APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC LUND; SUSANNAH LUND, Plaintiffs-Appellants, v. STATE OF CALIFORNIA; et al., Defendants-Appellees.	FILED OCT 26 2021 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS No. 20-17133 D.C. No. 2:19-cv-02287-JAM-DMC MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted October 7, 2021
San Francisco, California

Before: THOMAS, Chief Judge, and HAWKINS and FRIEDLAND, Circuit Judges.

Eric and Susannah Lund appeal the dismissal of their civil action alleging multiple federal and state law claims against numerous defendants, including

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

the State of California; the California Highway Patrol ("CHP"); the City of Vacaville, California; Solano County; the Solano County District Attorney's Office; and individual employees of each. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001), and may affirm on any basis supported by the record, *In re Leavitt*, 171 F.3d 1219, 1223 (9th Cir. 1999). We refer to the claims by the numbers assigned to them in the Second Amended Complaint ("SAC"). We affirm in part, vacate in part, and remand to the district court for further proceedings consistent with this decision.

1. The district court dismissed 69 of the SAC's 73 claims as barred by the preclusion doctrines announced in *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994) and *Yount v. City of Sacramento*, 183 P.3d 471, 484 (Cal. 2008). Defendants bore the burden to demonstrate the applicability of *Heck* or *Yount* to each claim for which they sought dismissal on that ground. *See Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 n.5 (9th Cir. 2016). Rather than addressing the claims individually, defendants largely took a shotgun approach, seeking a general dismissal by arguing the SAC's allegations as a whole are intertwined with the investigation, arrest, prosecution, and conviction of Mr. Lund. In doing so, they failed to carry their burden, and it was error to dismiss all claims relating to events pre-dating Mr. Lund's conviction on a general finding that the SAC's "allegations are inextricably linked to Mr. Lund's conviction." We decline to examine each claim individually for the first time on appeal and instead discuss only those claims necessary to address

the parties' legal arguments and provide guidance to the district court on remand.

Under *Heck*, a 42 U.S.C. § 1983 claim must be dismissed if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," unless the conviction or sentence has already been invalidated. *Heck*, 512 U.S. at 487. *Yount* applies the same rule to claims under California state law. *See* 183 P.3d at 484. Thus, *Heck* and *Yount* bar a claim if it would negate an element of the offense or relies on facts inconsistent with the plaintiff's extant conviction. *See Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) ("[I]f a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed.").

Contrary to the Lunds' argument, § 1983 claims predicated on Fourth Amendment violations are not categorically exempt from *Heck* preclusion. *Szajer v. City of Los Angeles*, 632 F.3d 607, 611 (9th Cir. 2011) ("Although footnote seven [of *Heck*] left open the question of the applicability of *Heck* to Fourth Amendment claims, this Court has since answered that question affirmatively."). For example, because Claims 1 and 2 attack the probable cause basis for the search warrant that uncovered the child pornography for which Mr. Lund was convicted, the district court properly dismissed those claims as *Heck*-barred. *See Whitaker v. Garcetti*, 486 F.3d 572, 583–84 (9th Cir. 2007). Dismissal of the parallel state law claims—Claims 3, 4, and 5—as *Yount*-barred was proper for the same reason. *See Yount*, 183 P.3d at 484 (finding no reason to distinguish between federal and state law

claims). Additionally, the Lunds do not challenge the dismissal of Claims 37, 38, and 43 as *Heck*-barred. However, the dismissal of any *Heck/Yount*-barred claims should have been without prejudice. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995). Therefore, we affirm the dismissal of claims 1–5, 37, 38, and 43 but remand to the district court with instructions to amend the judgment to reflect that the dismissal of these claims is without prejudice to refiling in the event Mr. Lund's conviction is invalidated.

Conversely, *Heck* does not automatically bar a claim simply because the claim relates to events that pre-date Mr. Lund's conviction; rather, to trigger the *Heck/Yount* bar, the claim must be fundamentally inconsistent with Mr. Lund's conviction. *See Smithart*, 79 F.3d at 952. For example, Claim 45 alleges a Fourth Amendment violation resulting from the presence of third parties during the execution of a subsequent search warrant for the Lunds' home following Mr. Lund's arrest. A claim asserting that the presence of third parties during the search implicated Mr. Lund's Fourth Amendment rights does not, on its face, impugn the probable cause for the search or otherwise rely on facts inconsistent with his conviction. *See Wilson v. Layne*, 526 U.S. 603, 614 n.2 (1999). At oral argument, counsel for the CHP defendants effectively conceded that some claims, such as Claim 45, might not imply the invalidity of Mr. Lund's conviction as pled but argued the claims fail to state a cognizable theory for relief on the merits. We leave it to the defendants to argue specifically and the district court to determine in the first instance whether each individual claim necessarily implies the

invalidity of Mr. Lund's conviction or warrants dismissal on other grounds. Thus, we vacate the dismissal of Claims 6–35, 39–42, 44–59, 65–67, and 69–73 and remand for further proceedings consistent with this decision.

2. The Lunds next argue that the district court erred by concluding that Claims 62 and 64 were barred by California Government Code section 821.6. We agree. In *Garmon v. County of Los Angeles*, we predicted that "the California Supreme Court would adhere to [its holding that section 826.1 is confined to malicious prosecution actions] even though California Courts of Appeal have strayed from it." 828 F.3d 837, 847 (9th Cir. 2016). Until the California Supreme Court holds otherwise, we are bound by *Garmon*'s interpretation of California law. *See FDIC v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992) ("[W]e are bound by our prior decisions interpreting state as well as federal law in the absence of intervening controlling authority."). Claims 62 and 64 regard an allegedly defamatory post on the Solano County District Attorney's Facebook page, and neither asserts a claim for malicious prosecution. Accordingly, it was error to dismiss Claims 62 and 64 under California Government Code section 821.6. *See Garmon*, 828 F.3d at 847.

3. We need not determine whether the district court erred by applying absolute immunity to Claim 63 because Claim 63 fails to state a cognizable claim for relief. To state a defamation claim under § 1983, a plaintiff must allege "injury to [the] plaintiff's reputation from defamation accompanied by an allegation of injury to a recognizable property or liberty interest." *Crowe v. County of San Diego*, 608

F.3d 406, 444 (9th Cir. 2010). The SAC does not allege the requisite constitutional injury to support this type of "defamation plus" claim and does not plead a viable § 1983 claim predicated on a Fourteenth Amendment or Eighth Amendment violation. *See id.*; *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) ("An equal protection claim will not lie by conflating all persons not injured into a preferred class receiving better treatment than the plaintiff." (internal quotation marks and citation omitted)); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (acknowledging verbal harassment generally is not sufficient to state a constitutional deprivation). Therefore, we affirm the dismissal of Claim 63 with prejudice.

4. In their reply brief, the Lunds concede that the district court properly dismissed Claims 36 and 61 with prejudice. They also concede that the district court properly dismissed Claim 60 with prejudice to the extent it is based on the prosecutor's introduction of evidence at trial. It is apparent from the face of the SAC that absolute immunity shields in full the prosecutorial acts forming the basis of Claim 60. *See Van de Kamp v. Goldstein*, 555 U.S. 335, 343 (2009). Therefore, we affirm the dismissal of Claims 36, 60, and 61 with prejudice.

5. Because we vacate the dismissal of several federal claims and remand for further proceedings, we vacate the district court's dismissal of Claim 68 against defendants Hai Luc and Wanona Ireland, in

their individual capacities.[1] In the event the district court dismisses the remaining federal claims on remand, the court again may determine whether to decline to exercise supplemental jurisdiction over Claim 68 and any other remaining state law claims. *See* 28 U.S.C. § 1367(c)(3); *Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001) (district court may decline to exercise supplemental jurisdiction over state law claims if all claims over which it has original jurisdiction have been dismissed).

In conclusion, we:

- Affirm the dismissal of Claims 36, 60, 61, and 63 with prejudice;
- Affirm the dismissal of Claims 1–5, 37, 38, and 43 and remand to the district court with instructions to amend the judgment to reflect that the dismissal of these claims is without prejudice to refiling in the event Mr. Lund's conviction is invalidated; and
- Vacate the dismissal of Claims 6–35, 39–42, 44–59, 62, and 64–73 and remand for further proceedings consistent with this decision.[2]

---

[1] The Lunds do not challenge the dismissal of Claim 68 against CHP, the State, or Luc and Ireland in their official capacities.

[2] The Lunds concede that the Eleventh Amendment bars all claims against CHP, Warren Stanely in his official capacity, and the State on claims brought against CHP. *See Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017).

The Lunds' motion for judicial notice (Docket Entry No. 33) is denied as unnecessary.

AFFIRMED in part, VACATED in part, and REMANDED. The parties will bear their own costs on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ERIC LUND individually and on behalf of other aggrieved employees of the California Highway Patrol and SUSANNAH LUND individually, Plaintiff, v. JEFFREY DATZMAN, JOHN CARLI, JASON JOHNSON, STEVE CAREY, DAVID KELLIS, MATT LYDON, MARK FERREIRA, CHRIS LECHUGA, WARREN STANLEY, J.A. FARROW, NICK NORTON, SAMUEL DICKSON, STEVE WEST, KEVIN KNOPF, HELENA WILLIAMS, KEVIN DOMBY, DAVID VARAO, RYAN DUPLISSEY, TOM ANDRADE, JOHN BLENCOWE, ERIC BEAL, HAI LUC, WANONA IRELAND, KRISHNA	No. 2:19-cv-02287-JAM-DMC **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS**

ABRAMS, ILANA SHAPIRO, and DOES 1–40, individually and as public employees, VACAVILLE POLICE DEPARTMENT, CALIFORNIA HIGHWAY PATROL, SOLANO COUNTY DISTRICT ATTORNEY'S OFFICE, CITY OF VACAVILLE, COUNTY OF SOLANO, and STATE OF CALIFORNIA, as public entities,

Defendants.

Eric Lund ("Mr. Lund") and Susannah Lund (collectively "Plaintiffs") filed a 185-page (including exhibits) Second Amended Complaint ("SAC") containing 73 causes of action against: twenty-five individually named Defendants from the Vacaville Police Department, California Highway Patrol, and the Solano County District Attorney's Office; against the agencies themselves; and against the City of Vacaville, County of Solano, and State of California (Collectively "Defendants"). *See* SAC, ECF No. 43. Plaintiffs allege claims under 42 U.S.C. § 1983, the California Constitution, and California tort law against Defendants stemming from Mr. Lund's arrest, prosecution, and conviction of possession of child pornography. *Id.*

Before the Court are three separate motions to dismiss Plaintiffs' lengthy complaint from: (1) the Vacaville Police Department, its individual defendants, and the City of Vacaville (collectively "the

Vacaville Defendants"), (2) the Solano County District Attorney's Office, its individual Defendants, and the County of Solano (collectively "the Solano Defendants"), and (3) the California Highway Patrol, its individual Defendants, and the State of California (collectively "the State Defendants"). *See* Vacaville Mot. to Dismiss ("Vacaville Mot."), ECF No. 54; Solano Mot. to Dismiss ("Solano Mot."), ECF No. 53; State Mot. to Dismiss ("State Mot."), ECF No. 49. Plaintiffs oppose the three motions. *See* Opp'n to Vacaville's Mot. ("Vacaville Opp'n"), ECF No. 59; Opp'n to Solano' Mot. ("Solano Opp'n"), ECF No. 58; Opp'n to State' Mot ("State Opp'n"), ECF No. 57. For the reasons set forth below, the Court GRANTS in part and DENIES in part Defendants' motions to dismiss Plaintiffs' SAC.[1]

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

The Court takes the facts, as best it can, from Plaintiffs' SAC. Because the SAC is unnecessarily voluminous and mixes allegations and arguments in a confusing manner, the Court "cannot be sure [it] ha[s] correctly understood all the averments." *McHenry v. Renne*, 84 F.3d 1172, 1174 (9th. Cir. 1996) (finding the Plaintiffs' fifty-three page long complaint to be confusing and unfairly burdensome). If the Court has not, "[P]laintiffs have only themselves to blame." *Id.*

Mr. Lund worked as a California Highway Patrolman ("CHP") for 26 years. SAC ¶ 50. Shortly before he planned to retire, Mr. Lund was detained by Vacaville Police Officers after arriving for duty at the

---

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for May 19, 2020.

Solano Area CHP office on October 16, 2014. *Id.* ¶ 52. The Officers, Detective Jeffrey Datzman and Sergeant Steve Carey, searched Mr. Lund's vehicle pursuant to a search warrant. *Id.* ¶ 54. The officers found a bag full of technology, including a hard drive containing child pornography. *Id.* ¶¶ 55–56. The officers arrested Mr. Lund for possession and distribution of child pornography. *Id.* ¶ 58.

On November 3, 2014, Solano District Attorney Krishna Abrams charged Mr. Lund with possession of child pornography. *Id.* ¶ 59. Deputy District Attorneys Natasha Jontulovich and Ilana Shapiro prosecuted the case against Mr. Lund. *Id.* ¶ 60. The first trial, in June 2018, resulted in a hung jury, and a mistrial was declared. *Id.* ¶ 61. Shapiro tried the case again in October 2018 and secured a conviction for possession of child pornography. *Id.* ¶ 62. Mr. Lund was sentenced to five years in state prison. *Id.* Mr. Lund appealed his sentence but that appeal is still pending. *Id.* ¶ 63. His conviction has not been invalidated in any way and he is currently serving his sentence in state prison.

Plaintiffs factual allegations all stem from the search, arrest, and prosecution of Mr. Lund's conviction. Representing herself and Mr. Lund, Mrs. Lund filed their initial complaint on November 12, 2019. ECF No. 1. The Solano County Defendants filed a motion to dismiss that complaint, ECF No. 27, but Plaintiffs filed an amended complaint before a ruling could be made on that motion, ECF No. 33. Defendants notified Plaintiffs of their intent to seek dismissal of that complaint as well, so the parties stipulated that Plaintiffs could file a SAC to try to cure

any deficiencies. ECF No. 37. The SAC, ECF No. 43 is the subject of the present motions to dismiss.

II. OPINION

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a)(2). Courts must dismiss a suit if the plaintiff fails to "state a claim upon which relief can be granted." Fed. R. Civ. Proc. 12(b)(6). To defeat a Rule 12(b)(6) motion to dismiss, a plaintiff must "plead enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard requires "factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "At this stage, the Court "must accept as true all of the allegations contained in a complaint." *Id.* But it need not "accept as true a legal conclusion couched as a factual allegation." *Id.* Lastly, a plaintiff suing multiple defendants "must allege the basis of his claim against each defendant" to satisfy the pleading standards. *Reyes ex. rel. Reyes v. City of Fresno*, No. CV F 13–0418 LJO SKO, 2013 WL 2147023, at *4 (E.D. Cal. May 15, 2013).

B. Judicial Notice

The State Defendants ask the Court to take judicial notice of the government claims forms Plaintiffs filed with the Department of General Services. *See* Req. for Judicial Notice ("RJN"), ECF No. 65 & 69 (duplicate filing). Plaintiffs do not oppose this request. Since this request is unopposed and proper under Federal

Rule of Evidence 201, the Court GRANTS Defendants' request.

C. Analysis

1. Section 1983 Claims

Plaintiffs assert numerous Section 1983 claims against the State, Vacaville, and Solano Defendants. *See* City Opp'n, Exh. 1, ECF No. 59 (chart of all 73 claims). Defendants all oppose these claims for the same reason—these claims are barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). *See* State Reply at 1; Vacaville Reply at 1; Solano Reply at 3.

In *Heck*, the Supreme Court held that "to recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a Section 1983 plaintiff must prove that the conviction or sentence has been" reversed, expunged, declared invalid, or called into question. 512 U.S. at 487. In other words, if a Plaintiff brings a claim for damages based on "a conviction or sentence that has not been so invalidated," the claim is not cognizable under Section 1983. *Id.* Therefore, when a state prisoner seeks damages in a Section 1983 suit, the court "must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* If it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.* Otherwise, the action should be allowed to proceed unless there another bar to the suit. *Id.*

It is uncontroverted that Mr. Lund's conviction has not been overturned, or otherwise invalidated. SAC

¶ 62. But Plaintiffs argue that the "intent of this lawsuit is *not* to challenge the fact of conviction or duration of incarceration." State Opp'n at 6. And that since they are pursuing claims that do not "necessarily invalidate[]" Mr. Lund's conviction, they may proceed even if the facts they adduce could support a reversal of his conviction. State Opp'n at 6. The Court disagrees.

As each Defendant points out in its respective motion to dismiss, Plaintiffs' Section 1983 claims "are based on the prerequisite that [Mr. Lund] was wrongfully investigated, arrested, and convicted." State Mot. at 8; *see also* SAC ¶¶ 293–313, 359–420. Plaintiffs' specific allegations include that: exculpatory evidence was excluded; "Warrant E" was unlawfully obtained based on an unreliable tool; the investigation was faulty; "Warrant E" was improperly executed; evidence used against him in trial was unlawfully seized; search of his desk and locker lacked probable cause; his arrest was unlawful because the evidence was insufficient and lacked probable cause; his property was wrongfully seized pursuant to the warrant and wrongfully delivered to the Court; a second warrant was based on improper, incorrect, or tainted information; and his home was unlawfully searched. Vacaville Mot. at 6. All of these allegations are inextricably linked to Mr. Lund's conviction and necessarily imply the invalidity of that conviction. Plaintiffs' argument that Defendants "do not point to a single cause of action in the SAC that directly seeks to invalidate" Mr. Lund's conviction, is without merit. Vacaville Opp'n at 4.

Plaintiffs also attempt to argue their claims are not barred because they are simply arguing there was an

"unlawful arrest" and not denying that new evidence could have later appeared that allowed a proper conviction. Vacaville Opp'n at 7. But Plaintiffs cite no authority for that contention. Instead, in their three Opposition briefs, Plaintiffs attempt to argue *Heck* does not apply because "subsequent caselaw has continued to reaffirm the narrow application of the bar." *See e.g.*, Solano Opp'n at 12. While they cite to cases that have in fact narrowed the holding, Plaintiffs fail to demonstrate how that narrowing applies to them or the specific facts of this case.

The only Section 1983 claim the Court finds to not implicate Mr. Lund's conviction is the 63rd Cause of Action related to the Solano County District Attorney's Facebook Post. *See* SAC 915–920. But the rest of Plaintiffs' Section 1983 claims are DISMISSED WITH PREJUDICE. *See Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002) (finding leave to amend need not be granted when amendment would be futile).

2. State Law Causes of Action

Plaintiffs state law claims are also barred by *Heck*. *See* Vacaville Mot. at 7–8, *see also* State Mot. at 7. While *Heck* is a federal rule, the California Supreme Court determined the bar applies to "a state tort claim arising from the same alleged misconduct." *Yount v. City of Sacramento*, 43 Cal. 4th 885, 902 (2008).

Plaintiffs concede that such a bar does exist against state law claims. Vacaville Opp'n at 7. But they argue that as long as Mr. Lund does not use this civil suit as "a vehicle to overturn his conviction," his claims should not be barred. *Id.* at 9. Moreover, they argue Defendants' cited cases are distinguishable because success on the claims involved in those cases

necessarily invalidated an element of the state court's finding, whereas here, "none of the elements of child pornography possession would be negated." *Id.* At 8–9.

Plaintiffs misconstrue the holding in *Yount*; it does not require that an element of the offense be necessarily invalidated for the bar to the apply. Rather the court held "a criminal defendant must obtain exoneration by postconviction relief as a prerequisite to obtaining relief for the *legal malpractice* that led to the conviction." *Yount*, 43 Cal. 4th at 902. Here, Plaintiffs challenge a whole range of alleged "legal malpractice[s]" that led to his conviction. And while the California Supreme Court recognized this broad rule would preclude recovery in many instances, it nevertheless found it justified to promote judicial economy and to prevent "the creation of two conflicting resolutions arising out of the same or identical transactions." *Id.*

As Defendants assert, Plaintiffs' 56 state law causes of action against them also "necessarily imply the invalidity of [Mr. Lund's] criminal conviction." *See e.g.*, Vacaville Mot. at 8. Indeed, all of Plaintiffs' state law claims rely on the same set of factual allegations as the Section 1983 claims. *See e.g.*, SAC ¶¶ 317–319 (The Common Law Abuse of Process claim is premised on the same "material statements and omissions in warrant" facts alleged for the first two Section 1983 claims). As explained above, these factual allegations challenge: the investigative techniques and tactics used to collect evidence against Mr. Lund, the scope of the investigation, the validity and sufficiency of the evidence used in his conviction, the validity of his arrest and detention for the charges in which he was

convicted, the presentation of evidence at the criminal proceeding, and the transmission and communication of evidence the prosecution, among other things. *See* Vacaville Mot. at 8.

Even the claims that at first glance might not necessarily invalidate Mr. Lund's conviction, are also inextricably linked to the aforementioned factual allegations. For example, the causes of action stemming from the "private marital communication" allegations are premised on the search of Mr. Lund's phone and his cross-examination at trial on evidence obtained from that search. SAC ¶¶ 855–868. All of these factual allegations therefore also directly attack the basis for Mr. Lund's conviction—regardless of Plaintiffs' intention. *Id.* The only two state law claims the Court finds to not implicate Mr. Lund's conviction are the claims related to the Solano County District Attorney's Facebook Post and the claim based on CHP's alleged interference with his pension (which are further discussed below). The rest of Plaintiffs' state law claims are DISMISSED WITH PREJUDICE.

3. The Solano District Attorney's Facebook Post

Plaintiffs assert claims for defamation (62nd cause of action), Section 1983 (63rd cause of action), and California Constitution violations (64th cause of action) against the Solano Defendants based on a post made by the Solano County District Attorney's Office on Facebook. SAC ¶¶ 891–925. Defendants seek to dismiss these claims for numerous reasons including: (1) absolute immunity, (2) qualified immunity, (3) state law immunity under California Government Code Section 821.6, and (4) litigation privilege. *See*

Solano Reply at 1–3. The Court will only address the relevant immunities.

a. Absolute Immunity

Both state and federal prosecutors are absolutely immune from Section 1983 claims stemming from not only the handling of a case before or during trial, but also the *post-trial* handling of a case. *Demery v. Kupperman*, 735 F.2d 1139, 1145 (9th Cir. 1984). This protection exists because "resentful defendants [may] initiate suits irrationally or for purposes of harassment, [and] they are just as likely to ascribe unconstitutional purposes to the prosecutor's post-trial acts before and during trial." *Id.* The Court finds that Plaintiffs' Section 1983 claim, based on the Solano District Attorney's Office's post on Facebook detailing Mr. Lund's conviction, falls under the protections of a post-trial handling of a case. Accordingly, the Defendants against whom this claim is brought are absolutely immune from this claim. The Court therefore DISMISSES this Section 1983 claim WITH PREJUDICE.

b. Section 821.6

The Court finds the Solano Defendants are also immune from the state law claims (62nd and 64th causes of action) because of California Government Code Section 821.6. Solano Reply at 2–3.

Section 821.6 provides: "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." Cal. Gov. Code § 821.6. Immunity under this Section is not limited to claims for malicious prosecution—"[it]

extends to other causes of action arising from conduct protected under the statute, including defamation and intentional infliction of emotional distress." *Roger v. County of Riverside*, 44 Cal. App. 5th 510, 527 (Jan. 29, 2020). In determining whether such immunity applies, the Court must consider whether the allegations occurred during "part of the 'prosecution' of a judicial proceeding within the meaning of Section 821.6." *Id.* Only "discretionary" prosecutorial acts are protected. *Id.* at 528. A discretionary act requires "personal deliberation, decision and judgment." *Id.* (internal citations omitted). Ministerial acts, on the other hand, are those "in which the officer is left no choice of his own." *Id.*

The Court agrees with Plaintiffs that affirmative defenses, such as those brought under Section 821.6, "may [only] be considered properly on a motion to dismiss where the allegations in the complaint suffice to establish the defense." *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013). But such allegations exist here. In *Gillian v. City of San Marino*, a California court found that "[prosecutorial] [a]cts undertaken in the course of investigation, including press releases reporting the progress or results of the investigation, cannot give rise to liability." 147 Cal. App. 4th 1033, 1048 (2007). Here, it is clear from the Complaint that Plaintiffs assert claims for a Facebook post—the modern equivalent of a press release—made by the prosecutors to report on "the results of [their] investigation." *See* SAC ¶¶ 891–911. Accordingly, the Solano Defendants are immune from the state law claims stemming from this discretionary prosecutorial act. The Court therefore DISMISSES these claims WITH PREJUDICE.

4. Tortious Interference With Lund's Pension

Plaintiffs allege the State Defendants tortiously interfered with Mr. Lund's pension because two of the State Defendants conveyed "reckless inaccurate conclusions" that Mr. Lund was prosecuted for a crime arising from his official duties. SAC ¶¶ 1001–1011 (68th cause of action). The State Defendants seek to dismiss this claim for several reasons. *See generally* State Mot. However, these reasons are blanket arguments focused on dismissing *all* state law claims asserted against them, rather than just this specific claim. Therefore, many of the arguments do not apply to the tortious interference claim.

The Court does find, however, that the claim is barred by the Eleventh Amendment, as the State Defendants contend. State Mot. 15–16. Defendants specifically argue this bar applies to the State and to the CHP as a state agency. State Reply at 5. While Plaintiffs do respond to this argument in their Opposition, they do so on pages 18–20. *See* State Opp'n 18–20. As the Court noted when sanctioning Plaintiffs for violating its page limits, the Court will not consider arguments made past page 15 (the page limit). Minute Order Issuing Sanctions, ECF No. 60. The Court therefore considers this argument to be unopposed and DISMISSES this Claim as against the State and the CHP WITH PREJUDICE.

However, the State Defendants fail to present any specific argument in support of their motion to dismiss this claim against individual Defendants Hai Luc and Wanona Ireland. Because the Court has no basis upon which to dismiss this claim against them, the case will

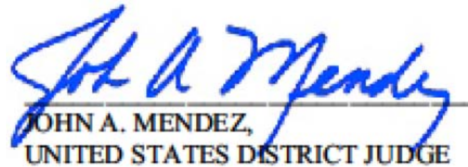
proceed on this one claim as asserted only against Luc and Ireland.

III. ORDER

For the reasons set forth above, the Court GRANTS IN PART and DENIES IN PART Defendants' Motions to Dismiss. All Defendants and all causes of action are dismissed from this lawsuit with prejudice except for the 68th cause of action as it applies to individual Defendants Hai Luc and Wanona Ireland. These two individual Defendants shall file their response to the SAC within twenty days of the date of this Order.

IT IS SO ORDERED.

Dated: June 30, 2020



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

ERIC LUND,
ET AL.,

v. CASE NO:
2:19-CV-02287-JAM-DMC

HAI LUC,
ET AL.,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 9/29/2020

Keith Holland
Clerk of Court

ENTERED: **September 29, 2020**

by: /s/ G. Michel
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC LUND; SUSANNAH LUND, Plaintiffs-Appellants, v. STATE OF CALIFORNIA; et al., Defendants-Appellees.	FILED DEC 3 2021 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS No. 20-17133 D.C. No. 2:19-cv-02287-JAM-DMC Eastern District of California, Sacramento ORDER

Before: THOMAS, Chief Judge, and HAWKINS and FRIEDLAND, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

Judges Thomas and Friedland have voted to deny the petition for rehearing en banc and Judge Hawkins so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for panel rehearing and petition for rehearing en banc are denied.

APPENDIX E

U.S. Const. amend. IV
Search and Seizure; Warrants

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 2241
Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to

have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2254
State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual

determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.