

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1 KIRK B. LENHARD, ESQ.
Nevada Bar No. 1437
2 klenhard@bhfs.com
TAMARA BEATTY PETERSON, ESQ.
3 Nevada Bar No. 5218
tpeterson@bhfs.com
4 SCOTT M. SCHOENWALD, ESQ.
Nevada Bar No. 5484
5 sschoenwald@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
6 100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
7 Telephone: 702.382.2101
Facsimile: 702.382.8135
8 *Attorneys for Defendants City of Henderson, Nevada,*
Jutta Chambers, Garrett Poiner, Ronald Feola,
9 *Ramona Walls, Angela Walter, Christopher Worley,*
and Janette R. Reyes-Speer
10

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13 ANTHONY MITCHELL, LINDA
14 MITCHELL, and MICHAEL MITCHELL

15 Plaintiffs,

16 v.

17 CITY OF HENDERSON, NEVADA; JUTTA
CHAMBERS, individually and in her official
18 capacity as Chief of the Henderson Police
Department, GARRETT POINER, RONALD
19 FEOLA, RAMONA WALLS, ANGELA
WALKER, and CHRISTOPHER WORLEY,
20 individually and in their official capacities as
Henderson police officers; CITY OF NORTH
LAS VEGAS, NEVADA; JOSEPH
21 CHRONISTER, individually and in his official
capacity as Chief of the North Las Vegas
22 Police Department; MICHAEL WALLER,
DREW ALBERS, DAVID CAWTHORN,
23 ERIC ROCKWELL, AND /F/N/U SNYDER,
individually and in their official capacities as
24 North Las Vegas police officers; JANETTE R.
REYES-SPEER; DOE individuals 1-40, jointly
25 and severally; and ROE CORPORATIONS 1-
40 jointly and severally,
26

27 Defendants.
28

Case No.: 2:13-cv-01154-APG-CWH

**DEFENDANTS CITY OF
HENDERSON, NEVADA, JUTTA
CHAMBERS, GARRETT POINER,
RONALD FEOLA, RAMONA WALLS,
ANGELA WALTER, CHRISTOPHER
WORLEY, AND JANETTE R. REYES-
SPEER'S MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

**[MOTION FOR LEAVE TO FILE IN
EXCESS OF 30-PAGE LIMIT FILED
CONCURRENTLY HEREWITH]**

**[ORAL ARGUMENT REQUESTED
PURSUANT TO LR 78-2]**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION2

II. FACTUAL BACKGROUND AS ALLEGED BY PLAINTIFFS.3

III. LEGAL STANDARD7

IV. ARGUMENT10

 A. Plaintiffs' First Through Ninth Claims For Relief Based On Alleged
 Violations Of Civil Rights Under Section 1983 Are Barred By The
 Applicable Two-Year Statute Of Limitations.....10

 B. Plaintiffs' First Through Ninth Claims For Relief Should Be Dismissed To
 The Extent They Purport To State Claims Against "Doe" HENDERSON
 DEFENDANTS Because "Doe" Pleading Is Improper In Federal Court.....11

 C. Plaintiffs' First Claim For Relief For Violation Of Civil Rights Under
 Section 1983 For Retaliation For First Amendment Protected Expression
 Should Be Dismissed Because It Fails To State A Claim Against The
 HENDERSON DEFENDANTS13

 D. Plaintiffs' Ninth Claim For Relief For Violation Of Civil Rights Under
 Section 1983 For Malicious Prosecution Should Be Dismissed Because It
 Fails To State A Claim Against The HENDERSON DEFENDANTS14

 E. Plaintiffs' Tenth Claim For Relief For Violation Of Civil Rights Under
 Section 1983 Custom, Policy, And Practice Should Be Dismissed Because
 It Fails To State A Claim Against The HENDERSON DEFENDANTS As
 A Matter Of Law15

 1. Plaintiffs Have Failed To State A Claim Against The City Of
 Henderson For Municipal Liability Based On Monell v.
 Department of Social Services.....16

 2. Plaintiffs' Section 1983 Claim Against The HENDERSON
 DEFENDANTS Fails To State A Claim Because A Valid
 Constitutional Deprivation Has Not Been Alleged18

 a. Plaintiffs' Tenth Claim For Relief Fails To State A Section
 1983 Claim Based On Violations Of The Third Amendment19

 b. Plaintiffs' Tenth Claim For Relief Fails To State A Section
 1983 Claim Based On Violations Of The Fourteenth
 Amendment.....23

 (1) Plaintiffs' Tenth Claim For Relief Fails To State A
 Claim Under The Fourteenth Amendment As To
 LINDA MITCHELL.....24

 (2) Plaintiffs' Tenth Claim For Relief Fails To State A
 Claim Under The Fourteenth Amendment As To
 MICHAEL MITCHELL25

 (3) Plaintiffs' Tenth Claim For Relief Fails To State A
 Claim Under The Fourteenth Amendment As To
 ANTHONY MITCHELL26

BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 SEVENTEENTH STREET, SUITE 2200
DENVER, CO 80202-4432

TABLE OF CONTENTS
(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

c. Plaintiffs' Tenth Claim For Relief Fails To State A Section 1983 Claim Based On Violations Of The Fourth Amendment.....27

F. Plaintiffs' Eleventh Claim For Relief For Conspiracy To Violate Civil Rights Under 42 U.S.C. § 1985(3) Should Be Dismissed, As A Matter Of Law, Based On The Lack Of Subject Matter Jurisdiction And The Failure To State A Claim Upon Which Relief Can Be Granted Against The HENDERSON DEFENDANTS28

G. Plaintiffs' Twelfth Claim For Relief For Neglect To Prevent A Conspiracy To Violate Civil Rights Under 42 U.S.C. § 1986 Should Be Dismissed, As A Matter Of Law, Based On The Failure To State A Claim Upon Which Relief Can Be Granted Against The HENDERSON DEFENDANTS29

H. Plaintiffs' State Law Claims Against the HENDERSON DEFENDANTS Should be Dismissed Because They Plaintiffs Failed To Present These Claims As Required Under Nevada Law30

I. Plaintiffs' Failure To Serve Former HPD Police Chief CHAMBERS And HPD Officer WALLS Within 120 Days Of Filing Their Original Complaint Requires Dismissal Of All Claims Against Them32

J. Plaintiffs Have Also Failed To State A Section 1983 Claim Against Former Police Chief JUTTA CHAMBERS Because They Allege No Personal Involvement By Her In The Events On Which They Base Their First Amended Complaint33

K. Defendant HPD Officers CHAMBERS, POINER, FEOLA, WALLS, WALTER, And WORLEY Are Entitled To Qualified Immunity From Suit In Their Individual Capacities34

L. The Court Lacks Supplemental Jurisdiction Over Plaintiffs' Remaining State Law Claims (Plaintiffs' Thirteenth Through Twenty-Second Claims For Relief).....35

M. Defendant HPD Officers CHAMBERS, POINER, FEOLA, WALLS, WALTER, And WORLEY Are Entitled To Discretionary Immunity Under Nevada Law For All State Law Claims (Plaintiffs' Thirteenth Through Twenty-Second Claims For Relief)36

N. Plaintiffs' Seventeenth Claim For Relief For Negligent Infliction Of Emotional Distress Should Be Dismissed Because It Fails To State A Claim Against The HENDERSON DEFENDANTS37

O. Plaintiffs' Nineteenth Claim For Relief For Abuse Of Process Should Be Dismissed Because It Fails To State A Claim Against The HENDERSON DEFENDANTS38

P. Plaintiffs' Twenty-First Claim For Relief For Respondeat Superior Liability Should Be Dismissed Because It Fails To State A Claim Against The HENDERSON DEFENDANTS38

Q. Plaintiffs' Claims For Punitive Damages Should Be Dismissed As A Matter Of Law39

BROWNSTEIN HYATT FARBER SCHRECK, LLP
 410 SEVENTEENTH STREET, SUITE 2200
 DENVER, CO 80202-4432

TABLE OF CONTENTS

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

1.	The CITY OF HENDERSON, A Municipality, Is Immune To Punitive Damage Claims As A Matter Of Law	39
2.	The Individual HENDERSON DEFENDANTS, Including Officers CHAMBERS, POINER, FEOLA, WALLS, WALTER, And WORLEY And Deputy City Attorney REYES-SPEER, Are Immune From Plaintiffs' Punitive Damages Claim As A Matter Of Law	39
V.	CONCLUSION.....	40

BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 SEVENTEENTH STREET, SUITE 2200
DENVER, CO 80202-4432

TABLE OF AUTHORITIES

	Page
CASES	
1 <i>Albright v. Oliver</i> , 510 U.S. 266 (1994)	18
2 <i>Allen v. Scribner</i> , 812 F.2d 426, amended by 828 F.2d 1145 (9th Cir. 1987).....	13
3 <i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	passim
4 <i>Askins v. U.S. Dep't of Homeland Sec.</i> , No. 12-cv-2600 W(BLM), 2013 WL 1561546, at	
5 *4-5 (S.D. Cal. April 12, 2013)	14
6 <i>Atkinson v. Gurich</i> , 248 P.3d 356, 360 n. 22 (Okla. 2011).....	20
7 <i>Baker v. McCollan</i> , 443 U.S. 137 (1979)	24, 26
8 <i>Baker v. Racansky</i> , 887 F.2d 183 (9th Cir.1989).....	34
9 <i>Bell Atlantic Corporation v. Twombly</i> , 550 U.S. 544 (2007)	passim
10 <i>Blair v. Bethel Sch. Dist.</i> , 608 F.3d 540 (9th Cir. 2010).....	13
11 <i>Bolden v. City of Topeka</i> , 441 F.3d 1129 (10th Cir. 2006).....	32
12 <i>Bray v. Alexandria Women's Health Clinic</i> , 506 U.S. 263 (1993)	28
13 <i>Bryan v. Las Vegas Metro. Police Dep't</i> , 349 F.App'x 132 (9th Cir. 2009).....	39
14 <i>Cabrera v. City of Huntington Park</i> , 159 F.3d 374, 379 (9th Cir. 1998)	10
15 <i>Caldeira v. County of Kauai</i> , 866 F.2d 1175 (9th Cir. 1989).....	28, 29
16 <i>Carey v. Nev. Gaming Control Bd.</i> , 279 F.3d 873 (9th Cir. 2002).....	36, 37
17 <i>Carr v. Int'l Game Tech.</i> , 770 F. Supp. 2d 1080 (D. Nev. 2011)	32
18 <i>Castillo v. McFadden</i> , 399 F.3d 993 n.5 (9th Cir. 2004)	18
19 <i>Chachas v. City of Ely</i> , 615 F. Supp. 2d 1193 (D. Nev. 2009).....	10, 29
20 <i>Cholla Ready Mix, Inc. v. Civish</i> , 382 F.3d 969 (9th Cir. 2004).....	8
21 <i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	39
22 <i>Cnty. of Sacramento v. Lewis</i> , 523 U.S. 833 (1998).....	23
23 <i>Collins v. Cundy</i> , 603 F.2d 825 (10th Cir.1979)	24
24 <i>Craig v. United States</i> , 413 F.2d 854 (9th Cir. 1969).....	12
25 <i>Crippins v. Sav On Drug Stores</i> , 961 P.2d 761 (Nev. 1998).....	37
26 <i>Custer Cnty. Action Ass'n v. Garvey</i> , 256 F.3d 1024, 1043 (10th Cir. 2001).....	21
27 <i>Davis v. City of Ellensburg</i> , 869 F.2d 1230 (9th Cir. 1989).....	24
28 <i>Davis v. City of Las Vegas</i> , 478 F.3d 1048 (9th Cir. 2007).....	36, 37
<i>Davis v. Mason Cnty.</i> , 927 F.2d 1473 (9th Cir. 1991).....	17, 38
<i>Dougherty v. City of Covina</i> , 654 F.3d 892 (9th Cir. 2011).....	17
<i>Ellins v. City of Sierra Madre</i> , 710 F.3d 1049 (9th Cir. 2013).....	17
<i>Emmons v. McLaughlin</i> , 874 F.2d 351 (6th Cir. 1989)	24
<i>Engblom v. Carey</i> , 677 F.2d 957 (2d Cir. 1982)	20, 22
<i>Estate of Bennett v. Wainwright</i> , No. 06-28-P-S, 2007 WL 1576744 (D. Me. May 30,	
2007).....	20, 22
<i>Estate of Ford v. Ramirez-Palmer</i> , 301 F.3d 1043 (9th Cir. 2002).....	34
<i>Fayle v. Stapley</i> , 607 F.2d 858 (9th Cir. 1979).....	33
<i>Fifty Assoc. v. Prudential Ins. Co. of Am.</i> , 446 F.2d 1187 (9th Cir. 1970)	11
<i>Funderburk v. Williams</i> , No. 2:08-cv-0169-KJD-LRL, 2011 WL 835498, at *3 (D. Nev.	
2011).....	33
<i>Gillespie v. Civiletti</i> , 629 F.2d 637 (9th Cir. 1980)	11
<i>Gillette v. Delmore</i> , 979 F.2d 1342 (9th Cir.1992)	18
<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	27
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	13
<i>Graziose v. Am. Home Products Corp.</i> , 202 F.R.D. 638 (D. Nev. 2001).....	11
<i>Griffin v. Breckenridge</i> , 403 U.S. 88 (1971)	28
<i>Hartrim v. Las Vegas Metro. Police Dep't</i> , 2:11-cv-00003-RLH-PAL, 2011 WL 2690148	
(D. Nev. July 8, 2011)	31

TABLE OF AUTHORITIES
(continued)

	Page
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
	35
	24, 25, 26, 34
	23, 24, 25
	10
	15
	28
	33
	12
	33
	3
	38
	38
	34
	36
	15
	10, 29
	29
	16, 17, 18, 38
	23
	15
	24
	15
	34
	10, 11
	23, 26
	19
	18
	29
	20
	33
	11, 12
	13
	15
	34
	33
	11
	17
	11
	28, 29, 30
	35
	20
	24
	28
	31

BROWNSTEIN HYATT FARBER SCHRECK, LLP
 410 SEVENTEENTH STREET, SUITE 2200
 DENVER, CO 80202-4432

BROWNSTEIN HYATT FARBER SCHRECK, LLP
 410 SEVENTEENTH STREET, SUITE 2200
 DENVER, CO 80202-4432

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

28 U.S.C. § 1367(a) 35
 28 U.S.C. § 1367(c)(3) 35
 42 U.S.C. § 1983 2, 10, 16, 39
 42 U.S.C. § 1985(3) 28, 29
 42 U.S.C. § 1986 29
 Fed. R. Civ. P. 12(b)(1) 1
 Fed. R. Civ. P. 12(b)(5) 1
 Fed. R. Civ. P. 12(b)(6) 1
 Fed. R. Civ. P. 4 32
 Fed. R. Civ. P. 8 8
 NAC 41.100 30, 31
 Nev. Rev. Stat. § 11.190(4)(e) 10, 29
 Nev. Rev. Stat. § 41.031 36
 Nev. Rev. Stat. § 41.035(1) 39
 Nev. Rev. Stat. § 41.036(2) 30, 31
 Restatement (Second) of Torts § 908 (1979); W. Prosser, *Law of Torts*, at 9-10 (4th ed. 1971) 39

OTHER AUTHORITIES

James P. Rogers, *Third Amendment Protections in Domestic Disasters*, 17 Cornell J.L. & Pub. Pol'y 747 (2008) 19
 U.S. Const., amend IV 27
 U.S. Const., amend. III 19

1 Defendants CITY OF HENDERSON, NEVADA ("CITY OF HENDERSON"), JUTTA
2 CHAMBERS ("CHAMBERS"), GARRETT POINER ("POINER"), RONALD FEOLA
3 ("FEOLA"), RAMONA WALLS ("WALLS"), ANGELA WALTER ("WALTER"),
4 CHRISTOPHER WORLEY ("WORLEY"), and JANETTE R. REYES-SPEER ("REYES-
5 SPEER") (collectively the "HENDERSON DEFENDANTS") hereby move this Honorable Court
6 for an order dismissing Plaintiffs' First Amended Complaint with prejudice.¹ This Motion is
7 made and based on Federal Rules of Civil Procedure 12(b)(1), 12(b)(5), and 12(b)(6), the
8 following Memorandum of Points and Authorities, all pleadings, papers, and documents on file
9 with the Court in this action, such further documentary evidence as the Court deems appropriate,
10 and the oral arguments of counsel at any hearing on this Motion.

11 DATED this 12th day of November, 2013.

12 BROWNSTEIN HYATT FARBER SCHRECK, LLP

13
14 By: /s/ Tamara Beatty Peterson

KIRK B. LENHARD, ESQ.

Nevada Bar No. 1437

TAMARA BEATTY PETERSON, ESQ.

Nevada Bar No. 5218

SCOTT M. SCHOENWALD, ESQ.

Nevada Bar No. 5484

100 North City Parkway, Suite 1600

Las Vegas, Nevada 89106

Attorneys for Defendants

City of Henderson, Nevada, Jutta Chambers,

Garrett Poiner, Ronald Feola, Ramona Walls,

Angela Walter, Christopher Worley, and

Janette R. Reyes-Speer

15
16
17
18
19
20
21
22
23
24
25
26
27
28

¹ Plaintiffs erroneously named Defendant ANGELA WALTER as Angela Walker in the caption of their First Amended Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This case arises out of a police response to a high intensity domestic violence call in a neighborhood in the City of Henderson. Plaintiffs ANTHONY, LINDA, and MICHAEL MITCHELL have filed suit against the CITY OF HENDERSON, its former police chief, several officers of the Henderson Police Department ("HPD"), and a deputy city attorney, among others, asserting liability under 42 U.S.C. § 1983 ("Section 1983") and various state law theories. Plaintiffs essentially allege that they were innocent bystanders who resided near the incident and suffered injury as a result of the manner in which the police performed their duties. No matter how meticulously it reviews their First Amended Complaint, however, the Court will find that Plaintiffs have failed to state a claim for relief against any of the HENDERSON DEFENDANTS as a matter of law. Although Plaintiffs have filed a 48-page First Amended Complaint, they have not even attempted to satisfy the liberal pleading requirements of the Federal Rules of Civil Procedure in asserting their claims against the HENDERSON DEFENDANTS.

The only factual allegations in Plaintiffs' First Amended Complaint that purportedly relate to the HENDERSON DEFENDANTS are that HPD Officer WORLEY telephoned Plaintiff ANTHONY MITCHELL to ask his assistance because he resided near the suspect, that HPD Officer WORLEY somehow conspired against Plaintiff ANTHONY MITCHELL after he denied the request for assistance, that HPD Officers WORLEY and WALTER prepared false police reports that caused the issuance of criminal complaints against Plaintiffs ANTHONY and MICHAEL MITCHELL, and that Henderson Deputy City Attorney REYES-SPEER wrongfully filed criminal complaints against Plaintiffs ANTHONY and MICHAEL MITCHELL. Nothing more. On this basis alone, Plaintiffs' allegations are grossly inadequate to sustain their Section 1983 claims against the HENDERSON DEFENDANTS, which are the only federal claims alleged against them.

Plaintiffs have failed to state a claim against the HENDERSON DEFENDANTS, however, for at least *three* additional reasons. *First*, not only do Plaintiffs merely set forth conclusory allegations as to how the HENDERSON DEFENDANTS purportedly violated their

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1 federal constitutional rights, they fail to plead how such conduct was the product of a custom,
 2 practice, or policy of the CITY OF HENDERSON for Section 1983 purposes. *Second*, Plaintiffs
 3 overlook that Henderson Deputy City Attorney REYES-SPEER is entitled to absolute immunity
 4 for her alleged prosecutorial acts against them and that the HPD officers are entitled to both
 5 qualified and discretionary immunity from the asserted claims because they were all acting within
 6 the scope of their police duties. *Third*, Plaintiffs overlook that their own conduct suggested that
 7 they were aiding the suspect in resisting the police response. Thus, no matter how vociferously
 8 Plaintiffs may claim injury, they have plainly failed to state any federal claims against the
 9 HENDERSON DEFENDANTS as a matter of law.

10 Because Plaintiffs' federal claims warrant dismissal under these circumstances, the Court
 11 should likewise dismiss all asserted state law claims. The Court should decline to exercise
 12 supplemental jurisdiction over Plaintiffs' state law claims in the interests of judicial economy,
 13 convenience, and fairness. For these reasons, the HENDERSON DEFENDANTS respectfully
 14 submit that the Court should grant this motion and dismiss Plaintiffs' First Amended Complaint in
 15 its entirety.

16 **II. FACTUAL BACKGROUND AS ALLEGED BY PLAINTIFFS.**²

17 On the morning of July 10, 2011, officers of the Henderson Police Department ("HPD")
 18 responded to a domestic violence call on the street where Plaintiffs ANTHONY, MICHAEL, and
 19 LINDA MITCHELL resided in the CITY OF HENDERSON. *See* First Amended Complaint
 20 ("FAC"), ¶ 20, Court Docket No. 3. The home of the suspect was located at 363 Eveningside
 21 Avenue. *See id.* Plaintiff ANTHONY MITCHELL resided near the suspect at 367 Eveningside
 22 Avenue. *See id.*, ¶ 25. Plaintiffs MICHAEL MITCHELL and LINDA MITCHELL resided
 23 across the street from the suspect at 362 Eveningside Avenue. *See id.*, ¶¶ 21 and 25. Plaintiffs

24 _____
 25 ² The HENDERSON DEFENDANTS vehemently deny the allegations of Plaintiffs' First
 26 Amended Complaint. When ruling on a motion to dismiss, however, the Court must "accept all
 27 factual allegations in the complaint as true and construe the pleadings in the light most favorable
 28 to the nonmoving party." *See Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). It is solely
 on this basis that the HENDERSON DEFENDANTS set forth the erroneous "facts" as alleged by
 Plaintiffs. Even accepting such allegations as true for purposes of this motion to dismiss,
 Plaintiffs have failed to state a claim for relief against the HENDERSON DEFENDANTS as a
 matter of law.

1 assert no allegations regarding the specific nature of the domestic violence call or the threat posed
2 by the suspect.

3 Plaintiffs allege that, at the outset of the police response to the suspect's residence,
4 ANTHONY and MICHAEL MITCHELL contacted the suspect by telephone and took
5 photographs of the police activity from inside their homes to disseminate to the news media and
6 the public. *See id.*, ¶¶ 22, 28, 33, and 43. Plaintiffs acknowledge that ANTHONY MITCHELL
7 had ongoing telephone communications with the suspect as events unfolded on Eveningside
8 Avenue, "donned a protective ballistic vest," "yelled" at officers to "shut the siren off," gave an
9 officer "a hand gesture with his middle finger," and contacted Fox 5 Vegas KVVU. *See id.*, ¶¶
10 27, 36, 38-44. Plaintiffs further allege that ANTHONY MITCHELL called MICHAEL
11 MITCHELL several times to speak with him about the "escalating police activity on the street,"
12 and that the "Defendants" knew that ANTHONY MITCHELL was calling Fox 5 Vegas KVVU
13 and that ANTHONY and MICHAEL MITCHELL were taking photographs of the police activity
14 from inside their homes. *See id.*, ¶¶ 34 and 45. According to Plaintiffs, MICHAEL MITCHELL
15 even attempted to justify the suspect's conduct to police based on his own telephone
16 communications with him. *See id.*, ¶¶ 21, 22, 68.

17 Significantly, as alleged in the First Amended Complaint, the only interaction between
18 any of the HENDERSON DEFENDANTS and any of the Plaintiffs during the course of the
19 police response was a single telephone conversation between HPD Officer WORLEY and
20 Plaintiff ANTHONY MITCHELL that ended without incident. *See id.*, ¶ 35. HPD Officer
21 WORLEY allegedly contacted ANTHONY MITCHELL by telephone and advised him that
22 police needed to occupy his home for the purpose of gaining a tactical advantage over the suspect.
23 *See id.* Plaintiffs acknowledge that HPD Officer WORLEY ended the telephone call when
24 ANTHONY MITCHELL refused his request to leave the residence. *See id.* The First Amended
25 Complaint alleges no other contact between HPD Officer Worley and ANTHONY MITCHELL,
26 or any of the other HENDERSON DEFENDANTS and ANTHONY MITCHELL during the
27 police response.
28

1 Plaintiffs make the bare, conclusory allegation that HPD Officer WORLEY and several
2 officers of the NORTH LAS VEGAS POLICE DEPARTMENT ("NLVPD") thereafter
3 "conspired among themselves" to force ANTHONY MITCHELL out of his home and occupy it
4 "for their own use," but the First Amended Complaint sets forth no allegations that HPD Officer
5 Worley or any of the other HENDERSON DEFENDANTS acted in furtherance of this purported
6 conspiracy. *See id.*, ¶ 47. Rather, the First Amended Complaint alleges that five NLVPD officers
7 – and no HPD police officers – banged on ANTHONY MITCHELL'S door and commanded him
8 to open it. *See id.*, ¶ 48. ANTHONY MITCHELL responded by calling his mother, Plaintiff
9 LINDA MITCHELL, on the telephone and exclaiming to her that the police were beating on his
10 front door. *See id.*, ¶ 49. When ANTHONY MITCHELL refused to comply with the NLVPD
11 officers' commands to open the door, NLVPD officers and several unidentified "Doe" officers
12 allegedly entered his house, fired "pepperball" rounds at him, forcibly removed him from the
13 house, and searched the premises for an unspecified period of time. *See id.*, ¶¶ 50-61, 67.
14 Plaintiffs allege that ANTHONY MITCHELL was eventually arrested by one or more
15 unidentified officers. *See id.*, ¶¶ 63 and 64. Although Plaintiffs allege that ANTHONY
16 MITCHELL "was taken into custody" by HPD Officer WALTER a "short time later," they do not
17 allege that any HPD officers entered the house at 367 Eveningside Avenue to apprehend
18 ANTHONY MITCHELL, to search or occupy the residence, or for any other purpose. *See id.*, ¶
19 65.

20 The First Amended Complaint is equally devoid of allegations that the HENDERSON
21 DEFENDANTS had any interaction with Plaintiffs MICHAEL and LINDA MITCHELL.
22 Plaintiffs allege that, at approximately the same time that HPD Officer WORLEY contacted
23 ANTHONY MITCHELL by telephone, unidentified "Doe" officers entered the backyard of
24 Plaintiff MICHAEL and LINDA MITCHELL'S home at 362 Eveningside Avenue and asked
25 MICHAEL MITCHELL to accompany them to the "command center" to assist in negotiations
26 with the suspect. *See id.*, ¶ 68. MICHAEL MITCHELL agreed. *See id.* Although MICHAEL
27 MITCHELL left the command center when he was told that he could not call the suspect, he
28 returned when he was informed that his wife, Plaintiff LINDA MITCHELL, would meet him

1 there. *See id.*, ¶¶ 75 and 76. MICHAEL MITCHELL was arrested and detained by an
2 unidentified "Doe" officer when he again sought to leave the command center. *See id.*, ¶ 77.

3 In the early afternoon, at approximately 11:58 a.m., unidentified "Doe" officers allegedly
4 entered the backyard of Plaintiff MICHAEL and LINDA MITCHELL'S residence at 362
5 Eveningside Avenue, "banged" on the back door, and demanded that LINDA MITCHELL open
6 the door. *See id.*, ¶ 69. LINDA MITCHELL complied, and an unidentified "Doe" officer then
7 removed her from the house. *See id.*, ¶ 70. Another unidentified "Doe" officer escorted LINDA
8 MITCHELL toward the "Command Post" as other unidentified "Doe" officers "searched and
9 occupied" the house. *See id.*, ¶¶ 70-73. When LINDA MITCHELL subsequently returned to the
10 house, she found that the unidentified "Doe" officers had left cabinet doors, closet doors, the
11 refrigerator door, and a sliding glass door ajar, consumed water from the water dispenser, left
12 approximately 15 disposable plastic cups in the kitchen trashcan, and left mustard and
13 mayonnaise on the kitchen floor. *See id.*, ¶ 73. Plaintiffs further allege that unidentified "Doe"
14 officers searched trucks owned by ANTHONY and MICHAEL MITCHELL. *See id.*, ¶ 74.
15 Again, the First Amended Complaint includes no allegations that any of the HENDERSON
16 DEFENDANTS committed these alleged acts or the length of time that the unidentified "Doe"
17 officers remained inside the house or vehicles.

18 After Officer WORLEY concluded his telephone call with ANTHONY MITCHELL, the
19 only alleged contact between the HPD Defendants and Plaintiffs came following the arrest of
20 ANTHONY and MICHAEL MITCHELL. Plaintiffs allege that ANTHONY MITCHELL "was
21 taken into custody" by HPD Officer WALTER and that MICHAEL MITCHELL was arrested by
22 an unidentified "Doe" officer and placed in the back of an HPD vehicle. *See id.*, ¶¶ 65, 77, 81.
23 Without any alleged factual basis, Plaintiffs assert that Officers WORLEY and WALTER
24 prepared false police reports with the intent to use them to maliciously prosecute ANTHONY and
25 MICHAEL MITCHELL. *See id.*, ¶¶ 89 and 90. Both ANTHONY and MICHAEL MITCHELL
26 were transported to the Henderson Detention Center and booked on charges of obstructing an
27 officer. *See id.*, ¶ 83. Although Henderson Deputy City Attorney REYES-SPEER filed criminal
28

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1 complaints against ANTHONY and MICHAEL MITCHELL on or about July 13, 2011, the
2 charges were later dismissed with prejudice in early November 2011. *See id.*, ¶¶ 92-96.

3 Based on these allegations, Plaintiffs' First Amended Complaint is unsustainable as a
4 matter of law against the HENDERSON DEFENDANTS. The First Amended Complaint does
5 not allege, among other things, the following allegations necessary to support the asserted claims:

- 6 • That any of the HENDERSON DEFENDANTS had contact with ANTHONY
7 MITCHELL during the police response after HPD Officer WORLEY ended his
8 telephone call with him without incident.
- 9 • That any of the HENDERSON DEFENDANTS had contact with MICHAEL
10 MITCHELL at any time prior to his arrest.
- 11 • That any of the HENDERSON DEFENDANTS had contact with LINDA
12 MITCHELL at any time relevant to the First Amended Complaint.
- 13 • That any HPD officers entered ANTHONY MITCHELL'S home.
- 14 • That any HPD officers entered MICHAEL and LINDA MITCHELL'S home.
- 15 • That former Henderson Chief of Police JUTTA CHAMBERS was present at any
16 time relevant to the First Amended Complaint, had direct participation in the
17 alleged events, or had any knowledge of the events as they occurred.
- 18 • That Henderson Deputy City Attorney REYES-SPEER acted outside her
19 prosecutorial duties when she filed criminal complaints against ANTHONY and
20 MICHAEL MITCHELL.
- 21 • That no HPD officer, including Officers WORLEY and WALTER, had qualified
22 and/or discretionary immunity from suit for their alleged acts.

23 On this basis, the HENDERSON DEFENDANTS respectfully submit that the dismissal of
24 Plaintiffs' First Amended Complaint against them, with prejudice, is necessary and appropriate at
25 this time.

26 **III. LEGAL STANDARD.**

27 Although a court must accept all facts alleged in a complaint as true and construe them in
28 the light most favorable to the plaintiff when presented with a motion to dismiss, it "is not

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1 required to accept legal conclusions cast in the form of factual allegations if those conclusions
2 cannot be reasonably drawn from the facts alleged" or "to accept as true allegations that are
3 merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *See Cholla*
4 *Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). Recently, in *Ashcroft v. Iqbal*, 556
5 U.S. 662 (2009), and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), the United
6 States Supreme Court clarified the standard for evaluating whether the allegations of a complaint
7 are sufficient to survive a motion to dismiss in two ways that are pertinent here:

8 -- First, the Court held that the tenet that all allegations contained in a
9 complaint must be accepted as true is inapplicable to legal conclusions. *See*
10 *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678 ("[t]hreadbare recitals
11 of the elements of a cause of action, supported by mere conclusory statements, do
12 not suffice"). The liberal pleading standard established by Rule 8 of the Federal
13 Rules of Civil Procedure ("Rule 8") does not "unlock the doors of discovery for a
14 plaintiff armed with nothing more than conclusions." *See Iqbal*, 556 U.S. at 678.

15 -- Second, the Court determined that only a complaint that states a
16 "plausible claim for relief" may survive a motion to dismiss. *See id.* at 679.
17 Where the alleged facts "do not permit the court to infer more than the mere
18 possibility of misconduct, the complaint has alleged – but it has not shown – that
19 the pleader is entitled to relief." *Id.* at 679 (internal quotations omitted). Rule 8
20 "does not require 'detailed factual allegations,' but it demands more than an
21 unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678. A
22 pleading therefore is "plausible" only where the court may draw the reasonable
23 inference that the defendant is liable for the misconduct alleged. *See id.*

24 The Supreme Court's application of these principles under the facts presented in *Iqbal*, a
25 constitutional discrimination case, is particularly instructive here given the nature of Plaintiffs'
26 allegations against the HENDERSON DEFENDANTS, which merely consist of legal conclusions
27 that fail to state a plausible claim for relief.

28

1 The federal government arrested Iqbal, a Pakistani Muslim, and detained him under
2 restrictive conditions. *See Iqbal*, 555 U.S. at 667-78. Iqbal's complaint alleged that the Attorney
3 General of the United States and the Director of the Federal Bureau of Investigations designated
4 him a person of high interest on account of his race, religion, or national origin in violation of his
5 First and Fifth Amendment rights. *See id.* In disposing of Iqbal's complaint, the Court identified
6 several of his allegations that were not entitled to an "assumption of truth," including that:

7 (1) "[P]etitioners 'knew of, condoned, and willfully and maliciously
8 agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy,
9 solely on account of [his] religion, race and/or natural origin and for no legitimate
10 penological interest,'" [*Id.* at 680]; and

11 (2) "Ashcroft was the 'principal architect' of this invidious policy" and
12 "Mueller was 'instrumental' in adopting and executing it." *Id.* at 680-81 (citations
13 omitted).

14 The Court held that these allegations were conclusory, and established no basis for relief, because
15 they were nothing more than "a formulaic recitation of the elements' of a constitutional
16 discrimination claim, namely that petitioners adopted a policy 'because of,' not merely 'in spite of,'
17 its adverse effects upon an identifiable group." *Id.* at 681 (quoting *Twombly*, 550 U.S. at 554-55).
18 The Court explained that "the conclusory nature of respondent's allegations, rather than their
19 extravagantly fanciful nature ... disentitle[d] them to the presumption of truth." *Id.*

20 The Court then considered the well-pleaded factual allegations of the complaint to
21 determine whether they plausibly suggested an entitlement to relief, and found them lacking. *See*
22 *id.* While the allegations were consistent with a theory of discrimination, the Court concluded
23 that they did not plausibly establish that Iqbal's designation as a person of high interest had an
24 unconstitutional discriminatory purpose. *See id.* at 681. The Court observed that, "even if the
25 complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the
26 result of unconstitutional discrimination, that inference alone would not entitle respondent to
27 relief." *Id.* at 682. In dismissing Iqbal's claims, the Court explained that to prevail under a
28 Section 1983 claim, the complaint would have had to include "*facts plausibly showing* that

1 [defendants] purposefully adopted a policy classifying post-September-11 detainees as 'of high
2 interest' because of their race, religion or national origin," and it failed to do so. *See id.* at 682
3 (emphasis added); *see also See Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012) ("[t]he
4 absence of specifics is significant because, to establish individual liability under 42 U.S.C.
5 § 1983, a plaintiff must plead that each Government-official defendant, through the official's own
6 individual actions, has violated the Constitution").

7 These fundamental principles compel the conclusion that Plaintiffs' claims against the
8 HENDERSON DEFENDANTS are legally unsustainable. As in *Iqbal*, Plaintiffs have not stated
9 a plausible claim for relief against any of the HENDERSON DEFENDANTS as a matter of law.
10 Plaintiffs' First Amended Complaint therefore warrants dismissal in its entirety.

11 **IV. ARGUMENT.**

12 **A. Plaintiffs' First Through Ninth Claims For Relief Based On Alleged** 13 **Violations Of Civil Rights Under Section 1983 Are Barred By The Applicable** 14 **Two-Year Statute Of Limitations.**

15 It is well-settled that state statutes of limitations applicable to personal injury actions
16 establish the statute of limitations for claims made under Section 1983. *See McDougal v. Cnty. of*
17 *Imperial*, 942 F.2d 668, 672 (9th Cir. 1991). When a state has "multiple statutes of limitations for
18 various types of personal injury claims, the residual statute of limitations for personal injury
19 actions is to be applied." *See Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989). The residual
20 statute of limitations for personal injury claims in Nevada is the two-year statute of limitations
21 established by Nev. Rev. Stat. § 11.190(4)(e). *See id.* Thus, in Nevada, "the statute of limitations
22 for claims brought pursuant to § 1983 is two years." *See Chachas v. City of Ely*, 615 F. Supp. 2d
23 1193, 1202-03 (D. Nev. 2009).

24 Under federal law, a claim generally accrues under Section 1983 when the plaintiff
25 "knows or has reason to know of the injury which is the basis of the action." *See Cabrera v. City*
26 *of Huntington Park*, 159 F.3d 374, 379 (9th Cir. 1998). According to the allegations of the First
27 Amended Complaint, Plaintiffs' First through Ninth Claims for Relief accrued on July 10, 2011
28 because Plaintiffs plainly knew or had reason to know of their purported injuries as of that date,
which is the only date on which the events underlying these claims occurred. *See FAC*, ¶ 20.

1 Plaintiffs asserted these claims for the first time, however, when they filed the First Amended
 2 Complaint on October 14, 2013. *See id.* at 1. Given that Plaintiffs asserted these claims more
 3 than two years after they accrued, the applicable statute of limitations bars them as a matter of
 4 law. The Court therefore should dismiss, with prejudice, Plaintiffs' First through Ninth claims for
 5 Relief on this basis alone.³ *See Perez*, 869 F.2d at 426; *see also Taylor v. Regents of Univ. of*
 6 *Cal.*, 993 F.2d 710, 711 (9th Cir. 1993) (affirming dismissal of Section 1983 claims based on
 7 statute of limitations).

8 **B. Plaintiffs' First Through Ninth Claims For Relief Should Be Dismissed To**
 9 **The Extent They Purport To State Claims Against "Doe" HENDERSON**
 10 **DEFENDANTS Because "Doe" Pleading Is Improper In Federal Court.**

11 The use of "Doe" pleading is disfavored in federal court. *See Gillespie v. Civiletti*, 629
 12 F.2d 637, 642 (9th Cir. 1980); *see also Tolefree v. Ritz*, 382 F.2d 566, 567 (9th Cir. 1967)
 13 (dismissing Doe defendants and noting that Plaintiffs have other procedural remedies to name
 14 additional persons). In federal courts, "'John Doe' casts no magical spell." *See Fifty Assoc. v.*
 15 *Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1191 (9th Cir. 1970). This is so because "[t]here is no
 16 provision in the Federal Statutes or the Federal Rules of Civil Procedure for use of fictitious
 17 parties." *Id.* "If there are unknown persons or entities, whose role is known, that fact should be
 18 expressed in the complaint, but it is unnecessary and improper to include 'Doe' parties in the
 19 pleadings." *Graziose v. Am. Home Products Corp.*, 202 F.R.D. 638, 643 (D. Nev. 2001).

20 The Ninth Circuit has long recognized that "John Doe complaints are dangerous at any
 21 time." *See Sigurdson v. Del Guercio*, 241 F.2d 480, 482 (9th Cir. 1956). The plaintiffs there
 22 named John Doe and Richard Roe, describing them merely as "officers of the United States
 23 Immigration and Naturalization Services." *Id.* Affirming the dismissal entered by the district
 24 court, the Ninth Circuit explained with regard to John Doe complaints that "[i]t is inviting disaster

25 _____
 26 ³ In addition, Plaintiffs' claims based on the Third, Fourth, Fifth, and Fourteenth
 27 Amendments are unsustainable for the reasons set forth *infra* at Section IV(e)(2)(a) (Third
 28 Amendment – Seventh Claim for Relief); Section IV(e)(2)(b) (Fourteenth Amendment – Second
 through Ninth Claims for Relief); Section IV(e)(2)(c) (Fourth Amendment – Second, Third,
 Fourth, Fifth, Sixth, Eighth, and Ninth Claims for Relief); and n.4 (Fifth Amendment – Eighth
 and Ninth Claims for Relief).

1 to allow them to be filed and to allow fictitious persons to remain defendants if the complaint is
2 still of record." *Id.*

3 Here, Plaintiffs improperly purport to sue "Doe" defendants, broadly described as "police
4 officers, employees, agents, contractors and/or servants of CITY OF HENDERSON," and more
5 specifically characterized as "state police officers, sergeants, lieutenants, captains, commanders,
6 deputy chiefs and/or civilian employee agents, policy makers and representatives of HPD
7 [Henderson Police Department]." *See* FAC, ¶¶ 15-18. Not only are several of their claims (*i.e.*,
8 the Fourth through Seventh Claims for Relief) asserted only against Doe defendants, Plaintiffs
9 seek to maintain their First, Second, Third, Eighth, and Ninth Claims for Relief at least in part
10 against Doe Defendants. Plaintiffs do not directly name any of the HENDERSON
11 DEFENDANTS as parties to their Second through Eighth Claims for Relief, but rather are
12 apparently relying on "Doe" pleading to maintain these claims against the HENDERSON
13 DEFENDANTS. The use of Doe pleading in this manner provides the HENDERSON
14 DEFENDANTS with no meaningful notice, assuming Plaintiffs are even purporting to assert
15 these claims against the HENDERSON DEFENDANTS, because Plaintiffs' expansive definition
16 could conceivably include any employee of the CITY OF HENDERSON. Every employee is a
17 representative of the City in some respect. The Court therefore should preclude Plaintiffs from
18 maintaining broad and generalized allegations that the "actions" of "Doe" or "Roe" defendants
19 "proximately resulted in the physical, emotional, and future damages to" them. *See id.*, ¶ 18.

20 Under these circumstances, allowing the "Doe" and "Roe" defendants to remain parties to
21 this action would run directly contrary to federal court policy, and accordingly the principles
22 articulated in *Iqbal* and *Twombly*. *See Craig v. United States*, 413 F.2d 854, 856 (9th Cir. 1969);
23 *see also Keller v. United States*, 667 F. Supp. 1351, 1356, fn. 9 (S.D. Cal. 1987) ("[t]here is a
24 strong federal policy against naming fictitious defendants in the pleadings"); *see also Iqbal*, 556
25 U.S. at 662; *Twombly*, 550 U.S. at 544. Based on these well-settled principles, the Court should
26 dismiss all "Doe" and "Roe" defendants from this action along with all claims (*i.e.*, Plaintiffs'
27 Fourth through Seventh Claims for Relief) in which Plaintiffs have purported to sue only "Doe"
28 or "Roe" defendants.

1 **C. Plaintiffs' First Claim For Relief For Violation Of Civil Rights Under Section**
 2 **1983 For Retaliation For First Amendment Protected Expression Should Be**
 3 **Dismissed Because It Fails To State A Claim Against The HENDERSON**
 4 **DEFENDANTS.**

5 Plaintiffs' First Claim for Relief is unsustainable as a matter of law because Plaintiffs are
 6 unable to state a Section 1983 claim for wrongful retaliation under the First Amendment of the
 7 United States Constitution. To recover on a claim of this nature, a plaintiff must plead and prove
 8 that: "(1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to
 9 adverse action by the defendant that would chill a person of ordinary firmness from continuing to
 10 engage in the protected activity; and (3) there was a substantial causal relationship between the
 11 constitutionally protected activity and the adverse action." *See Blair v. Bethel Sch. Dist.*, 608
 12 F.3d 540, 543 (9th Cir. 2010). Plaintiffs cannot establish any of the elements of such a claim
 13 because taking photographs of police responding to a domestic violence call that exposes officers
 14 and the public to substantial danger does not constitute constitutionally protected speech.⁴ *See,*
 15 *e.g., Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

16 The freedoms guaranteed by the First Amendment are not without limitation. It is well-
 17 settled that "even speech dealing with matters of public concern is subject to government
 18 regulation." *See Allen v. Scribner*, 812 F.2d 426, 432 (9th Cir.), *amended by* 828 F.2d 1145 (9th
 19 Cir. 1987). Reasonable time, place, and manner regulations on the exercise of First Amendment
 20 rights "may be necessary to further significant governmental interests, and are permitted." *See*
 21 *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *see also Smith*, 212 F.3d at 1333 (the
 22 photographing and videotaping of police conduct is "subject to reasonable time, manner and place
 23 restrictions"). Consistent with this principle, photographing officers engaged in sensitive
 24 government operations is not within the scope of the First Amendment. *See Askins v. U.S. Dep't*
 25 *of Homeland Sec.*, No. 12-cv-2600 W(BLM), 2013 WL 1561546, at *4-5 (S.D. Cal. April 12,

26 ⁴ Plaintiffs allege that ANTHONY MITCHELL engaged in a variety of activities which
 27 they claim were protected under the First Amendment, including expressions of what "he
 28 believed were his legal rights," "giving" police officers "the middle finger gesture and expressing
 his disapproval of the officer's conduct," and "yelling" to police officers to "shut the siren off and
 expressing his disapproval of the conduct of the officers." *See* FAC, ¶¶ 110-112. Plaintiffs do
 not allege, however, that the HENDERSON DEFENDANTS took any retaliatory actions in
 response to these activities. *See id.*, ¶¶ 105-118.

1 2013) (finding no First Amendment right to photograph border patrol officers in the discharge of
 2 their duties had been established, "especially in light of the sensitive nature of CBP operations
 3 and its responsibility for national security and secure borders"). It is clear from the allegations of
 4 the First Amended Complaint that Plaintiffs were taking the photographs while the police
 5 operation was still in progress, that Plaintiffs were communicating with the suspect, and that
 6 Plaintiffs' stated purpose for taking the photographs was to disseminate photographs of the police
 7 operations and movements so that they could be broadcast while the standoff was still in progress.
 8 There was a clear danger that the photographs taken would be used in a manner that would
 9 undermine the police response and endanger the lives of officers and the public. Under the
 10 circumstances, the First Amendment did not protect Plaintiffs' conduct.

11 Even assuming arguendo that ANTHONY and MICHAEL MITCHELL had been engaged
 12 in activities protected by the First Amendment, Plaintiffs have failed to plead any of the other
 13 required elements necessary to establish the claim. Plaintiffs allege that the HENDERSON
 14 DEFENDANTS acted "with the intent to intimidate, chill and silence Plaintiffs from
 15 photographing police misconduct and disseminating it to the public and news media," but
 16 nowhere do they allege that the HENDERSON DEFENDANTS knew that Plaintiffs' purpose in
 17 taking such photographs was to disseminate them to the news media and the public in the exercise
 18 of their First Amendment rights. *See* FAC, ¶ 114, at 23:4-13. In other words, Plaintiffs have not
 19 set forth any factual basis for their conclusory allegation that the HENDERSON DEFENDANTS
 20 acted to deter them from continuing to engage in an activity protected by the First Amendment.
 21 The allegation is also conclusory and speculative, and thus cannot be taken as true on a motion to
 22 dismiss. Plaintiffs have failed to allege facts which would support all of the necessary elements
 23 of their First Claim for Relief and it should be dismissed.

24 **D. Plaintiffs' Ninth Claim For Relief For Violation Of Civil Rights Under**
 25 **Section 1983 For Malicious Prosecution Should Be Dismissed Because It Fails**
 26 **To State A Claim Against The HENDERSON DEFENDANTS.**

27 Fundamental immunity principles preclude Plaintiffs' attempt to maintain a Section 1983
 28 malicious prosecution claim against Henderson Deputy City Attorney Reyes-Speer as well as
 HPD Officers WALTER and WORLEY. The United States Supreme Court has long recognized

1 that a prosecutor enjoys *absolute immunity* under Section 1983 when acting within the scope of
 2 his or her prosecutorial duties. *See Imbler v. Pachtman*, 424 U.S. 409, 420-29 (1976); *see also id.*
 3 at 431 ("in initiating a prosecution and in presenting the State's case, the prosecutor is immune
 4 from a civil suit for damages under § 1983"). The sole basis for Plaintiffs' Section 1983
 5 malicious prosecution claim against Henderson Deputy City Attorney REYES-SPEER are
 6 prosecutorial acts for which she indisputably has absolute immunity from suit – the filing of
 7 criminal complaints. *See* FAC, ¶ 173. This claim against Defendant REYES-SPEER should be
 8 summarily dismissed premised on absolute prosecutorial immunity. *See McCarthy v. Mayo*, 827
 9 F.2d 1310, 1314 (9th Cir. 1987); *Peace v. Baker*, 697 F. Supp. 1145, 1147 (D. Nev. 1988).

10 Equally unsustainable is Plaintiffs' Section 1983 malicious prosecution claim against
 11 Defendant Officers WALTER and WORLEY. Once Deputy City Attorney REYES-SPEER
 12 exercised her independent judgment to file criminal complaints against Plaintiffs ANTHONY and
 13 MICHAEL MITCHELL, WALTER and WORLEY became immune from Section 1983 liability
 14 arising out of the arrest. *See Newman v. Cnty. of Orange*, 457 F.3d 991, 993 (9th Cir. 2006)
 15 ("[w]e have long recognized that '[f]iling a criminal complaint immunizes investigating officers . .
 16 . from damages suffered thereafter because it is presumed that the prosecutor filing the complaint
 17 exercised independent judgment in determining that probable cause for an accused arrest exists at
 18 that time'" (omissions supplied by court). Plaintiffs cannot sustain a malicious prosecution claim
 19 where, as here, they assert nothing more than a version of events that conflicts with the account of
 20 the officers involved. *See id.* at 995-96. Thus, Plaintiffs' Ninth Claim for Relief should be
 21 dismissed, in its entirety, as to all of the HENDERSON DEFENDANTS.

22 E. **Plaintiffs' Tenth Claim For Relief For Violation Of Civil Rights Under**
 23 **Section 1983 Custom, Policy, And Practice Should Be Dismissed Because It**
 24 **Fails To State A Claim Against The HENDERSON DEFENDANTS As A**
Matter Of Law.

25 When there has been no constitutional deprivation as a result of a municipal custom,
 26 practice, or policy, a municipality is not subject to Section 1983 liability as a matter of law.
 27 Plaintiffs' Tenth Claim for Relief is legally unsustainable because no constitutional deprivation
 28 has been stated against any CITY OF HENDERSON employee. Plaintiffs do not identify even a

1 single action taken by any of CITY OF HENDERSON employee pursuant to a custom, policy, or
 2 practice of the CITY OF HENDERSON that has resulted in a constitutional tort. The Court
 3 therefore should summarily dismiss this claim, along with the other claims set forth in the First
 4 Amended Complaint, as a matter of law.

5 **1. Plaintiffs Have Failed To State A Claim Against The City Of**
 6 **Henderson For Municipal Liability Based On *Monell v. Department of***
 7 ***Social Services*.**

8 In *Monell v. Dep't of Social Services*, 436 U.S. 658, 690-91 (1978), the United States
 9 Supreme Court held that a municipality may only be subject to liability under Section 1983 when
 10 its custom, practice, or policy is the *moving force*, in causing the claimed constitutional
 11 deprivation. Stated otherwise, it is only when the "execution of the government's policy or
 12 custom ... inflicts the injury" that a municipality may be held liable under Section 1983. *See id.* at
 13 694. Section 1983 provides in relevant part:

14 Every person who, under color of any statute, ordinance, regulation, custom, or
 15 usage, of any State or Territory or the District of Columbia, subjects, or causes to
 16 be subjected, any citizen ... to the deprivation of any rights, privileges, or
 17 immunities secured by the Constitution and laws, shall be liable to the party
 18 injured in an action at law, suit in equity, or other proper proceeding for redress ...

19 *See* 42 U.S.C. § 1983 (emphasis added). The Supreme Court held in *Monell* that the plain
 20 language and legislative history of Section 1983 are clear that Congress did not intend for
 21 municipalities, like the CITY OF HENDERSON, "to be held liable unless action pursuant to
 22 official municipal policy ... caused a constitutional tort." *See Monell*, 436 U.S. 658, 691
 23 (emphasis added).

24 In determining whether official municipal policy is the cause of a constitutional tort, "it is
 25 not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the
 26 municipality." *See Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997).
 27 Rather, *Monell* is explicit that it is only when the "execution of a government's policy or custom,
 28 whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent
 official policy, *inflicts the injury* that the government as an entity is responsible under § 1983."
See Monell, 436 U.S. at 694 (emphasis added).

1 Consistent with *Monell*, the Ninth Circuit has held that "municipalities are subject to
2 damages under § 1983 in three situations: when the plaintiff was injured pursuant to an expressly
3 adopted official policy, a long-standing practice or custom, or the decision of a 'final
4 policymaker.'" *See Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013). To
5 establish the liability of a governmental entity under *Monell* pursuant to a theory that an official
6 policy, practice, and/or custom was the basis for the constitutional tort, Plaintiffs must allege:

7 (1) that [the plaintiff] possessed a constitutional right of which [s]he was
8 deprived; (2) that the municipality had a policy; (3) that this policy amounts to
9 deliberate indifference to the plaintiff's constitutional right; and, (4) that the
policy is the moving force behind the constitutional violation.

10 *See Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (internal quotation marks and
11 citation omitted; alterations in original)).

12 Plaintiffs have failed to state a claim pursuant to *Monell*, and the Plaintiffs' Tenth Claim
13 for Relief should be dismissed. Significantly, nowhere do Plaintiffs allege that a purported
14 custom, practice, or policy of the CITY OF HENDERSON was the "moving force" behind the
15 constitutional violations alleged by them. Also, it is well-settled that, where plaintiffs allege
16 municipal liability under *Monell*, formulaic recitations of a cause of action are inadequate and
17 therefore should be dismissed. *See Dougherty*, 654 F.3d at 900-01 (dismissing § 1983 claims
18 where plaintiffs' claims lacked any factual allegations regarding key elements of *Monell*). Here,
19 in merely alleging that the CITY OF HENDERSON developed and maintained "policies and/or
20 customs," Plaintiffs could not have been more formulaic in their pleading. *See FAC*, ¶ 180.

21 Finally, *Monell* bars Plaintiffs' Tenth Claim for Relief to the extent recovery is sought
22 under Section 1983 on a theory of respondeat superior liability. *See FAC*, ¶¶ 257-61. It is well-
23 settled that a municipality is not subject to Section 1983 liability for the acts of its employees
24 under a respondeat superior theory. *See Monell*, 436 U.S. at 691; *see also Davis v. Mason Cnty.*,
25 927 F.2d 1473, 1480 (9th Cir. 1991); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th
26 Cir.1989). In other words, "a municipality cannot be held liable solely because it employs a
27 tortfeasor." *See Monell*, 436 U.S. at 691 (italics deleted). The local government "itself must
28 cause the constitutional deprivation." *See Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th

1 Cir.1992). Because *Monell* expressly precludes Plaintiffs' claim that the CITY OF
 2 HENDERSON may bear liability for the "tortious acts of [its] agents and employees," dismissal is
 3 warranted on this additional basis. See FAC, ¶ 258.

4 In sum, Plaintiffs' First Amended Complaint fails to satisfy *Monell* because it lacks
 5 allegations: (1) as to how Plaintiffs' asserted constitutional injuries were the result of a custom,
 6 practice, or policy of the CITY OF HENDERSON; and (2) that a custom, practice, or policy of
 7 the CITY OF HENDERSON was the "moving force" behind the alleged constitutional
 8 deprivations. Given that Plaintiffs cannot satisfy the rigorous culpability and causation elements
 9 necessary to establish liability against the CITY OF HENDERSON under *Monell*, Plaintiffs'
 10 Tenth Claim for Relief should be dismissed as a matter of law.

11 **2. Plaintiffs' Section 1983 Claim Against The HENDERSON**
 12 **DEFENDANTS Fails To State A Claim Because A Valid**
 13 **Constitutional Deprivation Has Not Been Alleged.**

14 "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method
 15 for vindicating federal rights elsewhere conferred.'" See *Albright v. Oliver*, 510 U.S. 266, 271
 16 (1994). The first step in evaluating a claim under Section 1983 is to identify the constitutional
 17 right allegedly infringed. See *id.* The scant allegations against the HENDERSON
 18 DEFENDANTS in the First Amended Complaint demonstrate that no constitutional right of any
 19 kind has been infringed by them HENDERSON DEFENDANTS in this case.

20 Because of their conclusory nature, Plaintiffs' allegations are "not entitled to be assumed
 21 true." See *Iqbal*, 556 U.S. at 681. Most notably, Plaintiffs provide no factual allegations which
 22 support a Section 1983 claim against the HENDERSON DEFENDANTS, individually or
 23 collectively, which would establish any violation of their rights guaranteed by the United States
 24 Constitution.⁵ See *id.* at 678. To support their Tenth Claim for Relief, Plaintiffs plead that, "prior

25 ⁵ Plaintiffs' reliance on the Fifth Amendment is misplaced. See FAC, ¶¶ 1 and 19. The
 26 Fifth Amendment applies only to actions of the federal government. See *Rini v. Zwirn*, 886 F.
 27 Supp. 270, 289 (E.D.N.Y. 1995) ("[a]s the plaintiffs have not alleged any acts by the federal
 28 government, or an act by any defendant associated with the federal government, the plaintiffs'
 Fifth Amendment § 1983 claim must be stricken"); see also *Castillo v. McFadden*, 399 F.3d 993,
 1002 n.5 (9th Cir. 2004) ("[t]he Fifth Amendment prohibits the federal government from
 depriving persons of due process").

1 to the events of June 10th, 2011," the CITY OF HENDERSON "developed and maintained
 2 policies and/or customs exhibiting deliberate indifference to the Constitutional rights of United
 3 States Citizens" and that actions by the HENDERSON DEFENDANTS "resulted from and were
 4 taken from a de facto policy" to violate a variety of constitutional rights.⁶ See FAC, ¶¶ 180 and
 5 181. These bare, conclusory allegations plainly constitute nothing more than a formulaic
 6 recitation of a constitutional deprivation that is insufficient to sustain a Section 1983 claim as a
 7 matter of law. See *Iqbal*, 556 U.S. at 681.

8 **a. Plaintiffs' Tenth Claim For Relief Fails To State A Section 1983**
 9 **Claim Based On Violations Of The Third Amendment.**

10 Plaintiffs' failure to plead their claims in conformance with the plausibility standard
 11 articulated in *Iqbal* and *Twombly* leaves the HENDERSON DEFENDANTS in the untenable
 12 position of having to speculate about the unstated basis for Plaintiffs' ill-defined Section 1983
 13 claim premised on a purported violation of the Third Amendment to the United States
 14 Constitution. The Third Amendment provides:

15 No Soldier shall, in time of peace be quartered in any house,
 16 without the consent of the Owner, nor in time of war, but in a
 manner prescribed by law.

17 See U.S. Const., amend. III. Because Plaintiffs not stated a plausible claim of a Third
 18 Amendment violation under Section 1983 such claim should be dismissed.

19 The Third Amendment serves to prevent the unauthorized "quartering" (i.e., lodging or
 20 dwelling) of soldiers in private homes. See James P. Rogers, *Third Amendment Protections in*
 21 *Domestic Disasters*, 17 Cornell J.L. & Pub. Pol'y 747, 767 (2008); see also *Ravin v. State*, 537
 22 P.2d 494, 503 (Alaska 1975) ("[a]mong the enumerated rights in the federal Bill of Rights are the
 23 guarantee against quartering of troops in a private house in peacetime (Third Amendment)"). The
 24 Founding Fathers established this protection in response to the British government's Quartering
 25 Act of 1774, which authorized British commanders to quarter, or house, their troops wherever
 26 necessary, including within the homes of American colonists. See *Engblom v. Carey*, 677 F.2d

27 ⁶ As part of their tenth claim for relief, Plaintiffs again allege a violation of their First
 28 Amendment rights. See FAC, ¶¶ 181(c), 185, 187. Such a claim is unsustainable here for the
 same reasons set forth in Section IV(C) above.

1 957, 967 (2d Cir. 1982) (Kaufman Circuit Judge, concurring in part and dissenting in part)
2 (summarizing the historical origin of Third Amendment); *see also Atkinson v. Gurich*, 248 P.3d
3 356, 360 n. 22 (Okla. 2011) ("[t]he Acts were also directly responsible for the Third Amendment
4 of the United States Constitution"); *The Quartering Act, America's Homepage, Historic*
5 *Documents of the United States*, http://ahp.gatech.edu/quartering_act_1765.html.

6 The First Amended Complaint sets forth no allegations, which if accepted as true, could
7 establish that Plaintiffs' constitutional rights under the Third Amendment were violated by the
8 HENDERSON DEFENDANTS or any of them. The question of whether police officers can be
9 considered "soldiers" and whether the use of a house for less than twenty-four hours could be
10 construed as "quartering" within the scope of the Third Amendment was addressed by the U. S.
11 District Court for the District of Maine, which was affirmed by the First Circuit. *See Estate of*
12 *Bennett v. Wainwright*, No. 06-28-P-S, 2007 WL 1576744 (D. Me. May 30, 2007), *aff'g*
13 *magistrate judge*, 2007 WL 2028961 (D. Me. July 7, 2009), *aff'd*, 548 F.3d 155 (1st Cir. 2008).
14 The plaintiffs in *Estate of Bennett* alleged that a Maine state trooper forced them from their home
15 without authority, constituting "illegal quartering" in violation of the Third Amendment. *See*
16 *Estate of Bennett*, 2007 WL 1576744, at *3.

17 The trial court rejected the plaintiffs' position that a municipal officer can, and should be,
18 considered a soldier under the Third Amendment:

19 The plaintiffs' position appears to be another of the "far-fetched, metaphorical
20 applications" of this amendment that have been "summarily rejected" as noted by
21 the Second Circuit. ***There is no sense in which a single state trooper and several***
22 ***deputy sheriffs can be considered "soldiers" within the meaning of that word as***
23 ***it is used in the amendment nor in which the use of a house presumably owned***
by one of the plaintiffs for a period of fewer than 24 hours could be construed
as "quartering" within the scope of the amendment. The county defendants are
entitled to judgment on the pleadings as to any claim asserted under the Third
Amendment.

24 *Id.* at *6 (citing *Engblom*, 677 F.2d at 959 n. 1) (emphasis added). Consistent with this holding,
25 several other courts have likewise summarily dismissed claims of Third Amendment violations.
26 *See Sec. Investor Prot. Corp. v. Exec. Sec. Corp.*, 433 F. Supp. 470, 473 n.2 (S.D.N.Y. 1977)
27 (dismissing a claim that a subpoena violated the claimant's Third Amendment right); *United*
28 *States v. Valenzuela*, 95 F. Supp. 363, 366 (S.D. Cal. 1951) (rejecting a claim that the 1947 House

1 and Rent Act is "the incubator and hatchery of swarms of bureaucrats to be quartered as storm
2 troopers upon the people"); *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1043 (10th Cir.
3 2001) (rejecting a claim that the operation of military aircraft over private property without the
4 owner's permission constitutes "quartering" and violation of the Third Amendment).

5 Plaintiffs, here, have failed to plead a plausible claim that any of the HENDERSON
6 DEFENDANTS violated their Third Amendment right not to quarter soldiers in their homes.
7 Plaintiffs do not allege any action from which it could be inferred that the HENDERSON
8 DEFENDANTS were soldiers engaged in quartering in Plaintiffs' homes. Although Plaintiffs
9 purport to allege a claim for violation of the Third Amendment as to MICHAEL and LinDA
10 MITCHELL (Seventh Claim for Relief) by unidentified "Doe" officers, they have asserted no
11 Third Amendment claim of any kind as to ANTHONY MITCHELL and, again, do not maintain
12 that the HENDERSON DEFENDANTS infringed any Third Amendment rights. *See id.*, ¶¶ 152-
13 57. Finally, Plaintiffs have set forth no allegations that the purported custom or policy of the
14 CITY OF HENDERSON referenced in their First Amended Complaint was a "moving force"
15 behind the supposed deprivation of their Third Amendment right to deny the quartering of
16 soldiers in their homes. *See id.*, ¶¶ 179-89.

17 Even if their allegations adequately state a violation of constitutional rights (which they do
18 not), Plaintiffs have failed to plead factual allegations which demonstrate that ANTHONY
19 MITCHELL is plausibly entitled to relief under Section 1983 for a purported violation of the
20 Third Amendment. First, Plaintiffs do not plead that the HENDERSON DEFENDANTS ever
21 entered ANTHONY MITCHELL'S home. *See FAC*, ¶¶ 48-60, 67. Of the officers identified in
22 Plaintiffs' First Amended Complaint that allegedly entered ANTHONY MITCHELL'S home,
23 Plaintiffs' First Amended Complaint acknowledges that none were Henderson police officers.
24 *See id.* Second, while Plaintiffs' First Amended Complaint does allege that unidentified "officers"
25 entered ANTHONY MITCHELL'S home and "used it as an observation post," Plaintiffs do not
26 allege that such use constituted quartering within the scope of the Third Amendment. *See id.*, ¶
27 67. Plaintiffs' First Amended Complaint is devoid of any allegations as to: (1) how the
28 unidentified "officers" were soldiers under the Third Amendment; (2) how long the unidentified

1 "officers" stayed in ANTHONY MITCHELL'S home; and (3) how the duration of the stay of the
2 unidentified "officers" was sufficient to constitute quartering (*i.e.*, the lodging of soldiers) under
3 the Third Amendment. *See id.*; *see also Engblom*, 677 F.2d at 967. Plaintiffs' notion constitutes
4 nothing more than another "'far-fetched, metaphorical application[]" of [the Third] amendment"
5 which the Court should summarily reject. *See Estate of Bennett*, 2007 WL 1576744, at *7
6 (quoting *Engblom*, 677 F.2d at 959 n. 1). Thus, regardless of whether Plaintiffs intend to premise
7 their Tenth Claim for Relief on purported violations of ANTHONY MITCHELL'S rights under
8 the Third Amendment, they have failed to state a claim upon which relief can be granted as a
9 matter of law.

10 Plaintiffs' allegations are likewise unsustainable as to LINDA and MICHAEL
11 MITCHELL. Like their allegations regarding ANTHONY MITCHELL, Plaintiffs fail to plead
12 that any of the HENDERSON DEFENDANTS ever entered MICHAEL and LINDA
13 MITCHELLS' home. *See FAC*, ¶¶ 68-73. Rather, Plaintiffs allege that a group of unidentified
14 "Doe" officers entered MICHAEL and LINDA MITCHELLS' backyard, that one of the
15 unidentified "Doe" officers removed LINDA MITCHELL from her house, and that the remaining
16 unidentified "Doe" officers entered the house. *See id.* Plaintiffs' First Amended Complaint
17 contains no allegations the unidentified "Doe" officers were in MICHAEL and LINDA
18 MITCHELLS' house for a significant amount of time, let alone that they took up residence (*i.e.*,
19 quartered) in their home. Plaintiffs' mere allegation that unidentified "Doe" officers entered
20 MICHAEL and LINDA MITCHELLS' house, left doors open, drank water, deposited disposable
21 plastic cups in a trashcan, and left condiments on the floor cannot and does not plausibly
22 constitute the "quartering" of a soldier as contemplated by the Third Amendment under any
23 circumstances, and plainly does not constitute a constitutional violation of any kind by the
24 HENDERSON DEFENDANTS.

25 Because Plaintiffs have no viable claim against the HENDERSON DEFENDANTS for
26 violation of the Third Amendment, their Tenth Claim for Relief under Section 1983 is
27 unsustainable as a matter of law and should be dismissed.

28 ...

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

b. Plaintiffs' Tenth Claim For Relief Fails To State A Section 1983 Claim Based On Violations Of The Fourteenth Amendment.

Like their claim under the Third Amendment, Plaintiffs have failed to plead a Section 1983 claim based on violation of the Fourteenth Amendment.

To plead a constitutional tort under the due process clause of the Fourteenth Amendment, Plaintiffs must plausibly allege, which they have not done, that the HENDERSON DEFENDANTS' governmental actions have deprived them of their individual life, liberty, and property interests of constitutional magnitude. *See Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 370 (9th Cir. 1998). The cognizable level of governmental abuse of power must be so egregious as to "shock the conscience" or "violate the 'decencies of civilized conduct'" to reach a magnitude of constitutional proportions. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998).

To that end, the United States Supreme Court has made clear that the due process guarantee does not impose liability "whenever someone cloaked with state authority causes harm." *See id.* at 848; *see also Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008) (explaining that only official conduct, which both shocks the conscience and was carried out with a "purpose to harm for reasons unrelated to legitimate law enforcement objectives" is cognizable as a due process violation under the Fourteenth Amendment). The Fourteenth Amendment does not protect against all deprivations of liberty, but rather only protects against those deprivations that are undertaken without due process of law. *See Hillblom v. Cnty. of Fresno*, 539 F. Supp. 2d 1192, 1207 (E.D. Cal. 2008) (Fourteenth Amendment claims related to Police Officers entering Plaintiffs' home without a warrant and arresting Plaintiff dismissed as actions not shocking to the conscience and emotional health claims do not warrant substantive due process protection). As a result, an officer's conduct may be objectively unreasonable and still not breach the more demanding standard that governs Fourteenth Amendment due process claims. *See Moreland*, 159 F.3d at 372.

In addition, to plead a constitutional violation under the Fourteenth Amendment arising out of the training and/or supervision of an employee, Plaintiffs would have to allege, which they

1 again have not done, plausible facts demonstrating that the training was sufficiently inadequate as
 2 to constitute "deliberate indifference" to the individual rights of ANTHONY, LINDA, and
 3 MICHAEL MITCHELL. *See Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989);
 4 *see also* FAC, ¶ 184. Plaintiffs must further demonstrate "**actual causation**" between the
 5 inadequate training and the deprivation of the Plaintiff's rights, which they likewise have failed to
 6 do." *See Herrera v. Las Vegas Metro. Police Dep't*, 298 F. Supp. 2d 1043, 1052 (D. Nev. 2004)
 7 (emphasis added).

8 Although the due process clause of the Fourteenth Amendment "provides heightened
 9 protection against government interference with certain fundamental rights and liberty interests,"
 10 "[t]here is no general liberty interest in being free from capricious government action." *See*
 11 *Hillblom*, 539 F. Supp. 2d at 1208 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997),
 12 and *Nunez v. City of Los Angeles*, 147 F.3d 867, 873 (9th Cir. 1998)). As a result, "[c]ourts must
 13 resist the temptation to augment the substantive reach of the Fourteenth Amendment." *Id.* For
 14 example, emotional health claims do not warrant substantive due process protection. *See id.*; *see*
 15 *also Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989) (police officer's "I'm going to get
 16 you" threat "not an actual infringement of constitutional right"); *Collins v. Cundy*, 603 F.2d 825,
 17 827 (10th Cir.1979) (verbal harassment including sheriff's threat to "hang" prisoner states no
 18 constitutional deprivation). Nor does the Fourteenth Amendment "guarantee that only the guilty
 19 will be arrested." *See Baker v. McCollan*, 443 U.S. 137, 145 (1979) (arrest of individual based on
 20 mistaken identity not a violation of his due process rights). As the Supreme Court noted, "[i]f it
 21 did, § 1983 would provide a cause of action for every defendant acquitted-indeed, for every
 22 suspect released." *Id.* According to these fundamental principles, Plaintiffs' Section 1983 claim
 23 premised on purported violations of the Fourteenth Amendment cannot stand.

24 **(1) Plaintiffs' Tenth Claim For Relief Fails To State A**
 25 **Claim Under The Fourteenth Amendment As To**
 26 **LINDA MITCHELL.**

27 Plaintiffs' First Amended Complaint fails to allege that the HENDERSON
 28 DEFENDANTS, acting under the color of state law, took actions that resulted in the deprivation
 of LINDA MITCHELL'S due process rights under the Fourteenth Amendment. *See* FAC ¶¶ 49,

1 58, 68, 70-74. Plaintiffs have not even alleged how the HENDERSON DEFENDANTS
2 purportedly violated LINDA MITCHELL'S Fourteenth Amendment rights. *See id.*, ¶¶ 70-72,
3 140-51. For example, absent from Plaintiffs' First Amended Complaint is any assertion that any
4 of the HENDERSON DEFENDANTS knew LINDA MITCHELL prior to the incident, had any
5 prior contact with LINDA MITCHELL, possessed any personal animus towards LINDA
6 MITCHELL, or even interacted with LINDA MITCHELL at any time relevant to the First
7 Amended Complaint. *See id.* The HENDERSON DEFENDANTS plainly could not have acted
8 with the necessary "deliberate indifference" so as to "shock the conscience" if they did not know
9 or ever interact with LINDA MITCHELL. Plaintiffs likewise have not alleged how any CITY
10 OF HENDERSON custom, policy, or practice was the actual cause of the purported deprivation
11 of LINDA MITCHELL'S Fourth Amendment rights. *See Herrera*, 298 F. Supp. 2d at 1052; *see*
12 *also* FAC, ¶¶ 179-89.

13 Even assuming for argument purposes only that the basis of LINDA MITCHELL'S
14 Fourteenth Amendment claim is the "extreme emotional distress" that she allegedly suffered in
15 listening to the arrest of ANTHONY MITCHELL, Plaintiffs' claim is still unsustainable. Not
16 only does the due process clause of the Fourteenth Amendment offer no protection from distress
17 of that nature, the HENDERSON DEFENDANTS could not have been the source of such distress
18 because Plaintiffs have not alleged that any of the HENDERSON DEFENDANTS ever entered
19 ANTHONY MITCHELL'S home. *See Hillblom*, 539 F. Supp. 2d at 1208; *see also* FAC, ¶¶ 48-
20 60. Accordingly, LINDA MITCHELL has failed to state a Section 1983 claim against the
21 HENDERSON DEFENDANTS based on the violation of Fourteenth Amendment rights as a
22 matter of law.

23 **(2) Plaintiffs' Tenth Claim For Relief Fails To State A**
24 **Claim Under The Fourteenth Amendment As To**
MICHAEL MITCHELL.

25 Plaintiffs' notion that the HENDERSON DEFENDANTS infringed MICHAEL
26 MITCHELL'S rights under the Fourteenth Amendment lacks a legal basis for at least *five* reasons.
27 *First*, Plaintiffs do not allege that the HENDERSON DEFENDANTS had any interaction with
28 MICHAEL MITCHELL prior to his arrest. *See* FAC, ¶¶ 134-39, 146-51, 158-70. *Second*,

1 Plaintiffs' allegations confirm that any interaction that the unidentified "Doe" officers had with
2 MICHAEL MITCHELL occurred during the course of an ongoing investigation related to the
3 domestic violence call on the same street. *See id.*; *see also Porter*, 546 F.3d at 1137. *Third*,
4 Plaintiffs acknowledge that MICHAEL MITCHELL voluntarily left his house at the request of
5 unidentified "Doe" officers to "assist them in negotiating the surrender of" the suspect. *See FAC*,
6 ¶ 68. *Fourth*, because the Fourteenth Amendment does not guarantee that only the guilty will be
7 arrested, MICHAEL MITCHELL'S arrest is not protected by the due process clause under any
8 circumstances. *See Baker*, 443 U.S. at 145. *Fifth*, as with LINDA MITCHELL, Plaintiffs' First
9 Amended Complaint is bereft of any allegation as to how a CITY OF HENDERSON custom,
10 policy, or practice was the actual cause of the purported deprivation of MICHAEL MITCHELL'S
11 Fourth Amendment rights. *See Herrera*, 298 F. Supp. 2d at 1052. On these grounds, MICHAEL
12 MITCHELL has failed to state a Section 1983 claim against the HENDERSON DEFENDANTS
13 based on the violation of Fourteenth Amendment rights as a matter of law.

14 **(3) Plaintiffs' Tenth Claim For Relief Fails To State A**
15 **Claim Under The Fourteenth Amendment As To**
16 **ANTHONY MITCHELL.**

17 Plaintiffs have likewise failed to state a claim against that the HENDERSON
18 DEFENDANTS for violating ANTHONY MITCHELL'S due process rights under the Fourteenth
19 Amendment. Specifically, Plaintiffs have not alleged that the HENDERSON DEFENDANTS
20 participated in the entry and search of ANTHONY MITCHELL'S home, or any of the actions that
21 allegedly preceded his arrest. *See FAC*, ¶¶ 48-64, 119-33. The HENDERSON DEFENDANTS
22 could not have acted with "deliberate indifference" toward ANTHONY MITCHELL so as to
23 "shock the conscience" if they were not participants in these alleged events. *See id.* A CITY OF
24 HENDERSON policy or custom regarding the training and/or supervision of its officers therefore
25 also could not have been the cause of a Fourteenth Amendment violation, even if Plaintiffs had
26 properly alleged so (which they have not). *See Herrera*, 298 F. Supp. 2d at 1052; *see also FAC*, ¶
27 184. For these reasons, the Court should dismiss ANTHONY MITCHELL'S claim under the
28 Fourteenth Amendment along with the related claims of LINDA and MICHAEL MITCHELL.

...

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

c. Plaintiffs' Tenth Claim For Relief Fails To State A Section 1983 Claim Based On Violations Of The Fourth Amendment.

Equally inadequate under *Twombly* and *Iqbal* is Plaintiffs' suggestion in their First Amended Complaint that the HENDERSON DEFENDANTS somehow violated their rights under the Fourth Amendment to the United States Constitution. As a result, like the other claims asserted against them, the HENDERSON DEFENDANTS must defend themselves against Plaintiffs' Section 1983 claim without any notice of the basis on which they supposedly committed a Fourth Amendment violation. The First Amended Complaint is entirely silent in this regard. *See* FAC, ¶¶ 179-89. Plaintiffs make no effort to assert Fourth Amendment violations against any of the HENDERSON DEFENDANTS. *See id.*, ¶¶ 119-51. Because Plaintiffs have failed to allege how the HENDERSON DEFENDANTS purportedly infringed their rights under the Fourth Amendment, Plaintiffs' First Amended Complaint fails to state a Section 1983 claim on this additional ground as a matter of law.

The Fourth Amendment protects individuals against excessive use of force by government officials. *See* U.S. Const., amend IV. When an officer's use of force is objectively reasonable under the circumstances, however, no constitutional violation has occurred. *See Graham v. Connor*, 490 U.S. 386, 397 (1989) ("[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force"). The determination of whether force used is excessive or reasonable requires a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *See id.* at 396 (internal quotations omitted).

Here, Plaintiffs' notion that the HENDERSON DEFENDANTS violated their Fourth Amendment rights are without basis under the plain language of their First Amended Complaint. No matter how painstakingly the Court examines the First Amended Complaint, it will find no allegation that the HENDERSON DEFENDANTS entered Plaintiffs' homes or interacted with Plaintiffs in any way, other than through HPD Officer WORLEY'S innocuous telephone call with ANTHONY MITCHELL, until after the arrest of ANTHONY and MICHAEL MITCHELL. It is axiomatic that the HENDERSON DEFENDANTS could not have violated any of the Plaintiffs

1 Fourth Amendment rights under such circumstances. The Court therefore should dismiss
2 Plaintiffs' Section 1983 claim in its entirety.

3 F. **Plaintiffs' Eleventh Claim For Relief For Conspiracy To Violate Civil Rights**
4 **Under 42 U.S.C. § 1985(3) Should Be Dismissed, As A Matter Of Law, Based**
5 **On The Lack Of Subject Matter Jurisdiction And The Failure To State A**
6 **Claim Upon Which Relief Can Be Granted Against The HENDERSON**
7 **DEFENDANTS.**

8 Plaintiffs claim against the HENDERSON DEFENDANTS under 42 U.S.C. § 1985(3)
9 ("Section 1985(3)") is legally unsustainable for at least *three* reasons.

10 -- *First*, it is well-settled that a claim under Section 1985(3) requires a showing of racial or
11 class-based discrimination. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68
12 (1993); *see also Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) ("[t]he language requiring
13 intent to deprive of equal protection, or equal privileges and immunities, means that there must be
14 some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the
15 conspirators' action"). A plaintiff therefore must set forth "'specific allegations of 'class based
16 discriminatory animus'" in order to maintain a Section 1985(3) claim. *See Jenkins v. Rockwell*
17 *Int'l Corp.*, 595 F. Supp. 399, 402 (D. Nev. 1984). Because Plaintiffs have asserted no allegations
18 of discrimination of any kind, their Section 1985(3) claim against the HENDERSON
19 DEFENDANTS should be dismissed for a lack of subject matter jurisdiction *and* a failure to state
20 a claim upon which relief can be granted. *See id.*; *Whitehorn v. F.C.C.*, 235 F. Supp. 2d 1092,
21 1103 (D. Nev. 2002), *aff'd*, 63 F.App'x 346 (9th Cir. 2003); *Trzaska v. Int'l Game Tech.*, No.
22 2:10-cv-2268 JCM (GWF), 2011 WL 2516931, at *4 (D. Nev. June 23, 2011); *see also Caldeira*
23 *v. County of Kauai*, 866 F.2d 1175, 1182 (9th Cir. 1989) ("Caldeira never alleges invidiously
24 discriminatory, racial or class-based animus, which is necessary to state a claim under section
25 1985(3)").

26 -- *Second*, a claim under Section 1985(3) fails unless the plaintiff has successfully stated a
27 claim for deprivation of rights under Section 1983. *See Caldeira*, 866 F.2d at 1182 ("the absence
28 of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on
the same allegations"). Given that Plaintiffs have not stated a viable Section 1983 claim against

1 the HENDERSON DEFENDANTS, their Section 1985(3) claim likewise cannot survive
2 dismissal. *See id.*; *Trzaska*, 2011 WL 2516931, at *4; *see also supra* Sections IV(A)-(E).

3 -- *Third*, like Section 1983, the two-year statute of limitations for personal injury claims
4 under Nevada law constitutes the statute of limitations applicable to Plaintiffs' Section 1985(3)
5 claim. *See Chachas*, 615 F. Supp. 2d at 1202-03; *see also* Nev. Rev. Stat. § 11.190(4)(e). The
6 Ninth Circuit has explained:

7 An action under § 1985(3) alleging a conspiracy to deprive a person of
8 constitutional rights is designed to remedy the same types of harms as the
9 deprivations actionable under § 1983. Accordingly, we hold that suits under
§ 1985(3) are also best characterized as personal injury actions and are governed
by the same statute of limitations as actions under § 1983.

10 *See McDougal*, 942 F.2d at 673. Although the events on which Plaintiffs base their Section
11 1985(3) claim occurred on July 10, 2011, they did not assert such a claim against the
12 HENDERSON DEFENDANTS until they filed their First Amended Complaint more than two
13 years later, on October 14, 2013. *See* FAC, ¶ 191, at 37:11-16. Plaintiffs' Section 1985(3) claim
14 accordingly is barred by the two-year statute of limitations.

15 On each of these separate and independent grounds, Plaintiffs' Eleventh Claim for Relief
16 is unsustainable as a matter of law.

17 **G. Plaintiffs' Twelfth Claim For Relief For Neglect To Prevent A Conspiracy To**
18 **Violate Civil Rights Under 42 U.S.C. § 1986 Should Be Dismissed, As A**
19 **Matter Of Law, Based On The Failure To State A Claim Upon Which Relief**
20 **Can Be Granted Against The HENDERSON DEFENDANTS.**

21 Plaintiff's Twelfth Claim for Relief is unsustainable against the HENDERSON
22 DEFENDANTS, as a matter of law, for at least *two* reasons. *First*, a viable claim under Section
23 1985(3), which Plaintiffs have failed to state here, is a prerequisite to relief under 42 U.S.C.
24 § 1986 ("Section 1986"). *See* 42 U.S.C. § 1986; *Sanchez v. City of Santa Ana*, 936 F.2d 1027,
25 1040 (9th Cir. 1990) ("[a] violation of section 1986 thus depends on the existence of a valid claim
26 under 1985"); *Mollnow v. Carlton*, 716 F.2d 627, 632 (9th Cir. 1983) ("Section 1986 depends on
27 the existence of a claim under § 1985"). *Second*, a one-year statute of limitations applies to
28 claims under Section 1986, and Plaintiffs delayed more than two years before they asserted a
claim on this basis. *See* 42 U.S.C. § 1986 ("no action under the provisions of this section shall be

1 sustained which is not commenced within one year after the cause of action has accrued"). On
 2 each of these separate and independent grounds, Plaintiffs Twelfth Claim for Relief warrants
 3 dismissal as a matter of law. *See Trzaska*, 2011 WL 2516931, at *4 (Section 1986 claim "must
 4 fail" because "plaintiff does not successfully state a claim for relief under § 1985" and "plaintiff's
 5 § 1986 claim is barred by the one year statute of limitations").

6 **H. Plaintiffs' State Law Claims Against the HENDERSON DEFENDANTS**
 7 **Should be Dismissed Because Plaintiffs Failed To Present These Claims As**
 8 **Required Under Nevada Law.**

9 Even if the Court retains jurisdiction over Plaintiffs' state law claims (which it should not),
 10 it should dismiss them because Plaintiffs failed to comply with the claim presentation
 11 requirements set forth under Nevada law. NRS 41.036(2) requires that:

12 Each person who has a claim against any political subdivision of the State arising
 13 out of a tort must file the claim within 2 years after the time the cause of action
 14 accrues with the governing body of that political subdivision.

15 The requirements of a "claim" against the state or political subdivision are set forth in
 16 NAC 41.100:

17 1. In support of a claim for compensation for death or personal injury a claimant
 18 must submit:

- 19 (a) A statement which sets forth the amount of relief sought;
- 20 (b) A clear and concise statement which explains how the injury occurred;
- 21 (c) Reports from all physicians who, subsequent to the claimant's injury
 22 or to the death, treated or examined the claimant or decedent in relation to
 23 the injury for which compensation is claimed; and.
- 24 (d) A statement as to why the claimant believes the state to be responsible
 25 for the damages.

26 2. In support of a claim for compensation for loss of or injury to property a
 27 claimant must submit:

- 28 (a) A statement which sets forth the amount of relief sought;.
- (b) A clear and concise statement which explains how the property was
 damaged;
- (c) Proof of ownership of the property; and.
- (d) A statement which lists the:
 - (1) Value of the property before the damage occurred;.
 - (2) Cost of repairs; and.
 - (3) Salvage value.

3. A claim must be:

- (a) Typewritten or legibly handwritten;.
- (b) Signed and verified by the claimant; and.
- (c) Submitted in the original to the office of the ex officio clerk of the
 State Board of Examiners at the Blasdel Building, Capitol Complex,
 Carson City, Nevada 89710.

1 Failure to comply with the requirements set forth under NRS 41.036(2) is grounds for dismissal.
2 *Hartrim v. Las Vegas Metro. Police Dep't*, 2:11-cv-00003-RLH-PAL, 2011 WL 2690148 (D.
3 Nev. July 8, 2011) (dismissing state law claims against individual officers and the Las Vegas
4 Metropolitan police department for failure to comply with requirements under NRS 41.036(2)).

5 Here, the incident allegedly giving rise to Plaintiffs' claims took place on July 10, 2011.
6 Thus, in order to comply with the claim presentation requirements under NRS 41.036(2) Plaintiffs
7 would have had to present their claims no later than July 10, 2013. The mere filing of a pleading
8 does not satisfy the claim presentation requirements set forth under NRS 41.036. *Zaic v. Las*
9 *Vegas Metro. Police Dep't*, 2:10-CV-01814-PMP, 2011 WL 884335, at *5 (D. Nev. Mar. 11,
10 2011) (finding that despite filing complaint (with the court) within the period set forth in NRS
11 41.036(2) plaintiff did not substantially comply with statutory requirements because she served
12 the complaint on defendants a month after the two-year period expired). Even if served, a
13 complaint itself may not satisfy the requirements NRS 41.036(2). *See* NAC 41.100. Nor would a
14 demand letter lacking the essential requirements of a claim. *See id.*

15 Plaintiffs did not meet the claim presentation requirements set forth in NRS 41.036(2).
16 Plaintiffs' original Complaint was filed on July 1, 2013. *See* Court Docket No. 1. However, the
17 original Complaint was never served on any of the HENDERSON DEFENDANTS. More
18 importantly, the original Complaint is not the operative pleading in this matter. On October 14,
19 2013—more than three months after the time for complying with NRS 41.036(2) had expired—
20 Plaintiffs filed their First Amended Complaint. *See* Court Docket No. 3. The First Amended
21 Complaint adds additional parties, is **thirty pages longer** than the original Complaint, and
22 includes **ten additional claims** for relief. Thus, even had Plaintiffs served the original Complaint,
23 it still would not have satisfied the requirements set forth in NRS 41.036(2).

24 The First Amended Complaint was not filed until October 14, 2013, and was not served or
25 otherwise presented to any of the HENDERSON DEFENDANTS before October 21, 2013, well
26 after the deadline for compliance with NRS 41.036(2). As a result, the Court should dismiss the
27 Plaintiffs state law claims against the HENDERSON DEFENDANTS.
28

1 **I. Plaintiffs' Failure To Serve Former HPD Police Chief CHAMBERS And**
 2 **HPD Officer WALLS Within 120 Days Of Filing Their Original Complaint**
 3 **Requires Dismissal Of All Claims Against Them.**

4 The Court should summarily dismiss Plaintiffs' claims against CHAMBERS and WALLS
 5 based on their failure to comply with the service requirements of Rule 4 of the Federal Rules of
 6 Civil Procedure ("Rule 4"). Specifically, Plaintiffs neglected to serve CHAMBERS and WALLS
 7 within the 120-period mandated by Rule 4(m), which provides:

8 If a defendant is not served within 120 days after the complaint is
 9 filed, the court—on motion or on its own after notice to the
 10 plaintiff—**must dismiss** the action without prejudice against that
 11 defendant or order that service be made within a specified time. But
 12 if the plaintiff shows good cause for the failure, the court must
 13 extend the time for service for an appropriate period.

14 *See* Fed. R. Civ. P. 4(m) (emphasis added). Plaintiffs filed their original Complaint on July 1,
 15 2013, but did not serve CHAMBERS until October 31, 2013, **or 122 days later**, and did not serve
 16 WALLS until November 4, 2013, **or 126 days later**. *See* Complaint, Court Docket No. 1. As a
 17 result, Plaintiffs missed the deadline for serving CHAMBERS by two days and the deadline for
 18 serving WALLS by six days.

19 Although Plaintiffs filed their First Amended Complaint on October 14, 2013, the 120-day
 20 service period established by Rule 4(m) continued to run from July 1, 2013 as a matter of law
 21 because they had named CHAMBERS and WALLS as defendants in their original Complaint.
 22 The filing of an amended complaint does not restart the 120-day period as provided in Rule 4(m)
 23 "except as to those defendants newly added in the amended complaint." *See Carr v. Int'l Game*
 24 *Tech.*, 770 F. Supp. 2d 1080, 1100 (D. Nev. 2011) (quoting *Bolden v. City of Topeka*, 441 F.3d
 25 1129, 1148 (10th Cir. 2006)). This construction of Rule 4(m) prevents a plaintiff from repeatedly
 26 filing amended complaints "to extend the time for service indefinitely." *See Bolden*, 441 F.3d at
 27 1148. Absent this construction, a dilatory plaintiff, like the Plaintiffs here, could avoid the time
 28 constraint in Rule 4(m) by simply "filing an amended complaint when it felt like effecting
 service." *See id.* at 1148-49. Because Plaintiffs cannot show good cause for serving
 CHAMBERS and CHAMBERS late after having 120 days to effectuate service, Rule 4(m)
 mandates the dismissal of all claims against them at this time.

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

J. Plaintiffs Have Also Failed To State A Section 1983 Claim Against Former Police Chief JUTTA CHAMBERS Because They Allege No Personal Involvement By Her In The Events On Which They Base Their First Amended Complaint.

Because Plaintiffs' First Amended Complaint is devoid of any allegation that former Police Chief CHAMBERS personally directed, supervised, or participated in the alleged incident, their Section 1983 claims against her should be dismissed as a matter of law. Individual capacity suits require proof that a government official, acting under color of state law, caused the deprivation of a federal right. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). To pursue an individual capacity action, the plaintiff must show the official's actual personal involvement in the alleged constitutional violation. *See Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979) (dismissing Director of State Health Department in individual capacity because of lack of involvement); *see also Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (holding that officers cannot be liable for an allegedly unlawful search when there is no direct evidence of their individual participation); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (dismissing Attorney General in individual capacity because of lack of involvement). It is well-established that an individual claim under Section 1983 does not lie against a superior officer by virtue of the chain of command to the alleged offending officer. *See Serna v. Colo. Dep't of Corrections*, 455 F.3d 1146, 1155 (10th Cir. 2006); *Funderburk v. Williams*, No. 2:08-cv-0169-KJD-LRL, 2011 WL 835498, at *3 (D. Nev. 2011).

Other than mentioning her in the caption of this action and alleging that she was the Henderson Chief of Police at the relevant time, Plaintiffs' First Amended Complaint contains no allegation that former Police Chief CHAMBERS had any personal involvement in the alleged incident, let alone that she was the "cause" of the alleged constitutional torts. *See FAC*, ¶¶ 8 and 10. Accordingly, Plaintiffs' Section 1983 claims against former Police Chief CHAMBERS, in her individual capacity, warrants dismissal.

...
...
...

1 **K. Defendant HPD Officers CHAMBERS, POINER, FEOLA, WALLS,**
2 **WALTER, And WORLEY Are Entitled To Qualified Immunity From Suit In**
3 **Their Individual Capacities.**

4 Qualified immunity protects all government officials and employees, including police
5 officers, from suit in their individual capacities for actions taken within the scope of their
6 discretionary authority while acting under the color of state law. *See Somavia v. Las Vegas*
7 *Metro. Police Dep't*, 816 F. Supp. 638, 641 (D. Nev. 1993), *aff'd*, 15 F.3d 1089 (9th Cir. 1994).
8 Not only does qualified immunity protect "all but the plainly incompetent or those who
9 knowingly violate the law," [*Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049 (9th Cir.
10 2002)], it "generally protects government officials so long as their conduct does not 'violate
11 clearly established statutory or constitutional rights of which a reasonable person would have
12 known.'" *See Herrera*, 298 F. Supp. 2d at 1051 (quoting *Baker v. Racansky*, 887 F.2d 183, 186
13 (9th Cir.1989)); *see also Pearson v. Callahan*, 555 U.S. 223, 244 (2009) ("[t]his inquiry turns on
14 the 'objective legal reasonableness of the action, assessed in light of the legal rules that were
15 clearly established at the time it was taken'"). Discretionary authority includes all acts undertaken
16 pursuant to the performance of the official's duties that are within the scope of his or her
17 authority. *See Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995).

18 No dispute exists in this case that the Defendant HPD officers were acting in their official
19 capacities at all relevant times. Plaintiffs' First Amended Complaint confirms that the Defendant
20 HPD officers were on scene responding to a domestic violence call. *See FAC*, ¶ 20. Given that
21 Plaintiffs do not allege that any of the Defendant HPD officers, including Officers CHAMBERS,
22 POINER, FEOLA, WALLS, WALTER, and WORLEY, ever interacted with MICHAEL or
23 LINDA MITCHELL, none of them could have exhibited conduct towards either of these
24 Plaintiffs that clearly violated their rights. And, prior to his arrest, the only alleged interaction
25 that ANTHONY MITCHELL had with the HENDERSON DEFENDANTS was HPD Officer
26 WORLEY'S unobjectionable telephone request that he vacate his residence. Plaintiffs' allegations
27 regarding that telephone call do not suggest that a clear violation of the law had occurred, but
28 rather confirm that no violation of the law had occurred. *See FAC*, ¶ 35. Finally, as a result of
the decision by the City Attorney's Office to file criminal complaints against Anthony and

1 MICHAEL MITCHELL, Officers WALTER and WORLEY became immune from Section 1983
2 liability arising out of the arrest. *See supra* Section IV(D). For these reasons, Defendant HPD
3 Officers CHAMBERS, POINER, FEOLA, WALLS, WALTER, and WORLEY are entitled to
4 qualified immunity in their individual capacities as to Plaintiffs' claims as a matter of law.

5 L. **The Court Lacks Supplemental Jurisdiction Over Plaintiffs' Remaining State**
6 **Law Claims (Plaintiffs' Thirteenth Through Twenty-Second Claims For**
7 **Relief).**

8 Federal law confers supplemental jurisdiction on the district courts:

9 [I]n any civil action of which the district courts have original jurisdiction, the
10 district courts shall have supplemental jurisdiction over all other claims that are so
11 related to claims in the action within such original jurisdiction that they form part
12 of the same case or controversy under Article III of the United States
13 Constitution.

14 *See* 28 U.S.C. § 1367(a). A district court may only invoke its supplemental jurisdiction when
15 there is a "hook of original jurisdiction on which to hang it." *See Herman Family Revocable*
16 *Trust v. Teddy Bear*, 254 F.3d 802, 805 (9th Cir. 2001). Section 1367 authorizes district courts
17 to decline to exercise supplemental jurisdiction over pendent claims when it has dismissed all
18 claims over which it has original jurisdiction. *See* 28 U.S.C. § 1367(c)(3). As the United States
19 Supreme Court has held, supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's
20 right." *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).

21 In *Gibbs*, the Court made clear that the purpose of supplemental jurisdiction over pendent
22 state law claims is to promote judicial economy, convenience, and fairness. *See id.* When these
23 considerations are absent, a federal court should be reticent to exercise jurisdiction. *See id.* The
24 Court explained that "if the federal claims are dismissed before trial, even though not
25 insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *See id.*

26 Here, the dismissal of Plaintiff's Section 1983 claims, the only causes of action for which
27 this Court would have original jurisdiction, necessitates the dismissal of Plaintiffs' state law
28 claims, over which this Court would retain only supplemental jurisdiction. The dismissal of
Plaintiffs' state law claims would most effectively promote judicial economy, convenience, and
fairness because Plaintiffs would then have the opportunity to seek the adjudication of such

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1 claims in a Nevada state court. Plaintiffs would suffer no prejudice from their dismissal of their
2 state law claims given that this case is in its infancy.

3 **M. Defendant HPD Officers CHAMBERS, POINER, FEOLA, WALLS,**
4 **WALTER, And WORLEY Are Entitled To Discretionary Immunity Under**
5 **Nevada Law For All State Law Claims (Plaintiffs' Thirteenth Through**
6 **Twenty-Second Claims For Relief).**

7 Even if the Court retains jurisdiction over Plaintiffs' state law claims (which it should not),
8 it should still dismiss them as to all individual HPD officers under well-settled principles of
9 discretionary immunity. HPD Officers CHAMBERS, POINER, FEOLA, WALLS, WALTER,
10 and WORLEY, all government employees acting under the color of law, are entitled to
11 discretionary immunity with regard to all of Plaintiffs' state law based claims (the Thirteenth
12 through Twenty-Second Claims for Relief). *See Carey v. Nev. Gaming Control Bd.*, 279 F.3d
13 873, 878 (9th Cir. 2002).

14 Nevada Revised Statute § 41.032 provides, in relevant part:

15 [N]o action may be brought under NRS 41.031 or against an
16 immune contractor or an officer or employee of the State or any of
17 its agencies or political subdivisions which is:

- 18 1. Based upon an act or omission of an officer, employee or
19 immune contractor, exercising due care, in the execution of a
20 statute or regulation, whether or not such statute or regulation is
21 valid, if the statute or regulation has not been declared invalid by a
22 court of competent jurisdiction; or
- 23 2. Based upon the exercise or performance or the failure to exercise
24 or perform a discretionary function or duty on the part of the State
25 or any of its agencies or political subdivisions or of any officer,
26 employee or immune contractor of any of these, whether or not the
27 discretion involved is abused.

28 To come within the scope of discretionary act immunity under Nevada law, "a decision
must (1) involve an element of individual judgment or choice and (2) be based on considerations
of social, economic, or political policy." *See Martinez v. Maruszczak*, 123 Nev. 433, 446-47, 168
P.3d 720, 729 (2007). "An officer's decision as to how to accomplish a particular seizure or
search is generally considered a discretionary determination under Nevada law, and officers are
therefore immune from suit as to state law claims arising therefrom in most cases." *Davis v. City
of Las Vegas*, 478 F.3d 1048, 1059 (9th Cir. 2007). It is only when an officer's actions are

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1 "attributable to bad faith" that "immunity does not apply whether an act is discretionary or not."
 2 *Davis v. City of Las Vegas*, 478 F.3d 1048, 1059 (9th Cir. 2007).

3 Plaintiffs' First Amended Complaint makes clear that Defendant HPD Officers
 4 CHAMBERS, POINER, FEOLA, WALLS, WALTER, and WORLEY were all exercising their
 5 discretionary authority as police officers responding to a domestic violence call, and that they are
 6 therefore entitled to discretionary immunity under Nevada law. *See* FAC, ¶ 20; *see also* Nev.
 7 Rev. Stat. § 41.032; *Carey*, 279 F.3d at 878. Plaintiffs fail to allege any interaction between
 8 Defendant HPD Officers CHAMBERS, POINER, FEOLA, WALLS, or WALTER and the
 9 individual Plaintiffs occurred during the police response while Defendant HPD Officer
 10 WORLEY'S telephone call to ANTHONY MITCHELL was clearly discretionary and without
 11 any indication of bad faith. To the extent Plaintiffs complain about HPD Officer WALTER
 12 taking ANTHONY MITCHELL into custody after his arrest or about the police reports prepared
 13 by HPD Officers WALTER and WORLEY, the officers were plainly exercising their
 14 discretionary authority under the circumstances presented and are therefore entitled to
 15 discretionary immunity. *See* FAC, ¶¶ 65, 89, 90. On these additional grounds, the Court should
 16 dismiss Plaintiffs' Second through Tenth Claims for Relief as to Defendant HPD Officers
 17 CHAMBERS, POINER, FEOLA, WALLS, WALTER, and WORLEY as a matter of law.

18 **N. Plaintiffs' Seventeenth Claim For Relief For Negligent Infliction Of**
 19 **Emotional Distress Should Be Dismissed Because It Fails To State A Claim**
 20 **Against The HENDERSON DEFENDANTS.**

21 The allegations of Plaintiffs' Seventeenth Claim for Relief cannot sustain a claim for
 22 negligent infliction of emotional distress on behalf of Plaintiff LINDA MITCHELL as a result of
 23 events that allegedly occurred after police entered the home of her son, ANTHONY MITCHELL.
 24 Such a claim "requires that a bystander plaintiff be closely related to the victim of an accident, be
 25 located near the scene of the accident, and suffer a shock resulting from direct emotional impact
 26 stemming from the sensory and contemporaneous observance of the accident." *See Crippins v.*
 27 *Sav On Drug Stores*, 961 P.2d 761, 762 (Nev. 1998). Not only do Plaintiffs allege nowhere in
 28 their First Amended Complaint that any of the HENDERSON DEFENDANTS entered the home
 of ANTHONY MITCHELL, Plaintiffs concede through their allegations that LINDA

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1 MITCHELL was not a bystander to the alleged events and did not observe them. *See* FAC, ¶¶
2 228-231. Instead, Plaintiffs acknowledge that LINDA MITCHELL was in her own home on the
3 telephone when the alleged events occurred. *See id.*, ¶ 229. Because Plaintiffs have failed to
4 allege the necessary elements of a claim for negligent infliction of emotional distress, and cannot
5 do so, the Court should dismiss their Seventeenth Claim for Relief.

6 O. **Plaintiffs' Nineteenth Claim For Relief For Abuse Of Process Should Be**
7 **Dismissed Because It Fails To State A Claim Against The HENDERSON**
8 **DEFENDANTS.**

9 Under Nevada law, an abuse of process claim consists of two elements, including: "(1) an
10 ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the
11 use of the legal process not proper in the regular conduct of the proceeding." *See Kovacs v.*
12 *Acosta*, 787 P.2d 368, 369 (Nev. 1995). Plaintiffs have not stated a claim upon which relief can
13 be granted against the HENDERSON DEFENDANTS because the mere filing of a criminal
14 complaint does not establish the tort of abuse of process. *See Laxalt v. McClatchy*, 622 F. Supp.
15 737, 751-52 (D. Nev. 1985). Actions taken after the filing of a criminal complaint may constitute
16 abuse of process, but Plaintiffs have not alleged that the HENDERSON DEFENDANTS willfully
17 misused the legal process in this case after criminal charges had been filed against ANTHONY
18 and MICHAEL MITCHELL. *See id.*; *Kovacs*, 787 P.2d at 369. Given that both elements of the
19 claim have not been pled, Plaintiffs' Nineteenth Claim for Relief should be dismissed.

20 P. **Plaintiffs' Twenty-First Claim For Relief For Respondeat Superior Liability**
21 **Should Be Dismissed Because It Fails To State A Claim Against The**
22 **HENDERSON DEFENDANTS.**

23 Like Plaintiffs' Tenth Claim for Relief, *Monell* bars Plaintiffs' Twenty-First Claim for
24 relief to the extent they seek recovery under Section 1983 on a theory of respondeat superior
25 liability. *See* FAC, ¶¶ 257-61. Because a municipality is not subject to Section 1983 liability for
26 the acts of its employees under a respondeat superior theory, this claim is legally unsustainable
27 and should be dismissed on this basis. *See Monell*, 436 U.S. at 691; *see also Davis v. Mason*
28 *Cnty.*, 927 F.2d 1473, 1480 (9th Cir. 1991).

27 ...
28 ...

1 **Q. Plaintiffs' Claims For Punitive Damages Should Be Dismissed As A Matter Of**
 2 **Law.**

3 **1. The CITY OF HENDERSON, A Municipality, Is Immune To Punitive**
 4 **Damage Claims As A Matter Of Law.**

5 Punitive damages are not intended to compensate the injured party, but rather to punish
 6 the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others
 7 from similar extreme conduct. *See* Restatement (Second) of Torts § 908 (1979); W. Prosser, *Law*
 8 *of Torts*, at 9-10 (4th ed. 1971). Dispositive here in the CITY OF HENDERSON's favor is *City*
 9 *of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 248 (1981), where the United States Supreme
 10 Court expressly held that "a municipality is immune from punitive damages under 42 U.S.C.
 11 § 1983." The Court reasoned that the considerations of history and policy do not support
 12 exposing a municipality to punitive damages for the bad faith actions of its officials. *See id.* at
 13 271. The Court further reasoned that an award of punitive damages against a municipality
 14 punishes only the taxpayers, who took no part in the commission of the tort. *See id.* at 263.
 15 Neither reason nor justice suggests that blameless and unknowing taxpayers should be subject to
 16 such retribution. *See id.*

17 Furthermore, Nevada law likewise expressly bars Plaintiffs' state law claims for punitive
 18 damages against the CITY OF HENDERSON. *See* Nev. Rev. Stat. § 41.035(1); *see also Bryan v.*
 19 *Las Vegas Metro. Police Dep't*, 349 F.App'x 132, 134-35 (9th Cir. 2009) (holding that
 20 municipalities are immune from liability for punitive damages under Section 1983 claims as well
 21 as under state law claims). Thus, Plaintiffs' federal and state claims for punitive damages against
 22 the CITY OF HENDERSON should be dismissed with prejudice as a matter of law.

23 **2. The Individual HENDERSON DEFENDANTS, Including Officers**
 24 **CHAMBERS, POINER, FEOLA, WALLS, WALTER, And**
 25 **WORLEY And Deputy City Attorney REYES-SPEER, Are Immune**
 26 **From Plaintiffs' Punitive Damages Claim As A Matter Of Law.**

27 It is well-settled that "an award for damages in a tort action against employees of the state
 28 or any political subdivision may not include punitive damages." *See Bryan*, 349 F.App'x at 134-
 35; Nev. Rev. Stat. § 41.035(1). All of the individual HENDERSON DEFENDANTS, including
 Officers CHAMBERS, POINER, FEOLA, WALLS, WALTER, and WORLEY and Deputy City

1 Attorney REYES-SPEER, were employees of the CITY OF HENDERSON at the time of the
2 alleged events and, according to the allegations of Plaintiffs' First Amended Complaint, were
3 acting in their roles as employees of CITY OF HENDERSON. See FAC, ¶¶ 8, 10, 12, 13.
4 Consequently, all punitive damage claims against each of these individual HENDERSON
5 DEFENDANTS should be dismissed with prejudice as a matter of law.

6 **V. CONCLUSION.**

7 For the foregoing reasons, Defendants CITY OF HENDERSON, NEVADA, JUTTA
8 CHAMBERS, GARRETT POINER, RONALD FEOLA, RAMONA WALLS, ANGELA
9 WALTER, CHRISTOPHER WORLEY, and JANETTE R. REYES-SPEER respectfully request
10 that the Court grant this Motion and dismiss Plaintiffs' First Amended Complaint against them in
11 its entirety.

12 DATED this 12th day of November, 2013.

13 BROWNSTEIN HYATT FARBER SCHRECK, LLP

14
15 By: /s/ Tamara Beatty Peterson
16 KIRK B. LENHARD, ESQ.
17 Nevada Bar No. 1437
18 TAMARA BEATTY PETERSON, ESQ.
19 Nevada Bar No. 5218
20 SCOTT M. SCHOENWALD, ESQ.
21 Nevada Bar No. 5484
22 100 North City Parkway, Suite 1600
23 Las Vegas, Nevada 89106
24 *Attorneys for Defendants*
25 *City of Henderson, Nevada, Jutta Chambers,*
26 *Garrett Poiner, Ronald Feola, Ramona Walls,*
27 *Angela Walter, Christopher Worley, and*
28 *Janette R. Reyes-Speer*

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

CERTIFICATE OF SERVICE

Pursuant to Fed.R.Civ.P.5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that the foregoing **DEFENDANTS CITY OF HENDERSON, NEVADA, JUTTA CHAMBERS, GARRETT POINER, RONALD FEOLA, RAMONA WALLS, ANGELA WALTER, CHRISTOPHER WORLEY, AND JANETTE R. REYES-SPEER'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** was served via electronic service on the 12th day of November, 2013 and to the addresses shown below:

BENJAMIN C. DURHAM, ESQ.
bdurham@vegasdefense.com
FRANK H. COFER, III, ESQ.
fcofer@vegasdefense.com
COFER, GELLER & DURHAM. LLC
601 South Tenth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

ROBERT W. FREEMAN, JR.
kfreeman@lbbslaw.com
LEWIS BRISBOIS BISGAARD & SMITH
6385 S. Rainbow, Suite 600
Las Vegas, NV 89118
Attorneys for Defendants City of North Las Vegas, Joseph Chronister, Sergeant Michael Waller, Drew Albers, David Cawthorn, Eric Rockwell and Travis Snyder

/s/ Erin Parcels
An employee of Brownstein Hyatt Farber Schreck

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 NORTH CITY PARKWAY, SUITE 1600
LAS VEGAS, NV 89106
(702) 382-2101

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28