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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17 WESTERN DIVISION

18 MAYA LAU,

19 *Plaintiff,*

20 v.

21 COUNTY OF LOS ANGELES; ALEX
22 VILLANUEVA; MARK LLIENFELD;
23 and TIM MURAKAMI

24 *Defendants.*

Case No. 2:25-cv-04766-SPG-BFM

**PLAINTIFF’S COMBINED
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION
TO DEFENDANTS’
MOTIONS TO DISMISS**

*[Filed Concurrently with Proposed
Order]*

Date: September 17, 2025

Time: 1:30PM

Judge: Hon. Sherilyn Peace Garnett

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1 **SUMMARY OF ARGUMENT**

2 Under the First Amendment, few principles should be clearer than the rule that
3 “[o]fficial harassment of the press” violates the Constitution. *Branzburg v. Hayes*,
4 408 U.S. 665, 707 (1972). In this case, Alex Villanueva, Tim Murakami, and Mark
5 Lillienfeld (“the Individual Defendants”) used the official powers of the Los Angeles
6 County Sheriff’s Department to pursue a baseless and retaliatory criminal
7 investigation of Plaintiff Maya Lau—then a reporter for the *Los Angeles Times*—
8 because she lawfully reported information of obvious public concern about deputy
9 misconduct. See Dkt. 30 ¶¶ 3–17. With full knowledge that Ms. Lau had done
10 nothing wrong, the Defendants then went on to refer Ms. Lau for prosecution. See *id.*

11 In response, the Defendants do not dispute that Ms. Lau adequately alleges that
12 her reporting was “constitutionally protected activity,” *O’Brien v. Welty*, 818 F.3d
13 920, 932–33 (9th Cir. 2016) (internal citation omitted); do not dispute that Ms. Lau
14 adequately alleges that the Individual Defendants’ animus toward her reporting “was
15 a substantial or motivating factor” in the decision to investigate her and refer her for
16 criminal prosecution, *id.*; and do not dispute that the County would be liable for the
17 Individual Defendants’ alleged misconduct, because a California sheriff “acts as a
18 final policymaker for the County when investigating crime,” *Brewster v. Shasta*
19 *County*, 275 F.3d 803, 812 (9th Cir. 2001). Instead, the Defendants stake out the
20 position that being criminally investigated and ultimately referred for prosecution
21 would not “chill a person of ordinary firmness from continuing to engage in the
22 protected activity,” *O’Brien*, 818 F.3d at 932 (internal citation omitted), and that Ms.
23 Lau suffered no harm from the Sheriff’s Department’s vindictive campaign.

24 Defendants are wrong. The identification of a speaker as the target of a formal
25 criminal investigation, and their referral for prosecution, would each discourage an
26 ordinary person from exercising their First Amendment rights. The Ninth Circuit has

1 made clear that “[w]hen evaluating executive branch investigations that threaten First
2 Amendment rights, this court and others have required that the investigation serve a
3 legitimate law enforcement interest” and that “the government must not investigate
4 for the purpose of violating First Amendment rights.” *United States v. Mayer*, 503
5 F.3d 740, 751–52 (9th Cir. 2007); *see also Sterner v. San Diego Police Dep’t*, No.
6 08-cv-1407, 2009 WL 160921, at *3 (S.D. Cal. Jan. 22, 2009) (holding, in
7 investigation of a doctor, that “surreptitious and retaliatory police investigations
8 would chill the speech of even the most law-abiding physician” and rejecting bid to
9 dismiss retaliatory investigation claim for “lack of actual damages”)

10 But if the investigation standing alone did not suffice to chill a person of
11 ordinary firmness, that Defendants referred Ms. Lau for prosecution is more than
12 enough. “People do not lightly disregard public officers’ thinly veiled threats to
13 institute criminal proceedings against them” for exercising their First Amendment
14 rights, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963), and as a result a
15 “referral” for punishment “itself is chilling even if it does not result in a finding of
16 responsibility or criminality,” *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th
17 Cir. 2019); *see also Gomez v. Cnty. of Los Angeles*, 314 F. App’x 928, 930 (9th Cir.
18 2009) (“failed initiation of a criminal investigation” is an adverse action for
19 retaliation claim). The Constitution does not reward the Sheriff’s Department for
20 pursuing a prosecution so baseless that no prosecutor would touch it.

21 The Defendants’ objection to Ms. Lau’s standing to seek redress fares no
22 better. Repeating substantially the same position, the County maintains that Ms. Lau
23 suffered no cognizable injury. To start with, a plaintiff is not “required to show any
24 actual injury beyond the free speech violation itself to state a constitutional claim.”
25 *Hayes v. Idaho Correctional Ctr.*, 849 F.3d 1204, 1212 (9th Cir. 2017) (internal
26 citation omitted). But regardless, Ms. Lau also adequately alleged that she suffered
27 emotional, dignitary, and privacy harms from Defendants’ misconduct, from “the

1 unique stigma associated with having a government official label [her] a law
2 breaker,” *Kennedy v. Warren*, 66 F.4th 1199, 1206 (9th Cir. 2023), to “anxiety and
3 stress,” *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010).

4 Defendants might prefer more detail, but even at trial, “[c]ompensatory
5 damages” in a civil-rights action “may be awarded for humiliation and emotional
6 distress established by testimony or inferred from the circumstances, whether or not
7 plaintiffs submit evidence of economic loss or mental or physical symptoms.” *Tortu*
8 *v. Las Vegas Metro. Police Dep’t*, 556 F.3d 1075, 1086 (9th Cir. 2009) (internal
9 citation omitted). Here, it should be easy enough to infer why the threat of being
10 investigated and prosecuted for lawful journalism would cause distress. And even if
11 that were not the case, the Ninth Circuit has explained that nominal damages are
12 available under § 1983 to redress a past violation of the First Amendment “in cases in
13 which the plaintiff is not entitled to compensatory damages, such as cases in which
14 no actual injury is incurred.” *Hazle v. Crofoot*, 727 F.3d 983, 991 n.6 (9th Cir. 2013)
15 (citing *Carey v. Phipus*, 435 U.S. 247, 266–67 (1978)); *see also Sterner*, 2009 WL
16 160921, *3 (same in claim for retaliatory investigation). Defendants cannot
17 downplay Ms. Lau’s injuries to avoid confronting her allegations on the merits.

18 At base, much as Defendants might prefer to ignore the harm, the Sheriff’s
19 Department’s abuse of the criminal-justice process to punish a journalist for her
20 lawful reporting was an attack on the first principles of the First Amendment. “The
21 free press is the guardian of the public interest, and the independent judiciary is the
22 guardian of the free press.” *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). Ms.
23 Lau’s complaint more than adequately alleges her entitlement to redress for the
24 Defendants’ violation of her constitutional rights; their motions should be denied.

25 **FACTUAL BACKGROUND**

26 In December 2017, Plaintiff Maya Lau and two colleagues at the *Los Angeles*
27 *Times* published an article discussing a “Brady List” that was maintained by the Los

1 Angeles County Sheriff’s Department (LASD). Dkt. 30 ¶ 4. The LASD’s Brady List
2 catalogued roughly 300 LASD deputies who had histories of dishonesty or other
3 misconduct that made them open to impeachment as trial witnesses. *Id.* ¶ 5. Ms.
4 Lau’s article highlighted several officers included in the Brady List, and explained
5 that the LASD’s Brady List had been withheld from prosecutors and defendants’
6 counsel. *Id.* ¶¶ 8, 33–37, 40. Ms. Lau’s reporting helped spark new legislation that
7 required officer personnel files to be open to public review. *Id.* ¶¶ 43–44.

8 LASD leadership was furious that its Brady List had leaked. *Id.* ¶ 11. Under
9 then-Sheriff Jim McDonnell, an initial investigation of the disclosure found no
10 evidence to suggest Ms. Lau had broken the law. *Id.* ¶¶ 48–50. Despite that finding,
11 newly elected Sheriff Alex Villanueva opened a *new* criminal investigation into Ms.
12 Lau a year later. *Id.* ¶¶ 51–53. He instructed the Civil Rights and Public Integrity
13 Detail—a group of officers Villanueva used to target individuals who criticized him
14 or the LASD—to investigate Ms. Lau. *Id.* ¶¶ 52–56, 65–82. Detective Mark
15 Lillienfeld led the investigation. *Id.* ¶ 57. Again, it turned up no evidence suggesting
16 that Ms. Lau had committed any crime. *Id.* ¶ 58. However, Undersheriff Tim
17 Murakami (by delegation from Sheriff Villanueva) referred Ms. Lau for prosecution.
18 *Id.* ¶¶ 60–61. He claimed that Ms. Lau had engaged in conspiracy, theft of
19 government property, unlawful access of a computer, burglary, and receiving stolen
20 property. *Id.* ¶ 62. The California Attorney General declined to prosecute. *Id.* ¶ 64.

21 Ms. Lau sued Alex Villanueva, Mark Lillienfeld, and Tim Murakami for
22 retaliating against her in violation of the First Amendment. *See generally* Dkt. 30.
23 Ms. Lau alleged that even if the Brady List had been leaked, she did not commit a
24 crime by publishing it. *Id.* ¶¶ 12, 14. The retaliatory investigation was based solely
25 upon her reporting, and under *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001),
26 journalists cannot be held criminally liable for reporting on information that may
27 have been illegally obtained by a source. *Id.* ¶¶ 1, 12, 14. Ms. Lau also sued the

1 County of Los Angeles for maintaining a policy and practice of retaliating against
2 individuals who used their public positions to criticize Sheriff Villanueva and LASD.

3 The Individual Defendants and the County filed Motions to Dismiss, Dkts. 31-
4 1 & 32-1, to which this Combined Brief in Opposition responds.

5 **ARGUMENT**

6 **I. Ms. Lau’s complaint adequately alleges that the County’s retaliation**
7 **against her lawful reporting on LASD violated the First Amendment.**

8 A plaintiff states a claim for First Amendment retaliation by alleging that “(1)
9 [s]he engaged in constitutionally protected activity; (2) as a result, [s]he was
10 subjected to adverse action by the defendant that would chill a person of ordinary
11 firmness from continuing to engage in the protected activity; and (3) there was a
12 substantial causal relationship between the constitutionally protected activity and the
13 adverse action.” *Blair v. Bethel School Dist.*, 608 F.3d 540, 543 (9th Cir. 2010).

14 Defendants challenge only the second prong, maintaining that neither
15 launching a criminal investigation nor referring a journalist for prosecution is chilling
16 enough to “stifle someone from speaking out.” *Id.* at 544. But the Ninth Circuit has
17 made clear that “‘investigating’ on the basis of speech of protected by the First
18 Amendment” can, in fact, violate the Constitution, *Conant v. Walters*, 309 F.3d 629,
19 636 (9th Cir. 2002) (affirming injunction that prohibited “initiat[ing] an investigation
20 of a physician solely on the basis of” speech protected by the First Amendment,
21 “unless the government in good faith believes that it has substantial evidence of
22 criminal conduct”); *see also Mayer*, 503 F.3d at 752 (noting that, “to avoid running
23 afoul of the First Amendment, the government must not investigate for the purpose of
24 violating First Amendment rights”). And if the formal investigation standing alone
25 weren’t danger enough, the referral for prosecution would be, because “false
26 accusations of criminal activity” that “intimat[e] that punishment would imminently
27 follow” chill speech. *Mulligan v. Nichols*, 835 F.3d 983, 990 (9th Cir. 2016).

1 Ultimately, Defendants had no reason to believe that Ms. Lau committed any
2 crime, yet they did everything within their power to punish her because they did not
3 like the content of her reporting. The threat of indefinite, unbounded criminal
4 investigations would discourage any ordinary journalist from reporting on the LASD
5 (and would discourage any sources from speaking to them further). The fact that
6 prosecutors did not accept the Department’s referral against Ms. Lau does not make
7 the threat any less chilling. *See Gomez*, 314 F. App’x at 930.

8 **A. Even standing alone, a retaliatory criminal investigation would chill**
9 **an ordinary person from exercising their First Amendment rights.**

10 As the Ninth Circuit has often emphasized, “the precise nature of the retaliation
11 is not critical to the inquiry in First Amendment retaliation cases,” *Coszalter v. City*
12 *of Salem*, 320 F.3d 968, 974–75 (9th Cir. 2003), because the defendant’s misconduct
13 “need not be severe and it need not be of a certain kind,” *id.* To take an extreme case,
14 the Supreme Court has observed that the Constitution would prohibit “even an act of
15 retaliation as trivial as failing to hold a birthday party for a public employee . . . when
16 intended to punish her for exercising her free speech rights.” *Hyland v. Wonder*, 972
17 F.2d 1129, 1135 (9th Cir. 1992) (quoting *Rutan v. Republican Party of Ill.*, 497 U.S.
18 62, 75 n.8 (1990)). The test screens out only action “so insignificant that it does not
19 deter the exercise of First Amendment rights.” *Coszalter*, 320 F.3d at 975.¹

20 The opening of a formal criminal investigation would deter an ordinary person
21 from speaking or gathering news about the LASD because “[a]wareness that the
22 government may be watching chills associational and expressive freedoms.” *United*
23 *States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring). On learning
24 that an investigation has been opened, any reasonable person would fear that they

25 _____
26 ¹ *Coszalter* was a public-employee retaliation case in particular, but the Ninth
27 Circuit applies substantially the same First Amendment framework to cases involving
28 a “government worker who loses his job” that it does to those involving “citizens who
are allegedly targeted by law enforcement” like Ms. Lau. *Blair*, 608 F.3d at 544.

1 might now be subjected to the wide range of intrusive investigative techniques that
2 police can deploy without further authorization—that they might be tailed from place
3 to place, or that a stake-out of their home and office might be in the works. *See*
4 *Anderson v. Davila*, 125 F.3d 148, 159 (3d Cir. 1997) (plaintiff who was followed
5 and photographed in public for retaliatory purposes stated First Amendment claim,
6 even though “the Government’s surveillance of individuals in public places does not,
7 by itself, implicate the Constitution”); *see also Garcia v. Montgomery Cnty.*, 145 F.
8 Supp. 3d 492, 515 (D. Md. 2015) (journalist who noticed officers stationed outside
9 his home suffered adverse action for purposes of retaliation claim). Any reasonable
10 journalist would flinch at the prospect of being singled out for that sort of scrutiny.
11 *Media Matters for Am. v. Paxton*, 138 F.4th 563, 580 (D.C. Cir. 2025) (“[B]ad faith
12 use of investigative techniques can abridge journalists’ First Amendment rights.”).

13 Moreover, a journalist’s professional career would be threatened by the
14 opening of a retaliatory investigation. A journalist’s success often depends on the
15 willingness of sources to speak candidly with her, and confidential sources would be
16 deterred from providing information if they believed a journalist was being surveilled
17 by police. *See Reps. Comm. for Freedom of the Press v. AT&T*, 593 F.2d 1030, 1064
18 (D.C. Cir. 1978) (“Unlike good faith investigation to which all citizens are subject,
19 official harassment places a special burden on information-gathering, for in such
20 cases the ultimate, though tacit, design is to obstruct rather than investigate[.]”). A
21 reasonable journalist might refrain, too, from publishing on topics likely to trigger
22 law enforcement scrutiny in order to protect her relationships with confidential
23 sources. *See Media Matters for Am.*, 138 F.4th at 581 (media organization “pared
24 back its reporting[] and declined to pursue follow-up” in light of retaliatory
25 investigation). As a result, “instigating unwarranted criminal investigations” chills
26 the exercise of First Amendment rights by journalists just as much as it would for any
27 ordinary member of the public—if not even more so. *Coszalter*, 320 F.3d at 975.

1 Ninth Circuit precedent reinforces this conclusion. In *Conant v. Walters*, for
2 instance, the court affirmed an injunction that imposed a “bar against ‘investigating’
3 on the basis of speech protected by the First Amendment”—including the threshold
4 step of “initiating any investigation” solely on the basis of protected speech—without
5 a good-faith basis to suspect criminal conduct. 309 F.3d at 636 (internal citation
6 omitted). In *United States v. Mayer*, dealing with an undercover investigation that
7 would not have required any suspicion under the *Fourth* Amendment, the Circuit
8 nevertheless emphasized that “the government must not investigate for the purpose of
9 violating First Amendment rights” and again required a good-faith investigative
10 purpose. 503 F.3d at 752. And in *Gomez v. County of Los Angeles*, the court flatly
11 “disagree[d]” with the County that the “failed initiation of a criminal investigation” is
12 insufficiently adverse to chill a person of ordinary firmness. 314 F. App’x at 930.

13 Arguing otherwise, the County in a footnote leans on *Moore v. Garnand*, 83
14 F.4th 743 (9th Cir. 2023), where the Ninth Circuit found in the qualified-immunity
15 context that a plaintiff failed to carry his burden to identify “caselaw that clearly
16 established that a retaliatory investigation per se violates the First Amendment,” *id.* at
17 752. *Moore* has little precedential value because the plaintiff there simply never cited
18 to *Mayer* or *Conant*, both of which establish as much, *see* Appellee’s Answering Br.,
19 *Moore v. Garnand*, No. 22-16236, 2023 WL 2167183, at *40–41 (9th Cir. Feb. 15,
20 2023), and so the panel’s holding in that case was limited to “Plaintiffs’ fail[ure] to
21 meet their burden” to identify the relevant caselaw, *Moore*, 83 F.4th at 753.
22 Regardless, as the County agrees, *Moore* did not purport to make a holding on the
23 underlying First Amendment merits question. As a result, *Moore* did not—and could
24 not—overrule the Circuit’s prior guidance that “the government must not investigate
25 for the purpose of violating First Amendment rights,” *Mayer*, 503 F.3d at 752, and
26 that even the threshold step of “initiat[ing] an investigation” solely on the basis of
27

1 protected speech is unconstitutional, “unless the government in good faith believes
2 that it has substantial evidence of criminal conduct,” *Conant*, 309 F.3d at 636.

3 Those precedents square with common sense. The Supreme Court has
4 emphasized that the First Amendment prohibits not just “formal legal sanctions” for
5 speaking out but also the “threat of invoking legal sanctions and other means of
6 coercion, persuasion, and intimidation.” *Bantam Books*, 372 U.S. at 67. And even
7 before any further steps have been taken, learning that an investigation has been
8 opened “intimate[s] that punishment [will] imminently follow.” *Mulligan*, 835 F.3d
9 at 990; *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009) (“the mere *threat* of
10 harm can be an adverse action” in the retaliation context “regardless of whether it is
11 carried out because the threat itself can have a chilling effect”). Because “[t]he man
12 who knows that he must bring forth proof and persuade another of the lawfulness of
13 his conduct necessarily must steer far wider of the unlawful zone,” *Speiser v.*
14 *Randall*, 357 U.S. 513, 526 (1958), it takes little more than a “gratuitous show of
15 uninvited law enforcement interest” to communicate that a plaintiff would be better
16 off not antagonizing the police, *Garcia*, 145 F. Supp. 3d at 515 (seeing officers near
17 journalist’s home sufficiently adverse); *Gibson v. United States*, 781 F.2d 1334, 1338
18 (9th Cir. 1986) (helicopter flights overhead sufficiently adverse). In plain language:
19 An ordinary person who learned that they were under criminal investigation because
20 they had published information critical of LASD would be reluctant to do so again.

21 Following those cues, district courts in this Circuit, too, have found that
22 “retaliatory police investigations” are actionable under § 1983. *Sterner*, 2009 WL
23 160921, at *3; *Colonies Partners LP v. County of San Bernardino*, No. 18-cv-420,
24 2020 WL 5102160, at *22 (C.D. Cal. July 28, 2020); *Denney v. Drug Enforcement*
25 *Admin.*, 508 F. Supp. 2d 815, 830 (E.D. Cal. 2007); *see also Udd v. City of Phoenix*,
26 No. 18-cv-01616, 2020 WL 1536326, at *17 (D. Az. Mar. 31, 2020) (same under
27 Title VII); *Carlson v. County of Los Angeles*, 2016 WL 11522183, at *5 (C.D. Cal.

1 Jan. 8, 2016) (same as to retaliatory child-welfare investigation). And were it
2 otherwise, it would take “little imagination to envision police abuse of investigative
3 procedures to affirmatively chill speech.” *Sterner*, 2009 WL 160921, at *3.

4 In arguing that LASD should have “a license to retaliate through investigative
5 procedures,” *id.*, Defendants rely entirely on out-of-circuit cases. True enough:
6 There is an unresolved circuit split on the question, and Ninth Circuit precedent
7 places it on one side. *Hernandez v. Cook County Sheriff’s Office*, No. 07-cv-855,
8 2017 WL 4535982, at *7 (N.D. Ill. Sept. 25, 2017) (identifying the Ninth Circuit as
9 one among “a number of other circuit courts [that] have found that a retaliatory
10 investigation can violate the First Amendment”). And the Ninth Circuit’s view on the
11 issue hardly stands alone. *See, e.g., Media Matters*, 138 F.4th at 580; *Pendleton v. St.*
12 *Louis County*, 178 F.3d 1007, 1010–11 (8th Cir. 1999) (defendants who “fabricated a
13 criminal investigation” in retaliation for plaintiff’s speech “could not have reasonably
14 believed that their actions comported with clearly established law”); *Anderson*, 125
15 F.3d at 159–60, 163 (finding that a “surveillance operation” was an adverse action).²

16 For that matter, many of Defendants’ cited cases do not support the proposition
17 for which Defendants offer them because they deal with different constitutional
18 provisions. For instance, *United States v. Trayer* is unhelpful because it involves the
19 Fourth Amendment, and the legal standard for an unlawful “search” is entirely
20 different than the standard for an “adverse action” in a First Amendment retaliation
21 claim. *Compare Trayer*, 898 F.2d 805, 808 (D.C. Cir. 1990) (under the Fourth
22 Amendment, “there is no constitutional right to be free of investigation”), *with Media*

23 ² The Justice Department likewise prohibits federal law enforcement officers
24 from opening even the most preliminary of investigations “based solely on the
25 exercise of First Amendment rights.” Fed. Bureau of Investigation, Domestic
26 Investigations & Ops. Guide § 5.5(b) (Feb. 27, 2024). And Congress has imposed the
27 same limit by statute on many of the federal government’s investigative authorities.
28 *See* 18 U.S.C. § 2709(b)(1) (to obtain certain business records, government must
certify that investigation is “not conducted solely on the basis of activities protected
by the first amendment); 50 U.S.C. § 1805(a)(2)(A) (prohibiting certain electronic
surveillance “solely upon the basis of activities protected by the first amendment”).

1 *Matters*, 138 F.4th at 580 (under the First Amendment, “allegation that [plaintiffs] are
2 targets of a retaliatory government investigation is a claim regarding concrete harm”).
3 Similarly, *Aponte v. Calderon* is inapposite because it asks whether there is a right
4 under the *Due Process Clause* to be free from criminal investigations. 284 F.3d 184,
5 191–93 (1st Cir. 2002). But the First Amendment prohibits retaliatory adverse
6 actions even when no liberty interest would be at stake for purposes of due process.
7 *See Hyland*, 972 F.2d at 1136, 1141 (plaintiff stated claim under First Amendment,
8 but not *Due Process Clause*, for retaliatory revocation of volunteer position).

9 Other cases cited by Defendants address only a given plaintiff’s failure to carry
10 their burden on qualified immunity, not the merits of the First Amendment issue.
11 *Compare, e.g., Lincoln v. Maketa*, 880 F.3d 533, 540–41 (10th Cir. 2018) (granting
12 qualified immunity), *with Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)
13 (“[A]ny form of official retaliation for exercising one’s freedom of speech, including
14 prosecution, threatened prosecution, bad faith investigation, and legal harassment,
15 constitutes an infringement of that freedom.” (internal citation omitted)).

16 None of the Defendants’ proffered support, then, justifies departing from the
17 Ninth Circuit’s own guidance. Ultimately, Defendants’ argument rests upon out-of-
18 circuit cases that run contrary to *Conant* and *Mayer*. And the Defendants’ authorities
19 are unpersuasive on their own terms, too, because they fail to fit the assertion that a
20 retaliatory investigation is not actionable into the governing test: Would learning that
21 the Sheriff’s Department had initiated a criminal investigation of her journalism
22 “chill a person of ordinary firmness” from reporting with the same enthusiasm on the
23 Department? *Blair*, 608 F.3d at 543. That the Defendants answer ‘no’ blinks reality.

24 Finally, bundled with the County’s insistence that a criminal investigation is
25 not adverse seems to be the argument that covert retaliation cannot violate the First
26 Amendment if a plaintiff learns about it after the fact. Dkt. 31-1 at 9. The County
27 never explains why the timing would matter to whether its misconduct ultimately

1 chills speech; an ordinary person who learns that they were targeted for a retaliatory
2 investigation in the past would fear that speaking again will prompt renewed law
3 enforcement scrutiny, much as the investigation in Ms. Lau’s case had already been
4 closed once before Sheriff Villanueva reopened it on a retaliatory basis. *See* Dkt. 30
5 ¶¶ 52–56. But in any event, the Ninth Circuit has already foreclosed the County’s
6 position. *See Az. Students’ Ass’n v. Az. Bd. of Regents*, 824 F.3d 858, 868 (9th Cir.
7 2016) (“covert surveillance” is an adverse action that can chill speech); *see also*
8 *Sterner*, 2009 WL 160921, *3 (“surreptitious” investigation is an adverse action).

9 And for good reason. Whether an action is adverse does not turn on when a
10 particular plaintiff learned about it because the inquiry whether misconduct “would
11 chill a person of ordinary firmness” is “generic and objective,” *O’Brien*, 818 F.3d at
12 933 (internal citation omitted); whether Ms. Lau herself “was, or would have been,
13 chilled” is irrelevant, *id.*, and thus so is the question of how long the County
14 concealed its misconduct from her. Just as importantly, the County’s position would
15 have startling implications. On its view, even a journalist baselessly wiretapped by
16 the Department would have no remedy after secret and retaliatory surveillance ends.
17 Even the Individual Defendants do not join that police-state vision. *See* Dkt. 32-1 at
18 5 n.1 (conceding that a “secret warrantless wiretap” would be actionable).

19 However dressed up, the County’s position in substance is that “official
20 harassment of the press” is just the price of doing business as a reporter, *Branzburg*,
21 408 U.S. at 707, and that the ordinary journalist should be hardy enough to brush off
22 the prospect that they will be targeted for criminal investigation for reporting that the
23 Sheriff’s Department dislikes. That is not the law. Because the Sheriff’s Department
24 violated the constitutional command that “the government must not investigate for
25 the purpose of violating First Amendment rights,” *Mayer*, 503 F.3d at 752, Ms. Lau
26 states a plausible claim based on the opening of a retaliatory criminal investigation.

27

28

1 **B. The County went above and beyond conducting a retaliatory**
2 **criminal investigation by referring Ms. Lau for prosecution.**

3 Even if an investigation alone could not give rise to retaliation liability, much
4 of the County’s motion is misdirected because Ms. Lau alleged more than an
5 investigation: The Sheriff’s Department took the further step of referring her for
6 criminal prosecution, knowing full well that no cause (let alone probable cause)
7 existed to do so. Dkt. 30 ¶¶ 14, 54–56, 60–64. The “threat of invoking legal
8 sanctions” is a classic adverse action for purposes of First Amendment retaliation,
9 *Mulligan*, 835 F.3d at 989 n.5 (internal citation omitted), and “false accusations of
10 criminal activity” fit the bill when they “intimate[] that punishment [will] imminently
11 follow,” *id.* at 990; *Worrell*, 219 F.3d at 1212 (“threatened prosecution” is an adverse
12 action). At the risk of stating the obvious, any reasonable individual who learns they
13 have been referred for criminal prosecution would worry that punishment will follow.
14 *See Kennedy*, 66 F.4th at 1210 (noting that it “would have been foolish” for a speaker
15 to ignore the views of a commission with the power to “recommend prosecutions”).

16 In arguing otherwise, the County makes much of the fact that no prosecutor
17 would act on the referral—proposing a topsy-turvy standard in which referrals with
18 enough superficial merit to prompt charges are actionable, but entirely baseless
19 referrals are not. The suggestion makes little sense. In *Bantam Books*, too, “no one
20 [had] been prosecuted” because the commission accused of making threats against
21 protected speech had no “power to apply formal legal sanctions” without the
22 independent action of a prosecutor. 372 U.S. at 66–67. But the Supreme Court
23 nevertheless made clear that “the threat of invoking legal sanctions” was harm
24 enough to violate the First Amendment, *id.* at 67, pointing to the example of threats
25 made not just by prosecutors but “on the part of chiefs of police,” *id.* at 67 n.8.

26 Following *Bantam Books*, the federal courts of appeal have consistently found
27 that the prospect of “referral” for punishment “itself is chilling even if it does not

1 result in a finding of responsibility or criminality,” *Speech First, Inc.*, 939 F.3d at
2 765, even in contexts much less fraught than the risk of criminal prosecution, *accord*
3 *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020); *Speech First, Inc. v.*
4 *Cartwright*, 32 F.4th 1110, 1122 (11th Cir. 2022); *see also Gomez*, 314 F. App’x at
5 930 (even “failed initiation of a criminal investigation” is an adverse action for
6 retaliation claim). After all, the good luck that the LASD struggled to find a willing
7 prosecutor would not relieve an ordinary person’s concern that the LASD might try
8 again. And as a result, as the Ninth Circuit has recognized, “the mere *threat* of harm
9 can be an adverse action” in the retaliation context “regardless of whether it is carried
10 out because the threat itself can have a chilling effect.” *Brodheim*, 584 F.3d 1270;
11 *see also Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 848 (9th Cir.
12 2002) (finding, under an analogous retaliation test for the False Claims Act, that
13 threats of employment consequences were “reasonably likely to deter employees
14 from engaging” in protected activity even though the threats were not carried out).

15 Finally, it bears underlining that it would offer Defendants a perverse windfall
16 to excuse the retaliatory referral because of the independent acts of prosecutors who
17 found it meritless. Liability under § 1983 looks to an official’s conduct “*at the time*
18 *they decided to act.*” *Rhodes v. Robinson*, 408 F.3d 559, 570 (9th Cir. 2005). Once
19 the referral was made, the Individual Defendants had done everything within their
20 power to achieve Ms. Lau’s prosecution. That other officials would not collaborate
21 in the campaign did nothing to dilute the message any ordinary person would have
22 received on learning of the referral: In the County of Los Angeles, journalists surface
23 unflattering information about the Sheriff’s Department under threat that the
24 Department will pursue charges. Because “people do not lightly disregard public
25 officers’ thinly veiled threats to institute criminal proceedings against them,” *Bantam*
26 *Books*, 372 U.S. at 68, Ms. Lau has adequately alleged that referring her for
27 prosecution in retaliation for her reporting violated her First Amendment rights.

1 **II. Ms. Lau’s complaint adequately alleges that County officials acted under**
2 **color of state law when they abused their official powers to punish her.**

3 In a footnote, the County suggests that “to the extent Plaintiff argues Individual
4 Defendants’ actions were taken to vindictively target Villanueva’s perceived
5 opponents, such actions were not conduct under color of state law.” Dkt. 31-1 at 9
6 n.3. “Arguments raised only in footnotes, or only on reply, are generally deemed
7 waived,” *Estate of Saunders v. C.I.R.*, 745 F.3d 953, 962 n.8 (9th Cir. 2014), and this
8 Court should decline to consider an argument for which the County offered no
9 reasoning. (For one, Ms. Lau is prejudiced in responding because it is difficult to
10 discern the argument’s basis; the pincite offered in the County’s unexplained citation
11 points only to a generic statement that § 1983 requires a deprivation of rights under
12 color of law.) But in the interest of avoiding any doubt, the argument is meritless.

13 “It is firmly established that a defendant in a § 1983 suit acts under color of
14 state law when he abuses the position given to him by the State. Thus, generally, a
15 public employee acts under color of state law while acting in his official capacity or
16 while exercising his responsibilities pursuant to state law.” *McDade v. West*, 223
17 F.3d 1135, 1140 (9th Cir. 2000). A California sheriff’s responsibilities plainly
18 include “the function of conducting criminal investigations,” *Jackson v. Barnes*, 749
19 F.3d 755, 764 (9th Cir. 2014), and it should go without saying that a formal referral
20 for prosecution—made on Sheriff’s Department letterhead, not Sheriff Villanueva’s
21 personal stationery—is not a citizen’s tip. The fact that the Individual Defendants
22 had a retaliatory motive for attempting to punish Ms. Lau, for its part, does not take
23 their conduct outside § 1983’s scope, or else there would be no such thing as a First
24 Amendment retaliation claim under § 1983. *Cf. Lozman v. City of Riviera Beach*, 585
25 U.S. 87, 95 (2018) (allegations of an “official municipality policy of intimidation,”
26 pursued “in retaliation for . . . criticisms of city officials” states a First Amendment
27 claim under § 1983). And in any event, Ms. Lau’s complaint does not allege that the

1 crusade was motivated by *personal* animus; it alleges that the County’s
2 decisionmakers had a policy of retaliating against individuals who “report
3 unfavorable information about *LASD*.” Dkt. 30 ¶¶ 110 (emphasis added); *see also id.*
4 ¶¶ 52, 65. The County cannot avoid liability for Defendants’ abuse of their official
5 power to retaliate against a journalist for reporting about the County that they dislike.

6 **III. Ms. Lau adequately pleaded her conspiracy claim.**

7 The Individual Defendants also resist the conclusion that Ms. Lau plausibly
8 alleged a conspiracy for purposes of § 1983. As the Individual Defendants make
9 clear, this argument is derivative of their belief that they never violated the First
10 Amendment, *see* Dkt. 32-1 at 11, but as discussed above, Ms. Lau adequately pleaded
11 that the Individual Defendants violated the First Amendment by retaliating against
12 her for engaging in protected activity. Moreover, Ms. Lau plausibly alleged that the
13 Defendants conspired to violate the Constitution by reaching an unlawful agreement
14 amongst themselves. *See* Dkt. 30 ¶¶ 97–104 (allegations describing the work of the
15 Civil Rights and Public Integrity Detail responsible for the investigation and referral).

16 **IV. The Individual Defendants are not entitled to qualified immunity.**

17 Finally, the Individual Defendants mount a qualified-immunity defense.³ The
18 County did not raise this argument because “[m]unicipalities cannot claim qualified
19 immunity.” *Gallagher v. City of Winlock*, 287 F. App’x 568, 577 (9th Cir. 2008).

20 Granting qualified immunity on the pleadings alone is strongly disfavored,
21 because “[d]etermining claims of qualified immunity at the motion-to-dismiss stage
22 raises special problems for legal decision making” on an undeveloped record. *Keates*
23 *v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018); *accord Stringer v. County of Bucks*,
24 141 F.4th 76, 87 & n.8 (3d Cir. 2025) (emphasizing that it is “generally inappropriate

25 ³ The Individual Defendants also briefly mention that they believe
26 “corresponding state law immunities” protect them from liability, but never specify
27 which state law immunities would apply. Dkt. 32-1 at 11. Those arguments are
28 therefore waived. Regardless, state law immunities cannot be used to thwart federal
constitutional claims. *See Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996).

1 for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified
2 immunity” and collecting cases (citation omitted)). It bears underlining, in that vein,
3 that *Moore v. Garnand*—on which the Individual Defendants principally rely—was
4 decided at summary judgment, only after a degree of discovery about “[t]he scope
5 and manner of the investigation” to which the panel pegged its analysis. 83 F.4th at
6 752 (citation omitted) (emphasis omitted). Here too, if “Defendants’ immunity
7 defense cannot be resolved without some discovery,” the proper course is to deny it
8 and defer the question to summary judgment. *Stringer*, 141 F.4th at 89.

9 Regardless, the Individual Defendants’ argument fails on its own terms.
10 Government officials are not entitled to qualified immunity if they (1) violate a
11 plaintiff’s constitutional rights, and (2) those rights are clearly established at the time
12 of the misconduct. *See Estate of Hernandez v. City of Los Angeles*, 139 F.4th 790,
13 802 (9th Cir. 2025) (en banc). Ms. Lau plausibly alleged the first prong of this
14 analysis for all the reasons stated above. As for the second prong, it was clearly
15 established in 2018 that police officers could not open an investigation “for the
16 purpose of abridging first amendment freedoms,” *Mayer*, 503 F.3d at 751; *see also*
17 *Conant*, 309 F.3d at 636, and that they could not use “false accusations of criminal
18 activity” accompanied by the “threat of invoking legal sanctions” to suppress
19 protected speech, *Mulligan*, 835 F.3d at 989–990 & n.5.⁴

20 For decades, officers within the Ninth Circuit have been on notice that
21 investigations must be conducted “in good faith.” *Mayer*, 503 F.3d at 751 (citing
22 *United States v. Aguilar*, 883 F.2d 662, 705 (9th Cir. 1989) (superseded by statute on
23 other grounds)). An investigation is not conducted in good faith if it is opened “for
24 the purpose of abridging first amendment freedoms,” *id.*, and *Conant* made clear that

25
26 ⁴ As with the merits, the Individual Defendants’ qualified-immunity argument is
27 limited to whether their actions were adverse enough to chill a person of ordinary
28 firmness; they do not raise any argument that a reasonable official would not have
known Ms. Lau’s conduct as a journalist was protected by the First Amendment.

1 the same “good faith” requirement extends to the threshold step of “initiat[ing] an
2 investigation,” 309 F.3d at 636. That is precisely the situation here: Ms. Lau
3 plausibly alleges that the Individual Defendants investigated her solely because she
4 published an article discussing the LASD’s Brady List, not because they suspected
5 her of committing any crime. Dkt. 30 ¶¶ 14, 54–56, 59. And it makes no difference
6 that the Ninth Circuit articulated those rules in cases that did not involve journalists;
7 if anything, the fact that “the press serves and was designed to serve as a powerful
8 antidote to any abuse of power by governmental officials” makes the illegality of the
9 Defendants’ misconduct more obvious. *Mills v. Alabama*, 384 U.S. 214, 219 (1966);
10 *see also Quraishi v. St. Charles Cnty.*, 986 F.3d 831, 838–39 (8th Cir. 2021) (no prior
11 case involving journalists in particular required to put officials on notice that
12 retaliating against journalists violates the First Amendment). Any reasonable officer
13 in 2018 would have recognized that opening a criminal investigation to punish a
14 journalist for an unfavorable story would be unlawful. *See Sterner*, 2009 WL
15 160921, at *4 (denying qualified immunity for retaliatory investigation claim);
16 *Colonies Partners LP*, 2020 WL 5102160, at *32 (same); *Gomez*, 314 F. App’x at
17 930 (denying immunity even for “failed initiation of a criminal investigation”).

18 Finally, the fact that the Individual Defendants also referred Ms. Lau for
19 prosecution makes the qualified-immunity analysis especially easy. *See Keates*, 883
20 F.3d at 1235 (“If the operative complaint contains even one allegation of a harmful
21 act that would constitute a violation of a clearly established constitutional right, then
22 plaintiffs are entitled to go forward with their claims.” (citation omitted)). In addition
23 to opening an investigation in bad faith, the Individual Defendants ultimately
24 attempted to use legal sanctions to punish Ms. Lau for her reporting. The Supreme
25 Court settled in *Bantam Books* that “the threat of invoking legal sanctions” is, itself,
26 sufficient to chill speech even where “no one has been prosecuted.” 372 U.S. at 67;
27 *see also White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (same); *Mulligan*, 835

1 F.3d at 990 (“false accusations of criminal activity” that “intimat[e] that punishment
2 would imminently follow” violate the First Amendment). And the overwhelming
3 weight of persuasive authority in other federal courts of appeals confirms that a
4 “referral” for punishment “itself is chilling even if it does not result in a finding of
5 responsibility or criminality.” *Speech First, Inc. v.*, 939 F.3d at 765; *accord Speech*
6 *First, Inc.*, 979 F.3d at 330; *Speech First, Inc.*, 32 F.4th at 1122.

7 That result makes sense. There is no question, after all, that Defendants would
8 be liable for retaliatory prosecution under clearly established law if charges against
9 Ms. Lau had in fact been filed. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006).
10 And because the qualified-immunity analysis looks only to whether Defendants’
11 conduct “was unlawful *at the time they decided to act*,” *Rhodes*, 408 F.3d at 570, the
12 subsequent actions of the prosecutor are irrelevant to the analysis. Defendants had
13 already done as much as they personally could to violate Ms. Lau’s rights. *Cf.*
14 *Thompson v. Clark*, 596 U.S. 36, 40 (2022) (recognizing malicious prosecution claim
15 under the Fourth Amendment where police officer “filed a criminal complaint” but
16 prosecution then “moved to dismiss the charges”). By attempting to peg their
17 immunity defense to what happened *after* they made the retaliatory referral, “the
18 officers would have qualified immunity turn *on the harm eventually caused* by an
19 official’s conduct. But that puts the cart before the horse: It shifts the focus of the
20 qualified immunity inquiry from the time of the conduct to its aftermath and effect,
21 and therefore would make immunity hinge upon *precisely* the kind of post hoc
22 judgment that the doctrine is designed to avoid.” *Rhodes*, 408 F.3d at 570. Ninth
23 Circuit law forecloses that gambit. Any reasonable official in 2018 would have
24 known that referring a journalist for criminal prosecution in retaliation for their
25 reporting, with no valid basis for doing so, violates the First Amendment.

1 **V. Ms. Lau’s complaint adequately alleges that the County’s retaliation for**
2 **her reporting caused her cognizable injury that is redressable by damages.**

3 Further downplaying the gravity of its effort to prosecute a journalist, the
4 County argues in the alternative that Ms. Lau has no standing to seek damages for its
5 officials’ misconduct, either because the County has since changed its ways or
6 because Ms. Lau did not suffer enough harm. The County is mistaken on both points.

7 The County’s first argument misreads the Complaint: Ms. Lau seeks damages
8 for the past constitutional violations she suffered, not prospective relief from future
9 harm. Dkt. 30 ¶ 86. The County’s claim that LASD does not *currently* have a
10 retaliatory policy—a factual claim that would be inappropriate to resolve in the
11 County’s favor on a motion to dismiss in any event—is therefore irrelevant to Ms.
12 Lau’s claim for relief for a *past* constitutional injury. As the Supreme Court held in
13 *Uzuegbunam v. Preczewski*, damages (even nominal damages) provide effective
14 redress “where a plaintiff’s claim is based on a completed violation of a legal right,”
15 including a past First Amendment injury whose scope may be challenging to
16 quantify. 592 U.S. 279, 293 (2021). And as *Uzuegbunam* likewise held, Defendants’
17 purported change in policy does not moot her claim for relief for that past injury. *Id.*

18 In the alternative, the County claims that Plaintiff lacks standing because she
19 has not suffered a “cognizable harm.” Dkt. 31-1 at 11–12. But Ms. Lau alleged a
20 cognizable injury several times over. For one, Supreme Court precedent recognizes
21 that First Amendment violations are concrete harms without any additional showing
22 of tangible injury. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021)
23 (“abridgment of free speech” is a concrete harm); *Hayes*, 849 F.3d at 1212 (a plaintiff
24 is not “required to show any actual injury beyond the free speech violation itself”
25 (citation omitted)); *see also Sterner*, 2009 WL 160921, at *3 (rejecting motion to
26 dismiss retaliatory investigation claim for purported “lack of actual damages”).

27
28

1 The County seems to believe Ms. Lau should have said more about the *extent*
2 of those damages, but Article III requires no such thing; there is no “amount-in-
3 controversy requirement” for past constitutional injuries. *Uzuegbunam*, 592 U.S. at
4 802. On the contrary, under § 1983, a plaintiff is entitled to recover at least nominal
5 damages for a past constitutional violation even in “cases in which no actual injury is
6 incurred or can be proven.” *Hazle*, 727 F.3d at 991 n.6; *see also, e.g., Brannian v.*
7 *City of San Diego*, 364 F. Supp. 2d 1187, 1194 (S.D. Cal. 2005) (even at summary
8 judgment, “in this § 1983 case alleging a First Amendment violation, Plaintiffs
9 clearly are *not* required to demonstrate actual damages in order to proceed on their
10 claim for nominal damages”). Ms. Lau did, in fact, allege further damages as
11 discussed below. But even if she hadn’t, the County’s motion to dismiss simply
12 ignores Ms. Lau’s claim for nominal damages for the past invasion of her rights. *See*
13 Dkt. 30 ¶ 86. This Court can deny the motion on that ground alone.

14 In addition to her First Amendment injuries, Ms. Lau alleged that the County’s
15 retaliatory investigation and referral caused Ms. Lau the sort of dignitary, privacy,
16 and emotional harms that have traditionally “provid[ed] a basis for lawsuits in
17 American courts.” *TransUnion LLC*, 594 U.S. at 425 (noting that reputational harms,
18 disclosure of private information, and intrusion upon seclusion are concrete harms);
19 *see also* Dkt. 30 ¶ 84 (alleging that Ms. Lau’s “dignity and privacy” were infringed,
20 and that she suffered emotional distress in the form of anxiety).

21 Defendants neglect to address the dignitary and privacy harms of their conduct,
22 and have therefore waived any arguments related to those injuries, but each would
23 independently provide standing. *See Kennedy*, 66 F.4th at 1206 (“the unique stigma
24 associated with having a government official label someone a law breaker” is a
25 cognizable Article III injury). And while Ms. Lau does not know yet the full extent
26 of Defendants’ investigation, the reasonable inference to draw from Defendants’
27 decision to refer her for prosecution is that Defendants believed they had obtained

1 information about her interactions with a source—information that is exceptionally
2 sensitive under California and federal law. *See Shoen v. Shoen*, 5 F.3d 1289, 1294–
3 96 (9th Cir. 1993) (discussing the reporter’s privilege); *see also Al-Ahmed v. Twitter,*
4 *Inc.*, 648 F. Supp. 3d 1140, 1153–54 (N.D. Cal. 2023) (collection of journalist’s
5 information was sufficient to show standing, even if “the privacy of his information is
6 still in debate”). A journalist whose confidential relationships were scrutinized would
7 naturally feel that her privacy and dignity were infringed.

8 As for the distress the County’s misconduct caused Ms. Lau, allegations of
9 emotional harms, such as anxiety, are sufficient for the pleading stage. *See, e.g.,*
10 *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) (finding that
11 “generalized anxiety and stress” conferred standing on plaintiff); *Davis v. Astrue*, 874
12 F. Supp. 2d 856, 862–63 (N.D. Cal. 2012) (collecting cases in which emotional
13 distress was found to constitute injury-in-fact). In insisting otherwise, Defendants
14 latch onto a line of state-tort cases finding that anxiety fails to satisfy a necessary
15 element of the *merits* of certain tort claims. *See* Dkt. 31-1 at 11–12 (citing *Medoff v.*
16 *Minka Lighting, LLC*, 2023 WL 4291973, at *9 (May 8, 2023), for negligence claim,
17 and *Wong v. Jing*, 189 Cal. App. 4th 1354, 1377–78 (2010), for NIED and IIED
18 claims).⁵ But the two ideas are unrelated. *See Krottner v. Starbucks Corp.*, 406 Fed.
19 App’x 129, 131 (9th Cir. 2010) (distinguishing between an “injury-in-fact for
20 purposes of Article III standing” and the question whether a plaintiff “adequately pled
21 damages for purposes of their state-law claims”). *Wong v. Jing*, for instance, explains
22 that a plaintiff alleging an NIED claim must allege that she suffered “severe
23 emotional suffering,” 189 Cal. App. 4th at 1376, a degree of harm that is far above

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25 ⁵ Defendants also cite *Payne v. Office of the Commissioner of Baseball*, 705 Fed.
26 App’x 654 (9th Cir. 2017) (mem.), an unpublished decision finding that the plaintiff
27 lacked standing to sue the Major League Baseball Commissioner for *injunctive* relief
because she did not allege a “substantial risk” that she would be hit by foul balls at
baseball games in the future. That case has no relevance here because this suit
involves retrospective relief; Ms. Lau has already suffered her constitutional injury.

1 the injury-in-fact requirement, which requires only that harm be “real, and not
2 abstract,” *TransUnion*, 594 U.S. at 424 (quotation omitted). In fact, Defendants’ own
3 case makes this distinction in a privacy-related context: In *Medoff v. Minka Lighting,*
4 *LLC*, the court found that plaintiff had standing because he suffered an injury-in-fact
5 (invasion of privacy), but dismissed the claim on the merits because plaintiff failed to
6 satisfy the “harm” element of a state-law negligence claim. 2023 WL 4291973, at *9.

7 As already discussed above, there is no comparable damages threshold in the
8 First Amendment context; the Ninth Circuit has made clear that a plaintiff is not
9 “required to show any actual injury beyond the free speech violation itself to state a
10 constitutional claim.” *Hayes*, 849 F.3d at 1212. And it would make little sense to
11 require a more granular discussion of Ms. Lau’s emotional harms at this early date.
12 At the pleading stage, “general factual allegations of injury” suffice because courts
13 “presume that general allegations embrace those specific facts that are necessary to
14 support the claim.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)
15 (quotation omitted). And in a § 1983 case, compensatory damages can ultimately be
16 “awarded for humiliation and emotional distress established by testimony or inferred
17 from the circumstances, whether or not plaintiffs submit evidence of economic loss or
18 mental or physical symptoms.” *Tortu*, 556 F.3d at 1086. The County’s motion
19 effectively insists on a higher showing at the pleading stage than would ultimately be
20 required at trial. But “the precise amount of damages is a question for later
21 proceedings,” *Sterner*, 2009 WL 160921, at *6, not a basis on which the County can
22 avoid the merits. The County’s effort to minimize Ms. Lau’s injuries is meritless.

23 **VI. Ms. Lau’s complaint adequately alleges that the Individual Defendants are**
24 **liable in their personal capacities for retaliating against her reporting.**

25 Finally, the County argues that because the Individual Defendants committed
26 their misconduct while acting in their official capacities, this case must be brought
27 only against the County. Supreme Court precedent explicitly rejects the argument.

1 In *Hafer v. Melo*, the Supreme Court addressed and dismissed the argument
2 that “officials may not be held liable in their personal capacity for actions they take in
3 their official capacity.” 502 U.S. 21, 27 (1991). “[T]o establish *personal* liability in
4 a § 1983 action, it is enough to show that the official, acting under color of state law,
5 caused the deprivation of a federal right.” *Hafer*, 502 U.S. at 25. That is, as already
6 discussed, exactly what Ms. Lau alleged here, *see* Dkt. 30 ¶¶ 26–30, 95, and there is
7 no basis for suggesting that she did not mean to hold the Individual Defendants
8 personally liable in addition to holding the County accountable, *see Price v. Akaka*,
9 928 F.2d 824, 828 (9th Cir. 1990) (rejecting the argument that “[plaintiff’s] suit must
10 be against the [defendants] in their official capacities because the Complaint’s
11 allegations concern [their] conduct while performing their official functions”).

12 Plaintiffs frequently allege both personal-capacity claims and municipal
13 liability claims alongside each other, because the distinction has practical
14 consequences for the immunities available to—and damages available against—
15 different defendants. *See Kentucky v. Graham*, 473 U.S. 159, 166–67 & n.13 (1985).
16 As a result, the two are anything but redundant or interchangeable. And the Ninth
17 Circuit has already held that personal-capacity claims remain personal-capacity
18 claims even if an indemnification agreement means that the government employer
19 would ultimately foot the bill for a judgment against the individual official. *See*
20 *Ashker v. California Dep’t of Corrections*, 112 F.3d 392, 395 (9th Cir. 1997).

21 The only case that Defendants offer for their view is *Zuurveen v. Los Angeles*
22 *Cnty. Dep’t of Health Svcs.*, 2022 WL 14966244, at *3 (Sept. 28, 2022) (cited at Dkt.
23 31-1 at 12). But *Zuurveen* does not support the proposition for which it is cited. The
24 cited section simply restates the *Iqbal/Twombly* pleading standard; it does not say
25 anything about the distinction between personal-capacity versus official-capacity
26 lawsuits. It is difficult, then, to understand how the County arrived at its position.
27 Both the Supreme Court and the Ninth Circuit have made clear the argument is

1 meritless. Ms. Lau’s complaint means what it says: The Individual Defendants are
2 personally liable for their unlawful retaliation against her reporting.

3 * * *

4 Plaintiff stands by the adequacy of her complaint, but if this Court should find
5 any aspect lacking, Plaintiff asks for the opportunity to amend her complaint and fix
6 the deficiency. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc)
7 (“[A] district court should grant leave to amend even if no request to amend the
8 pleading was made, unless it determines that the pleading could not possibly be cured
9 by the allegation of other facts.” (internal quotation omitted)).

10 **CONCLUSION**

11 For the reasons set forth above, Ms. Lau respectfully urges the Court to deny
12 Defendants’ Motions to Dismiss.

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Respectfully submitted,

14
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