No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Paul S. Daniels and Nanette S. Dillard,

Petitioners

v.

County of Alameda, Alameda County Board of Supervisors, Nate Miley, Scott Haggerty, Alameda County Auditor-Controller Agency, and Patrick J. O'Connel

Respondents

United States Courts of Appeal
Ninth Circuit
No. 19-17534

United States District Court
Northern District of California
No. 19-cv-00602
Hon. Jacqueline Scott Corley

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Where absence of probable cause to prosecute is an element of a federal section 1983 civil rights claim – for example a malicious or retaliatory prosecution claim – is the probable cause determination governed by federal law or state law?

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Petition for a Writ of Certiorari

Paul S. Daniels and Nanette S. Dillard, by and through their counsel of record, Violet Elizabeth Grayson, respectfully petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

I. Opinions Below

The Ninth Circuit's opinion affirming the judgment of the District Court, dated January 12, 2021, is reported at 842 Fed. Appx. 110. The Ninth Circuit denied rehearing en banc on March 19, 2021. This order may be found at 2021 U.S. App. LEXIS 8167.

The order of the Federal District Court for the Northern District of California dismissing the Complaint herein without prejudice on July 10, 2019 may be found at 2019 U.S. Dist. LEXIS 114794. The order of the Federal District Court for the Northern District of California dismissing the Complaint herein *with* prejudice on December 2. 2019 may be found at 2019 U.S. Dist. LEXIS 207378.

The California Court of Appeal opinion, styled *People v. Dillard and Daniels,* which reversed petitioners' counts of conviction on the ground that the state court prosecution violated the Supremacy Clause of the United States Constitution, may be found at 21 Cal.App.5th 1205 (2018).

Each of the foregoing documents is contained in the Appendix hereto.

II. Jurisdiction

The federal district court had jurisdiction under 28 U.S.C. sections 1331 and 1343 subd. (a) (3). The Ninth Circuit of Appeals had jurisdiction under 28 U.S.C. section 1291.

The Ninth Circuit having denied rehearing en banc on March 19, 2021, this petition is timely under this Court's COVID 19 emergency order extending time for filing a Petition for Writ of Certiorari from 90 days to 150 days. Petitioners accordingly invoke this Court's jurisdiction under 28 U.S.C. section 1254 subd. (1).

III. Statutory Provision Involved

42 U.S.C. section 1983 provides:

> 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.

IV. Statement of the Case

A. Introduction

Several types of section 1983 causes of action – notably those for prosecution in retaliation for exercise of First Amendment rights, and malicious prosecution linked to federal constitutional violations -- require the section 1983 plaintiff to plead and prove a lack of probable cause for the underlying prosecution. (See *Hartman v. Moore*, 547 U.S. 250 (2006); *Blue v. Lopez*, 901 F.3d 1352 (11th Cir. 2018); *Awabdy v. City of Adelanto*, 368 F.3d 1062 (9th Cir. 2004).) A difference of opinion has arisen between the Eleventh Circuit Court of Appeals and the Ninth Circuit Court of

Appeals regarding whether the absence of probable cause element of these federal section 1983 causes of action should be adjudicated applying federal law or state law. (Compare *Blue, supra* (applying federal law) and *Awabdy, supra* (stating in *dicta* that state law applies.))

B. History of the Case

1. State Court Proceedings

This case began with corrupt county officials' retaliation against a whistle-blower and her husband. Nanette Dillard was the executive director of a quasi-governmental anti-poverty agency. In 2010, she discovered that funds which Alameda County was holding in trust for the anti-poverty agency were missing from the county treasury. Ms. Dillard reported the funds missing to Alameda County Supervisor Nate Miley, who sat on the anti-poverty agency's board of directors. Unbeknownst to Dillard, Miley and his fellow Alameda County Supervisor, Scott Haggerty, who also sat on the anti-poverty agency's board, were responsible for the disappearance of the funds.

Miley promptly had Dillard terminated from her position as executive director of the anti-poverty agency. Dillard's husband, Paul Daniels, who also worked for the anti-poverty agency, was likewise terminated. Dillard then sued Miley, Haggerty, and the County, alleging that her termination violated California law. Alameda County settled this lawsuit for a sum in excess of $300,000.

In the next round of retaliation, County Supervisors Miley and Haggerty induced the Alameda County District Attorney -- an elected county official like themselves -- to commence a prosecution against Dillard and Daniels. Supervisor Haggerty openly told a reporter for a local newspaper that he was in talks with the District Attorney's office for the purpose of inducing a prosecution. After the

prosecution was commenced, a deputy district attorney assigned to the case confided to defense counsel that he did not like pursuing this case of dubious merit, but that the District Attorney's Office was acting under intense political pressure.

The case was tried to a jury over the course of four months. The jury acquitted Dillard and Daniels on most counts, but convicted on others. The two counts on which both Daniels and Dillard were convicted involved prosecuting Dillard and Daniels for violation of federal civil regulations governing a grant program administered by the federal Department of Health and Human Services. Dillard and Daniels appealed, and a state appellate court overturned their convictions for violation of the federal grant program regulations, on the ground that the state court prosecution interfered with the federal department's administration of its grant program, thereby violating the Supremacy Clause of the United States Constitution. (See *People v. Dillard and Daniels,* 21 Cal.App.5th 1205 (2018)) In the wake of the California Court of Appeal's decision, the state trial court dismissed the case against Dillard and Daniels, and expunged their criminal records.

2. Federal Court Proceedings

Although the state trial court judge did not sentence Dillard or Daniels to custody time, noting that that they had not taken money for themselves, and that they had done much good in their lives, the prosecution was nevertheless catastrophic for Dillard and Daniels. Attorneys' fees consumed all of their cash on hand and savings. They became unemployed and unemployable. They lost their house in foreclosure. Daniels was unable to pay for his blood pressure medication.

After their records were expunged, Dillard and Daniels commenced a federal civil rights case, under 42 U.S.C. section 1983, against Miley, Haggerty, Alameda County, and related county governmental defendants. The section 1983 case alleged

retaliatory and malicious prosecution. The Federal District Court for the Northern District of California dismissed the case, relying upon what is commonly known as the California Interim Adverse Judgment Rule. The District Court observed that plaintiffs were required to plead and prove an absence of probable cause for their prosecution. The District Court further opined that, per *Awabdy v. City of Adelanto,* 368 F.3d 1062 (9th Cir. 2004), the probable cause determination was governed by state law. The District Court then cited California Interim Adverse Judgment Rule cases, one dating back to the 1930s, for the proposition that a conviction, even if reversed on appeal, conclusively established probable cause to prosecute. (See *Daniels and Dillard v. Alameda County et al.,* 2019 U.S. Dist. LEXIS 114794 * 15 (N.D. Cal. Case No. 19-cv-00602-JSC, decided July 10, 2019), citing *Cowles v. Carter*, 115 Cal.App.3d 350, 358 (1981); *Norton v. John M.C. Marble Co.*, 30 Cal.App.2d 451, 454–55 (1939), and *Plumley v. Mockett*, 164 Cal.App.4th 1031, 1053 (2008).) Thus, the Alameda County District Attorney was deemed to have had probable cause to prosecute Dillard and Daniels for violation of the federal civil regulations, even though the California Court of Appeal overturned the convictions on the ground that the prosecution was barred from its inception by the Supremacy Clause of the United States Constitution – in other words that the prosecution itself violated the United States Constitution and was therefore void *ab initio.*

Dillard and Daniels appealed to the Ninth Circuit. In both the District Court and the Circuit Court, Dillard and Daniels argued that federal law, rather than state law, should be applied to the probable cause determination, for the reasons set forth in *Blue v. Lopez,* 901 F.3d 1352 (11th Cir. 2018). The district court rejected this suggestion, stating: "This Court is bound by the Ninth Circuit and Plaintiffs' reliance on the Eleventh Circuit's decision in *Blue v. Lopez*, 901 F.3d 1352 (11th Cir.

2018), is thus unpersuasive." (*Daniels and Dillard v. Alameda County et al.*, 2019 U.S. Dist. LEXIS 207378, *8 (N.D. Cal. Case No. 19-cv-00602-JSC, decided December 2, 2019))

In the Ninth Circuit, plaintiffs Daniels and Dillard argued that the Circuit Court's statement in *Awabdy v. City of Adelanto,* 368 F.3d 1062 (9th Cir. 2004), to the effect that probable cause determinations in section 1983 malicious prosecution cases were governed by state law, was casual *dicta* because, in concluding that probable cause to prosecute Mr. Awabdy was lacking, the Ninth Circuit cited interchangeably to state law, federal law, and national treatises. The Ninth Circuit panel in this case, however, rejected this argument, stating:

> We have unambiguously held that state law determines whether probable cause existed in a state court action "because we have incorporated the relevant elements of the common law of tort of malicious prosecution into our analysis under § 1983." *Awabdy v. City of Adelanto,* 368 F.3d 1062, 1066 (9th Cir. 2004.) Nothing about that admonition is dicta, and it clearly binds us.
>
> * * * * *
>
> If the criminal charges result in a conviction, the prima facie presumption [of probable cause to prosecute] becomes conclusive and may only be overcome by a showing that the conviction was obtained by fraud or perjury. *Plumley v. Mockett,* 79 Cal. Rptr. 3d 833 838 (Cal. Ct. App. 2008). Even an appellate reversal of the criminal conviction will not negate probable cause absent one of these factors. *See Bealmear v. S. Cal. Edison, Ltd.,* 139 P.2d 20, 21 (Cal. 1943)

(*Daniels and Dillard v. Alameda County et al.,* 842 Fed. Appx. 110, 111 (9th Cir. 2021))

In addition to opining that state law governed the probable cause determination and barred plaintiffs' lawsuit, the Ninth Circuit further stated that plaintiffs had not pled with sufficient particularity. In so stating, the panel failed to address the

controlling Ninth Circuit case of *Park v. Thompson*, 851 F.3d 910, 928–929 (9th Cir. 2017), heavily relied upon by plaintiffs, which holds that pleading requirements are relaxed when the relevant facts are known only to the defendants.

Dillard and Daniels moved for en banc rehearing of the panel opinion.[1] The Ninth Circuit denied rehearing en banc on March 19, 2021. In the wake of denial of rehearing en banc, we are left with a sharp split of authority between two federal circuit courts regarding an important matter of federal law.

V. Reasons for Granting the Writ

A. Introduction

Paul Daniels and Nanette Dillard respectfully petition this Court to grant a writ of certiorari because the decision of the Ninth Circuit Court of Appeals in their case conflicts with the decision of the Eleventh Circuit Court of Appeals in *Blue v. Lopez,* 901 F.3d 1352 (11th Cir. 2018), regarding an important point of federal law. (See Rules of the Supreme Court of the United States, Rule 10) For the reasons set forth below, petitioners urge this Court to grant certiorari and adopt the Eleventh Circuit's reasoning in *Blue.*

B. The Eleventh Circuit Opinion in *Blue v. Lopez*

The question adjudicated on appeal in *Blue v. Lopez,* 901 F.3d 1352 (11th Cir. 2018), was whether Georgia's "*Monroe* Rule," which dictated that denial of a motion for directed verdict in a criminal trial conclusively demonstrated the existence of probable cause to prosecute, thereby precluding a Georgia common-law malicious

[1] The Ninth Circuit opinion was authored by Judge Jay Bybee, and joined by Judge Ryan Nelson and the Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

prosecution action, also operated to conclusively demonstrate the presence of probable cause to prosecute in the context of a federal 42 U.S.C. section 1983 civil rights action. The Eleventh Circuit answered this question in the negative, observing that the *Monroe* Rule was the wrong "measuring device" in a federal section 1983 action. (*Blue, supra,* 901 F.3d at 1354) "The denial of a directed verdict in a criminal trial does not measure what matters in evaluating on summary judgment in the §1983 case whether probable cause for a prosecution existed: the credibility, reliability, and quality of evidence supporting the prosecution in the first place." (*Ibid.*)

The Eleventh Circuit further explained:

> [T]he district court found, based on the Georgia criminal court's denial of the motion for directed verdict, that Blue could not establish a necessary element of his malicious-prosecution claim—a lack of probable cause. The district court did not conduct any independent analysis of whether probable cause in fact existed to prosecute Blue. Rather, it relied exclusively on the *Monroe* Rule and the denial of the motion for directed verdict in Blue's criminal prosecution to preclude Blue's claim.

(*Blue, supra,* 901 F.3d at 1358)

The Eleventh Circuit concluded that this approach was erroneous:

> Federal law, not state law, governs the resolution of §1983 claims. And federal law does not allow the denial of a motion for directed verdict to serve as conclusive evidence of probable cause. [¶] [A . . .] malicious prosecution claim under § 1983 remains a federal constitutional claim, and its elements and whether they are met ultimately are controlled by federal law. So although courts historically have looked to the common law for guidance as to the constituent elements of the claim, when malicious prosecution is brought as a federal constitutional tort, the outcome of the case does not hinge on state law, but federal law, and does not differ depending on the tort law of a particular state. Indeed, with respect to the very issue we consider here, we have cited with approval the Second Circuit's statement that the "federal law of probable cause—not state law—should determine whether a plaintiff

> has raised a genuine issue of material fact with respect to a § 1983 malicious prosecution claim. *Id.* (quoting *Green v. Montgomery*, 219 F.3d 52, 60 n.2 (2d Cir. 2000)).
>
> If the rule were otherwise, the same malicious-prosecution claim brought as a federal constitutional tort would result in different outcomes depending on the state in which it was prosecuted. But a § 1983 malicious-prosecution claim is a *federal* constitutional tort. It is therefore governed by federal law, so it will produce the same outcome, regardless of the state in which it is brought . . . Here, however, the district court relied on state law instead of federal law to resolve Blue's malicious-prosecution claim. And in this case, the state law the district court relied upon—the *Monroe* Rule—yields a resolution that federal law does not allow.

(*Blue, supra,* 901 F.3d at 1358; emphasis in original; some internal quotation marks and citations omitted.)

The Eleventh Circuit further held that Georgia's "fraud and corruption" exception to the *Monroe* Rule did not justify its application in the section 1983 setting:

> [A] jury evaluating a § 1983 malicious-prosecution claim may choose to disbelieve a civil defendant based on far less than evidence that the defendant engaged in a fraud on the court or that she intentionally corrupted the criminal trial. So the fraud-and-corruption exception to the *Monroe* Rule cannot render the Rule a viable stand-in for a factual determination of whether probable cause actually existed at the time of the prosecution.

(*Blue*, *supra*, 901 F.3d at 1359)

C. The Ninth Circuit Opinion in This Case

The Ninth Circuit opinion in this case takes an approach diametrically opposed to the approach taken by the Eleventh Circuit in *Blue, supra.* The opinion reads:

> The district court correctly applied California law to find that probable cause existed to charge Daniels and Dillard criminally. It is well settled that the existence of probable cause dooms a malicious or retaliatory prosecution claim. *See Hartman v. Moore,* 547 U.S. 250, 265–66 (2006); *Lassiter v. City of Bremerton,* 556 F.3d 1049, 1054 (9th Cir. 2009). We have unambiguously held that state law determines whether probable cause existed in a state court action "because we have incorporated relevant elements of the common law tort of malicious prosecution into our analysis under § 1983." *Awabdy v. City of Adelanto,* 368 F.3d 1062, 1066 (9th Cir. 2004). Nothing about that admonition is dicta, and it clearly binds us here.
>
> In "California, as in virtually every other jurisdiction" prima facie evidence of probable cause exists when a defendant is held to answer to criminal charges after a preliminary hearing. *Id.* at 1067 (citing *Holliday v. Holliday,* 5 P. 703, 704 (Cal. 1898)). The prima facie evidence is only rebutted if the prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith. *Id.* (citations omitted). If the criminal charges result in a conviction, the prima facie presumption becomes conclusive and may only be overcome by a showing that the conviction was obtained by fraud or perjury. *Plumley v. Mockett,* 79 Cal. Rptr. 3d 822, 838 (Cal. Ct. App. 2008). Even an appellate reversal of the criminal conviction will not negate probable cause absent one of these factors. *See Bealmear v. S. Cal. Edison, Ltd.,* 139 P.2d 20, 21 (Cal. 1943).

(*Daniels and Dillard v. Alameda County et al.,* 842 Fed. Appx. 110, 111 (9th Cir. 2021))

D. Certiorari Should Be Granted to Heal the Inter-Circuit Split and Adopt the Eleventh Circuit's Reasoning in *Blue*

As set forth above, Eleventh Circuit precedent and Ninth Circuit precedent are sharply in conflict regarding an important point of federal law. They cannot be harmonized. Consequently, the outcome in federal section 1983 civil rights cases involving a probable cause element depends upon the federal circuit (and within the Ninth Circuit, the state) in which the plaintiff's rights under the United States Constitution were violated. This creates a fundamentally unfair and chaotic

situation. The section 1983 action to vindicate the plaintiff's civil rights under the United States Constitution stands or falls, arbitrarily, based upon the locality where those rights were violated.

Such an outcome is inconsistent with this Court's precedent. In *Robertson v. Wegmann*, 436 U.S. 584 (1978), this Court held that state law may be imported into section 1983 cases only where federal law is silent, the state law is not "inhospitable to survival of a section 1983 action," and the state law "has no independent adverse effect on the policies underlying section 1983." (*Robertson, supra,* 436 U.S. at 594) State law rules such as Georgia's *Monroe* Rule or California's Interim Adverse Judgment Rule, relied upon by the Ninth Circuit in this case, are "inhospitable to survival of [] section 1983 action[s]," as illustrated by both *Blue* and the instant case. As explained by the Eleventh Circuit in *Blue,* the importation of such rules into section 1983 cases does indeed have an "independent adverse effect on the policies underlying section 1983." The Eleventh Circuit explained:

> The functions of § 1983 and the Georgia malicious-prosecution action differ. As we have noted, the *Monroe* Court acknowledged that Georgia law disfavors malicious-prosecution claims. [] Section 1983, on the other hand, is not a disfavored cause of action. Rather, it was designed to provide a broad remedy for violations of federally protected civil rights . . . (*Owen v. City of Independence*, 445 U.S. 622, 636 (1980) (§ 1983 provides a broad remedy for violations of federally protected rights). But where a directed verdict was previously denied, the *Monroe* Rule begrudgingly allows for malicious-prosecution claims to be brought under Georgia law only when an alleged victim of the violation can prove fraud on the criminal court or corruption of the criminal trial. *Georgia law's presumption disfavoring all malicious-prosecution claims—no matter how meritorious—runs contrary to the remedial purpose of § 1983* . . .

(*Blue, supra,* 901 F.3d at 1359–1360; emphasis added.)

Unsurprisingly, this Court has specifically cautioned against importation of state tort law, particularly the elements of malicious prosecution, into federal

constitutional torts. In *Hartman v. Moore,* 547 U.S. 250 (2006), the very case establishing the lack of probable cause element for federal retaliatory prosecution claims, this Court opined that "the common law is best understood here more as a source of inspired examples than of prefabricated components of [constitutional] tort claims." (*Hartman, supra,* 547 U.S. at 258) The folly of importing state law tort rules concerning malicious prosecution into section 1983 cases is vividly illustrated by the instant case where importation and mechanical application of California's Interim Adverse Judgment Rule barred section 1983 malicious and retaliatory prosecution claims even though the criminal prosecution was itself violative of the Supremacy Clause of the United States Constitution and therefore void *ab initio.* It is difficult to conceive of a state procedural rule more inhospitable to the vindication of federal constitutional rights.

In summary, state courts and state legislatures should not be allowed *carte blanche* to impose procedural rules protecting state actors who have violated the United States Constitution. Everyone should enjoy equal access to the remedies afforded by section 1983 when their federal constitutional rights are violated. There is an overriding need for national uniformity in the law governing the substantive elements of section 1983 civil rights claims. A patchwork approach is arbitrary and fundamentally unfair. This Court should therefore grant certiorari to heal the doctrinal split between the Circuits, and adopt the reasoning set forth by the Eleventh Circuit in *Blue.*

VI. Conclusion

For the reasons stated above, Paul Daniels and Nanette Dillard respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: July 13, 2021

By: /s/ Violet Elizabeth Grayson

Attorney for Petitioners
Paul S. Daniels and Nanette S. Dillard

Appendix

Opinion of the Ninth Circuit Court of Appeal

FILED

JAN 26 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL S. DANIELS; NANETTE S. DILLARD,

Plaintiffs-Appellants,

v.

COUNTY OF ALAMEDA; ALAMEDA COUNTY BOARD OF SUPERVISORS; NATE MILEY; SCOTT HAGGERTY; ALAMEDA COUNTY AUDITOR-CONTROLLER AGENCY; PATRICK J. O'CONNELL,

Defendants-Appellees,

and

KEITH CARSON; RICHARD VALLE; WILMA CHAN, County Supervisor; SUSAN MURANISHI; DIANA SOUZA; ROBERT LIEBER,

Defendants.

No. 19-17534

D.C. No. 3:19-cv-00602-JSC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California

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

Jacqueline Scott Corley, Magistrate Judge, Presiding

Argued and Submitted January 12, 2021
San Francisco, California

Before: BYBEE and R. NELSON, Circuit Judges, and WHALEY,[**] District Judge.

Paul Daniels and Nanette Dillard appeal the district court's order dismissing their malicious- and retaliatory-prosecution claims, which they brought under 42 U.S.C. § 1983. The couple argues that the district court erroneously relied on California law—instead of federal law—to impose a presumption that the Alameda County District Attorney had probable cause to charge them in connection with misappropriated federal grant funds. Alternatively, the couple contends that the district court erred in concluding that their complaint failed to adequately connect any particular defendant to the district attorney's charging decision. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and we have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019). We affirm.

[**] The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

The district court correctly applied California law to find that probable cause existed to charge Daniels and Dillard criminally. It is well settled that the existence of probable cause dooms a malicious- or retaliatory-prosecution claim. *See Hartman v. Moore*, 547 U.S. 250, 265–66 (2006); *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054 (9th Cir. 2009). We have unambiguously held that state law determines whether probable cause existed in a state court action "because we have incorporated the relevant elements of the common law tort of malicious prosecution into our analysis under § 1983." *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004). Nothing about that admonition is dicta, and it clearly binds us here.

In "California, as in virtually every other jurisdiction" prima facie evidence of probable cause exists when a defendant is held to answer to criminal charges after a preliminary hearing. *Id.* at 1067 (citing *Holliday v. Holliday*, 55 P. 703, 704 (Cal. 1898)). That prima facie evidence is only rebutted if the prosecution was "induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Id.* (citations omitted). If the criminal charges result in a conviction, the prima facie presumption becomes conclusive and may only be overcome by a showing that the conviction was obtained by fraud or perjury. *Plumley v. Mockett*, 79 Cal. Rptr. 3d 822, 838 (Cal. Ct. App. 2008). Even

an appellate reversal of the criminal conviction will not negate probable cause absent one of those factors. *See Bealmear v. S. Cal. Edison Co., Ltd.*, 139 P.2d 20, 21 (Cal. 1943).

Daniels and Dillard have not rebutted either presumption. The couple has not alleged any facts demonstrating that their convictions were the result of fraud or perjury. Nor have they adequately alleged that the district attorney's decision to charge them was the result of fraud, corruption, perjury, or other bad-faith motives. The complaint alleges wide-spread corruption within the Alameda County government. But the couple does not plausibly allege that the defendants were "actively instrumental in causing the initiation of legal proceedings." *See Awabdy*, 368 F.3d at 1067. And where the complaint does allege specific facts related to the district attorney's decision to charge the couple, the allegations are too attenuated to have been "instrumental" to the charging decision. *Id.*

Alternatively, the couple failed to allege specific facts tying any particular defendant to the district attorney's charging decision. To state a claim in a § 1983 action, a plaintiff must plead facts showing that each defendant's "own individual actions . . . violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The closest the complaint comes to plausibly connecting a particular defendant to the district attorney's charging decision is that one county board member

recommended that the district attorney investigate Dillard for allegedly misappropriating federal grant funds in March 2011. Even assuming that the defendant specifically asked the district attorney to charge the couple, we presume that a district attorney's charging decision "result[ed] from an independent determination on the part of the prosecutor." *Awabdy*, 368 F.3d at 1067. The isolated allegation here does not rebut that presumption and has not "nudged [the couple's] claims . . . across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680 (citations omitted).

AFFIRMED.

Opinion of District Court Dismissing Case with Leave to Amend

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PAUL S. DANIELS, et al.,

Plaintiffs,

v.

ALAMEDA COUNTY, et al.,

Defendants.

Case No.19-cv-00602-JSC

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. No. 15

Paul Daniels and Nanette Dillard allege that they were prosecuted by the Alameda County District Attorneys' Office in retaliation for exercising their First Amendment rights. Defendants move to dismiss all of Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6) and to strike the state law claims under California Code of Civil Procedure § 425.16, the anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute.[1] (Dkt. No. 15.) After carefully considering the parties' submissions, including their post-hearing submissions, and having had the benefit of oral argument on June 13, 2019, Defendants' motion to dismiss Plaintiffs' Section 1983 claim is GRANTED with leave to amend and the motion to dismiss Plaintiffs' state law claims is denied without prejudice. The Section 1983 claim must be dismissed because Plaintiffs have not plausibly alleged that each defendant caused Plaintiffs' prosecution; nor have they plausibly alleged an absence of probable cause. The Court declines to address the state law claims until it determines if the federal claim will proceed past the pleading stage.

[1] All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 7 & 9.)

BACKGROUND

A. Complaint Allegations[2]

Nanette Dillard was the Executive Director of Alameda County's Associated Community Action Program ("ACAP"). (Complaint at ¶ 7.) ACAP was a "quasi-governmental Joint Powers Agency in Alameda County." (*Id.* at ¶ 5.) During the summer of 2005, Ms. Dillard and Paul Daniels, who worked for ACAP as the Community Services Block Grant Manager, fell in love. (*Id.* at ¶ 7.) The couple married two years later in 2007. (*Id.*)

In 2010, Ms. Dillard discovered that $159,000 which should have been held in the Alameda County Treasury for ACAP was missing. (*Id.* at ¶ 8.) Ms. Dillard raised this issue at a January 19, 2011 meeting with Alameda County Board of Supervisors President Nate Smiley, who was also a member of the ACAP Governing Board. (*Id.*) Although Ms. Dillard requested Mr. Smiley's assistance in tracing the missing funds, they were never accounted for and Ms. Dillard now believes that Supervisor Miley and Scott Haggerty, who was on the Alameda County Board of Supervisors, caused them to be transferred. (*Id.*)

At the January 19, 2011 meeting Ms. Dillard also raised concerns regarding the financial services Alameda County provided to ACAP under the joint powers agreement. (*Id.* at ¶ 9.) Ms. Dillard requested that ACAP be allowed to go forward as an independent 501(c)(3) non-profit organization and allowed to "operate outside of political motivation." (*Id.*) This change did not happen, and instead, Plaintiff was placed on administrative leave following a February 2, 2011 emergency closed door session of the ACAP Board of Governors. (*Id.* at ¶ 11.) Ms. Dillard and Mr. Daniels were both subsequently removed from their positions with ACAP. (*Id.* at ¶ 12.)

The County thereafter shut down ACAP and "cannibalized its grants to benefit the pet pork barrel projects of certain supervisors including Supervisor Miley." (*Id.* at ¶ 12.) The County then attempted to interfere with Ms. Dillard and Mr. Daniels' unemployment benefits by suggesting that they had been terminated for cause. (*Id.*) Ms. Dillard sued the ACAP Governing Board including Mr. Miley, Mr. Haggerty, Mr. Lieber, and Ms. Souza for violation of her rights under

[2] Because the Court only relies on the facts as alleged in the Complaint, Plaintiffs' request to strike portions of Defendants' brief summarizing the facts is denied as moot.

California's Brown Act based on their actions at the February 2, 2011 meeting and her termination. (*Id*. at ¶ 13.) The County ultimately agreed to settle the suit for more than $300,000. (*Id*.)

As soon as the settlement was reached, "County officials immediately demanded that Dillard return the settlement money paid, based on a bogus theory that Dillard was liable for certain ACAP indebtedness to the federal government." (*Id*. at ¶ 14.) However, this "indebtedness was a consequence of the County Political Defendants' own actions." (*Id*.) When Ms. Dillard refused to return the settlement money, "the county Political Defendants trumped up a raft of specious accusations, and caused a criminal prosecution to be commenced against both Dillard and Daniels." (*Id*.) Defendants "peddled" "false allegations" to the District Attorney's Office and Ms. Dillard and Mr. Daniels were charged with having violated federal regulations by "drawing down and distributing federal Department of Health and Human Services ("DHHS") funds." (*Id*. at ¶ 16.) The criminal complaint also charged Ms. Dillard with "enrich[ing] herself by utilizing ACAP resources, and [] creat[ing] two backdated documents immediately following her dismissal as executive director of ACAP." (*Id*.) Mr. Daniels was only charged "to place pressure on Dillard to enter a plea bargain" and she was promised that if she entered a plea, the charges against Mr. Daniels would be reduced to a misdemeanor. (*Id*. at ¶ 17.) A deputy district attorney also advised Mr. Daniels and Ms. Dillard's defense counsel that although "the prosecutors were disinclined to bring the action of highly dubious merit," they did so because of "intense political pressure from the County Board of Supervisors." (*Id*.) Plaintiffs also subsequently discovered that the County was pursuing an insurance claim that the carrier would only pay if Mr. Daniels or Ms. Dillard was convicted of a crime. (*Id*.)

Mr. Daniels and Ms. Dillard "refused to buckle under pressure" and the case against them proceeded to trial. (*Id*. at ¶ 18.) The trial lasted over four months during which time "Defendants drummed up publicity, and Dillard and Daniels were portrayed in the press and media as crooks." (*Id*.) The cost of attorney's fees "was crushing" and led to Ms. Dillard and Mr. Daniels losing their home in foreclosure. (*Id*. at ¶ 19.) Mr. Daniels and Ms. Dillard were eventually convicted of some of the charges and acquitted of others. (*Id*. at ¶ 20.) In particular, they were both convicted

of improper "draw-down" of federal funds and Ms. Dillard was also convicted of creating two post-dated documents that she intended to use in unspecified legal proceedings. (*Id.*) Neither Mr. Daniels nor Ms. Dillard received any custody time; instead, the judge ordered them to pay over $300,000 in restitution. (*Id.* at ¶ 21.) "The restitution order was based upon the mistaken belief that Dillard and Daniels owed this sum to the federal Department of Health and Human Services." (*Id.*)

Mr. Daniels and Ms. Dillard appealed their convictions; however, this process took over four years and during this time they paid appellate counsel $100,000 which left them "destitute" and "virtually unemployable." (*Id.* at ¶ 22.) On March 29, 2018, the First District Court of Appeal issued an opinion finding that "Alameda County had violated the Supremacy Clause of the United States Constitution by fashioning state law crimes out of violations of non-penal federal regulations, when the federal agency charged with administering the regulations did not deem Daniels' and Dillards' conduct culpable." (*Id.* at ¶ 24.) As a result, Mr. Daniels "was fully exonerated on the merits" and Ms. Dillard was "left with only a single count of conviction, for creating two back-dated documents." (*Id.*)

The Alameda County Superior Court subsequently granted Mr. Daniels' and Ms. Dillard's request to dismiss all charges, terminate their probation, and expunge their criminal records. (*Id.* at ¶ 25.) Both Mr. Daniels and Ms. Dillard nonetheless continue to struggle for employment. (*Id.* at ¶ 26.) Ms. Dillard now works for a tour company making $47,000 a year. (*Id.*)

B. Procedural Background

Nearly ten months after the Court of Appeal's decision, Mr. Daniels and Ms. Dillard filed this action against Alameda County; the Alameda County Board of Supervisors; Nate Miley, Keith Carson, Scott Haggerty, Wilma Chan, all members of the Alameda County Board of Supervisors; Susan Muranishi, the Alameda County Administrator; Robert Lieber, the former mayor of Albany and a former member of the ACAP Governing Board; Diana Souza, a former San Leandro City Council member and former member of the ACAP Governing Board, the Alameda County Auditor-Controller Agency, and Patrick O'Connell, the former Alameda County Auditor-Controller. (Dkt. No. 1.) Plaintiffs plead four claims for relief: (1) malicious/retaliatory

prosecution in violation of 42 U.S.C. § 1983; (2) malicious prosecution under California common law; (3) violation of the Bane Act, Cal. Civ. Code § 52.1; and (4) California common law intentional infliction of emotional distress.

Defendants Alameda County, Alameda County Board of Supervisors, Keith Carson, Wilma Chan, Scott Haggerty, Nate Miley, Susan Muranishi, Patrick J O'Connell, and Richard Valle (hereafter "Defendants") subsequently filed the now pending motion to dismiss and to strike the state law claims under California Code of Civil Procedure § 425.16, the anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute. (Dkt. No. 15.) Defendants Diana Souza and Robert Lieber separately moved to dismiss and Plaintiffs thereafter voluntarily dismissed their claims against both of these defendants. (Dkt. Nos. 17, 21, 25 & 27.)

DISCUSSION

Defendants move to dismiss Plaintiffs' claims on multiple grounds. As a threshold matter, they insist that Plaintiffs' complaint fails to state a claim upon which relief can be granted because Plaintiffs have not sufficiently alleged that any defendant caused the criminal prosecution, and, even if they could so allege, given their conviction following a jury trial Plaintiffs cannot show as a matter of law that probable cause was lacking for their prosecution. In the alternative, Defendants insist that Plaintiffs' Section 1983 claim is time-barred, that Defendants are entitled to qualified immunity, and that there is no basis for municipal liability against the County or the Board of Supervisors. In addition, Defendants maintain that Plaintiffs' state law claims fail on other grounds and that they must be struck under the California anti-SLAPP statute.

A. Section 1983 Malicious and/or Retaliatory Prosecution Claim

Plaintiffs allege that "Defendants caused Dillard and Daniels to be prosecuted in retribution for exercising their First Amendment Rights." (Complaint at ¶ 30.) It is unclear whether Plaintiffs' claims are predicated on a malicious prosecution theory or a retaliatory prosecution theory or both. To prevail on a section 1983 malicious prosecution claim a plaintiff must prove that criminal proceedings were instituted with malice, without probable cause, and for the purpose of denying the plaintiff a specific constitutional right. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). The claim "requires 'the institution of criminal proceedings

against another who is not guilty of the offense charged' and that 'the proceedings have terminated in favor of the accused.'" *Lacey v. Maricopa Cty*., 693 F.3d 896, 919 (9th Cir. 2012) (quoting Restatement (Second) of Torts § 653 (1977)). A Section 1983 retaliatory prosecution claim requires a showing of a "'retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision.'" *Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008) (quoting *Hartman v. Moore*, 547 U.S. 250, 265 (2006)).

Defendants insist that Plaintiffs' claims predicated on either a malicious prosecution or retaliatory prosecution theory fail because: (1) Plaintiffs have not alleged facts that plausibly suggest than any defendant, let alone all of the defendants, caused the District Attorney to bring charges against them in retaliation for the exercise of their First Amendment rights or for other reasons, and (2) the underlying criminal charges were supported by probable cause as a matter of law.

1) Allegations Tying Defendants to the Prosecution

Whether Plaintiffs bring a retaliatory prosecution claim or a malicious prosecution claim, Plaintiffs must tie the claim to each defendant's conduct. In particular, Plaintiffs must allege facts that support a plausible inference that each defendant "improperly exerted pressure on the prosecutor, knowingly provided misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings." *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004); *see also Beck*, 527 F.3d at 865 (holding that a retaliatory prosecution claim requires a showing of a "retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision").

Here, Plaintiffs allege that following the settlement of the Brown Act claim, "Defendants trumped up a raft of specious accusations, and caused a criminal prosecution to be commenced against both Dillard and Daniels," that the District Attorney prosecuting the case was "proceeding under intense political pressure from the Board of Supervisors," and that during the trial "Defendants drummed up publicity, and Dillard and Daniels were portrayed in the press and media as crooks." (Complaint at ¶¶ 15, 17, 28.) These allegations are insufficient to show that

Defendants—of whom there are 7 individuals in addition to the County and Board of Supervisors—caused the District Attorney to bring criminal charges against Plaintiffs.

First, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level."). Plaintiffs have not alleged any facts—as opposed to conclusions--that support a plausible inference that Defendants were responsible for the prosecution. Second, Plaintiffs improperly group all of the defendants together and do not include allegations specific to each defendant to support a plausible inference of each defendant's liability. *See Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *see also Gressett v. Contra Costa Cty.*, No. C-12-3798 EMC, 2013 WL 2156278, at *15 (N.D. Cal. May 17, 2013) (the plaintiff must "please sufficient facts to hold each Individual Defendant liable for malicious prosecution").

To the extent Plaintiffs seek to supplement their allegations through the declarations submitted with their opposition brief, at the motion to dismiss stage the Court cannot consider evidence outside the pleadings without converting the motion into a summary judgment motion. *See Gerritsen v. Warner Bros. Ent. Inc.*, 112 F. Supp. 3d 1011, 1021 (C.D. Cal. 2015) ("Courts regularly decline to consider declarations and exhibits submitted in ... opposition to a motion to dismiss ... if they constitute evidence not referenced in the complaint or not a proper subject of judicial notice."). Further, Plaintiffs' insistence that the Court cannot dismiss this claim without allowing discovery because it involves information under Defendants' control is misplaced. "The *Twombly* plausibility standard ... does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Park v. Thompson*, 851 F.3d 910, 928-29 (9th Cir. 2017) (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)); *see also Menzel v. Scholastic, Inc.*, No.

17-CV-05499-EMC, 2018 WL 1400386, at *3 (N.D. Cal. Mar. 19, 2018) (noting that even where the evidence is within the defendant's control, plaintiff still must allege specific facts which on information and belief make the inference of culpability plausible). Plaintiffs' conclusory allegations fail to support a plausible inference that any particular defendant was instrumental in or actively encouraged Plaintiffs' prosecution. The motion to dismiss must be granted must be granted for this reason alone.

2) Probable Cause

"[A] plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge. If there was probable cause, the case ends." *Lozman v. City of Riviera Beach, Fla*., 138 S. Ct. 1945, 1952 (2018) (citing *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006)); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) ("It has long been "settled law" that retaliatory prosecution requires proving "the want of probable cause"). The same probable cause analysis applies to a section 1983 malicious prosecution claim. *See Awabdy*, 368 F.3d 1062, 1066 (9th Cir. 2004) ("to prevail on a § 1983 claim of malicious prosecution, a plaintiff 'must show that the defendants prosecuted [him] with malice and without probable cause...'" (citation omitted)).

Defendants argue that Plaintiffs cannot satisfy the absence of probable cause element as a matter of law because they were required to go to trial on all charges and were convicted of certain offenses. "[W]e look to California law to determine the legal effect of the state court's action because we have incorporated the relevant elements of the common law tort of malicious prosecution into our analysis under § 1983." *Awabdy*, 368 F.3d at 1066. "In California, as in virtually every other jurisdiction, it is a long-standing principle of common law that a decision by a judge or magistrate to hold a defendant to answer after a preliminary hearing constitutes prima facie—but not conclusive—evidence of probable cause." *Id*. at 1067 (collecting cases). A plaintiff can rebut a "finding of probable cause [] by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Id*. Where, however, "a trier of fact after a fair adversary hearing reach[ed] a determination on the merits against the defendant in the prior proceeding" there is a "conclusive

presumption of probable cause" and "the defendant in that proceeding may not thereafter institute an action for malicious prosecution, whether the matter was criminal or civil, even though he shows that the determination in question was reversed on appeal or set aside by the trial judge." *Cowles v. Carter*, 115 Cal. App. 3d 350, 358 (1981); *see also Norton v. John M.C. Marble Co.*, 30 Cal.App.2d 451, 454-55 (1939) (holding that a conviction establishes probable cause). The only exception to this conclusive presumption is where the conviction is obtained by means of fraud or perjury. *Cowles*, 115 Cal. App. 3d at 358; *see also Plumley v. Mockett*, 164 Cal. App. 4th 1031, 1053 (2008) (collecting cases re: the same); Rest.2d Torts, § 667(1) ["The conviction of the accused by a magistrate or trial court, although reversed by an appellate tribunal, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means"].).

a) Probable Cause for the Convicted Counts

Plaintiffs' convictions for theft by false pretenses and making a false account of public moneys, and Ms. Dillard's additional conviction of preparing false documentary evidence conclusively establish probable cause. *See Plumley*, 164 Cal. App. 4th at 1053 ("[V]ictory at trial . . . conclusively establishes probable cause to bring the underlying action"); *see also Cowles*, 115 Cal. App. 3d at 358; *Norton*, 30 Cal. App. 2d at 454-55. Plaintiffs do not allege that their convictions were obtained through fraud or perjury, nor do they suggest that they can so allege; instead, relying on the Ninth Circuit's decision in *Awabdy* and the United States Supreme Court's decision in *Hartman* they argue that probable cause is not established merely because an individual is "held to answer." Plaintiffs' reliance on these cases is misplaced as neither involves a conviction.

In *Awabdy*, the plaintiff was charged with embezzlement and held to answer following a preliminary hearing. Before the plaintiff was tried, the district attorney dismissed the charges in the interests of justice. The plaintiff subsequently sued for malicious prosecution. The district court dismissed the complaint on the grounds that the trial court's decision to require the plaintiff to answer the charges following a preliminary hearing conclusively established probable cause and therefore the plaintiff could not prove the absence of probable cause. The Ninth Circuit reversed,

concluding that the plaintiff being held to answer after preliminary hearing was only *prima facie* proof of probable cause and thus would "not prevent him from maintaining his § 1983 malicious prosecution claim if he is able to prove the allegations in his complaint that the criminal proceedings were initiated on the basis of the defendants' intentional and knowingly false accusations and other malicious conduct." *Awabdy*, 368 F.3d at 1066. Likewise, in *Hartman*, which was decided two years later, the charges against the plaintiff were dismissed at the close of the government's case based on a "'complete lack of direct evidence' connecting the defendants to any of the criminal wrongdoing alleged." *Hartman*, 547 U.S. at 254. Here, in contrast, Plaintiffs were *convicted* of three of the counts on which they were charged. Under California law, their convictions conclusively establish the existence of probable cause for the prosecution for theft by false pretenses and making a false account of public moneys, and Ms. Dillard's additional charge of preparing false documentary evidence. *See Plumley*, 164 Cal. App. 4th at 1053; *Cowles*, 115 Cal. App. 3d at 358; *Norton*, 30 Cal. App. 2d at 454-55.

That Mr. Daniels' convictions on both the counts on which he was convicted and Ms. Dillard's convictions on two of three counts on which she was convicted were reversed on appeal does not undermine the conclusive existence of probable cause. The rule under California law is that "a victory at trial, ***though reversed on appeal***, conclusively establishes probable cause to bring the underlying action." *Plumley*, 164 Cal. App. 4th at 1052 (referring to the principle as the "'interim adverse judgment' rule") (emphasis added). "'The rationale is that approval by the trier of fact, after a full adversary hearing, sufficiently demonstrates that an action was legally tenable.'" *Id.* (quoting *Cowles*, 115 Cal. App. 3d at 358). "To put it differently, success at trial shows that the suit was not among the least meritorious of meritless suits, those which are totally meritless and thus lack probable cause." *Id.* (internal quotation marks and citation omitted); *see also Cowles*, 115 Cal. App. 3d at 355 (1981) ("In the event the plaintiff in the prior action obtains judgment after trial, such judgment is, unless procured by fraud, conclusive proof that the proceedings were prosecuted with probable cause, ***notwithstanding the fact that the judgment is reversed on appeal***.") (emphasis added); *Norton*, 30 Cal. App. 2d at 454 ("a final judgment duly rendered after trial on the merits, in a court having complete jurisdiction, adverse to the defendant

in the proceedings in which the judgment is rendered, is, unless procured by fraud which may be either extrinsic or intrinsic, conclusive proof that the proceedings were prosecuted with probable cause, ***notwithstanding the fact that the judgment is reversed on appeal***.") (emphasis added). Plaintiffs' urging that a reversal based on federal preemption should eliminate the conclusive presumption of probable cause is not supported by any law—statutory, common, or other.

Plaintiffs' suggestion that *Hartman* rejected the notion that state law probable cause requirements should be imported into section 1983 retaliatory prosecution claims is unpersuasive. *Hartman* did not so hold—and Plaintiffs can point to no case interpreting it in that manner. Instead, *Hartman* emphasized the importance of the probable cause requirement: "Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven." 547 U.S. at 265-66. Similarly, *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019), also did not hold that probable cause for a retaliatory prosecution section 1983 claim is determined by federal common law rather than state law. In any event, Plaintiffs have not cited any federal common law, or any state's law for that matter, that is contrary to California's probable cause rules.

Plaintiffs' contention that *Heck v. Humphrey*, 512 U.S. 477 (1994), holds that reversal on direct appeal negates probable cause for purposes of a section 1983 action is equally unavailing. *Heck* bars suits "based on theories that 'necessarily imply the invalidity of [the plaintiff's] convictions or sentences.'" *Cunningham v. Gates*, 312 F.3d 1148, 1153-54 (9th Cir. 2003) (as amended) (quoting *Heck*, 512 U.S. at 487). If success on the section 1983 claim would imply the invalidity of the conviction or sentence, then the plaintiff cannot proceed with the claim unless and until "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." *Heck*, 512 U.S. at 486–87 (1994). *Heck* did not address whether a subsequently overturned conviction defeats a finding of a probable cause.

Finally, *Nieves* did not recognize an exception to the no-probable cause rule for retaliatory-

prosecution section 1983 cases. To the contrary, *Nieves* adopted the no-probable cause rule from retaliatory prosecution cases into retaliatory-arrest cases, with one narrow exception. 139 S.Ct. at 1725, 1727. As this is not a retaliatory-arrest case, *Nieves* does not apply.

Accordingly, Plaintiffs' convictions for theft by false pretenses and making a false account of public monies, and Ms. Dillard's additional conviction of preparing false documentary evidence preclude them from establishing a lack of probable cause for these counts and Plaintiffs' Section 1983 claim based on these charges—whether predicated on a malicious prosecution or retaliatory conviction theory—must be dismissed. As explained above, the only exception to the conclusive presumption of probable cause is if Plaintiffs can plead and prove that their convictions were obtained by fraud. There is nothing in the Court of Appeals decision that would even remotely support such allegations. Nonetheless, the Court will grant Plaintiffs leave to amend to so allege, but only if such allegations can be made consistent with Federal Rule of Civil Procedure 11.

b) Probable Cause for Acquitted Counts

Plaintiffs next argue that even if they cannot prove an absence of probable cause for those counts on which they were convicted, any presumption of probable cause is rebuttable for those counts on which they were acquitted. "In California, as in virtually every other jurisdiction, it is a long-standing principle of common law that a decision by a judge or magistrate to hold a defendant to answer after a preliminary hearing constitutes prima facie—but not conclusive—evidence of probable cause." *Awabdy*, 368 F.3d at 1067 (collecting cases re: same). "[A] plaintiff can rebut a prima facie finding of probable cause by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Id.* Plaintiffs' complaint fails to allege specific facts which plausibly support an inference that the criminal prosecution on the counts for which they were held over but acquitted was "induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." Plaintiffs' suggestion that the "retaliatory motive" itself is the wrongful conduct does not make sense. As *Hartman* noted, "a retaliatory motive on the part of an official urging prosecution ***combined with*** an absence of probable cause supporting the prosecutor's decision to go forward are reasonable grounds to suspend the presumption of regularity behind the

charging decision." 547 U.S. at 265. Under Plaintiffs' theory, the retaliatory motive itself would be sufficient, a theory *Hartman* expressly rejected. Accordingly, Plaintiffs will be granted leave to amend to the extent that they can makes factual allegations that plausibly rebut the prima facie showing of probable cause as to those counts on which they were acquitted.

3) Other Section 1983 Arguments

As the Court is dismissing Plaintiffs' Section 1983 Claim in its entirety for the reasons explained above, it declines to address Defendants' additional arguments at this time.

B. Plaintiffs' State Law Claims

In addition to their Section 1983 claim, Plaintiffs plead state law claims for malicious prosecution, violation of the Bane Act, Cal. Civ. Code § 52.1, and intentional infliction of emotional distress. The Court declines to address these claims until it determines if the federal claim, which gives rise this Court's subject matter jurisdiction, can proceed past the pleading stage. *See United Mine Works v. Gibbs*, 383 U.S. 715, 726 (1966).

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is GRANTED as to Plaintiffs' Section 1983 claim with leave to amend. The Court denies the motion to dismiss the state law claims without prejudice to the motion being renewed as to the state law claims in a subsequent motion to dismiss.

Plaintiffs shall file their amended complaint, if any, within 30 days of this Order.

This Order disposes of Docket No. 28.

IT IS SO ORDERED.

Dated: July 10, 2019

JACQUELINE SCOTT CORLEY
United States Magistrate Judge

Opinion of the District Court Dismissing Case Without Leave to Amend

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PAUL S. DANIELS, et al.,

Plaintiffs,

v.

ALAMEDA COUNTY, et al.,

Defendants.

Case No. 19-cv-00602-JSC

ORDER RE: DEFENDANTS' MOTION TO DISMISS AND STRIKE FIRST AMENDED COMPLAINT

Re: Dkt. No. 54

Paul Daniels and Nanette Dillard allege that they were prosecuted by the Alameda County District Attorneys' Office in retaliation for exercising their First Amendment rights. The Court previously granted Defendants' motion to dismiss Plaintiffs' Section 1983 malicious and retaliatory prosecution claim because Plaintiffs had not plausibly alleged that each defendant caused Plaintiffs' prosecution or that there was an absence of probable cause for their prosecution. (Dkt. No. 48.) In response to Plaintiffs' First Amended Complaint, Defendants have again moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) and to strike the state law claims under California Code of Civil Procedure § 425.16, the anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute.[1] (Dkt. No. 54.) Having considered the parties' briefs and having had the benefit of oral argument on November 21, 2019, the Court GRANTS Defendants' motion to dismiss without leave to amend. Plaintiffs have failed to cure the pleading defects in their First Amended Complaint.

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[1] All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 7 & 9.)

DISCUSSION

Defendants move to dismiss Plaintiffs' claims on multiple grounds. The threshold question, however, is whether Plaintiffs have adequately pled their malicious and retaliatory prosecution Section 1983 claims and cured the pleading defects identified in the Court's prior Order. Because they have not, the Court need not and does not address Defendants' other arguments.

A. Section 1983 Malicious and Retaliatory Prosecution Claims

To prevail on a section 1983 malicious prosecution claim a plaintiff must prove that criminal proceedings were instituted with malice, without probable cause, and for the purpose of denying the plaintiff a specific constitutional right. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). The claim "requires 'the institution of criminal proceedings against another who is not guilty of the offense charged' and that 'the proceedings have terminated in favor of the accused.'" *Lacey v. Maricopa Cty.*, 693 F.3d 896, 919 (9th Cir. 2012) (quoting Restatement (Second) of Torts § 653 (1977)). A Section 1983 retaliatory prosecution claim requires a showing of a "'retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision.'" *Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008) (quoting *Hartman v. Moore*, 547 U.S. 250, 265 (2006)).

The Court's prior order examined Plaintiffs' malicious and retaliatory prosecution claims in detail. The claims were dismissed because (1) Plaintiffs had not adequately tied their allegations to misconduct by any particular defendant, and (2) Plaintiffs had not adequately alleged an absence of probable cause. The same defects remain.

1) Allegations Tying Defendants to the Prosecution

To state either a malicious or retaliatory prosecution claim, Plaintiffs must allege facts that support a plausible inference that each defendant "improperly exerted pressure on the prosecutor, knowingly provided misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings." *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004); *see also Beck*, 527 F.3d at 865 (holding that a retaliatory prosecution claim requires a showing of a

"retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision"); *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *see also Gressett v. Contra Costa Cty.*, No. C-12-3798 EMC, 2013 WL 2156278, at *15 (N.D. Cal. May 17, 2013) (the plaintiff must "plead sufficient facts to hold each Individual Defendant liable for malicious prosecution").

Plaintiffs' amended complaint fails allege facts sufficient to show that each of the named defendants—Alameda County, the Alameda County Auditor-Controller Agency, the Alameda County Board of Supervisors, Nate Miley, Scott Haggerty, and Patrick O'Connell—"engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings." *Awabdy*, 368 F.3d at 1067. With respect to Defendants Miley and Haggerty, Plaintiffs (1) quote a news article stating that "Scott Haggerty says he has spoken to the District Attorney's office about a criminal investigation into Dillard's involvement in allegedly bilking ACAP," and (2) allege that "Miley and Haggerty were both exerting political pressure upon the District Attorney's Office to find something for which Dillard could be prosecuted." (FAC at ¶ 18.) The "mere allegation" that Mr. Haggerty had a conversation with the District Attorney a year before Plaintiffs was charged does not plausibly suggest that the District Attorney brought the charges *because of* what Mr. Haggerty said. *See Bala v. Stenehjem*, 671 F. Supp. 2d 1067, 1096 (D.N.D. 2009) ("the mere allegation that former United States Attorney Wrigley met with law enforcement officials, state authorities, and the IRS does not suggest plausible illicit activity."). Similarly, the "bare allegation" that Mr. Miley and Mr. Haggerty were exerting political pressure on the District Attorney to bring charges is a conclusory statement that is "little more than a formulaic recitation of the elements." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *see also Riley v. City of Richmond*, No. C 13-4752 MMC, 2014 WL 1101036, at *2 (N.D. Cal. Mar. 18, 2014) (finding that "plaintiff's conclusory allegations that 'the case lacked probable cause for prosecution' [] and that defendants 'provided misinformation' to and 'concealed exculpatory evidence' from the prosecutor [], are insufficient as a matter of law").

Nor have Plaintiffs included specific allegations which tie Alameda County, the Alameda County Board of Supervisors, the Alameda County Auditor-Controller Agency, and Patrick

O'Connell to the alleged wrongful prosecution. Indeed, for Defendants the Alameda County Auditor-Controller Agency and Patrick O'Connell, the only allegation as to them has nothing do with the District Attorney and instead is that they "created a fraudulent accounting purporting to verify that ACAP lacked funds to go forward" so that Mr. Miley and Mr. Haggerty could dismantle ACAP and dismiss all its employees including Mr. Daniels. (FAC at ¶ 17.) Similarly, while there are numerous allegations with respect to Alameda County and the Alameda County Board of Supervisors, there are no allegations which tie these entities' actions to Plaintiffs' prosecution except for the allegation that an "Alameda County representative" threatened Ms. Dillard at the mediation of her Brown Act case that if she did not refund the settlement payment she and Mr. Daniels would be prosecuted. (FAC at ¶ 27.) This vague allegation that an unnamed Alameda County representative threatened Ms. Dillard does not plausibly support an inference that the Alameda County Board of Supervisors or Alameda County caused the District Attorney's Office to bring charges two weeks later—two months *before* the Brown Act case settled. (*Id.* at ¶ 29.)

Plaintiffs have therefore again failed to allege a plausible basis for liability as to any Defendant.

2) Absence of Probable Cause

"[A] plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge. If there was probable cause, the case ends." *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1952 (2018) (citing *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006)); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) ("It has long been "settled law" that retaliatory prosecution requires proving "the want of probable cause"). The same probable cause analysis applies to a section 1983 malicious prosecution claim. *See Awabdy*, 368 F.3d at 1066 ("to prevail on a § 1983 claim of malicious prosecution, a plaintiff 'must show that the defendants prosecuted [him] with malice and without probable cause...'" (citation omitted)).

As a threshold matter, Plaintiffs insist that the probable cause determination is based on federal law rather than state law. The Court, however, already considered and rejected this argument in its prior order. Plaintiffs' suggestion that the Ninth Circuit meant something other

than what it said when it stated "[w]e look to California law to determine the legal effect of the state court's action because we have incorporated the relevant elements of the common law tort of malicious prosecution into our analysis under § 1983," *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004), is without support. And indeed, less than six months ago, the Ninth Circuit restated this rule in *Mills v. City of Covina*, 921 F.3d 1161, 1169 (9th Cir. 2019), cert. denied sub nom. *Mills v. Covina*, CA, No. 19-321, 2019 WL 5150535 (U.S. Oct. 15, 2019) (stating that "Federal courts rely on state common law for elements of malicious prosecution."). This Court is bound by the Ninth Circuit and Plaintiffs' reliance on the Eleventh Circuit's decision in *Blue v. Lopez*, 901 F.3d 1352 (11th Cir. 2018), is thus unpersuasive. Likewise, the Court squarely rejected Plaintiffs' argument that the Supreme Court in *Hartman* somehow overruled *Awabdy* and Plaintiffs have provided no reason to reconsider this holding. Accordingly, California law governs whether probable cause supports Plaintiffs' convictions.

"In California, as in virtually every other jurisdiction, it is a long-standing principle of common law that a decision by a judge or magistrate to hold a defendant to answer after a preliminary hearing constitutes prima facie—but not conclusive—evidence of probable cause." *Awabdy*, 368 F.3d at 1067 (collecting cases). A plaintiff can rebut a "finding of probable cause [] by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Id*. Where, however, "a trier of fact after a fair adversary hearing reach[ed] a determination on the merits against the defendant in the prior proceeding" there is a "conclusive presumption of probable cause" and "the defendant in that proceeding may not thereafter institute an action for malicious prosecution, whether the matter was criminal or civil, even though he shows that the determination in question was reversed on appeal or set aside by the trial judge." *Cowles v. Carter*, 115 Cal. App. 3d 350, 358 (1981); *see also Norton v. John M.C. Marble Co*., 30 Cal.App.2d 451, 454-55 (1939) (holding that a conviction establishes probable cause). The only exception to this conclusive presumption is where the conviction is obtained by means of fraud or perjury. *Cowles*, 115 Cal. App. 3d at 358; *see also Plumley v. Mockett*, 164 Cal. App. 4th 1031, 1053 (2008) (collecting cases re: the same); Rest.2d Torts, § 667(1) ["The conviction of the accused by a magistrate or trial court, although

reversed by an appellate tribunal, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means"].).

Because Plaintiffs were convicted of some counts and acquitted of others, the Court must engage in separate analysis of each.

a) Probable Cause for Convicted Counts

Plaintiffs were convicted of grand theft by false pretenses for unlawfully taking grant funds from DHHS (Count 2) and making a false account of public moneys by signing and sending false and inaccurate letters to DHHS (Count 3), and Ms. Dillard was separately convicted of preparing false and ante-dated documentary evidence by preparing a memoranda regarding the residency status of agency clients and an agenda of a seminar at a hotel (Count 6). (FAC, Ex. A, Dkt. No. 51 at 26.). Their convictions conclusively establish probable cause. *See Plumley*, 164 Cal. App. 4th at 1053 ("[V]ictory at trial. . . conclusively establishes probable cause to bring the underlying action"); *see also Cowles*, 115 Cal. App. 3d at 358; *Norton*, 30 Cal. App. 2d at 454-55. Thus, Plaintiffs can only show that these convictions lacked probable cause if they were obtained by fraud or perjury.

Plaintiffs advance two arguments.[2] First, Plaintiffs contend—as they did in response to the prior motion to dismiss—that the convictions are invalid or void because they violated the Supremacy Clause. However, Plaintiffs' argument that a reversal based on federal preemption eliminates the otherwise conclusive presumption of probable cause is not supported by the law. *See Plumley*, 164 Cal. App. 4th at 1052; *see also Cowles*, 115 Cal. App. 3d at 355 (1981) ("In the event the plaintiff in the prior action obtains judgment after trial, such judgment is, unless procured by fraud, conclusive proof that the proceedings were prosecuted with probable cause, ***notwithstanding the fact that the judgment is reversed on appeal***.") (emphasis added); *Norton*, 30 Cal. App. 2d at 454 ("a final judgment duly rendered after trial on the merits, in a court having complete jurisdiction, adverse to the defendant in the proceedings in which the judgment is rendered, is, unless procured by fraud which may be either extrinsic or intrinsic, conclusive proof

[2] Plaintiffs make no argument regarding Ms. Dillard's conviction on Count 6.

that the proceedings were prosecuted with probable cause, ***notwithstanding the fact that the judgment is reversed on appeal***.") (emphasis added).

Second, Plaintiffs insist that Defendants fraudulently manufactured the theft by false pretenses and making a false account of public moneys counts, both of which related to the use of the AFI grant funds. In particular, Plaintiffs allege that Mr. Ambrose "acting under directions from Haggerty, Miley, and the Alameda Board of Supervisors, refused to cooperate with DHHS to adjust the status of the AFI grant, and instead deliberately caused DHHS to issue a deficiency notice, so that the deficiency notice could be used as a tool to craft a state law theft cause of action against Dillard and Daniels, in violation of federal DHHS policies and federal regulations." (FAC at ¶ 21.) However, Plaintiffs do not dispute that they drew down the AFI grant fund or that they made a false accounting to DHHS; instead, Plaintiffs allege that Defendants—*after* the draw down and *after* their termination—refused to work with DHHS to fix the problems with the AFI grant despite the fact that DHHS's own internal operating procedures and the AFI grant regulations required the agency to "work with grantee ACAP to adjust accounting to bring the grant into compliance." (*Id*.) These allegations do not plausibly support an inference that the convictions related to Plaintiffs' use of the AFI funds were procured by fraud; indeed, according to the FAC, the trial judge excluded evidence "of the propriety of the county's interference with the federal Department of Health and Human Services' administration of its grant program." (*Id*. at ¶ 32.) What Defendants did *after* Plaintiffs committed the acts which led to their convictions does not plausibly support an inference that Plaintiffs' convictions were obtained by fraud.

b) Probable Cause for Acquitted Counts

Plaintiffs were acquitted of two charges: (1) conspiracy to commit grand theft by false pretenses for submitting a false certification to DHHS (Count 1), and (2) using public moneys for a purpose not authorized by law; namely improperly using over $280,000 of funds intended for a DHHS grant program to fund agency payroll and other expenses (Count 4). (Dkt. No. 51 at 26.) Ms. Dillard was also acquitted of appropriating money for her own use by instructing employees to work on her personal residence at below-market rates and obtaining reimbursement for improper business expenses (Count 5). (*Id.*)

"In California, as in virtually every other jurisdiction, it is a long-standing principle of common law that a decision by a judge or magistrate to hold a defendant to answer after a preliminary hearing constitutes prima facie—but not conclusive—evidence of probable cause." *Awabdy*, 368 F.3d at 1067 (collecting cases re: same). "[A] plaintiff can rebut a prima facie finding of probable cause by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Id.* Thus, the question is whether Plaintiffs have alleged facts sufficient to support a plausible inference that their criminal prosecutions for Counts 1, 4, and 5 were induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith.

Plaintiffs' only argument with respect to Count 4 is that it is void because it violated the Supremacy Clause. The Court has already considered and rejected this argument, *supra*. With respect to Count 1, Plaintiffs allege that to induce the District Attorney to file this count "Defendants misled the District Attorney to believe that Paul Daniels had stolen a computer from ACAP, altered data, and then returned the computer to ACAP." (FAC at ¶ 30.) However, Count 1 was for conspiracy to commit grand theft by false pretenses for submitting a false certification to DHHS regarding the availability of non-federal match funds in a Citibank account. (Dkt. No. 51 at 25-26.) Plaintiffs offer no explanation as to how the false accusation that Mr. Daniels stole a computer led to Count 1 which related to the availability of funds in a Citibank account. Plaintiffs have thus not alleged facts that support a plausible inference that the Count 1 charge was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith.

As for Count 5, which charged Ms. Daniels with appropriating public money for her own use "by instructing employees to work on her personal residence at below-market rates and obtaining reimbursement for improper business expenses," (Dkt. No. 15-2 at 20), Plaintiffs allege "Defendants induced the District Attorney to file this meritless charge by supplying a reimbursement receipt that had been altered and then duplicated at the Alameda County Auditor-Controller Agency." (FAC at ¶ 30.) Aside from Plaintiffs' failure to identify any particular Defendant who supplied the receipt, they do not make any allegations regarding the receipt that

would support an inference that it was material to the charging decision. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 482 (9th Cir. 2007). Plaintiffs can rebut the prima facie showing of probable cause by alleging that "the criminal proceedings were initiated *on the basis of* the defendants' intentional and knowingly false accusations and other malicious conduct." *Awabdy*, 368 F.3d at 1067 (emphasis added); *see also Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002) ("a coroner's reckless or intentional falsification of an autopsy report that plays a material role in the false arrest and prosecution of an individual can support a claim under 42 U.S.C. § 1983"). Plaintiffs have not alleged facts that support a plausible inference that Ms. Dillard's prosecution on Count 5 was based on this unidentified falsified receipt.

Further, Count 5 was based on two acts: obtaining reimbursement for personal expenses, and Ms. Dillard instructing employees to work at her personal residence at below-market rates. While a receipt could conceivably be material to the prosecution of Ms. Dillard for the first act, it appears irrelevant to the second act. Indeed, when asked at oral argument what more Plaintiffs could allege as to this receipt if given leave to amend, Plaintiffs did not proffer any facts relevant to Ms. Dillard having employees work at her personal residence.

Plaintiffs' argument that the entire prosecution was tainted by fraud, corruption, and wrongful conduct because it was done so that Mr. Miley and Mr. Haggerty could "continue their corrupt practices," so that the County could obtain an insurance payment, and to punish Plaintiffs all goes to the why and not the how of the prosecution.[3] (Dkt. No. 55 at 17.) It is not enough in a malicious or retaliatory prosecution action to allege *why* the defendants might have wrongfully done something, plaintiffs must allege that the defendants' actions "were *instrumental* in causing the filing and prosecution of the criminal proceedings." *Awabdy*, 368 F.3d at 1068 (emphasis added). This Plaintiffs have not done.

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[3] Likewise, Plaintiffs' allegation that Defendants spoliated evidence prior to their trial by expunging ACAP's computer server such that they were "[un]able to obtain exculpatory evidence when Defendants moved forward with their plan to have them prosecuted" fails to allege what evidence was destroyed or how such evidence was material to their defense. (FAC at ¶ 23.)

Plaintiffs have again failed to plead facts sufficient to overcome the conclusive presumption of probable cause with respect to the convicted counts or the prima facie showing of probable cause with respect to the acquitted counts, and have failed to tie their allegations of wrongdoing to specific actions by any defendant let alone each defendant. The Court therefore dismisses the section 1983 claim. The dismissal is without leave to amend. The Court previously granted leave, and specifically advised Plaintiffs that they must allege facts that support an inference that each Defendant induced the allegedly wrongful criminal charge. Yet the amended complaint does not do so. Putting that deficiency aside, Plaintiffs also fail to allege any facts that tie any particular fraudulent conduct to the charges. While at oral argument Plaintiffs suggested that they could allege more about the unidentified receipt that somehow led to Count 5 against Ms. Dillard, the proffered allegations as to the receipt are unrelated to the charge that Ms. Dillard had employees work on her personal residence at below-market rates.

CONCLUSION

Plaintiffs' attempt to obtain compensation for the personal and financial hardship they have suffered as a result of their prosecution is understandable. The law, however, does not permit recovery merely because a defendant is acquitted or a conviction reversed; instead, compensation is permitted only when the prosecuted persons can prove that deliberate misconduct caused the prosecution. Plaintiffs are unable to allege facts to meet this burden.

For the reasons stated above, Defendants' motion to dismiss the section 1983 claim is GRANTED without leave to amend. The state law claims are dismissed without prejudice. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

This Order disposes of Docket No. 54.

IT IS SO ORDERED.

Dated: December 2, 2019

Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY
United States Magistrate Judge

Order of the Ninth Circuit Denying Rehearing En Banc

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL S. DANIELS; NANETTE S. DILLARD, Plaintiffs-Appellants, v. COUNTY OF ALAMEDA; et al., Defendants-Appellees, and KEITH CARSON; et al., Defendants.	No. 19-17534 D.C. No. 3:19-cv-00602-JSC Northern District of California, San Francisco ORDER

Before: BYBEE and R. NELSON, Circuit Judges, and WHALEY,* District Judge.

Judge R. Nelson has voted to deny the petition for rehearing en banc, and Judges Bybee and Whaley so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

Appellants' petition for rehearing en banc, filed February 19, 2021, is **DENIED**.

Opinion of California Court of Appeal (re Supremacy Clause)

Filed 3/29/18

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NANETTE SHEREE DILLARD, et al., Defendants and Appellants.	A141998 (Alameda County Super. Ct. Nos. CH-53179A & CH-53179B)

Nanette Sheree Dillard and Paul Daniels appeal their convictions, following a jury trial, of crimes related to their work at an anti-poverty agency, the Associated Community Action Program (ACAP or the Agency). We conclude two of appellants' convictions were preempted by federal law and reverse these convictions. We otherwise affirm.

PROCEDURAL BACKGROUND

Dillard and Daniels were charged by amended information with the following:

Count 1: Conspiracy to commit grant theft by false pretenses (Pen. Code, §§ 182, subd. (a)(1), 487, subd. (a))[1], with overt acts of drafting, signing, and delivering a letter to the United States Department of Health and Human Services (HHS) "falsely attesting"

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II–IV.

[1] All undesignated section references are to the Penal Code.

that ACAP had more than $426,000 in " 'non-federal match funds' " in a Citibank account, and sending a draft of such a letter to a Citibank manager.

Count 2: Grand theft by false pretenses (§ 487, subd. (a)) by unlawfully taking grant funds from HHS. This count included an allegation that the property taken exceeded $200,000 (§ 12022.6, subd. (a)(2)).

Count 3: Making a false account of public moneys (§ 424, subd. (a)(3)) by signing and sending false and inaccurate letters to HHS. A third co-defendant, Vivian Rahwanji, was also charged with this count. Rahwanji entered into a plea agreement with the People on the eve of trial and, as part of this agreement, testified as a prosecution witness.

Count 4: Using public moneys for a purpose not authorized by law (§ 424, subd. (a)(2)), by improperly using over $280,000 of funds intended for a HHS grant program to fund Agency payroll and other Agency expenses.

In addition, Dillard was charged with the following:

Count 5: Appropriating public moneys to her own use (§ 424, subd. (a)(1)), by instructing employees to work on her personal residence at below-market rates and obtaining reimbursement for improper business expenses, such as massages and expensive meals.

Count 6: Preparing false and ante-dated documentary evidence (§ 134), by preparing a memoranda regarding the residency status of Agency clients and an agenda of a seminar at a hotel.

Following a lengthy trial, the jury convicted appellants of theft by false pretenses (count 2) and making a false account of public moneys (count 3), and convicted Dillard of preparing false documentary evidence (count 6). The jury acquitted appellants on all remaining counts.

FACTUAL BACKGROUND

The Agency

ACAP was an anti-poverty agency created pursuant to a joint powers agreement between Alameda County (the County) and several cities in the County. A governing board (the Board) consisted of representatives from each of the municipalities and,

among other powers, selected the Agency's executive director. Dillard was appointed the Agency's interim executive director in 2004 and its executive director in 2005. Daniels was hired as an administrative assistant at the Agency in 2004, and was promoted to grants manager the following year. Daniels and Dillard married in 2007.

The Assets for Independence Grant Program

In June 2005, the Agency sought, and was awarded, a five-year, $500,000 Assets for Independence (AFI) grant from HHS. Two HHS employees testified about the rules governing AFI grants: Katrina Morgan, an HHS grants management officer, and Anne Yeoman, a 10-year contract employee with HHS who worked primarily on the AFI program. AFI grants are awarded to organizations or agencies to fund programs that help low-income people build assets. We will refer to the organizations or agencies administering the AFI programs as "grantees," and the low-income individuals served by these programs as "savers." In an AFI program, savers deposit money in a designated individual bank account. These deposits are matched with federal AFI grant funds and an equal amount of nonfederal funds. The matched deposits can be withdrawn for approved uses, including higher education, starting a business, or buying a house.

Grantees do not receive the federal AFI money when the grant is awarded. Instead, during the five-year grant period, grantees periodically "drawdown" some or all of the federal grant funds into a dedicated bank account maintained by the grantee, called the reserve account. A grantee can only drawdown federal funds for which it has an equal amount of nonfederal funds on deposit, referred to as "matching nonfederal funds." Before each drawdown, grantees must submit to HHS a letter requesting the drawdown and a letter from the bank holding the reserve fund confirming the presence of matching nonfederal funds in that account. AFI federal grant funds must be drawn down into the reserve account within the five-year grant period, and the distribution of grant funds to savers must be completed by the end of an additional year. Grantees can spend no more than 15 percent of the drawn down federal AFI funds on program administration; the remainder must be used to match saver deposits. HHS provides grantees with an "AFI

Grantee Handbook," an AFI resource center available to answer grantee questions by phone or email, and in-person trainings at grantee conferences.

The Agency's Drawdowns of Federal AFI Grant Funds

The Agency's AFI reserve account, and the hundreds of individual saver deposit accounts participating in the Agency's AFI program, were held at a Citibank branch. The reserve account was the "umbrella" account, and the individual saver accounts were attached to the reserve account. Vivian Rahwanji was the manager of that Citibank branch. Dillard was the sole signatory on the AFI reserve account, and both she and Daniels had access to the AFI account records.

The Agency's five-year AFI grant period ended on June 14, 2010; this date was the last day the Agency could drawdown federal AFI funds. As of the beginning of that month, the Agency had drawn down less than $75,000 out of the $500,000 available federal AFI funds. On June 10, although the Agency only had approximately $47,000 in its AFI reserve account, Daniels emailed Rahwanji a template letter to HHS stating the Agency had $426,874.44 of "non-federal match funds" on deposit in its AFI reserve account and requested she "place the letter on Citibank stationary [and] sign it."[2] Rahwanji did so. Daniels sent the Citibank letter to HHS and HHS transferred the requested federal AFI grant funds to the Agency's reserve account. The prosecution argued this letter was the basis for the theft by false pretenses and false account of public moneys counts (counts 2 and 3)—even though the letter was signed by Rahwanji, the People argued appellants prepared the letter knowing Rahwanji would "rubber-stamp" it and/or aided and abetted her act.[3]

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[2] The parties presented evidence of emails and telephone calls leading up to this June 10 email; we omit these facts as unnecessary to our resolution of the appeal.

[3] Dillard, Daniels, and Rahwanji all testified they believed the savers' deposits could be counted as "non-federal match funds." The combined individual saver accounts contained less than $200,000. Daniels testified he relied on Rahwanji to verify the amount before she signed the letter. Rahwanji testified she attempted to so verify but abandoned the cumbersome task, believing based on an "eyeball" assessment that the figures were about right.

Events Following the June 2010 Drawdown

In August of 2010, the Agency did not have enough funds to meet payroll and AFI federal grant funds were used for this purpose. By February 1, 2011, approximately $280,000 of the federal AFI funds had been used for payroll and approximately $40,000 had been transferred to an Agency "petty cash" account.[4] The People confirmed in closing statements that they were not alleging appellants used AFI funds for their own personal use.

On February 2, 2011, the Board placed Dillard on administrative leave. Both appellants were subsequently terminated.

Following appellants' termination, an independent audit determined the Agency was in financial disarray and the Board decided to dissolve it. The interim executive director in charge of overseeing the Agency's dissolution determined that out of the nearly $500,000 in drawn down federal AFI funds, the Agency either lacked nonfederal matching funds for or had used for non-AFI purposes approximately $435,000. The County informed HHS of this and HHS demanded the Agency return these funds. The Agency had approximately $117,000 left in the AFI reserve account and this amount was paid back to the federal government, leaving a remaining liability of approximately $317,000.

Facts Relevant to Count 6 (Preparing False Documentary Evidence)

Count 6 alleged Dillard prepared two ante-dated documents. The first related to reimbursed expenses. On August 26, 2010, Dillard paid for meals, drinks, and massages for herself and the Agency's deputy director at a local hotel and spa, and was subsequently reimbursed by the Agency for these expenses. On February 3, 2011, the day after she was placed on administrative leave, Dillard emailed her assistant asking for "copies of all my expenses that have been submitted." The following day, Dillard

[4] Dillard testified she believed this use of the funds was permissible as long as all of the money was returned when the AFI grant closed out, and she intended to return the funds so used to the Citibank AFI reserve account. As noted above, the jury acquitted appellants of improperly using AFI funds.

emailed her assistant a document purporting to be an "agenda" for an "ACAP Organizational Management" seminar held on August 26, 2010 at the hotel where the expenses had been incurred. Dillard's email asked her assistant to "[p]lease attach to expenses." Her assistant, who made all the arrangements for the hotel visit, had never seen the agenda before. The deputy director testified that several aspects of the agenda did not accurately represent what happened that day.

The second document related to an Agency program called CREW, which provided job training and employment to eligible participants living in the County. Dillard's nephew and his friend were participants in the CREW program but their June 2010 Agency paperwork stated they lived outside the County. In February 2011, the day after Dillard was placed on administrative leave, she emailed her assistant asking if she could "get a hold of the client files for [her nephew and his friend]? I would like to review them in order to prepare any defense I might need. [¶] Please do not hesitate if anything I request makes you uncomfortable." The following day, Dillard emailed her assistant memoranda dated June 16, 2010 stating Dillard's nephew and his friend were homeless but staying within the County. The email asked her assistant to "[p]lease file in client files," a reference to the CREW participant files.

Dillard admitted both documents were prepared after the fact and ante-dated, but claimed they were recreations of contemporaneously-prepared documents.

DISCUSSION

I. *Preemption*

Appellants argue the prosecutions of counts 2 and 3—theft by false pretenses and false accounting of public moneys, both based on the representation to HHS that the Agency had matching nonfederal funds in its AFI reserve account—were preempted by federal law. We agree.

A. *Legal Standard*

" 'The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law.' [Citations.] . . . Preemption is foremost a question of

congressional intent: did Congress, expressly or implicitly, seek to displace state law? [Citations.] [¶] We have identified several species of preemption. Congress may expressly preempt state law through an explicit preemption clause, or courts may imply preemption under the field, conflict, or obstacle preemption doctrines.[5] [Citations.] . . . The burden is on . . . the party asserting preemption[] to demonstrate [one of these species of preemption] applies." (*Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 307–308 (*Quesada*).)

Appellants do not identify any explicit preemption clause, nor do they contend conflict preemption—present "when simultaneous compliance with both state and federal directives is impossible" (*Viva!, supra,* 41 Cal.4th at p. 936)—applies. Appellants rely in part on field preemption, which "applies 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.' " (*Ibid.*) However, as will be shown below, the federal laws and regulations governing the AFI program are "not so complex or comprehensive that it may be inferred Congress intended to occupy the field." (*In re Jose C.* (2009) 45 Cal.4th 534, 553.)

We focus instead on appellants' obstacle preemption argument. "Obstacle preemption permits courts to strike state law that stands as 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.] It requires proof Congress had particular purposes and objectives in mind, a demonstration that leaving state law in place would compromise those objectives, and reason to discount the possibility the Congress that enacted the legislation was aware of the background tapestry of state law and content to let that law remain as it was.

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[5] " 'The categories of preemption are not "rigidly distinct." ' [Citations.] We and the United States Supreme Court have often identified only three species of preemption, grouping conflict preemption and obstacle preemption together in a single category. [Citations.] As conflict and obstacle preemption are analytically distinct and may rest on wholly different sources of constitutional authority, we treat them as separate categories here." (*Viva! Intern. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935–936, fn. 3 (*Viva!*).)

Ultimately, 'what constitutes a "sufficient obstacle [for a finding of implied preemption] is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." ' " (*Quesada, supra*, 62 Cal.4th at p. 312.)

One of the primary cases relied on by appellants is *Buckman Co. v. Plaintiffs' Leg. Com.* (2001) 531 U.S. 341 (*Buckman*). In *Buckman*, the plaintiffs claimed to be injured by a medical device and brought a state law tort lawsuit against a consultant to the device's manufacturer. (*Id.* at p. 343.) The plaintiffs claimed the consultant "made fraudulent representations to the Food and Drug Administration (FDA or Administration) in the course of obtaining approval to market the [devices]" and, "[h]ad the representations not been made, the FDA would not have approved the devices, and plaintiffs would not have been injured." (*Ibid.*)

The high court discussed the federal statutory scheme governing medical devices, set forth in the Federal Food, Drug, and Cosmetic Act (FDCA), 52 Stat. 1040, as amended by the Medical Device Amendments of 1976 (MDA), 90 Stat. 539, 21 United States Code section 301. (*Buckman, supra,* 531 U.S. at p. 344.) Devices which " 'presen[t] a potential unreasonable risk of illness or injury,' " like the one at issue in that case, "must complete a thorough review process with the FDA before they may be marketed." (*Ibid.*) However, "devices that were already on the market prior to the MDA's enactment in 1976" and any " 'substantially equivalent' " devices may seek an exception to this review process whereby they "remain available until the FDA initiates and completes the [review] process." (*Id.* at p. 345.) Manufacturers applying for this exception, referred to as the " '§ 510(k) process,' " must submit certain information to the FDA, including the intended use for the device. (*Ibid.*) The plaintiffs contended that the defendant's successful section 510(k) application fraudulently represented the intended use of the device. (*Id.* at pp. 346–347.)

Buckman first considered whether there was a presumption against preemption: "Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied' [citation], such as to warrant a presumption against finding federal pre-emption of a state-law cause of action. To the contrary, the relationship between a

federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law. [Citation.] Here, petitioner's dealings with the FDA were prompted by the MDA, and the very subject matter of petitioner's statements were dictated by that statute's provisions. Accordingly—and in contrast to situations implicating 'federalism concerns and the historic primacy of state regulation of matters of health and safety,' [citation]—no presumption against pre-emption obtains in this case." (*Buckman, supra,* 531 U.S. at pp. 347–348.)

Buckman concluded the plaintiffs' claims were preempted because "the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration, and that this authority is used by the Administration to achieve a somewhat delicate balance of statutory objectives. The balance sought by the Administration can be skewed by allowing fraud-on-the-FDA claims under state tort law." (*Id.* at p. 348.) The court highlighted the existence of statutory and regulatory "provisions aimed at detecting, deterring, and punishing false statements made during this and related approval processes. The FDA is empowered to investigate suspected fraud [citations], and citizens may report wrongdoing and petition the agency to take action [citation]. In addition to the general criminal proscription on making false statements to the Federal Government [citation], the FDA may respond to fraud by seeking injunctive relief [citation], and civil penalties [citation]; seizing the device [citation]; and pursuing criminal prosecutions [citation]. The FDA thus has at its disposal a variety of enforcement options that allow it to make a measured response to suspected fraud upon the Administration. [¶] This flexibility is a critical component of the statutory and regulatory framework under which the FDA pursues difficult (and often competing) objectives." (*Buckman, supra,* 531 U.S. at p. 349, fns. omitted.) For example, the FDA must "ensure both that medical devices are reasonably safe and effective and that, if the device qualifies under the § 510(k) exception, it is on the market within a relatively short period of time," and must "regulat[e] the marketing and distribution of medical devices

without intruding upon decisions statutorily committed to the discretion of health care professionals," such as the off-label use of a medical device. (*Id.* at pp. 349–350.)

The court continued: "State-law fraud-on-the-FDA claims inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives. As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the FDCA and the MDA. Would-be applicants may be discouraged from seeking § 510(k) approval of devices with potentially beneficial off-label uses for fear that such use might expose the manufacturer or its associates (such as petitioner) to unpredictable civil liability. . . . [¶] Conversely, fraud-on-the-FDA claims would also cause applicants to fear that their disclosures to the FDA, although deemed appropriate by the Administration, will later be judged insufficient in state court. Applicants would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the FDA's evaluation of an application." (*Buckman, supra,* 531 U.S. at pp. 350–351.) The court emphasized the fact that the plaintiffs' "fraud claims exist solely by virtue of the FDCA disclosure requirements. . . . [¶] In sum, were plaintiffs to maintain their fraud-on-the-agency claims here, they would not be relying on traditional state tort law which had predated the federal enactments in questions. On the contrary, the existence of these federal enactments is a critical element in their case. For the reasons stated above, we think this sort of litigation would exert an extraneous pull on the scheme established by Congress, and it is therefore pre-empted by that scheme." (*Id.* at p. 353.)[6]

[6] Appellants also rely on two other United States Supreme Court cases. *Arizona v. U.S.* (2012) 567 U.S. 387 was a field preemption case. (*Id.* at p. 401.) The high court rejected the state's argument that the challenged law had "the same aim as federal law" because it "ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself." (*Id.* at p. 402.) The court also noted the argument was "unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework

Quesada, supra, 62 Cal.4th 298 is a contrasting case. In *Quesada*, the plaintiff alleged the defendant was selling conventionally grown produce under an organic label, and brought state law false advertising and unfair competition claims. (*Id.* at pp. 303–304.) The defendant argued these state law claims were preempted by the federal Organic Foods Production Act of 1990 (7 U.S.C. §§ 6501–6522; Organic Foods Act). (*Quesada*, at p. 304.) As in *Buckman*, the *Quesada* court considered whether a presumption against preemption applied. (*Quesada*, at pp. 312–314.) The court noted "[t]he regulation of food labeling to protect the public is quintessentially a matter of longstanding local concern" and "the federal government has assumed a more peripheral role and routinely left undisturbed local policy judgments about how best to protect consumers." (*Id.* at p. 313.) "Consequently, the presumption against preemption 'applies with particular force' where state consumer protection laws regulating deceptive food labeling are at issue." (*Id.* at p. 314.)

The California Supreme Court proceeded to consider the defendant's obstacle preemption argument. The court highlighted the express purposes of the Organic Foods Act: " 'to establish national standards governing the marketing of' " organic food, " 'to assure consumers that organically produced products meet a consistent standard,' " and " 'to facilitate interstate commerce in' " organic food. (*Quesada, supra,* 62 Cal.4th at p. 316.) The court found that "permitting state consumer fraud actions would advance, not impair, these goals. Substitution fraud, intentionally marketing products as organic

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Congress adopted. [Citations.] Were [the state law] to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." (*Ibid.*) *Wisconsin Dept. of Industry v. Gould Inc.* (1986) 475 U.S. 282, involved the National Labor Relations Act (NLRA), which "largely displaced state regulation of industrial relations." (*Id.* at p. 286.) The high court found a state law debarring repeat NLRA violators from state contracts "functions unambiguously as a supplemental sanction for violations of the NLRA," "conflicts with the [National Labor Relations] Board's comprehensive regulation of industrial relations," and "detracts from the 'integrated scheme of regulation' created by Congress." (*Id.* at p. 288–289.)

that have been grown conventionally, undermines the assurances the USDA Organic label is intended to provide. Conversely, the prosecution of such fraud, whether by public prosecutors where resources and state laws permit, or through civil suits by individuals or groups of consumers, can only serve to deter mislabeling and enhance consumer confidence. [Citation.] From the grower perspective too, anything that deters the few bad apples, the 'dishonest traders looking to cash in on the premium prices organic food commands' [citation], enhances the overall health of the interstate market and benefits those producers that play by the rules in processing and marketing their products. Private claims like those here are thus consistent with the Organic Foods Act's goals of reassuring consumers and enabling fair competition." (*Id.* at pp. 316–317, fn. omitted.)

B. *AFI Legislation and Regulations*

We turn now to the federal statutory and regulatory scheme governing the AFI program. The Assets for Independence Act (hereafter, AFI Act or the Act) was enacted in 1998 and codified as a note to 42 United States Code section 604.[7] The express purpose of the Act is "to provide for the establishment of demonstration projects designed to determine-- [¶] (1) the social, civic, psychological, and economic effects of providing to individuals and families with limited means an incentive to accumulate assets by saving a portion of their earned income; [¶] (2) the extent to which an asset-based policy that promotes saving for postsecondary education, homeownership, and microenterprise development may be used to enable individuals and families with limited means to increase their economic self-sufficiency; and [¶] (3) the extent to which an asset-based policy stabilizes and improves families and the community in which the families live." (AFI Act, § 403.)

[7] (Pub. L. 105-285 (Oct. 27, 1998) 112 Stat. 2759, as amended by Pub. L. 106-554 (Dec. 21, 2000) 114 Stat. 2763; Pub. L. 107-110 (Jan. 8, 2002) 115 Stat. 1947; Pub. L. 114-95 (Dec. 10, 2015) 129 Stat. 2168.)

To this end, the Act authorizes HHS to approve demonstration projects designed to help low-income, low-net worth individuals accumulate assets for specified purposes, including postsecondary education and buying a home. (AFI Act, §§ 404, 405, 408.) The demonstration projects may be administered by nonprofit organizations, state or local government agencies, tribal governments, or certain credit unions and financial institutions. (*Id.*, § 404.)

For approved projects, the grantee "shall establish a Reserve Fund" and deposit in it "all funds . . . from any public or private source in connection with the demonstration project." (AFI Act, § 407(a), (b)(1)(A).)[8] HHS shall disburse the grants over the course of the five-year demonstration projects "in an amount not to exceed the lesser of-- [¶] (1) the aggregate amount of funds committed as matching contributions from non-Federal public or private sector sources; or [¶] (2) $1,000,000." (*Id.*, § 406(b).) Each dollar an individual deposits up to $2,000 shall be matched by between $0.50 and $4 of nonfederal funds and an equal amount of federal AFI grant funds. (*Id.*, § 410(a)–(b).) The Act sets forth detailed requirements for individual saver eligibility and qualified uses of the matched deposit account funds. (*Id.*, §§ 404, 408.)

The Act requires grantees to submit annual progress reports including the "number and characteristics" of individual savers, the amounts deposited and withdrawn, how configurations of the program and grantee organization impacted saver participation, and how the impact on participation varied among "different populations or communities." (AFI Act, § 412(a).) The Act further requires HHS to hire "an independent research organization to evaluate the demonstration projects conducted under [the Act], individually and as a group." (*Id.*, § 414(a).) The independent evaluation is to consider a number of factors including the demonstration projects' effects on savings behavior, savings rates, and rates of homeownership and postsecondary education, as well as the

[8] The Act excludes state and local government grantees from the requirement to establish a reserve fund. (AFI Act, § 407(a).) However, the Agency's AFI grant award obligated it to establish a reserve fund.

"economic, civic, psychological, and social effects of asset accumulation," and for all of these factors, how they vary among different populations or communities. (*Id.*, § 414(b)(1)–(4).) The evaluation must also consider "potential financial returns" to the federal government, and whether "a permanent program of individual development accounts should be established." (*Id.*, § 414(b)(5)–(6).)

The Act provides that grantees shall "have sole authority over the administration of the project. [HHS] may prescribe only such regulations or guidelines with respect to demonstration projects conducted under [the Act] as are necessary to ensure compliance with the approved applications and the requirements of [the Act]." (AFI Act, § 411.) However, this administrative authority is expressly subject to HHS's sanction authority set forth in the Act. (*Id.*, §§ 411, 413.) The Act provides that if HHS determines a grantee "is not operating a demonstration project in accordance with the entity's approved application . . . or the requirements of [the Act] (and has not implemented any corrective recommendations directed by [HHS]), [HHS] shall terminate such entity's authority to conduct the demonstration project," take control of the grantee's reserve fund, and attempt to identify another entity to take over the demonstration project. (*Id.*, § 413.)

HHS has other sanctions available for the failure to comply with requirements regarding the reserve funds. AFI regulations provide that grantee reserve funds must comply with HHS's uniform administrative requirements. (45 C.F.R. § 1000.3.) The regulations setting forth these administrative requirements provide: "If a non-Federal entity fails to comply with Federal statutes, regulations, or the terms and conditions of a Federal award, the HHS awarding agency . . . may impose additional conditions . . . . [or, if] noncompliance cannot be remedied by imposing additional conditions, the HHS awarding agency . . . may take one or more of the following actions, as appropriate in the circumstances: [¶] (a) Temporarily withhold cash payments . . . . [¶] (b) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance. [¶] (c) Wholly or partly suspend (suspension of award activities) or terminate the Federal award. [¶] (d) Initiate suspension or debarment

proceedings . . . . [¶] (e) Withhold further Federal awards for the project or program. [¶] (f) Take other remedies that may be legally available." (45 C.F.R. § 75.371.) One of the other legally available remedies for false representations to HHS is to seek federal criminal prosecution under 18 U.S.C. section 1001.[9]

C. *Presumption Against Preemption*

We turn first to whether the presumption against preemption applies in this case. As highlighted in *Buckman*, the inquiry is whether the state regulation occurs in " 'a field which the States have traditionally occupied.' " (*Buckman, supra,* 531 U.S. at p. 347.) The analysis hinges on how we characterize the area of regulation: is it the prosecution of theft and criminal fraud, which lies within the states' historic police powers, or is it "[p]olicing fraud against federal agencies . . . [,] hardly 'a field which the States have traditionally occupied' " (*Buckman,* at p. 347).

For purposes of the presumption against preemption, *Buckman* characterized state law tort claims as claims involving "[p]olicing fraud against federal agencies," where the defendant's "dealings with the FDA were prompted by [a federal statute], and the very subject matter of [the defendant's] statements were dictated by that statute's provisions." (*Buckman, supra,* 531 U.S. at pp. 347–348.) Similarly, appellants' dealings with HHS were prompted by the AFI Act, and the subject matter of the Citibank letter was dictated by that statute's provisions.

Commonwealth's Motion to Appoint Counsel (3d Cir. 2015) 790 F.3d 457 (*Commonwealth's Motion*) is also instructive. In that case, a nonprofit organization providing federal defender services was representing capital prisoners in state post-

[9] With exceptions not relevant here, "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-- [¶] (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; [¶] (2) makes any materially false, fictitious, or fraudulent statement or representation; or [¶] (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; [¶] shall be fined under this title, imprisoned not more than 5 years . . . , or both." (18 U.S.C. § 1001.)

conviction review proceedings. (*Id.* at pp. 462–463.) In several such proceedings, the state attorney general asked the state Supreme Court to disqualify the federal defender organization from appearing absent federal court authorization. (*Id.* at pp. 463–464.) "[T]he cited reason for disqualification was based on the organization's alleged misuse of federal grant funds to appear in state proceedings," specifically, grant funds authorized by the Criminal Justice Act, 18 United States Code § 3006A, and administered by the Administrative Office of the United States Courts (AO). (*Commonwealth's Motion*, at pp. 461–462.) The state Supreme Court issued orders stating that, if federal grant funds were being used to fund the federal defender's appearance in the state proceedings, the federal defender should be disqualified. (*Id.* at pp. 464–465.)[10] The federal defender removed the disqualification motions to federal court and argued, inter alia, that federal law preempted the motions. (*Id.* at p. 461.)

The federal court of appeals considered whether the presumption against preemption applied. The state argued the authority for the removal was a state constitutional provision authorizing the state Supreme Court to prescribe rules governing the practice and procedure of the state courts. (*Commonwealth's Motion, supra,* 790 F.3d at p. 475.) The court of appeals reasoned: "As a general matter, it is true that the States have a long history of regulating the conduct of lawyers, who are officers of the courts. [Citation.] But the impetus for the proceedings here is that the Federal Community Defender is allegedly applying its federal grant funds to purposes not authorized by the relevant federal statutes and grant terms. [Citation.] As explained above, these grants are paid under the supervision of the AO, a federal agency within the Judicial Conference with regulatory control over the Federal Community Defender. '[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to

[10] The federal defender claimed only private funds were used for work on state proceedings, unless that work was preparatory for a federal proceeding. (*Commonwealth's Motion, supra,* 790 F.3d at p. 463.)

federal law.' [Citation.] Policing such relationships 'is hardly a field which the States have traditionally occupied,' and thus there can be no presumption against preemption here." (*Id.* at p. 476.)

We find this case akin to *Buckman* and *Commonwealth's Motion*, and unlike *Quesada.* In *Quesada,* the state laws "regulat[ed] deceptive food labeling," which the California Supreme Court found to be "quintessentially a matter of longstanding local concern." (*Quesada, supra,* 62 Cal.4th at pp. 313, 314.) Here, the sole basis for the prosecutions was appellants' representation to HHS about the AFI reserve account, made pursuant to and as required by the AFI Act. (See *Buckman, supra,* 531 U.S. at pp. 347–348.) The relationship between appellants and HHS "originates from, is governed by, and terminates according to federal law." (*Buckman,* at p. 347; *Commonwealth's Motion, supra,* 790 F.3d at p. 476.) Appellants' "dealings with [HHS] were prompted by the [AFI Act], and the very subject matter of [appellants'] statements were dictated by that statute's provisions." (See *Buckman,* at pp. 347–348.) Policing such a relationship is not an area of historic state regulation, accordingly, no presumption against preemption applies.

D. *Obstacle Preemption Analysis*

We now return to obstacle preemption and consider whether the prosecution of counts 2 and 3 is preempted by the AFI Act. As discussed in part I.B, *ante,* the purpose of the AFI Act was to establish asset-building demonstration projects and determine the various effects and impacts of asset-based policies. (AFI Act, § 403.) We conclude that permitting state criminal prosecutions based on grantees' representations to HHS made pursuant to the AFI Act would undermine these Congressional objectives.

The analysis in *Commonwealth's Motion*, finding preemption of the state's attempt to disqualify the federal public defender's office for violating the terms of its federal grant, is instructive. " 'Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions [may] undermine[] the congressional calibration of force.' [Citation.] This is especially so when a federal agency is afforded the discretion to apply those sanctions or stay its hand. [Citations.] [¶]

Here, Congress has delegated supervisory authority over [Criminal Justice Act] grants to the AO. The AO has the power to 'reduce, suspend, or terminate, or disallow payments . . . as it deems appropriate' if the Federal Community Defender does not comply with the terms of its grants. [Citation.] But if the [state] could sanction noncompliance, the AO could be hindered in its ability to craft an appropriate response. . . . After all, as the District Court noted . . . , 'the [AO's] usual remedies, such as recoupment of distributed funds, are more consistent with the CJA's objectives because they mitigate the disruption to the existing attorney-client relationships.' [Citation.] Allowing the Commonwealth to attach consequences to the Federal Community Defender's relationship with the AO would 'exert an extraneous pull on the scheme established by Congress' in a manner that conflicts with federal objectives. *Buckman*, 531 U.S. at 353." (*Commonwealth's Motion, supra,* 790 F.3d at p. 477.) Similarly, the AFI Act provides that if a grantee is not operating its AFI project in compliance with the Act and its grant, HHS may recommend corrective measures and, if those are not implemented, terminate the project. (AFI Act, § 413(a).) HHS can take additional sanction measures, including debarment or recommending federal criminal prosecution. If states could initiate their own criminal prosecutions, HHS "could be hindered in its ability to craft an appropriate response." (*Commonwealth's Motion,* at p. 477.)

Significantly, the Act depends on grantees' interest in participating in the AFI program. The threat of state criminal prosecution could deter potential grantees from applying for an AFI grant. (See *Buckman, supra,* 531 U.S. at p. 350 ["Would-be applicants may be discouraged from seeking [FDA] approval of devices with potentially beneficial off-label uses for fear that such use might expose the manufacturer or its associates (such as petitioner) to unpredictable civil liability."].) We note that the HHS employees testified at trial that the process of applying for an AFI grant was "extensive," "not easy," and "takes resources of the agency." They testified the AFI program was difficult to administer and involved unique, confusing rules. The asset-building work of an AFI program "is not very easy. Even if you have the money, doing it is not that easy" and requires a lot of hard work.

We find it notable that the only sanction for noncompliance set forth in the AFI Act itself is termination of the grantee's authority to conduct the demonstration project. (AFI Act, § 413(a).) It is also notable that the section of the Act setting forth sanctions includes detailed requirements that HHS attempt to identify another entity to operate the project and transfer the project to that entity. (AFI Act, § 413(b)(1)–(5).) This underscores Congress's purpose in enacting the AFI Act to conduct and support asset-building demonstration projects, and suggests Congress believed that punitive measures for noncompliance might often conflict with that purpose.[11]

Indeed, HHS's response to grantee noncompliance has conformed to this understanding. HHS employee Yeoman testified that when HHS becomes aware of problems with a grantee's administration of an AFI grant, "generally speaking, we sort of take the position of go and sin no more. That is, okay, you screwed up. . . . Here's how you need to do it. Do it right from now on. . . . [¶] We don't want to stop a program and stop the individuals from getting the benefit of it if we can find another way to get it right." If AFI grant money had been spent inappropriately, Yeoman testified, "[w]e would first figure out can we, can we make this right? It might, it might involve the grantee paying back funds, paying back money, into the grant from some other source . . . ." Morgan similarly testified that if HHS learned a grantee drew down federal AFI grant money without matching nonfederal funds on deposit, "we would try our best to work with the grantee to help them be successful in correcting such a problem without having to do some disciplinary action. So, we would probably try and we would, you know, talk to our legal counsel, again, in the office of general counsel for HHS, and try to work it out with them, if we could," although "once a grant project period is over, . . . it really would be difficult to pursue any type of correction to that type of thing without a

[11] The People argue that state theft prosecutions "can deter misuse of federal funds" and thus further the purpose of the AFI Act, but appellants were acquitted of misusing the AFI funds. The challenged prosecutions were based solely on appellants' misrepresentations to HHS.

disallowance." While this testimony is not indicative of Congress's intent at the time the AFI Act was enacted, it lends supports to our assessment of that intent.

This obstacle—the potential of the state law to deter applicants critical to the federal law's purpose—was entirely absent in *Quesada*, where the California Supreme Court found that "permitting state consumer fraud actions would advance, not impair" the goals of federal statutes. (*Quesada, supra,* 62 Cal.4th at p. 316 [establishing national marketing standards for organic food and increase consumer confidence in organically-labeled food].)

The People cite several cases rejecting preemption challenges to state criminal prosecutions for fraud against the federal government. We find these cases distinguishable. Three involve prosecutions based on the defendants' theft of federal benefits. (*State v. Jones* (Utah Ct.App. 1998) 958 P.2d 938, 939 [federal disability retirement benefits]; *People v. Lewis* (Ill.App.Ct. 1998) 693 N.E.2d 916, 917 [federal unemployment benefits for railroad employees]; *Commonwealth v. Morris* (Pa.Super.Ct. 1990) 575 A.2d 582, 583 [Social Security benefit checks].) The cases describe no Congressional purpose that would be hindered by state prosecutions. (*Jones,* at p. 943 [the defendant "concedes that the State's prosecution creates no actual conflict with the administration of [the federal law]"]; *Lewis,* at p. 920 ["we are confident that the State's prosecution of defendant for theft of federal unemployment benefits does not operate as an impediment to Congress's purposes and objectives in prohibiting benefits fraud"]; *Morris,* at p. 586 ["We conclude that the Social Security Act itself as well as its legislative history make clear that the federal government did not intend to dominate the field of public welfare to the exclusion of the states."].) Similarly, in a fourth case involving a state prosecution for forgery of federal income tax documents, "the defendant has not pointed to any actual conflict with federal law." (*State v. Radzvilowicz* (Conn.App.Ct. 1997) 703 A.2d 767, 788.)

In the two remaining cases relied on by the People, the defendants argued their state prosecutions were preempted by federal criminal statutes penalizing the same conduct. (*Carter v. Commonwealth* (Va.Ct.App. 1997) 492 S.E.2d 480, 480–481

[defendant convicted of cable television fraud; federal statute criminalized unauthorized reception of cable television service]; *State v. McMurry* (Ariz.Ct.App. 1995) 909 P.2d 1084, 1085–1086 [defendant convicted of forgery for possessing counterfeit $20 bills; federal statute criminalized possession of counterfeit tender].) Again, there was no indication of a Congressional purpose that would be hindered by the state prosecution; to the contrary, in both cases an express savings clause preserved the states' authority. (*Carter*, at pp. 481–482 [savings clause encompassed state laws " 'regarding the unauthorized interception or reception of any cable service,' " and the state law "stands not as an obstacle to the accomplishment and execution of the full objectives of Congress, but as a supplement"]; *McMurry*, at p. 1086 ["Nothing in the federal statutes regarding counterfeiting . . . indicates, much less expresses, an intent by the federal government to legislatively occupy the field as to the punishment of those who possess counterfeit tender, with an intent to defraud. In fact, 18 [United States Code section] 3231 declares a contrary intent by stating that '[n]othing in this title [18] shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.' "].)

Finally, the People rely on remarks by the bill's author that the bill "recognizes the limits of government and the fact that many of our worst social problems will never be solved by government alone." (Remarks of Sen. Coats, 144 Cong. Rec. S11868 (Oct. 8, 1998).) The People argue this indicates Congress's intent to delegate responsibility to the local level and "permits no implication" that state prosecutions of grantees could be preempted. However, the remark was not limited to the federal government, and appears to be directed at local government as well. Moreover, the sentence quoted by the People was immediately followed by: "We are beginning to recognize that there are people and institutions, families, churches, synagogues, parishes, community volunteer organizations, faith-based charities, that are able to communicate societal ideals and restore individual hope, and we need to allow those organizations to compete to provide services, and we have done so in each of the programs I have described." (*Ibid.*) The full statement thus underscores a Congressional understanding that the success of the AFI Act

depends on the willingness of organizations and entities to apply for AFI grants and become grantee organizations. The threat of state criminal prosecution could significantly dampen this willingness, thereby posing an obstacle to the objectives of the AFI Act. (See *Buckman, supra*, 531 U.S. at p. 350.)[12]

We conclude the prosecutions of counts 2 and 3 were preempted by federal law. We emphasize the narrowness of our holding, which is limited to state law liability for grantees' representations to HHS made pursuant to the AFI Act. This holding does not extend to criminal liability for conduct by savers participating in the AFI program. It also does not include theft prosecutions where an employee of the grantee took the federal AFI funds for their own personal use (a circumstance not alleged here), as such a prosecution would not arise from the relationship between the grantee and HHS as governed by federal law.

E. *Forfeiture of Preemption Claim as to Count 3*

Finally, we turn to the People's argument that appellants forfeited their preemption claim as to count 3. Appellants concede they raised this argument in the trial court only as to counts 1 and 2, but contend preemption is not forfeitable.

We need not decide whether appellants' preemption argument can be forfeited because we exercise our discretion to excuse any forfeiture. The issue is one of law and does not involve any disputed facts. (*People v. Rosas* (2010) 191 Cal.App.4th 107, 115 ["appellate courts regularly use their discretion to entertain issues not raised at the trial level when those issues involve only questions of law based on undisputed facts" (italics omitted)].) Moreover, the People were not prejudiced by any forfeiture: appellants preserved the identical claim as to other counts and the People point to no difference in

[12] The People also point to the AFI Act's section entitled "Local Control Over Demonstration Projects" (AFI Act, § 411), and argue it would be "incongruous to mandate local control but preclude local response to malfeasance." However, the local control referred to in the Act is the control of grantee organizations—not local government—and is expressly subject to HHS's sanction authority provided for in the Act. (AFI Act, § 411 ["A qualified entity [grantee] . . . shall, subject to the [sanctions provision of the Act], have sole authority over the administration of the project."].)

the analysis involving count 3. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 118 ["[T]o consider the [forfeited] claim entails no unfairness to the parties, who had an opportunity to litigate the relevant facts and to apply the relevant legal standard in the trial court [on a properly raised and effectively identical claim]. Nor does it impose any additional burden on us, as the reviewing court." (fn. omitted)].) Accordingly, we excuse any forfeiture on this issue as to count 3.

F. *Conclusion*

In sum, we find the prosecution of counts 2 and 3 preempted by federal law. We will reverse the convictions on those counts. This conclusion renders moot a number of appellants' additional arguments, which we need not and do not resolve. However, it does not impact Dillard's conviction on count 6, preparing false documentary evidence, and we consider Dillard's remaining arguments relevant to that count.

II. *Conflict of Interest*

Appellants argue the trial court erred in denying their motion asserting the district attorney's office had a conflict of interest. We affirm.

A. *Background*

In October 2011, the County submitted a claim under its crime insurance policy with AIG for the Agency's remaining liability to HHS of approximately $317,000 in AFI funds.

In February 2012, the Alameda County District Attorney filed criminal charges against appellants. At the November 2012 preliminary hearing, one of the witnesses was the interim executive director of the Agency appointed to oversee its dissolution after appellants' termination. During cross-examination, the witness testified that the County had filed a claim with its crime insurance policy for the AFI funds.

In March 2013, AIG sent a letter to the County with a "preliminary assessment" of the claim. The letter stated "it does not appear likely that the County will be able to establish that it has incurred an actual net loss covered under [the relevant policies] resulting directly from the alleged acts of Ms. Dillard. Any payment which the County might be required to make to the Federal Government is a return of funds to which it was

not otherwise entitled and thus . . . . an indirect loss, not covered under these insuring agreements." In addition, "our investigation thus far do[es] not show that [the Agency] suffered an actual net loss with respect to the use of the grant funds. . . . [T]he funds in question were used to fund the ongoing operations of [the Agency]. . . . Such losses are in the nature of bookkeeping losses that do not otherwise result in an actual net diminution of assets of the insured" and "accordingly are not generally covered under the [applicable policy]." AIG underscored, however, that it "has not reached a final conclusion" as to coverage. The People did not produce this letter to appellants.

In September 2013, counsel for Daniels sent a letter to the People asking for discovery of "[the Agency's] crime insurance policy and all documents related to any claims made on that policy." The People again did not produce the March 2013 AIG letter, subsequently representing they did not possess it, but appellants apparently obtained it through a third-party subpoena on the Agency's custodian of records (one of the constituent cities). Appellants claimed they did not receive the letter until after the start of trial, although before the presentation of evidence.

After the jury was sworn but before the presentation of evidence, Daniels filed a motion, later joined by Dillard, seeking dismissal of the charges due to prosecutorial misconduct of failing to produce the AIG letter.[13] Appellants argued the People intentionally failed to disclose the letter because it "demonstrates an unavoidable conflict of interest for the District Attorney," namely, that because the claim is still pending, the County "is trying this criminal case on a contingency basis . . . ." Although the AIG letter itself makes no reference to the then-pending criminal charges, Daniels's trial counsel represented that he spoke to an AIG representative who stated AIG was awaiting the outcome of the criminal trial. The motion continued: "Had defense counsel been timely provided with documentation demonstrating this obvious financial conflict of

[13] Appellants also argued the People's failure to disclose the AIG letter constituted a *Brady* violation because the letter was exculpatory. (*Brady v. Maryland* (1963) 373 U.S. 83.) They do not pursue this challenge on appeal.

interest, they would have filed a motion to recuse the district attorney in this case under [section] 1424 . . . . Due to the concealment of that information, however, it is impossible to substitute in new counsel after the start of trial." The motion cited no authority for the assertion that filing the recusal motion was now "impossible."

At the hearing on the motion, the trial court began by summarizing appellants' argument: "had the insurance records been timely provided, that they might well have demonstrated a conflict of interest on the part of the District Attorney, which would have grounded a motion pursuant to [section] 1424, to recuse, but which at this late date cannot be brought because I think basically jeopardy has already attached." Appellants agreed with this statement of the issue. Following argument, the trial court denied the motion to dismiss "for the reasons implied by my questioning in court." The court's questioning indicated its skepticism that the letter demonstrated a conflict of interest rendering it unlikely appellants would receive a fair trial.

B. *Legal Standard*

"[D]ismissal is an appropriate sanction for government misconduct that is egregious enough to prejudice a defendant's constitutional rights." (*People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, 446 (*Velasco-Palacios*).) Here, appellants argued below the alleged prosecutorial misconduct prevented them from filing a timely section 1424 motion to disqualify the district attorney. The trial court's denial appears to have rested on a conclusion that any section 1424 motion would not have been successful.

Section 1424 provides that a motion to disqualify a district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." "The statute demands a showing of a real, not merely apparent, potential for unfair treatment, and further requires that that potential 'rise to the level of a *likelihood* of unfairness.' [Citation.] Although the statute refers to a 'fair trial,' we have recognized that many of the prosecutor's critical discretionary choices are made before or after trial and have hence interpreted section 1424 as requiring recusal on a showing of a conflict of interest ' "so grave as to render it unlikely that defendant will receive fair treatment *during all portions of the criminal*

proceedings." ' [Citation.] [¶] On review of the trial court's denial of a recusal motion, '[o]ur role is to determine whether there is substantial evidence to support the [trial court's factual] findings [citation], and, based on those findings, whether the trial court abused its discretion in denying the motion.' " (*People v. Vasquez* (2006) 39 Cal.4th 47, 56 (*Vasquez*).)

C. *Analysis*

As an initial matter, appellants' argument on appeal suggests their motion below was a "recusal motion" which the trial court denied because it was untimely. Appellants argue this denial was in error because there is no time limit for filing a recusal motion. In fact, as set forth above, appellants filed a motion to *dismiss* in which *they* asserted that a disqualification motion would be untimely. The People argue appellants' failure to accurately characterize the proceedings below or to present appellate argument on prosecutorial misconduct (as opposed to conflict of interest) forfeits this issue. We need not decide whether any forfeiture occurred because, as we explain below, we affirm the trial court's ruling.

First, assuming (without deciding) the People's failure to produce the AIG letter was misconduct, appellants' argument on appeal refutes their claim of prejudice below. In the trial court, appellants argued they were prejudiced because the People's failure to provide the letter sooner precluded appellants from filing a timely section 1424 motion. On appeal, appellants argue there are no time limits in which such a motion must be filed. Because, according to appellants' own argument (on which we express no opinion), they were *not* precluded from filing a section 1424 motion after receiving the AIG letter, any prosecutorial misconduct in failing to provide the letter earlier did not cause prejudice.

Second, assuming that a section 1424 motion would have been untimely and that appellants have not forfeited this claim, dismissal is only appropriate if any prosecutorial misconduct prejudices appellants' constitutional rights. (See *Velasco-Palacios, supra*, 235 Cal.App.4th at p. 446.) The only prejudice relied on by appellants below was their purported inability to file a section 1424 motion to disqualify the district attorney. However, an inability to file a section 1424 motion—even assuming the motion would

have been granted—does not alone constitute a violation of constitutional rights. "[T]rial courts' statutory power under section 1424 . . . allow[s] recusal whenever a conflict creates a *likelihood* of unfair treatment. This standard serves to prevent potential constitutional violations from occurring. Thus, the failure to recuse when required under section 1424 may lead to the denial of a fair trial or other unfair treatment, but does not necessarily do so." (*Vasquez, supra,* 39 Cal.4th at p. 59.)

Finally, the trial court did not abuse its discretion in concluding that a section 1424 motion based on the AIG letter would be unsuccessful.[14] We note that the original charges against appellants were brought more than a year before the AIG letter issued and therefore any conflict of interest resulting from the letter could not exist at that time. Although, as appellants note, conflicts of interest can cause unfairness in other phases of criminal proceedings, appellants fail to identify any unfairness other than the fact of the prosecution itself, nor do they identify any changes in the prosecution's approach taking place after the letter issued. Moreover, it is unclear how the prosecution would impact AIG's coverage decision in light of the People's concession that they were not alleging appellants used AFI funds for their own personal use. Most significantly, appellants fail to provide authority that the potential for a criminal conviction to financially impact a *county* renders that county's *district attorney's office* conflicted. Cases involving the direct financial interest of a district attorney's office are inapposite. (See *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 51 ["giving a public prosecutor a direct pecuniary interest in the outcome of a case that he or she is prosecuting 'would render it unlikely that the defendant would receive a fair trial' "]; *People v. Eubanks* (1996) 14 Cal.4th 580, 595–596 ["a scheme that provides monetary rewards to a prosecutorial office might carry the potential impermissibly to skew a prosecutor's exercise of the charging and plea bargaining functions"]; *Eubanks,* at p. 598 [conflict of interest present

[14] Appellants contend our review is de novo because the trial court's ruling was based on a legal error, to wit, that the recusal motion was untimely. As explained above, we reject this characterization of the basis for the trial court's ruling.

where corporate crime victim paid a " 'substantial' " debt incurred by the district attorney in investigating the case].) Although a district attorney's budget may be impacted by a county's overall financial health, appellant cites no authority that such an attenuated impact can render it unlikely that a defendant will receive a fair trial. We affirm the trial court's denial of appellants' motion to dismiss.[15]

III. *Vindictive and Retributive Prosecution*

Appellants next argue the trial court erred by refusing to let them "submit evidence and argument to convince the jury that the prosecution was vindictive and retributive," in violation of their right to due process and a fair trial. We disagree.

During in limine motions, the People sought to exclude evidence of (1) the County's insurance claim, and (2) a lawsuit brought by Dillard against the County alleging her termination proceedings violated public meetings laws, and the parties' subsequent settlement. The People argued such evidence was irrelevant or, to the extent there was some relevance, should be excluded pursuant to Evidence Code section 352. The trial court denied the motion, finding both sets of evidence relevant "to establish bias, interest or motive of at least one or some of the witnesses." However, during argument on the motion, the court noted appellants "are alleging[] a discriminatory prosecution motion in the guise of what you wish to bring in front of a jury."

During trial, the court permitted testimony that Dillard sued the County, claiming her termination violated the Brown Act; that the lawsuit settled and pursuant to that settlement the County paid Dillard $219,000 plus $100,000 in attorney fees; that the County filed a claim for approximately $318,000 on its crime insurance policy based on HHS's disallowance of AFI funds; that AIG issued a "soft denial" of the claim; and that the Agency's member municipalities had not yet paid back the disallowed AFI funds because the repayment was "pending insurance claims." However, the court excluded

[15] Appellants also rely on evidence elicited at trial that they claim shows the district attorney "commenced this prosecution at the behest of Ms. Dillard's political enemies." This was not the basis of appellants' dismissal motion below and we decline to consider it.

under Evidence Code section 352 the settlement agreement for Dillard's termination lawsuit and the County's insurance claim form.[16] The court also sustained prosecution objections to statements during closing arguments about the civil settlement agreement and the People's motives in prosecuting the case. The court instructed the jury, in the course of sustaining these objections, that "the purpose of [evidence about the County's crime insurance claim] is for you to assess any bias that witnesses might have because of that outstanding crime insurance policy and for no other reason," and "[t]he reason why cases are filed are not a matter for your consideration."

Appellants argue the trial court's rulings violated their constitutional right to present evidence in their defense. Appellants' "attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive. 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." ' " (*People v. Boyette* (2002) 29 Cal.4th 381, 427–428.) Appellants also claim a violation of their right to present closing argument. "It is firmly established that a criminal defendant has a constitutional right to have counsel present closing argument to the trier of fact. [Citations.] Nonetheless, it is equally settled that a judge in a criminal case 'must be and is given great latitude in controlling the duration and limiting the scope of closing summations.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184.)

The trial court did not abuse its discretion in excluding evidence and limiting argument. "To be relevant, evidence must have some 'tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid.Code, § 210.)" (*People v. Contreras* (2013) 58 Cal.4th 123, 152.) Appellants argue the evidence was relevant to show the prosecution's motive in pursuing criminal charges. "[E]vidence of a prosecutor's subjective motivations when prosecuting a case is

[16] Although appellants claim the trial court also excluded the March 2013 AIG letter, the provided record cite does not support this claim. Because the March 2013 AIG letter does not appear on appellants' exhibit list, it appears appellants did not seek admission of this document at trial.

not relevant . . . ." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1329.) Appellants argue *Seumanu* involved a claim of prosecutorial vouching and is therefore inapplicable. We disagree. A prosecutor's subjective motivation is not relevant to any issue before the jury, regardless of which side tries to use it to their advantage.

Appellants contend prosecutorial motive is relevant for claims of vindictive or retaliatory prosecution, but such claims are properly argued to the court, not the jury—the basis for the claim is that vindictive prosecutions violate a defendant's constitutional rights, not that they constitute evidence of innocence. (See *People v. Valli* (2010) 187 Cal.App.4th 786, 802 ["The gravamen of a vindictive prosecution is the increase in charges or a new prosecution brought in retaliation for the exercise of constitutional rights. [Citation.] It is 'patently unconstitutional' to 'chill the assertion of constitutional rights by penalizing those who choose to exercise them.' "].) To the extent evidence regarding Dillard's lawsuit and the County's insurance claim were relevant to the jury's assessment of a witness's credibility, the court permitted the evidence and argument. In sum, the challenged rulings regarding evidence and argument were proper and did not violate appellants' constitutional rights.

IV. *Substantial Evidence (Count 6)*

Finally, Dillard argues the guilty verdict on count 6 (preparing false documentary evidence; § 134) lacks substantial evidence. We disagree.

Section 134 prohibits "preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law . . . ." Dillard concedes there is substantial evidence that she prepared two ante-dated documents: the agenda for the hotel meeting and the memorandum regarding the residential status of two CREW members. She argues there is no substantial evidence that she prepared either document with the intent that it be produced for any proceeding authorized by law or that she intended their production for a fraudulent or deceitful purpose.

First, Dillard prepared the ante-dated documents within two days after she was placed on administrative leave. Second, she asked her former assistant to place the ante-dated documents in the Agency's files. Third, when she asked her former assistant to send her the files regarding the CREW employees, she expressly stated her intent to "review them in order to prepare any defense I might need." This evidence, taken together, provides substantial evidence that Dillard prepared the documents with the intent that they be used in some proceeding involving her performance while employed at the Agency. That they were never so used is immaterial: "There is no requirement that the evidence actually be produced at all, only that the defendant intended it to be produced at any trial, proceeding, or inquiry, whatever, authorized by law." (*People v. Morrison* (2011) 191 Cal.App.4th 1551, 1556.)

As Dillard argues, the contemplated proceeding must be "authorized by law." (See *People v. Clark* (1977) 72 Cal.App.3d 80, 83–84 [administrative grievance board proceedings instituted pursuant to the Education Code are a " 'proceeding . . . authorized by law' " for purposes of § 134].) In closing arguments, the prosecution identified as possible proceedings a civil lawsuit filed by Dillard challenging any adverse employment action,[17] an investigation by the Board, and an audit. Dillard does not dispute that civil litigation challenging adverse employment action is a proceeding authorized by law, but argues the ante-dated documents were not relevant to the action she ultimately filed. Again, that the documents were not ultimately used is immaterial; there was substantial evidence for the jury to find that Dillard intended their use at the time she prepared them. With respect to an investigation or audit by the Board, Dillard argues there is no evidence such an inquiry was authorized by law or the Agency's by-laws. To the contrary, the

[17] We reject Dillard's suggestion that the prosecutor committed misconduct by suggesting during rebuttal argument that the documents were intended for use in Dillard's civil suit against the County. Dillard failed to object to the statement and has therefore forfeited the argument. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336 ["To preserve a claim of prosecutorial misconduct during argument, a defendant must contemporaneously object and seek a jury admonition."].)

Agency's joint powers agreement admitted into evidence at trial provides for an annual audit conducted by a certified public accountant "[p]ursuant to Section 6505 of the California Government Code . . . ." Government Code section 6505, subdivision (b), requires "an annual audit of the accounts and records of every agency or entity" created by a joint powers agreement. Such a proceeding is thus authorized by law.

Finally, the ante-dating of the documents provides substantial evidence that Dillard intended they be used for a fraudulent or deceitful purpose, namely, as documents purporting to record contemporaneous events. Substantial evidence supports the jury verdict on count 6.

DISPOSITION

Appellants' convictions on counts 2 and 3 are reversed. The matter is remanded to the trial court for resentencing. The judgments are otherwise affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A141998)

Superior Court of Alameda County, Nos. CH-53179A & CH-53179B, Hon. Allan Hymer, Judge.

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