Ninth Circuit No. 20-55903
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES HOWARD ERWIN, an individual,

Plaintiffs - Appellants,

v.

COUNTY OF SAN BERNARDINO; **MICHAEL A. RAMOS**, in his individual capacity; **R. LEWIS COPE**, in his individual capacity; **JAMES HACKLEMAN**, in his individual capacity; **HOLLIS BUD RANDLES**, in his individual capacity; **ROBERT SCHREIBER**, in his individual capacity,

Defendants - Appellees.

U.S. District Court No. 5:18-cv-00420-JGB-SHK

U.S. District Court for Central California, Riverside

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Honorable Jesus G. Bernal, District Judge

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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APPELLANT'S OPENING BRIEF

INTRODUCTION

James H. Erwin ("Erwin") is former Chief of Staff to a San Bernardino County Board of Supervisors member, and he is former President of the San Bernardino County Sheriff's Employee Benefit Association (SEBA). The County of San Bernardino (the "County"), its attorneys and their investigators, initiated a documented campaign of unlawful retaliation against Erwin for the lawful exercise of his First Amendment rights in connection with his participation in securing a $102 million settlement paid by the County and the San Bernardino County Flood Control District (the "District") to Colonies Partners LP ("Colonies").

At some point, the retaliatory campaign resulted in a baseless criminal investigation into Colonies, a managing member of its general partnership, Jeffrey Burum ("Burum") and their perceived "allies," Erwin included. The investigation was premised on the false belief the settlement was the product of bribes in the form of Political Action Committee ("PAC") contributions. The criminal investigation led to the filing of felony charges against Erwin and created more than eight years of criminal litigation. At trial, the jury was deadlocked as to the bribery counts, ultimately resulting in a mistrial.[1] Prosecutors thereafter moved to dismiss all remaining charges against Erwin. Excerpts of Record ("ER"), 9-ER-

[1] Burum was acquitted on all charges without having to call a single witness at trial. 1-ER-15, 62, 2-ER-262-82.

2179.

Consequently, these events led Erwin to file a complaint for: (1) retaliation under 42 U.S.C. § 1983; (2) malicious prosecution under 42 U.S.C. § 1983; (3) fabrication of evidence under 42 U.S.C. § 1983; (4) *Monell* municipal liability under 42 U.S.C. § 1983; (5) supervisorial liability under 42 U.S.C. § 1983; (6) conspiracy under 42 U.S.C. § 1983; (7) malicious prosecution (California law); (8) negligence; and (9) intentional infliction of emotional distress.

On summary judgment, the District Court found no triable issues to enable Erwin to proceed to trial on any of his causes of action. Erwin appeals the District Court's ruling as to the following claims: (1) retaliation (against Ramos and Hackleman); (2) *Monell* municipal liability; (3) malicious prosecution; (4) conspiracy; and (5) supervisorial liability.

JURISDICTIONAL STATEMENT

1. The United States District Court for the Central District of California ("District Court") had jurisdiction over the claims of Appellant, James Howard Erwin ("Erwin") pursuant to 28 U.S.C. § 1331, in that this action arises under the Constitution and laws of the United States, specifically 42 U.S.C. § 1983.

2. The Court of Appeals has jurisdiction over this appeal based upon 28 U.S.C. § 1291, in that Erwin is appealing a final judgment of the District Court.

3. On July 28, 2020, the District Court issued an order ("Order")

granting motions for summary judgment filed by the County, James Hackleman, Michael A. Ramos, R. Lewis Cope, Robert Schreiber and Bud Randles. 2-ER-262. Erwin filed a notice of appeal on August 26, 2020, the appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A), 2-ER-2367.

4. Erwin filed a Notice of Related Cases informing the District Court his lawsuit was related to *Colonies Partners, L.P. v. County of San Bernardino, et al.*, Case No. 5:18-CV-00420-JGB-SHK (lead case), and four others, 9-ER-2214-15; the District Court's Order fully and finally disposed of all of Erwin's claims, 1-ER-2-62.

ISSUES PRESENTED

I. Whether Hackleman and Ramos's unconstitutional animus was the substantial motivating factor to investigate Erwin for bribery because he accepted a donation to his PAC from Colonies.

II. Whether the County engaged in a longstanding municipal policy leading to a constitutional violation or Ramos took or ratified retaliatory action which led to a constitutional violation.

III. Whether Hackleman and Ramos's unconstitutional campaign of retaliation supports Erwin's claim for malicious prosecution.

IV. Whether Hackleman and Ramos's unconstitutional campaign of retaliation supports Erwin's claim for conspiracy.

V. Whether Hackleman and Ramos's unconstitutional campaign of retaliation supports Erwin's claim for supervisory liability.

STATEMENT OF THE CASE

In 2002, Colonies Partners LP ("Colonies"), a California limited real estate partnership, initiated civil litigation against the County of San Bernardino (the "County") and the San Bernardino County Flood Control District (the "District"). The lawsuit related to easements for flood control and for water conservation which affected title to real property owned by Colonies. After the litigation started, Colonies and Jeff Burum ("Burum"), co-managing member of Colonies' general partner, made public statements criticizing the County in addition to publicly and successfully supporting pro-development candidates for the County Board of Supervisors. On November 28, 2006, the County Board of Supervisors voted 3 to 2 to settle the lawsuit brought by Colonies, and the County and the District entered a $102 million settlement with Colonies. Bill Postmus ("Postmus"), board member, voted in favor of the settlement. 4-ER-74-78, 4-ER-821-52. Postmus would later become the County Assessor. 5-ER-1252.

To facilitate settlement, Burum and Colonies engaged James H. Erwin ("Erwin"), a political player in San Bernardino County, to act as an intermediary between Colonies and the Board of Supervisors. 4-ER-751, 753, 5-ER 1251, 6-ER, 1292-1293, 1295-1296, 1385, 7-ER-1613, 1643. In mid-2006, Erwin was the

current Chief of Administration and immediate past-President of the San Bernardino County Sheriff's Department Employee Benefit Association. 7-ER-1729. Post-settlement, Erwin was appointed to Assistant Assessor by newly elected County Assessor Postmus. 5-ER-1252-53. Thereafter, he was appointed Chief of Staff to newly elected San Bernardino County Supervisor Neil Derry. 8-ER-1940. Erwin resigned as Supervisor Derry's Chief of Staff on March 23, 2009. 5-ER, 1277. In addition to Erwin, Colonies retained professionals such as former California State Senator James Brulte. 5-ER-1251, 1270.

As part of the effort to informally resolve the litigation, Colonies—by and through Erwin—actively and directly petitioned members of the County Board of Supervisors and other County officials and employees to accept responsibility for the County and District's actions and reasonably settle the dispute. 2-ER-0152-53, 3-ER-0613, 4-ER-990, 5-ER-1254, 1256, 1266, 6-ER-1292, 1296, 1364, 7-ER-1643, 1647, 1794, 8-ER-2044. Erwin and the others were integral to Colonies' direct communications with County Board members and efforts to shape public discourse regarding the dispute. Particularly, Erwin had been an early supporter of Postmus when Postmus ran for office in 2000, and Postmus and Erwin knew each other well. 3-ER-541, 6-ER-1443. During the Colonies civil trial in May/June 2006, Erwin attended the trial in San Bernardino County Superior Court. While the trial was ongoing Erwin saw firsthand the daily losses being suffered by the

county. The complete opposite county lawyers were telling county supervisors. Erwin invited Postmus to the courtroom to observe the trial for himself. Afterwards Erwin became an outspoken critic of the county's handling of the case. True to Erwin's own observations the county lost. Erwin recommended to Postmus that should the county appeal, that it should do so on a contingency fee basis with outside county attorneys. 2-ER-156-157. For his services, Erwin was compensated by Colonies in the form of a January 2007 round trip private jet trip to New York City and Washington, D.C., along with a Rolex watch. 5-ER-1259, 1269.

In 2007, Following the settlement, Erwin formed a political action committee ("PAC") called Committee for Effective Government, which received one-hundred thousand dollars ($100,000) directly from Colonies. 5-ER-1251, 9-ER-2341-42. Erwin used this and other raised funding to support and oppose multiple candidates for elected office, including Neil Derry, an ultimately successful pro-development candidate who was outspoken against District Attorney Michael Ramos ("Ramos"). 2-ER-158, 274, 3-ER-466, 476, 5-ER-1134-36, 6-ER-1318, 9-ER-2352.

The County District Attorney's Office ("DA's Office") began to investigate the circumstances of the settlement, specifically, whether it was the result of corruption or a bribe. Evidence supports the conclusion the investigation began early. Emails from James Hackleman ("Hackleman"), assistant DA and prosecutor,

sent prior to the settlement demonstrate that he was aware of Burum and Colonies' settlement negotiations with the County. 1-ER-9-10, 3-ER-422-434, 439-455. Once the settlement was reached, the Public Integrity Unit ("PIU") within the DA's Office discussed the settlement in departmental meetings. 3-ER-448-453. In July 2008, Bud Randles ("Randles"), a senior investigator, expressed interest in Erwin and his becoming Chief of Staff for Neil Derry stating, "unless somebody can stop him." 8-ER-1971. On or about August 4, 2008, Randles asked associates of Postmus about Burum and the settlement, and whether Postmus accepted a bribe. 8-ER-1962-72.

The PIU began investigating circumstances leading to the settlement no later than November 1, 2008, when investigators, R. Lewis Cope ("Cope") and Randles, interviewed Adam Aleman ("Aleman"), Assistant Assessor, about Postmus's activity at the County Assessor's Office, which was alleged to have improperly utilized the services of a consulting firm while under Postmus's control. 5-ER-1238-1246. Since Erwin was previously Assistant Assessor, he provided damning information to the San Bernardino County Grand Jury and District Attorney's office regarding Aleman and Postmus's illegal activity. 1-ER-10, 8-ER-1940. The information was used to investigate and arrest both individuals. Aleman was accused of running a political operation out of the Assessor's Office and was facing nine felony charges, including falsifying information to the County Grand

Jury, at the time, agreed to cooperate with investigators in order to reduce his potential criminal liability. 4-ER-843-55. Aleman became aware of Erwin's involvement and when questioned by investigators about the Colonies settlement, Aleman provided false information to the PIU specific to Erwin as follows: (1) Aleman told the interviewing investigators that prior to the 2006 settlement, former Assistant Assessor Erwin had showed him political "hit pieces" that had been created and which would be publicly released if the Colonies Lawsuit was not settled; (2) Aleman discussed the shuttle negotiations that Postmus, Erwin, and Burum conducted in 2006; and (3) Aleman falsely stated Erwin received $100,000 payments to his PAC in exchange for voting or delivering the County Board of Supervisors' votes in favor of the 2006 settlement. 5-ER-1251, 1271-72. Aleman also told the interviewing investigators that Burum took Erwin on a trip to New York where Burum paid for a Rolex watch for Erwin and provided Erwin cash to spend on prostitutes. 5-ER-1255-1256.

The records that Randles received in response to the warrants confirmed that charges to Burum's American Express account were made in New York and Washington, D.C. in January 2007 and that Burum purchased two watches at Tourneau in New York on January 29, 2007. 3-ER-621, 623. On January 15, 2009, Schreiber and other investigators served a search warrant at Erwin's residence. 5-ER, 1257, 1259, 6-ER-1284-85. During the execution of the search warrant

Schreiber located a Rolex watch in Erwin's residence. 6-ER-1284-85. Schreiber interviewed Erwin while at his residence and Erwin confirmed his involvement in settlement negotiations. 6-ER-1291-93. Erwin also confirmed he formed his PAC, and it received $100,000 from Colonies and other sources. The funds were used for making "political contributions", "polling" and "buying mailers." 5-ER-1135-36, 6-ER-1306-07.

Investigators also obtained Erwin's California Fair Political Practices Commission's ("FPPC") Form 700 "Statement of Economic Interest" which did not disclose any benefits received in January 2007 from Colonies or from Burum, such as a Rolex or a trip. 5-ER-1270, 8-ER-2121, 2144. After the search of Erwin's home, he sought advice from Dave Ellis ("Ellis"), Ramos's chief political advisor. 8-ER-1952-53. Ellis informed Erwin that Ramos advised to amend his Form 700 to include the omitted items. 8-ER-1953. Within one month of the amendment, Ramos had Erwin arrested and charged with then (10) counts of perjury and filing false documents. 5-ER-1277. Ramos has been cited administratively multiple times by the FPPC for nondisclosure or improper accounting of campaign funds. 2-ER-160. He has twice been punished by the maximum allowed fines, but never criminally prosecuted. 2-ER-160.

The year 2010 was an important election year for Ramos. In a political mailer to Ramos's supporters regarding the sexual misconduct investigation

against him, Ramos's wife, Gretchen Ramos, specifically referenced, on letterhead captioned Friends of Mike Ramos, District Attorney, with a P.O. Box address in Ramos's city of residence of Redlands, California, containing allegations that Erwin failed to property report goods or services on public disclosure forms. 3-ER-457-71. Ramos would later testify at his deposition that the PIU – which was running the Colonies investigation – was a pillar of his re-election campaign. 3-ER-413-14.

Moreover, February 16, 2010, was the official opening of the political season. Hackleman wrote his colleagues on January 14, 2010, telling them "I advised our folks that my goal was to have [the Felony Complaint] filed and the bad guys cuffed by February 15." 3-ER-473. On January 28, 2010, Hackleman wrote to Ramos discussing a team meeting in which he "reiterated" Ramos's "goal of completing all of this before Feb. 16 and the importance of it." 3-ER-476. Failure to arrest and lack of "significant bail" were signs of "weakness and special treatment for these political wrongdoers who helped steal over $100 million from the County." 3-ER-478-81. Subsequently, Erwin was charged in a new additional second separate complaint and rearrested on February 10, 2010, on new charges for bribery, extortion, and conspiracy. 7-ER-1727-47. At trial, former state assemblyman and political supporter of Ramos, Bret Granlund, testified that prior to charging Erwin, Ramos told him "he was going to bring the entire weight of his

office down on Erwin's ass." 2-ER-159.

In February 2011, Hackleman acknowledged no direct evidence of a quid pro quo between "Burum and the players." He is quoted saying, "we have no proof" of criminal activity, but rather only "the foul smell." Just days later, Postmus is interviewed for the first time. 7-ER-1578-1726. The first interview was unsuccessful and did not lead to any evidence of a quid pro quo. 7-ER-1578-1726.

The Deputy Attorney General Melissa Mandel commented on the need for "caution in relying on the information [Postmus] is providing," noting a lack of reliability. 3-ER-490. This prompted Hackleman to write an email to Schreiber, Cope and others, in which he discussed the importance of "managing Postmus" during his next interview. 4-ER-477-78. Hackleman also instructed Schreiber to create a paper record about their purported quest for truth, stating that "[s]tatements like … ultimately we want the truth and nothing more … should be liberally sprinkled throughout his interview so that a trier of fact reviewing it will see what we want." 4-ER-748. In a subsequent interview with Randles and Schreiber, Postmus "flipped," agreeing to a plea deal. 7-ER-1671-73. He also told investigators that he agreed to and voted for the settlement because Erwin threatened to expose his homosexuality and drug use. 7-ER-1671-73. While testifying in the later criminal trial, Postmus stated investigators put words in his mouth, and his eventual statements about a "deal" he had with Burum were

"another example" of a "false belief" he had that "arose from the way suggestions were made and the questions were posted by Randles and Schreiber." 3-ER-589.

On May 9, 2011, the DA's Office and the Attorney General's Office filed a criminal indictment against Burum, Erwin, Kirk and Biane. 7-ER-1824-52. As with the previous complaint against Erwin, at the heart of the indictment were allegations that the 2007 political contributions were bribes for the three votes that authorized payment of the $102 million settlement. 7-ER-1829-36. According to the indictment, "[t]he object of the conspiracy was to illegally obtain $102,000,000 from the County, for personal gain, and for certain public officials to profit from those gains…" 7-ER-1829-36. The indictment explicitly alleges as an overt act that, pursuant to the settlement agreement, Postmus directed a transfer of $22 million by November 29, 2006, from the District to Colonies as the initial settlement payment. 7-ER-1833. These events led to more than eight years of criminal investigation and litigation, ultimately resulting in a mistrial.[2] The prosecution subsequently dismissed all remaining charges against him. Erwin did not call any witnesses in his defense. 2-ER-182-89, 9-ER-2340.

Because of Burum's role as a co-managing member of Colonies' general partner, and because Colonies found that the criminal charges against him were based on actions he took in good faith, with the consent of Colonies, and within the

[2] Burum was acquitted on all charges without having to call a single witness at trial.

course and scope of his role as co-managing general member of the limited partnership, Erwin was indemnified by Colonies for the Criminal Action. 4-ER-800, 802, 9-ER-2243. This indemnification was formalized when Colonies and Burum entered into an indemnity agreement by which Colonies agreed "to fully indemnify, defend, and reimburse Burum and Burum's agents" for all claims "arising from Burum's role as co-managing partner of Colonies." 9-ER-2264. In July of 2009, while he was facing the initial criminal charges relating to his compensation from Colonies, and then again after he was charged in the February 9, 2010, criminal complaint, Erwin submitted claims for indemnity to Colonies. 4-ER-800. Colonies and Erwin settled Erwin's indemnity claims, with Colonies agreeing to pay for Erwin's fees and costs in the criminal action. 4-ER-800-802.

SUMMARY OF THE ARGUMENT

I. Acting as middleman between County Board of Supervisors members and Burum, Erwin successfully facilitated a $102 million dollar settlement paid by the County. Throughout the process and immediately thereafter, Erwin made public statements chastising the County, accepted PAC donations from Colonies and financially supported Ramos opponents. Alleging the settlement was the product of bribes, Hackleman and Ramos investigated and charged Erwin for felonies, including perjury. Evidence in the record shows Hackleman and Ramos were motivated largely by their unconstitutional animus toward Erwin.

Consequently, a reasonable juror could conclude that Hackleman and Ramos sought to punish Erwin for his expression of opinions and conduct, and to deter or even prevent him from engaging in such conduct, or more importantly, participating in the political process which is all protected speech and expressive conduct. Accordingly, Erwin's claim against Hackleman and Ramos for retaliation under 42 U.S.C. § 1983 should proceed to trial.

II. As agent to Burum, Erwin was intimately tied to the 2006 settlement between Colonies and the County. As such, he was encompassed by the District Attorney's office's interest in the settlement negotiations. Because a juror could find a "longstanding practice or custom" against Burum dating back to 2006, the same conclusion extends to Erwin. Further, as a "final policymaker" of the County, Ramos took or ratified retaliatory action. Accordingly, Erwin's claim against the County for *Monell* municipal liability under 42 U.S.C. § 1983 should proceed to trial.

III. Accordingly, Erwin's claim against Randles and Schreiber for malicious prosecution under 42 U.S.C. § 1983 and California law should proceed to trial.

IV. Because Erwin has established triable issues of fact with respect to the retaliation claim he is entitled to present that claim and the related conspiracy

claim to the jury. Accordingly, Erwin's claim against Hackleman and Ramos for conspiracy under 42 U.S.C. § 1983 should proceed to trial.

V. Because Erwin has established triable issues of fact with respect to the retaliation claim he is entitled to present that claim and the related supervisory liability claim to the jury. Accordingly, Erwin's claim against Hackleman and Ramos for supervisorial liability under 42 U.S.C. § 1983 should proceed to trial.

STANDARD OF REVIEW

The Ninth Circuit reviews de novo a district court's grant of summary judgment. *Cruz v. Nat'l Steel & Shipbuilding Co.,* 910 F.3d 1263, 1267 (9th Cir. 2018). Viewing the evidence in the light that is most favorable to the nonmoving party, the appellate court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* The court should "treat the opposing party's papers more indulgently than the moving papers." *Lew v. Kona Hosp.,* 754 F.2d 1420, 1423 (9th Cir. 1985) (citing *Doff v. Brunswick Corp.,* 372 F.2d 801, 804 (9th Cir. 1966)). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 244 (1986). If reasonable minds could differ on the material fact at issue, summary judgment is improper. *Warren v. City of Oakland,* 58 F.3d 439, 441 (9th Cir. 1995).

ARGUMENT

I. TRIABLE ISSUES OF FACT EXIST AS TO WHETHER DEFENDANTS VIOLATED § 1983 BY TARGETING ERWIN FOR TRUMPED-UP INVESTIGATIONS IN RETALIATION FOR HIS FIRST AMENDMENT CONDUCT.

A. The Applicable Constitutional Framework.

It is well-established that the government may not take action against an individual in response to constitutionally protected speech, even if it otherwise could take such action based on lawful reasons. *See Mt. Healthy City Bd. Of Ed. v. Doyle,* 429 U.S. 274, 283-84 (1977). Allowing the government to retaliate against speakers it disfavors would violate the First Amendment's fundamental protection against censorship. *See Perry v. Sindermann,* 408 U.S. 593, 597-98 (1972).

The established analysis governing First Amended retaliation claims involves a burden-shifting framework. The claimant must show each of the following, of which the third is at issue in this case:

> (1) [H]e was engaged in constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.

O'Brien v. Welty, 818 F.3d 920, 932 (9th Cir. 2016) (quoting *Pinard v. Clatskanie Sch. Dist. 6J,* 467 F.3d 755, 770 (9th Cir. 2006)). The burden then shifts to the government to show it "would have taken the same action even in the absence of the protected conduct." *Id.* (internal quotation marks omitted) (citing *Mt. Healthy*).

To carry its burden, it is not enough for government defendants to point to the existence of a valid, non-retaliatory reason. *See id.* at 936 ("We have previously made it clear that there is a right to be free from retaliation even if a non-retaliatory justification exists for the defendants' action."). They "must show more than that they '*could* have' punished the plaintiffs in the absence of the protected speech; instead, 'the burden is on the defendants to show' through evidence that they '*would* have' punished the plaintiffs under those circumstances." *Pinard v. Clatskanie Sch. Dist. 6J,* 467 F.3d 755, 770 (9th Cir. 2006).

To ultimately "prevail on such a claim, a plaintiff must establish 'a causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury." *Nieves v. Bartlett,* 139 S.Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore,* 547 U.S. 250, 259 (2006)). Specifically, a plaintiff must show that the defendant's retaliatory animus was "a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Id.* (quoting *Hartman,* 547 U.S. at 260).

As explained *infra*, the application of the proper framework to the facts leads to the conclusion that Hackleman and Ramos violated Erwin's First Amendment right to be free from retaliation for his constitutionally protected conduct.

B. A Triable Issue of Fact Exists as to Whether Erwin's Protected Conduct Was A Substantial or Motivating Factor Leading to Hackleman and Ramos's Adverse Actions Against Erwin.

Erwin engaged in speech and conduct protected by the First Amendment. The relevant protected speech giving rise to Defendants' retaliatory animus is as follows: (1) utilizing his PAC to support Neil Derry, a pro-development candidate who was outspoken against Ramos (5-ER-1134-36, 6-ER-1318, 1532; (2) lobbying County Supervisors to settle Colonies' litigation (5-ER-1251, 1266, 1295); (3) asserting in public statements that his prosecution for incomplete disclosures on his Form 700 "Statement of Economic Interest" was politically motivated (8-ER-1934-61); and (4) publishing statements online (3-ER-473).

Erwin's evidence is sufficient to show Hackleman's retaliatory animus towards Erwin. For example, a December 1, 2009 email drafted by Hackleman states, "I see this as a fight to the death. They will either get Ramos or he will get them." 9-ER-2150. Also, in May 2009, Erwin became involved with two online political blogs, iepolitics.com and inlandpolitics.com, and his content drew the attention of the District Attorney's office. Erwin's blog was referred to as "venom-filled" and "JIMLAND." 3-ER-458. Hackleman emailed himself to note that Erwin runs the blog "iepolitics.com" and "is going to build a pile of dirt on Ramos" while compiling a list of things that could impact Ramos. 9-ER-2147. Evidence that defendants knew of Erwin's protected speech and expressed opposition to it can

create a genuine dispute of material fact on retaliatory motive to survive summary judgment. *See cf. Keyser v. Sacramento City Unified Sch. Dist.,* 265 F.3d 741, 751-52 (9th Cir. 2001). By 2010, Hackleman had nicknamed Erwin "evil Erwin" and called him "the bottom-sucking Erwin." 3-ER-483, 486-492. A reasonable juror could infer from this evidence that Hackleman was motivated largely by his animus toward Erwin.

Moreover, Erwin's evidence is sufficient to show Ramos's retaliatory animus towards Erwin. Erwin, as a political player in San Bernardino County, was an outspoken adversary to Ramos. He supported political candidates that were outspoken against Ramos and directly called for an independent investigation into allegations that Ramos engaged in sexual misconduct. 8-ER-1948-51. In response, Ramos referred to this as "a political attack on me" and directed subordinates, "[d]o not let this go without a fight." 3-ER-465-466. When the County decided to investigate Ramos's conduct in the workplace, Ramos issued a press release calling it an "attack on the District Attorney's Office and me" that "is part of a well-organized and well-funded effort by some of those we are investigating and prosecuting…" 3-ER-467-468. Ramos's wife went as far as to allege in a campaign mailer for Ramos's election that Erwin failed to properly report goods or services on public disclosure forms. 3-ER-469-71. Former state assemblyman and political supporter of Ramos, Bret Granlund, is on record stating Ramos told him "he was

going to bring the entire weight of his office down on Erwin's ass." 2-ER-159. A reasonable juror could infer from this evidence that Ramos was motivated largely by his animus toward Erwin.

With retaliatory animus filling Hackleman and Ramos's minds, Erwin was charged for felony perjury due to incomplete disclosures on Form 700. 5-ER-1277. Importantly, it cannot be said that even without bad motive such action would have been taken against Erwin. The statutory scheme under FPPC Regulations, Title 2, Division 6, Sections 18109-18997 of the California Code of Regulations, provides for a misdemeanor as the maximum criminal punishment. Nearly all violations, however, are handled administratively and customarily first-time violators are provided an opportunity to amend their Form 700. 2-ER-159-60. Erwin as a first-time violator received a felony charge. This is even more egregious given the fact that Ramos's advisor, Ellis, after consulting with Ramos, stated that Erwin should simply amend his form as this situation is usually handled administratively, and customarily first-time violators are provided an opportunity to amend. 2-ER-159-61, 8-ER-1953. A plaintiff who shows differential treatment "addressees [the] casual concern by helping to establish that 'non-retaliatory grounds [we]re in fact insufficient to provoke the adverse consequences.' " *Hartman,* 547 U.S. at 256.

Moreover, after Erwin argued publicly that his charge was politically motivated, and his statements were published in The Press Enterprise, the charges

were trumped up to include bribery and others and he was re-arrested in February 2010, evidencing a continuation of animosity toward Erwin. 9-ER-2149. Hackleman forwarded the article to Ramos commenting, "I bet this started your day off right." 9-ER-2149.

The investigation into Erwin and trumped-up charges against him came after former Assistant District Attorney, Michael Risley, wrote Hackleman questioning whether filing criminal charges against Erwin was proper. 3-ER-461-464. Risley cautioned Hackleman this was an "explosive road" and indicated his fear District Attorney, Mike Ramos, did not have clean hands. 3-ER-461-464. Risley overtly stated, I can only hope that whatever misdemeanor conviction is obtained against Erwin … is worth all the hell [Ramos] and the office will go through …" 3-ER-461-464. Despite such blatant doubt as to motives of the District Attorney and its investigative team, they pressed on criminally against Erwin. If these facts are believed, a reasonable juror could conclude that Hackleman and Ramos sought to punish Erwin for his expression of opinions and conduct, and to deter or even prevent him from engaging in such conduct, or more importantly, participating in the political process which is all protected speech and expressive conduct.

Importantly, Ramos's intentionally deleted his emails and personal text messages after the litigation started. 2-ER-115-144, 3-ER-411-12. Ramos testified that the County never advised him of his duty to preserve this critical evidence,

which is now lost forever. 3-ER-411-12. On February 27, 2020, the District Court found that Ramos and the County intentionally destroyed relevant evidence and issued an adverse inference sanction. 2-ER-115-144. "[W]here the innocent party has produced some (not insubstantial) evidence in support of his claim, the intentional destruction of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the line." *Kronisch v. United States*, 150 F.3d 112, 128 (2d. Cir. 1998). *Kronish* has been adopted by the Ninth Circuit. See *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 825 (9th Cir. 2002). Thus, when the above evidence is combined with the adverse inference, triable issues of fact entitle Erwin to proceed to trial against Ramos.

II. TRIABLE ISSUES OF FACT EXIST AS TO WHETHER DEFENDANTS' ARE SUBJECT TO MUNICIPAL LIABILITY UNDER THE *MONELL* DOCTRINE.

The County may be subject to municipal liability for causing a constitutional violation under 42 U.S.C. § 1983. *Owen v. City of Independence*, 445 U.S. 662, 651-52, 100 S. Ct. 1398, 1415-16 (1980). Liability is established if any of the following can be shown:

1. A municipal employee committed a constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity;
2. The individual who committed the constitutional tort was an official

with final policy-making authority (a question of state law) and the challenged action itself thus constituted an act of official governmental policy; or

3. An official with final policy-making authority (a question of state law) ratified a subordinate's unconstitutional decision or action and the basis for it.

Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992), *cert. denied*, 510 U.S. 932, 114 S. Ct. 345 (1993).

After proving that one of these three circumstances exist, a plaintiff must show that the circumstance was (1) the cause in fact and (2) the proximate cause of the constitutional deprivation. *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). A plaintiff does so by demonstrating "that, through its deliberate conduct, the municipality was the moving force behind the alleged injury." *Bd. Of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382 (1997).

While the existence of any one of the three circumstances enumerated in Gillette establishes a basis for municipal liability, *see Gillette,* 979 F.2d at 1346-47, all three are present here.

A. Defendants' Sustained Campaign of Retaliation Constituted a Violation of Custom or Policy.

The existence of a "longstanding practice or custom which constitutes the standard operating procedure of the local government entity" gives rise to municipal liability under the *Monell* doctrine. *Gillette*, *supra*. A longstanding

practice or custom for these purposes is one that is so "persistent and widespread" that it constitutes a "permanent and well settled city policy." *Monell v. Dept. of Soc. Serv. of N.Y.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036 (1978). Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a tradition method of carrying out policy. *Bennett v. City of Slidell,* 728 F.2d 767 (5th Cir. 1984); *see also, Meehan v. Los Angeles County,* 856 F.2d 102 (9th Cir. 1988) (two incidents not sufficient to establish custom).

As found by the District Court, a juror could find a "longstanding practice or custom" because members of the District Attorney's Office took interest in negotiations between Colonies and the County and in related statements even before the settlement vote. 1-ER-9-10, 3-ER-429-36, 442-444, 448-453. After the settlement, the PIU discussed the $102 settlement in department meetings.3-ER-448-53. By August 2008, an investigator was inquiring about Burum, Postmus, Erwin, settlement, and potential bribes, months before the November 2008 interview with Aleman. 3-ER-448-53, 8-ER-1962-72.

In declining to extend this reasoning to Erwin's *Monell* claim, the District Court overlooked critical facts and inferences establishing triable issues of fact. Erwin acted as an agent for Burum, serving as a consultant and advisor to Colonies

during the 2006 settlement negotiations.[3] 2-ER-156-157, 3-ER-613-14, 4-ER-786-87, 800, 5-ER-1248, 1251, 7-ER-1643. Erwin's intimate involvement in the settlement process, along with his being an outspoken critic of Ramos's handling of the Colonies lawsuit made Erwin a target of Defendants' scheme to retaliate as early as 2006 (when Defendants began targeting Colonies and Burum), warranting finding his inclusion in a "premeditated plan" of retaliation against Burum. The interest the District Attorney's Office's took in Burum clearly extended to Erwin due to Erwin's agency relationship with Burum. Notably, in 2007 Colonies made $100,000 payments to the PACs associated with Erwin. 7-ER-1826, 1829. As the District Court noted, by August 2008, an investigator was inquiring about potential bribes and payments to Erwin months before the November Aleman 2008 interviews. 1-ER-47 By December 2008, Erwin began working with Derry who called for an investigation into Ramos for alleged sexual misconduct. 3-ER-465-

[3] "An agent is one who represents another, called the principal, in dealings with third parties. Such representation is called agency." Cal. Civ. Code § 2295. "An agency is either actual or ostensible." Cal. Civ. Code § 2298. "An agency is actual when the agent is really employed by the principal." Cal. Civ. Code § 2299. "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." *American Cas. Co. of Reading, Penn. v. Krieger,* 181 F.3d 1113, 1121 (9th Cir. 1999) (citing Cal. Civ. Code § 2300). Existence of an agency and the extent of an agent's authority is a question of fact and should not be decided on summary judgment. See *C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc.,* 213 F.3d 474, 479-80 (9th Cir. 2000); accord *Whitlow v. Rideout Mem'l Hosp.,* 237 Cal.App.4th 631, 639 (3d Dist. 2015) ("Generally, under California law, ostensible authority is for a trier of fact to resolve and the issue should not be decided by an order granting summary judgment.")

71, 8-ER-1940. It was yet another month before a search warrant was executed on Erwin's residence in hopes of finding evidence implicating Erwin in wrongdoing. 5-ER-1260.

All that was discovered was a single luxury watch, raising the possibility that Erwin's Form 700 "Statement of Economic Interest" had not been complete. The customary practice in such circumstances is for the individual who submitted the form to receive a warning and an opportunity to amend the form. But Defendants charged Erwin with ten (10) felony counts of perjury after he amended the form as advised by Ramos, through his Political Advisor, Ellis. 8-ER-1952-53.

Weak evidence and the egregious attacks on Erwin continued until he received a mistrial. Over one year after Erwin's arrest, a memo circulated by Deputy Attorney General Melissa Mandel whereby she stated, "Aleman has little value as a witness against Erwin." Yet the prosecution charged forward. Postmus became a focal point with increasing pressure from the prosecution and its team. In one interview, he was told that if he did not change his story, the interview would "become an exercise in futility." 3-ER-550-51. Randles and Schreiber even suggested to him that he may not remember certain details because he "may have been under the influence." 3-ER-552. Hackleman stated Postmus's addiction left him with an "addled brain" and "liv[ing] in such an alternate universe that [he] cannot be confident that [Postmus] will suddenly develop skills of logic." 3-ER,

482-485. Despite all this doubt, the case against Erwin proceeded to trial. At trial in 2017, Postmus testified he was a methamphetamine addict, he was manipulated to state he coordinated PACs to receive money from Burum as a quid pro quo, he had told the truth in 2011 to Randles and Schreiber that there was no quid pro quo, and they pressured and threatened him if he did not cooperate. 3-ER-569-592. In January 2020, Deputy District Attorney, Michael Abney, testified "the case would have been very tough to prosecute without Postmus flipping…" 3-ER-531-35. Based on the foregoing, a reasonable juror could conclude that the individual Defendants at the PIU and District Attorney's Office acted pursuant to "a longstanding practice or custom" of retaliating against Erwin for his protected speech conduct. See *Delia v. City of Rialto,* 621 F.3d 1069, 1081-82 (9th Cir. 2010), *rev'd on other grounds*, 566 U.S. 377 (2012).

B. Ramos's Participation in and Ratification of Multiple Acts of Retaliation Establish a Constitutional Violation By a Final Policymaker.

It is undisputed that the County is liable for actions Ramos took or ratified as a final policymaker of the County. Ramos was a County employee and policymaker when he "directed the retaliatory investigation against Erwin" and "ratif[ied] [] his subordinates' illegal conduct during the investigation." The County argues, however, that Ramos should be viewed as state actor rather than a County actor when taking those actions.

Whether an officer is a state or a county official is determined by looking to state law to determine whether the particular acts the official is alleged to have committed fall within the range of the official's state or county functions. *Wiener v. San Diego County,* 210 F.3d 1025, 1028-29 (9th Cir. 2000) (discussing *McMillian v. Monroe County,* 520 U.S. 781, 785-86, 117 S. Ct. 1734 (1997).

The Ninth Circuit has analogized the difference between investigative conduct (imputable to the County) and prosecutorial conduct (not imputable to the County) to the difference between prosecutorial conduct entitled to qualified and that carrying absolute immunity. *Bishop Paiute Tribe v. City of Inyo,* 291 F.3d 549, 565 (9th Cir. 2002).

The actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. *Buckley v. Fitzsimmons,* 509 U.S. 259, 273, 113 S. Ct. 2606 (1993). Prosecutors are absolutely immune from liability under § 1983 for their conduct only insofar as it is "intimately" associated with the judicial phase of the criminal process. *See Burns v. Reed,* 500 U.S. 478, 486, 111 S. Ct. 1934 (1991) (quoting *Imbler v. Pachtman,* 424 U.S. 409, 430, 96 S. Ct. 984 (1976); *Miller v. Gammie,* 335 F.3d 889, 897 (9th Cir. 2003) (en banc) ("[T]o enjoy absolute immunity for a particular action, the official must be performing a duty functionally comparable to one for which officials were rendered immune at common law.") When prosecutors perform administrative or investigative

functions, only qualified immunity is available. *See Buckley,* 509 U.S. at 271-73, 113 S. Ct. 2606; *Broam v. Bogan,* 320 F.3d 1023, 1028 (9th Cir. 2003). If triable issues exist as to whether Ramos was performing administrative acts outside the scope of absolute prosecutorial immunity, he will be found to have been acting as a policymaker for the County. *See Weiner,* 210 F.3d at 1030-31 (holding that under California law a district attorney acts as a county officer for some administrative purposes and a state officer when deciding whether to prosecute an individual).

To determine whether an action is judicial, administrative, or investigative, the court looks at "the nature of the function performed, not the identity of the actor who performed it." *Kalina v. Fletcher,* 522 U.S. 118, 127, 118 S. Ct. 502 (1997) (quoting *Forrester v. White,* 484 U.S. 219, 229, 108 S. Ct. 538 (1988). Thus, whether a prosecutor benefits from absolute or qualified immunity depends on which of the prosecutor's actions are challenged. *See Morley v. Walker,* 175 F.3d 756, 759 (9th Cir. 1999). The official seeking absolute immunity bears the burden of demonstrating that absolute immunity is justified for the function in question. *Buckley,* 509 U.S. at 269, 113 S. Ct. 2606; *Burns,* 500 U.S. at 486, 111 S. Ct. 1934.

The initial felony complaint filed against Erwin was in March 2009. The filing of the complaint is not an event after which, by definition, all actions by the prosecutor and his staff are protected by absolute immunity. *Genzler v.*

Longanback, 410 F.3d 630, 637-38 (9th Cir. 2005). What matters is whether the subsequent actions at issue were quasi-judicial in nature. Viewing the evidence in the light most favorable to Erwin, Defendants were not performing functions "intimately associated" with the judicial phase of the criminal process with respect to the Postmus interviews on February 15, March 1, and March 10, 2011. *Genzler,* 410 F.3d at 637-38 (citing *Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001) ("If not done in a quasi-judicial capacity, the acquisition or manufacturing of evidence is not protected by absolute immunity.)

Despite the fact that Erwin had previously been arrested, the purpose or goal of the Postmus interviews as they relate to Erwin was investigative or administrative, not judicial. As such, it is attributable to the County. *Buckley,* 509 U.S. at 274 n. 5. After his first interview, Deputy Attorney General Melissa Mandel commented on the need for "caution in relying on the information [Postmus] is providing," noting a lack of reliability. 3-ER-490. This led Hackleman to write an email to Schreiber, Cope and others, emphasizing the importance of "managing Postmus" during his next interview. 4-ER-477-78. Hackleman also instructed Schreiber to create a paper record about their purported quest for truth, stating that "[s]tatements like … ultimately we want the truth and nothing more … should be liberally sprinkled throughout his interview so that a trier of fact reviewing it will see what we want." 4-ER-748. Hackleman also wrote

to Ramos stating, "we will need at least every pressure we can bring to bear on the guy if we ever have hopes of seeing him turn." 3-ER-526. In a subsequent interview with Randles and Schreiber Postmus "flipped," agreeing to a plea deal. He also told investigators that he agreed to and voted for the settlement because Erwin threatened to expose his homosexuality and drug use. 7-ER-1671-73. While testifying in the later criminal trial, Postmus stated investigators put words in his mouth, and his eventual statements about a "deal" he had with Burum were "another example" of a "false belief" he had that "arose from the way suggestions were made and the questions were posted by Randles and Schreiber." 3-ER, 599-606. Postmus further testified he was threatened and pressured by Schreiber and Randles to cooperate and say he had coordinated PACs to receive money and that Schreiber and Randles, along with Hackleman, knew he was a methamphetamine addict and suffered memory problems. 3-ER-569-92. A reasonable juror could conclude that the Postmus interviews were conducted for the sole purpose of manufacturing a basis for "turning up the heat" on Erwin, stripping any argument relating to absolute immunity and rendering Defendants' conduct investigative rather than quasi-judicial. As stated above, without Postmus, there may have been no case. 3-ER-531-35. Because Hackleman took an active role in planning interviews and Ramos received emails and frequent updates from Hackleman, Ramos ratified Hackleman's conduct. Hackleman, in turn, ratified Randles and

Schreiber's conduct. 3-ER-416-21, 439 . At the very least there is a genuine issue of material fact regarding whether a ratification occurred. *Christie v. Iopa,* 176 F.3d 1231, 1238-39 (9th Cir. 1999).

III. TRIABLE ISSUES OF FACT EXIST AS TO WHETHER ERWIN CAN ESTABLISH A § 1983 MALICIOUS PROSECUTION CLAIM BASED ON DEFENDANTS' UNCONSTITUTIONAL CAMPAIGN OF RETALIATION.

To maintain a Section 1983 action for malicious prosecution, "a plaintiff 'must show that the defendants prosecuted [him] . . . for the purpose of denying [him] equal protection or another specific constitutional right.'" *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004). Erwin alleges that he was wrongfully prosecuted in retaliation for his First Amendment rights to free speech. As the District Court recognized, the malicious prosecution claims in this action "rise and fall with the underlying First Amendment claims." 1-ER-55. As demonstrated in Section I *supra*, Erwin established a triable issue of fact on his First Amendment retaliation claim. Accordingly, he has also demonstrated at triable issue of fact with respect to his malicious prosecution claim.

IV. TRIABLE ISSUES OF FACT EXIST AS TO WHETHER ERWIN CAN ESTABLISH A CLAIM FOR CONSPIRACY IN VIOLATION OF § 1983 BASED ON DEFENDANTS' UNCONSTITUTIONAL CAMPAIGN OF RETALIATION.

A civil conspiracy is "a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of

harming another which results in damage." *Lacey v. Maricopa Cty.*, 693 F.3d 896, 935 (9th Cir. 2012) (quoting *Gillbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). A conspiracy exists when the defendants have "reached a unity of purpose or a common design or understanding, or a meeting of the minds in an unlawful arrangement." *Id.* (quoting *Gillbrook*, 177 F.3d at 856).[4]

The existence of a conspiracy is a factual issue reserved for the jury "so long as there is a possibility that the jury can infer from the circumstances (that the alleged conspirators) had a meeting of the minds and thus reached a[n] understanding to achieve the conspiracy's objectives." *Mendocino Environ. Center v. Mendocino Cty.*, 192 F.3d 1283, 1301 (9th Cir. 1999) (internal citations and quotes omitted). The agreement need not be overt; the jury may infer it from circumstantial evidence such as the conduct of the defendants. *Id.* "For example, a showing that the alleged conspirators have committed acts that 'are unlikely to have been undertaken without an agreement' may allow a jury to infer the existence of a conspiracy." *Id.*, quoting *Kunik v. Racine County*, 946 F.2d 1574,

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[4] The District Court properly rejected Defendants' claim that because the individual defendants are all County employees they cannot be considered individual actors for conspiracy purposes. This ruling was indisputably correct. *See*, *e.g.*, *Lacey*, 693 F.3d at 935; see also *Rebel Van Lines v. City of Compton*, 663 F. Supp. 786, 792-93 (C.D. Cal. 1987) (noting that to hold otherwise "would immunize official policies of discrimination.") Moreover, Defendants cannot simultaneously maintain that they collectively comprise a single County entity for conspiracy purposes and that Ramos was a state, rather than a County, actor for purposes of *Monell* liability.

1580 (7th Cir. 1991). If a common objective exists, the defendants are each liable even if they do not each know the exact details of the plan. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989).

The conspiracy at issue here is Defendants' conspiracy to retaliate against Erwin and the other plaintiffs for their protected First Amendment activities. 1-ER-39. Having erroneously entered summary judgment against Erwin on his retaliation claim, the District Court "eliminated" Erwin's related conspiracy claim. 1-ER-39. Because Erwin has established triable issues of fact with respect to the retaliation claim, see Section I *supra*, he is entitled to present that claim and the related conspiracy claim to the jury. *See Alcox v. City of Lompoc*, 2019 WL 8013875, at *13 (C.D. Cal. Nov. 27, 2019) (jury could find conspiracy where defendants had a close working relationship, communicated about the investigation, and each took direct actions to participate).

V. TRIABLE ISSUES OF FACT EXIST AS TO WHETHER ERWIN CAN ESTABLISH A CLAIM OF SUPERVISORY LIABILITY AGAINST RAMOS.

"Liability under [§] 1983 arises only upon a showing of personal participation by the defendant. A supervisor is only liable for constitutional violations of … subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. There is no respondeat superior liability under [§] 1983." *Taylor v. List,* 880 F.2d 1040, 1045

(9th Cir. 1989) (citations omitted); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Maxwell v. Cty. Of San Diego,* 708 F.3d 1075, 1097 (9th Cir. 2013) ("[T]here is no respondeat superior liability under § 1983. Rather, a government official may be held liable only for the official's own conduct."); *Robins v. Meecham,* 60 F.3d 1436, 1442 (9th Cir. 1995) (concluding that failure to intervene to stop alleged violation could be sufficient to establish liability).

The District Court correctly recognized a triable issue exists on the extent of Ramos's awareness and ratification of Hackleman's constitutional violations. 1-ER-60. This evidence, and the evidence supporting retaliatory motive, further supported an inference that Hackleman and Ramos either directed the violations or that there was a causal connection between their action or inaction and the violations. Should this Court find a triable issue exists with respect to Erwin's retaliation claim, then it should find a triable issue as to Erwin's supervisory liability claim as to Ramos and Hackleman as well. See Section I, *supra.*

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed, and the case remanded for trial on Erwin's retaliation (against Ramos and Hackleman, *Monell* municipal liability, malicious prosecution, conspiracy and supervisorial liability claims.

Date: July 6, 2021

Respectfully submitted,

LAW OFFICE OF ALAN S. YOCKELSON

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FORM 8 CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) No. 20-55903

I am the attorney or self-represented party.

This brief contains 8,238 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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s/ Alan S. Yockelson
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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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