 Latinos).  
11 Id. ¶¶ 8, 13. She concludes that, even when controlling for  
12 differences in these cities' Latino populations, Latinos were  
13 arrested for public intoxication at a much higher rate in San  
14 Jose. Id.

15 In addition to Kalinowski's analysis, Plaintiffs provide data  
16 from a 2007 report<sup>8</sup> by the National Highway Transportation Safety  
17 Administration (NHTSA) which, they argue, further illustrates that  
18 the SJPD arrest disparities are the product of discriminatory  
19 animus. Plaintiffs state that the NHTSA report indicates that the  
20 percentage of Latino drivers who drive at night without alcohol in  
21 their system is roughly comparable to the percentage of white  
22  
23

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24 <sup>7</sup>  $Z = 34.8$ ;  $P\text{-value} \approx 0$ . Kalinowski Decl. ¶ 9.

25 <sup>8</sup> Nat'l Transp. Safety Admin., National Roadside Survey of  
26 Alcohol and Drug Use: Alcohol Results (2007), available at  
27 <http://www.nhtsa.gov/Driving+Safety/Research+&+Evaluation/2007+National+Roadside+Survey+of+Alcohol+and+Drug+Use+by+Drivers>.  
28 Plaintiffs have asked the Court to take judicial notice of the  
report. The Court will take judicial notice of the report but not  
for the truth of the matters asserted therein.

1 drivers who do so.<sup>9</sup> Based on this statistic, Plaintiffs argue  
2 that "the percentage of Hispanics who are intoxicated while  
3 driving does not differ from the percent of Caucasians" and, thus,  
4 in the absence of discriminatory enforcement, the rates of public  
5 intoxication arrests between the two groups should be roughly  
6 equivalent. Opp. Summ. J. 23.

7 None of this evidence is sufficient to support an inference  
8 of discriminatory intent on the part of SJPD. The Kalinowski  
9 analysis falls far short of illustrating the "clear pattern" of  
10 discrimination "unexplainable on grounds other than race" that is  
11 required to establish equal protection liability based on  
12 statistical evidence. Arlington Heights, 429 U.S. at 266.  
13 Kalinowski fails to explain, for instance, why San Jose's Latino  
14 population represents the appropriate baseline against which the  
15 Latino share of section 647(f) arrestees should be compared. This  
16 decision ignores the possibility that some of SJPD's public  
17 intoxication arrests may involve individuals who reside outside of  
18 San Jose -- such as all four Plaintiffs in this case.<sup>10</sup> To show a  
19 pattern of discriminatory enforcement, Plaintiffs would have to  
20 select a baseline that more accurately reflects the population of  
21 people potentially subject to section 647(f) arrests. At the very  
22 least, Plaintiffs must explain why Kalinowski's choice of baseline  
23 is reasonable. Cf. Johnson v. Northwest Airlines, 1995 WL 242001,  
24 at \*3 (6th Cir.) (per curiam) (upholding summary judgment in favor  
25

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26 <sup>9</sup> Plaintiffs do not provide a citation to specific page of  
the report, which is over one hundred pages in length.

27 <sup>10</sup> Although Kalinowski states in her declaration that her  
28 conclusions would apply with equal force to the "San Jose census  
region," she fails to explain how she reached this conclusion.

1 of Title VII defendants because "plaintiff gives us no reason why  
2 his baseline . . . provides the appropriate statistic" for  
3 assessing discriminatory impact).

4 Kalinowski's analysis suffers from other critical defects.  
5 It relies, for example, on second-hand data taken from a 2009  
6 newspaper article and offers no guarantee of its accuracy.  
7 Kalinowski Decl. ¶ 8. Furthermore, the analysis purports only to  
8 show that the discrepancy between the Latino share of San Jose's  
9 population and the Latino share of SJPD's public intoxication  
10 arrests is "not due to chance." Id. ¶ 9. The Ninth Circuit has  
11 held that this type of analysis is, without more, insufficient to  
12 demonstrate discriminatory intent. Gay, 694 F.2d at 553 ("Simply  
13 put, statistics demonstrating that chance is not the more likely  
14 explanation are not by themselves sufficient to demonstrate that  
15 race is the more likely explanation for an employer's conduct [in  
16 a Title VII case].").

17 Kalinowski's comparison of section 647(f) arrest rates in San  
18 Jose, Oakland, and San Diego is similarly flawed. At no point  
19 does Kalinowski explain why Oakland and San Diego are appropriate  
20 cities against which to compare San Jose's Latino arrest rate.  
21 Without this explanation -- and with no reference to statewide  
22 statistics -- the selection of these cities amounts to little more  
23 than statistical cherry-picking.

24 Plaintiffs' reliance on the NHTSA report is even more  
25 problematic. Not only is the report based on the results of a  
26 national survey of nighttime drivers, which may or may not reflect  
27 the habits of San Jose-area drivers, but it says nothing about the  
28 drinking habits of non-drivers. As Plaintiffs' own arrests in

1 this case demonstrate, non-drivers -- such as Vasquez, Martinez,  
2 and Stubbs -- can also be arrested under section 647(f).  
3 Plaintiffs' effort to extrapolate the rates of public intoxication  
4 among different racial groups in the San Jose area from a national  
5 survey of nighttime drivers is too strained to satisfy their  
6 burden on summary judgment.

7 Thus, in light of the numerous deficiencies in Plaintiffs'  
8 statistical evidence and their failure to produce any other  
9 evidence of discrimination,<sup>11</sup> municipal Defendants are entitled to  
10 summary judgment on Plaintiffs' equal protection claim. See  
11 Jok-ef v. Columbia Basin CLG, 66 F.3d 335, at \*4 (9th Cir. 1995)  
12 (unpublished opinion) ("Statistical evidence by itself is not  
13 sufficient to avoid summary judgment unless such evidence reveals  
14 'a clear pattern [of discrimination], unexplainable on grounds  
15 other than race.'" (citations omitted; alterations in original)).<sup>12</sup>

16 3. Failure-to-Train Claims under Monell

17 The Supreme Court has recognized that, under "limited  
18 circumstances, a local government's decision not to train certain

19 \_\_\_\_\_  
20 <sup>11</sup> Although the comment that Agamau allegedly made to Valdez  
21 during his arrest constitutes non-statistical evidence of  
22 discrimination, it is insufficient on its own to support an  
23 inference of a widespread pattern of discrimination.

24 <sup>12</sup> In their motion for class certification, Plaintiffs refer  
25 to this suit as a "disparate impact" case and cite several cases  
26 where statistical evidence was used to show discriminatory impact.  
27 These cases are inapposite to Defendants' summary judgment motion.  
28 The cases Plaintiffs cite arise under civil rights statutes, such  
as Title VII and the Voting Rights Act, that expressly support  
liability for "disparate impact" and "discriminatory effect." In  
contrast, Plaintiffs' claims here arise under the Equal Protection  
Clause, which the Supreme Court has long held does not support  
"racial impact" liability. See Washington v. Davis, 426 U.S. 229,  
247-48 (1976).

1 employees about their legal duty to avoid violating citizens'  
2 rights may rise to the level of an official government policy for  
3 purposes of § 1983." Connick, 131 S. Ct. at 1359. To establish  
4 liability under this theory, the "municipality's failure to train  
5 its employees in a relevant respect must amount to 'deliberate  
6 indifference to the rights of persons with whom the [untrained  
7 employees] come into contact.'" Id. (citing Canton v. Harris,  
8 489 U.S. 378, 388 (1989)). This "stringent standard of fault"  
9 requires proof that "policymakers are on actual or constructive  
10 notice that a particular omission in their training program causes  
11 city employees to violate citizens' constitutional rights." 131  
12 S. Ct. at 1360. In short, the training deficiency must be the  
13 "functional equivalent of a decision by the city itself to violate  
14 the Constitution." Id. Plaintiffs have not met this standard  
15 here.

16 Defendants' evidence indicates that, since at least 2007,  
17 SJPD has provided its officers with specific training in section  
18 647(f) enforcement upon their graduation from the police academy.  
19 See Declaration of Michael Knox ¶¶ 2-7. Although Plaintiffs do  
20 not dispute this evidence, they contend that SJPD's training  
21 procedures were constitutionally deficient. They further assert  
22 that City policymakers should have known of this deficiency based  
23 on a report by the City's Public Intoxication Task Force, which  
24 was established in November 2008 to review SJPD's section 647(f)  
25 enforcement policies. Pls.' Request for Judicial Notice, Ex. K,  
26 Memorandum Re: Public Intoxication Task Force, at 1.<sup>13</sup> The task

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27 <sup>13</sup> The Court grants Plaintiffs' request to take judicial  
28 notice of this document.

1 force was created at the request of the City Council and charged  
2 with proposing policy recommendations to City officials. Id. It  
3 consisted of members of various community organizations and  
4 various City agencies, including SJPD. Id. The task force issued  
5 its recommendations in June 2009. Id., Ex. L.

6 Plaintiffs' reliance on the task force and its report as  
7 evidence of the City's failure to train its officers is misplaced.  
8 The task force convened after all four Plaintiffs in this case  
9 were arrested and Plaintiffs have not identified any evidence that  
10 SJPD made any unconstitutional arrests after the task force issued  
11 its report. Moreover, the report itself could not have provided  
12 the City with notice that SJPD officers were routinely committing  
13 constitutional violations, as Plaintiffs suggest. The report  
14 focused principally on proposing procedural reforms and did not  
15 address the constitutional implications of past SJPD practices.  
16 See id. Although one of the task force's member organizations  
17 highlighted possible racial disparities in section 647(f) arrest  
18 rates, the report itself stated that these "observations have not  
19 been approved or validated by the [task force] or Administration."  
20 Id.

21 Accordingly, neither the creation of the task force nor its  
22 final report gave City officials "notice that a particular  
23 omission in their training program causes city employees to  
24 violate citizens' constitutional rights." Connick, 131 S. Ct. at  
25 1360. Without this notice, the City cannot be held liable for  
26 failure to train its officers under Monell. Municipal Defendants  
27 are therefore entitled to summary judgment on this claim.  
28

1 F. State Claims

2 Plaintiffs assert claims of false arrest and battery against  
3 Wallace, Agamau, Orlando, Rickert, and Martin. In addition, they  
4 charge all Defendants with civil conspiracy, negligence, and  
5 violations of the Bane Act and the Ralph Act, Cal. Civ. Code  
6 §§ 52.1, 51.7.

7 Defendants contend that they are entitled to summary judgment  
8 on all of these claims because the officers who arrested  
9 Plaintiffs had probable cause to do so. Plaintiffs, in response,  
10 argue that summary judgment on these claims must be denied because  
11 Defendants have not established probable cause.

12 As explained above, the parties dispute several facts that  
13 are central to determining whether or not Defendants had probable  
14 cause to arrest Plaintiffs under section 647(f). Thus, because  
15 Defendants present no other arguments or evidence supporting their  
16 motion for summary judgment on Plaintiffs' state law claims, their  
17 motion must be denied with respect to these claims. See Nissan,  
18 210 F.3d at 1107.

19 II. Plaintiffs' Motion for Class Certification

20 A. Legal Standard

21 Plaintiffs seeking to represent a class must satisfy the  
22 threshold requirements of Rule 23(a) as well as the requirements  
23 for certification under one of the subsections of Rule 23(b).  
24 Rule 23(a) provides that a case is appropriate for certification  
25 as a class action if

- 26 (1) the class is so numerous that joinder of all members is  
27 impracticable;
- 28 (2) there are questions of law or fact common to the class;

- 1 (3) the claims or defenses of the representative parties are  
typical of the claims or defenses of the class; and
- 2 (4) the representative parties will fairly and adequately  
3 protect the interests of the class.

4 Fed. R. Civ. P. 23(a).

5 Plaintiffs must also establish that one of the subsections of  
6 Rule 23(b) is met. In the instant case, Plaintiffs seek  
7 certification under subsections (b) (1) and (b) (2), or  
8 alternatively, under (b) (3).

9 Rule 23(b) (1) applies where the prosecution of separate  
10 actions by individual members of the class would create the risk  
11 of "inconsistent or varying adjudications with respect to  
12 individual members of the class which would establish incompatible  
13 standards of conduct for the party opposing the class," or of  
14 adjudications "which would as a practical matter be dispositive of  
15 the interests of the other members not parties to the  
16 adjudications or substantially impair or impede their ability to  
17 protect their interests." Fed. R. Civ. P. 23(b) (1).

18 Rule 23(b) (2) applies where "the party opposing the class has  
19 acted or refused to act on grounds generally applicable to the  
20 class, thereby making appropriate final injunctive relief or  
21 corresponding declaratory relief with respect to the class as a  
22 whole." Fed. R. Civ. Proc. 23(b) (2). "Civil rights cases against  
23 parties charged with unlawful, class-based discrimination are  
24 prime examples" of Rule 23(b) (2) actions. Amchem Prods., Inc. v.  
25 Windsor, 521 U.S. 591, 614 (1997).

26 Rule 23(b) (3) permits certification where common questions of  
27 law and fact "predominate over any questions affecting only  
28 individual members" and class resolution is "superior to other



1 available methods for the fair and efficient adjudication of the  
2 controversy." Fed. R. Civ. P. 23(b)(3). These requirements are  
3 intended "to cover cases 'in which a class action would achieve  
4 economies of time, effort, and expense . . . without sacrificing  
5 procedural fairness or bringing about other undesirable results.'" Amchem Prods., 521 U.S. at 615 (quoting Fed. R. Civ. P. 23(b)(3)  
6 Adv. Comm. Notes to 1966 Amendment).

8       Regardless of what type of class the plaintiff seeks to  
9 certify, it must demonstrate that each element of Rule 23 is  
10 satisfied; a district court may certify a class only if it  
11 determines that the plaintiff has borne this burden. Gen. Tel.  
12 Co. of Sw. v. Falcon, 457 U.S. 147, 158-61 (1982); Doninger v.  
13 Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). In  
14 general, the court must take the substantive allegations of the  
15 complaint as true. Blackie v. Barrack, 524 F.2d 891, 901 (9th  
16 Cir. 1975). However, the court must conduct a "'rigorous  
17 analysis,'" which may require it "'to probe behind the pleadings  
18 before coming to rest on the certification question.'" Wal-Mart  
19 Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting  
20 Falcon, 457 U.S. at 160-61). "Frequently that 'rigorous analysis'  
21 will entail some overlap with the merits of the plaintiff's  
22 underlying claim. That cannot be helped." Dukes, 131 S. Ct. at  
23 2551. To satisfy itself that class certification is proper, the  
24 court may consider material beyond the pleadings and require  
25 supplemental evidentiary submissions by the parties. Blackie, 524  
26 F.2d at 901 n.17. "When resolving such factual disputes in the  
27 context of a motion for class certification, district courts must  
28 consider 'the persuasiveness of the evidence presented.'" Aburto

1 v. Verizon Cal., Inc., 2012 WL 10381, at \*2 (C.D. Cal.) (quoting  
2 Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir.  
3 2011)). Ultimately, it is in the district court's discretion  
4 whether a class should be certified. Molski v. Gleich, 318 F.3d  
5 937, 946 (9th Cir. 2003); Burkhalter Travel Agency v. MacFarms  
6 Int'l, Inc., 141 F.R.D. 144, 152 (N.D. Cal. 1991).

7 B. Analysis

8 Defendants contend that class certification must be denied  
9 here because Plaintiffs have failed to satisfy the commonality  
10 prerequisite of Rule 23(a)(2).

11 The Supreme Court recently held in Dukes that plaintiffs  
12 seeking to certify a Title VII class action must produce  
13 "'significant proof' that [the defendant] 'operated under a  
14 general policy of discrimination'" to satisfy the commonality  
15 prerequisite. 131 S. Ct. at 2253 (citations omitted) (emphasis  
16 added). Since Dukes, lower courts have applied this rule to  
17 plaintiffs in Fourth and Fourteenth Amendment class actions, as  
18 well, by requiring them to produce "significant proof" that the  
19 defendant followed an unconstitutional policy or practice. See,  
20 e.g., Aguilar v. Immigration & Customs Enforcement Div., 2012 WL  
21 1344417, at \*5-\*7 (S.D.N.Y.) (denying class certification under  
22 Dukes because plaintiffs failed to establish that the defendant  
23 immigration agency followed an unconstitutional policy of  
24 targeting Latinos for home raids). In the absence of such proof,  
25 courts have denied certification for lack of commonality. See id.

26 As explained above, Plaintiffs here have failed to produce  
27 sufficient evidence to establish that SJPD followed any  
28 unconstitutional policy or practice regarding public intoxication

1 arrests. Specifically, they have not shown that SJPD's training  
2 procedures resulted in widespread constitutional violations nor  
3 have they provided reliable evidence showing a widespread practice  
4 of unreasonable seizures or racially discriminatory enforcement of  
5 section 647(f).

6 Indeed, even if Plaintiffs' evidence did not suffer from the  
7 numerous deficiencies described above, it would still likely fall  
8 short of satisfying Rule 23(a)'s commonality requirement because  
9 it rests on five year old data. Earlier this year, a court in the  
10 Southern District of New York denied class certification on this  
11 basis to plaintiffs alleging that federal immigration agents  
12 unconstitutionally target Latinos for home raids. Aguilar, 2012  
13 WL 1344417, at \*7. The court found that the plaintiffs'  
14 statistical analysis of five year old data lacked the "scientific  
15 rigor" that Dukes required and could not be used to certify a  
16 class that included plaintiffs whose homes were raided years  
17 later. Id. ("Plaintiffs' statistical analysis is based on lists  
18 of targets for the 2007 operations. It is, as in [Dukes],  
19 standing alone, insufficient to provide a foundation for a  
20 determination that ICE agents today engage or would engage in  
21 intentional targeting of Latinos for unconstitutional home  
22 raids."). Plaintiffs' statistical analysis of 2007 arrest rates  
23 suffers from the same problem.

24 Accordingly, because Plaintiffs have failed to show that SJPD  
25 followed an unconstitutional practice or policy, they cannot  
26 demonstrate commonality under Rule 23(a)(2). In light of this  
27 failure, the Court need not address whether Plaintiffs have  
28 satisfied the requirements of Rule 23(b).

1 CONCLUSION

2 For the reasons set forth above, Defendants' motion for  
3 summary judgment (Docket No. 127) is GRANTED in part and DENIED in  
4 part. Plaintiffs' motion for class certification is DENIED  
5 (Docket No. 118). Defendants' administrative motion to accept  
6 their late filings (Docket No. 154) is GRANTED. Defendants'  
7 evidentiary objections to the declarations of Jessica Giron and Ann  
8 Kalinowski are overruled as moot.

9 Defendants are granted summary judgment on Plaintiffs' first,  
10 second, third, fourth, and fifth causes of action. Defendants are  
11 also granted summary judgment on Stubbs' and Martinez's Fourteenth  
12 Amendment claims, which are asserted in Count Six of Plaintiffs'  
13 sixth cause of action. Defendants City of San Jose, Chief Davis,  
14 Officer Rickert, and Officer Martin are entitled to summary  
15 judgment on all claims against them. Plaintiffs' other causes of  
16 action remain to be tried.

17 The parties are referred to Magistrate Judge Grewal for a  
18 settlement conference.

19 Within seven days of this order, the parties will submit a  
20 joint statement proposing dates for a final pretrial conference  
21 and a jury trial. The final pretrial conference must be scheduled  
22 for a Wednesday at 2:00 p.m. and take place at least two weeks  
23 before trial is set to begin.

24 IT IS SO ORDERED.

25  
26 Dated: 2/27/2013

27   
28 CLAUDIA WILKEN  
United States District Judge