UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FAHREN JAMES, et al., Plaintiffs, v. CITY OF SOUTH PASADENA, et al., Defendants.	CV 21-8256 DSF (KKx) Order GRANTING in PART and DENYING in PART Defendant's Motion to Dismiss (Dkt. 45) and GRANTING Request for Judicial Notice (Dkt. 47)

Defendants City of South Pasadena, Sergeant Matthew Ronnie, Sergeant Spencer Louie, Sergeant Robert Bartl, Corporal Randy Wise, and Officer Chris Perez (collectively, Officer Defendants, and with the City, Defendants) move to dismiss claims one through three and five through seven.[1] Dkt. 45 (Motion). Plaintiffs Fahren James and Victoria Patterson oppose. Dkt. 46 (Opp'n). The Court deemed this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons stated below, Defendants' motion is GRANTED in part and DENIED in part.

I. BACKGROUND

This case arises out of Defendants' conduct in relation to a series of protests in support of racial justice and the Black Lives Matter (BLM) movement in the City of South Pasadena. Dkt. 42 (FAC).

[1] The fourth cause of action is alleged only against Defendant Richard Cheney.

Plaintiff James is an African American woman who resides in Los Angeles County. Id. ¶¶ 1, 15, 24. Plaintiff Patterson, a white woman, is an "ally" who resides in South Pasadena. Id. ¶¶ 1, 16. Defendants Ronnie, Bartl, Louie, Wise, and Perez are officers of the South Pasadena Police Department (SPPD). Id. 17. Plaintiffs seek to hold the City responsible for the actions of the Officer Defendants through the SPPD. Id. ¶ 18-19. The City is alleged to

> maintain[] an unlawful policy, practice or custom of free speech repression, discrimination and retaliation against Ms. James, African Americans and BLM protesters, which was the moving force behind its deprivation of their civil rights described herein, including their rights to (1) free speech and association . . . (2) due process liberty interests . . . in violation of the 14th Amendment . . . and (3) equal protection, under the 14th Amendment . . . by engaging in acts and omissions intended to chill their free speech and association rights; failing to treat reported assaults against them as potential hate crimes, taking steps to protect victims, and creating false, inaccurate and biased police reports of those assaults, in violation of their mandatory duties; and acting in complicity with Ms. James and Ms. Patterson's attackers to allow them to violate Ms. James, Ms. Patterson and others' rights with impunity.

Id. ¶ 19. Plaintiffs further allege that the unlawful policy, practice, or custom is "reinforced" by the SPPD's supervision and training. Id. ¶ 20.

Sparked by the killing of George Floyd by a Minneapolis police officer, from July 2020 to November 2020, James led a four-month-long series of peaceful protests against policy brutality in South Pasadena. Id. ¶ 24. The demonstrations took place three or four times a week for several hours in the early evenings. Id. ¶ 25. In June 2020, Patterson joined the protests on most days. Id. 26.

The Complaint describes a series of incidents that took place in South Pasadena over the span of a year, in which Plaintiffs and BLM protestors were assaulted by individuals opposed to the BLM movement, yet Defendants allegedly failed to take action against the perpetrators; Defendants failed to report the assaults as potential hate crimes; Defendants produced inaccurate police reports and expressed anti-BLM views; and Defendants improperly instructed James to remove her protest signs. See id. ¶¶ 1, 4, 30-33, 35, 40-46, 49-51, 65, 68-69.

A. SPPD Hate Crime Policy

Plaintiffs allege that pursuant to the SPPD Policy Manual, officers must follow "heightened investigative procedures" when responding to a potential hate crime (SPPD Hate Crime Policy). Id. ¶¶ 36-37, 153. According to Plaintiffs, pursuant to the SPPD Hate Crime Policy, "[a]ll officers ***are required*** to be familiar with the [Hate Crimes] policy and use reasonable diligence to carry out the policy unless directed by the Chief of Police or other command-level officer." Id. ¶ 37 (quoting SPPD Policy Manual § 319.2).

According to Plaintiffs, SPPD officers' mandatory obligations under the Hate Crime Policy include: (1) "preserve evidence that establishes a possible hate crime," id. (quoting SPPD Policy Manual § 319.4(c)); (2) "take appropriate action to mitigate further injury or damage to potential victims or the community," id. (quoting SPPD Policy Manual § 319.4.2(d)); (3) prepare detailed, accurate, and unbiased reports, id. ¶ 99 (citing SPPD Policy Manual §§ 319.4, 323 *et seq.*); (4) prominently mark the report, id. ¶ 39 (citing SPPD Policy Manual § 319.4(g)); (5) "take reasonable steps to ensure that any such situation does not escalate further," id. (quoting SPPD Policy Manual § 319.4.2(i)); (6) responding officers are to inform their supervisor of the potential hate crime "as soon as practical," id. (quoting SPPD Policy Manual § 319.4(b)); and (6) supervisors are to "consider directing resources to protect vulnerable sites (such as assigning an officer to specific locations that could become targets), id. ¶ 40 (quoting SPPD Policy Manual § 319.4.3).

B. The July 8, 2020 Incident

On July 8, 2020, Joe Richcreek, an individual who allegedly had a long criminal history, approached a BLM protest "armed with weapons, including a sharpened drumstick." Id. ¶¶ 31-32. An altercation broke out between James and Richcreek, and when Patterson came closer to record the altercation, Richcreek grabbed her phone. Id. ¶ 33. After Patterson retrieved her phone, Richcreek spat on both Patterson and James. Id. During the altercation, a bystander called SPPD for assistance. Id. ¶ 34. SPPD arrived 25 minutes after the call, which Plaintiffs allege was "unreasonably long" because SPPD's headquarters is "no more than 500 feet from where the assault took place." Id. Two SPPD officers, Officer Roppo and Corporal Carrillo,[2] listened to what had occurred and watched Patterson's video, but initially failed to take a police report and only did so after James asked for a police report number. Id. ¶ 35.

Plaintiffs allege Roppo and Carrillo, as well as unidentified supervisors, failed to follow the "mandatory" SPPD Hate Crime Policy. Id. Specifically, Plaintiffs allege that Roppo and Carrillo "did nothing to try to apprehend Richcreek," failed to inform their supervisor, Sergeant Valencia, of the potential hate crime "as soon as practical," and "no SPPD supervisor complied with their mandatory obligation" to "consider directing resources" to the protest site. Id. ¶¶ 39-41.

Plaintiffs further contend that SPPD's report of the July 8 Incident was "materially inaccurate in many respects," including that it failed to identify James, an African American woman, as a victim of the incident. Id. ¶ 41. When Plaintiffs tried to correct the report, on information and belief, SPPD never forwarded the corrections to the Alhambra District Attorney's office, and as a result, failed to charge Richcreek with assaulting James or to treat the assault as a hate crime. Id.

[2] The FAC sometimes spells the name "Carillo."

C. The July 10, 2020

On July 10, 2020, when Richcreek returned to the BLM protest site, he called James a derogatory term and threw a "large, fist-sized rock at her which hit her leg." Id. ¶ 42. James and two witnesses pursued Richcreek and called SPPD to seek their assistance in apprehending him. Id. After James "cornered" Richcreek, SPPD officers arrived, specifically Defendants Wise and Louie. Id. ¶¶ 42, 49. According to Plaintiffs, Wise did not interview witnesses, including James, despite being presented with statements and video evidence of the assault. Id. ¶ 43. Instead, Wise "became agitated," claiming that James and the other BLM protestors were a threat to his and Richcreek's safety. Id. Wise also blamed Plaintiffs and the BLM protestors, and expressed "his predisposition against them" when he allegedly claimed, "you guys caused this . . . . this is wrong . . . . the cop hating around here . . . why bring this to our city?" Id. Louie allegedly "heard all of Defendant Wise'[s] biased comments about the BLM protestors." Id. ¶ 49. Plaintiffs further allege that Wise did not arrest Richcreek or "even put him in handcuffs or pat him down." Id. ¶ 44. Wise informed James that if she wanted Richcreek arrested, she needed to "make a citizens' arrest." Id. ¶ 45. When James reluctantly did so, Wise took Richcreek into custody, but informed him that, "I'm not arresting you man, SHE is," referring to James. Id.

Plaintiffs allege that the July 10 Incident police report prepared by Wise inaccurately describes James and the BLM supporters "negatively," despite video showing that they were not "angry" or "unruly," and falsely states that Wise was unable to interview James or other BLM protestors "due to their uncooperative behavior at the scene." Id. ¶ 46. Wise's report failed to identify the incident as a potential hate crime, and he failed to follow the "mandatory" SPPD Hate Crime Policy. Id. ¶ 47. Plaintiffs also allege that Wise's supervisor Louie failed to carry out his "mandatory" supervisory duties under the SPPD Hate Crime Policy to treat the incident as a potential hate crime, failed to correct Wise's erroneous police report, and otherwise "did nothing to correct [Wise's] First [A]mendment chilling behavior." Id. 49-50.

Plaintiffs allege that James, an African American woman, contacted SPPD to request further assistance as a victim of a hate crime and to request copies of the police reports of the July 8 and July 10 Incidents. Id. ¶ 52. SPPD purportedly "rebuffed" James's requests, ignored her emails, and "falsely" claimed that Wise attempted to call her after the July 10 Incident for follow-up. Id. Conversely, Plaintiffs allege that when Patterson, a White woman, asked for assistance after the July 8 Incident, she received multiple phone calls, but ultimately SPPD did nothing to assist her and "falsely" claimed that "their hands were tied because spitting was not an actionable offense" and that they lacked resources to do anything more "despite their mandatory duties to the contrary." Id. ¶ 53.

D. The July 19, 2020 Incident

On July 19, 2020, Richcreek returned to the protest site for a third time and verbally assaulted James and her fellow BLM protestors. Id. ¶ 58. Richcreek approached them with "what appeared to be a lead pipe under his arm," threatened to fight them, and then fled the scene yelling, "All Lives Matter," which Plaintiffs contend is a "well-known anti-BLM slogan." Id. In response, SPPD Officers Sandoval and Calderon talked to witnesses but failed to make any written report of the incident. Id. Plaintiffs allege on information and belief that Sandoval and Calderon also failed to turn on their body cameras to record the witness statements. Id.

E. The September 22, 2020 Incident

On September 22, 2020, Defendant Perez arrived at a protest site where James had been posting her BLM signs and warned her that her signs were in violation of section 31.2-7(a) of the City Municipal Code (Sign Ordinance). Id. ¶ 65. Defendant Perez warned James to take the signs down or SPPD would do it for her. Id. Plaintiffs allege on information and belief that Bartl, who in turn was directed by Ronnie and former Police Chief Joe Ortiz, directed Perez to issue the warning. Id. ¶ 68. Moreover, on information and belief, Plaintiffs allege that

SPPD's decision to warn James was in response to Cheney's complaint about the protest signs. Id. ¶ 70.

Plaintiffs allege Cheney and his wife indicated their "hatred" towards BLM protestors and for the BLM movement on their social media posts and referred to "lov[ing] the White supremacist extremist group the Proud Boys." Id. ¶ 83.

On September 24, 2020, a member of the City's Public Safety Commission, Alan Ehrlich, emailed City officials, including the Chief of Police, City Manager, City Clerk, and City Attorney expressing that the signs were protected speech. Id. ¶ 72. No one from SPPD or the City responded to Ehrlich's email. Id. ¶73. Although James continued to post her signs, "she remained fearful that SPPD would try to stop her protest activity again at any moment, and remained on edge because of that possibility going forward." Id.

F. The October 3, 2020 Incident

On October 3, 2020, Cheney intentionally drove his truck "across three lanes of opposing traffic and onto a busy sidewalk" where James was in the process of putting up a protest sign. Id. ¶ 74. Cheney's truck "came just feet away from Ms. James." Id. Cheney admitted that he was attempting to "get her to stop 'putting the sign up.'" Id. Cheney allegedly informed James that she was not allowed to put the sign up and then called SPPD to take "them" down. Id. Plaintiffs allege on information and belief that Cheney had called to complain about James's signs before she was warned on September 22, 2020. Id. ¶ 76. When SPPD arrived, they interviewed Cheney, James, and "several demonstrators who witnessed the incident." Id. ¶ 78. SPPD officers declined to arrest Cheney or cite him for a traffic violation. Id. Plaintiffs allege these decisions were made by Ronnie, who "was not at the scene, but directed responding Officers to not take any action against Defendant Cheney." Id.

Plaintiffs further allege that on October 3, 2020, Plaintiffs and Lang met with Ronnie who came out of the SPPD headquarters wearing a mask with a "Thin Blue Line" logo, which Plaintiffs contend

"is associated with the Blue Lives Matter movement, which is known to be opposed to the BLM movement, and also associated with White supremacy." Id. ¶ 79.

Plaintiffs allege that the October 3 Incident police report "is riddled with inaccuracies and omissions" and "admits that SPPD officers turned off their body cameras at key moments in the investigation, including its interview of Defendant Cheney." Id. ¶ 82. Plaintiffs allege that "[d]espite evidence of Defendant Cheney's bias against Ms. James on account of her race and affiliation with BLM, SPPD did not treat the October 3 incident as a hate crime" or comply with the associated "mandatory" obligations under the SPPD Hate Crime Policy. Id. ¶ 84.

G. The November 1, 2020 Trump Rally

Plaintiffs allege that on November 1, 2020, Trump supporters held a rally in South Pasadena. Id. ¶ 86. Plaintiffs further allege that "[d]espite multiple calls to SPPD to engage in crowd control, SPPD largely stayed away from the rally" and in fact showed support for the Trump rally. Id. ¶ 87. Plaintiffs allege that when a Trump supporter spat on two counter-protestors, Carrillo failed to take a police report and claimed the police "get spit on all the time." Id. ¶ 88. Plaintiffs further allege that at the same rally, a Trump supporter operating a merchandize booth grabbed a girl by her ponytail and pulled her to the ground where "other Trump supporters surrounded her and kicked her." Id. ¶ 89. Shortly after, SPPD arrived, including Officer Defendants and Chief Ortiz. Id. ¶ 90. Nonetheless, Plaintiffs allege that SPPD took no action, even going "out of their way to escort the pro Trump vendor to his car." Id. ¶ 91. Moreover, the City Manager "admitted that the pro Trump merchandise vendor was in violation of the same signage ordinance SPPD attempted to enforce against Ms. James," and on information and belief, SPPD "never issued a warning to the Trump merchandise vendor, let alone a citation for violating the ordinance." Id. ¶ 92.

II. LEGAL STANDARD

Rule 12(b)(6) allows an attack on the pleadings for failure to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam). However, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting Twombly, 550 U.S. at 557) (alteration in original) (citation omitted). A complaint must "state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. This means that the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. There must be "sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively . . . and factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

Ruling on a motion to dismiss will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Iqbal, 556 U.S. at 679 (alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2)).

On a 12(b)(6) motion, a court may consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); see also Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

As a general rule, leave to amend a complaint that has been dismissed should be freely granted. Fed. R. Civ. P. 15(a).

III. DISCUSSION

A. Judicial Notice

In support of their opposition to Defendants' motion to dismiss, Plaintiffs seek judicial notice of (1) the "Community Improvement and Code Enforcement" section from the City's website (Exhibit A), (2) California's "POST Hate Crimes Model Policy" (Exhibit B), (3) the SPPD's Hate Crime Policy Manual (Exhibit C), and (4) several SPPD press releases. Dkt. 47-1 (Pls.' RJN). Defendants do not oppose Plaintiffs' request. Plaintiffs' request for judicial notice is GRANTED.

B. First Amendment (Counts 1 and 2)

James alleges the City and Officer Defendants violated her First Amendment right to free speech and assembly and retaliated against her for exercising her rights under the First Amendment.

The First Amendment provides that "Congress shall make no law. . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment "reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" Snyder v. Phelps, 562 U.S. 443, 452 (2011) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

In order to state a claim for a First Amendment violation, a plaintiff must allege that "(1) [s]he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct." Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 770 (9th Cir. 2006) (citing Mendocino Env't Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999)); see also Mendocino Env't Ctr., 192 F.3d at 1300 (a plaintiff must allege that "'by his actions [the defendants] deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendants']

conduct.'") (quoting Sloman v. Tadlock, 21 F.3d 1462, 1469 (9th Cir. 1994) (simplified)). A plaintiff need not "demonstrate that [her] speech was actually inhibited or suppressed," only that a defendant "intended to interfere with [the plaintiff's] First Amendment rights." Mendocino Env't Ctr., 192 F.3d at 1300. The appropriate consideration is "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." Id. (citation omitted).[3]

James alleges that the City and Officer Defendants interfered with her "First Amendment rights of free speech and assembly" when (1) Wise blamed the July 10 Incident on James and BLM protestors, failed to detain Richcreek, and failed to follow the SPPD Hate Crime Policy; and (2) Perez, at the direction of Bartl, warned James on September 22, 2020 to take down her protest signs or SPPD would take them down for her. FAC ¶¶ 107-110. In addition, James alleges: (1) Louie and Wise retaliated against her when they failed to carry out the SPPD Hate Crime Policy with respect to the July 10 Incident; (2) Perez, at the direction of Bartl, "improperly" warned her that her "protest signs violated a City ordinance" and further warned her that if she did not take down the signs, SPPD officers would take them down; (3) Ronnie directed SPPD officers not to arrest Cheney when he intentionally drove his truck onto a sidewalk to prevent James from putting up a protest sign, and issued a biased press release; and (4) on information and belief, the City and Officer Defendants entered into a conspiracy with Cheney to "intentionally interfere with Ms. James' free speech rights on or before October 3, 2020." Id. ¶¶ 118-125.

[3] James alleges—and Defendants do not dispute—that she was engaged in constitutionally protected activity. See Baldwin v. Redwood City, 540 F.2d 1360, 1366 (9th Cir. 1976) ("Communication by signs and posters is virtually pure speech."); see also Index Newspapers LLC v. U.S. Marshals Serv., 977 F.3d 817, 830 (9th Cir. 2020) ("Public demonstrations and protests are clearly protected by the First Amendment.").

1. July 10, 2020 Incident

James has stated a First Amendment claim against Wise. First, the Court finds Plaintiffs have plausibly alleged that Wise's actions towards Richcreek after he threw a rock that hit James, a BLM protestor, coupled with his comment that BLM protestors "caused this," and insinuating that BLM protestors engage in "cop hating," would "chill or silence a person of ordinary firmness from" engaging in future protests in support of the BLM movement. Second, Wise's comment insinuating that BLM protests are "cop hating" suggests that Wise's views about the BLM protests and movement were a substantial or motivating factor in his alleged failure to take action against Richcreek. While Defendants argue that Wise "has a right to free speech and can voice his opinion," Defendants have provided no authority that Wise's purported First Amendment rights to express his opinion while on duty somehow detract from James's First Amendment claim against him.

Wise argues that his failure to arrest Richcreek was not due to his alleged animus towards BLM protesters and a desire to chill James's speech, but because Penal Code § 836(a)(1) did not authorize him to arrest Richcreek at that time. Motion at 18-19. California Penal Code § 836(a)(1) authorizes peace officers to arrest a subject without a warrant if the "officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence." Cal. Penal Code § 836(a)(1). It is undisputed that Wise did not have a warrant to arrest Richcreek. Because Richcreek allegedly threw the rock at James prior to the officers' arrival, and thus outside of the officers' presence, Wise argues that he had no authority to arrest Richcreek.

Wise's argument is unavailing. Wise allegedly took custody of Richcreek pursuant to James's citizen arrest, not California Penal Code § 836(a)(1). Thus, deciding whether California Penal Code § 836(a)(1) authorized Wise's actions has no bearing on James's First Amendment claims because the arrest ultimately occurred under the authority of an unrelated statute. Moreover, when executing the citizens' arrest, Wise allegedly stated, "I'm not arresting you, SHE is," emphasizing James.

FAC ¶ 45. This statement, coupled with Wise's prior statements in Plaintiffs' presence that BLM protesters "caused this" and engage in "cop hating," is sufficient to state a First Amendment claim for the reasons stated above.

James next alleges that Louie failed to follow the mandatory SPPD Hate Crime Policy and failed to correct Wise's "false and biased police report" because he "shared Defendant Wise's animus toward BLM protesters and African Americans including Ms. James in particular." Id. ¶ 47-51. Even if this conduct is sufficient to allege Louie's personal involvement or connection to the alleged First Amendment violation, James has not plausibly alleged that Louie's failure to report the July 10 Incident as a potential hate crime or his failure to correct Wise's misconduct was motivated by James's involvement with the BLM movement or protest. James does not allege that Louie made comments about the BLM movement or otherwise expressed hostile views of the movement. James's claims that Louie "shared Defendant Wise's animus toward BLM protesters," is a conclusory allegation devoid of "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. Similarly, James fails to provide factual allegations that Louie's act "would chill or silence a person of ordinary firmness from" engaging in future BLM protests.

Defendants' motion to dismiss the first and second claim is DENIED with respect to the July 10 Incident as to Wise and GRANTED with leave to amend with respect to the July 10 Incident as to Louie.

2. September 22, 2020 Incident

James alleges that on September 22, 2020, Perez, "at the direction of Bartl, and other SPPD decision-makers, improperly warned James that her protest signs violated a City ordinance governing signs in the public right of way," and warned her that SPPD would take the signs down if she did not. FAC ¶ 119; see also id. ¶ 66-67 (alleging that SPPD did not have the authority to enforce the ordinance under the

City's "Sign Placement and Enforcement Protocol" that was issued on September 30, 2020). James further alleges on information and belief that SPPD's decision to warn James "was in response to a citizen complaint" by Cheney whose "antipathy to the content of Ms. James' signs, and to the BLM movement, was disclosed on his and his wife's social media posts." Id. ¶ 70.

James has not plausibly alleged a First Amendment violation against Perez or Bartl. As with the prior motion to dismiss, dkt. 39, James fails to allege facts demonstrating her "protected activity was a substantial or motivating factor in the defendant's conduct." Pinard, 467 F.3d at 770. Although James alleges that Perez and Bartl "were among the SPPD officers who harbored animus toward the BLM movement and protests, and Ms. James in particular for leading them," FAC ¶ 68, this is a conclusory allegation that carries no weight on a motion to dismiss. Like her claims against Louie, James does not allege that either Perez or Bartl made overt comments about the BLM movement, expressed beliefs antagonistic to the movement, or otherwise were motivated by the content of James's sign.

James attempts to bolster her claims by alleging that Perez and Bartl singled her out on account of her pro-BLM messaging and selectively enforced the ordinance against her because the officers failed to enforce the same ordinance at the November 1, 2020 Trump rally. Opp'n at 17; FAC ¶¶ 66, 87, 90. However, Defendants argue and James concedes, that the Sign Placement and Enforcement Protocol issued on September 30, 2020, directed the SPPD to "defer incoming reports of illegally placed signs to the Public Works" and "report verified and confirmed violators of illegally placed signs to Code Enforcement." FAC ¶ 67; Motion at 20. In other words, the Sign Placement and Enforcement Protocol withdrew any authority the SPPD had to enforce the ordinance. As a result, Defendants argue, Perez and Bartl "were no longer tasked for issuing warnings regarding signs and therefore took no action on November 1, 2020." Motion at 20. James offers no plausible facts to suggest that Perez and Bartl's alleged inaction at the Trump rally reflected their alleged personal animus against BLM supporters, as opposed to compliance with the Sign

Placement and Enforcement protocol. Even if Perez and Bartl's actions against James were "a deviation" from the ordinance's enforcement, FAC ¶ 67, James does not plausibly allege that this deviation was the result of the officers' animus against BLM protesters.

Defendants' motion to dismiss the first and second claim is GRANTED with leave to amend with respect to the September 22 Incident as to Defendants Perez and Bartl.

3. October 3, 2020 Incident

James alleges that on October 3, 2020, Ronnie directed SPPD officers not to arrest or cite Cheney for intentionally driving his truck on a sidewalk near where James was putting up BLM protest signs. FAC ¶¶ 74-79. James characterizes this incident as an assault where Cheney's truck "came just feet away" from her. Id. ¶ 74-75. James further alleges Defendants issued a biased press release "insinuating that Cheney's assault was excusable in light of Ms. James' purported violation of the signage ordinance." Id. ¶ 80. She adds that Ronnie "had a shared antipathy toward BLM protesters and African Americans, and Ms. James in particular," id. ¶ 75, as evidenced by his decision to greet James "wearing a mask with a 'Thin Blue Line' logo," which she claims "is associated with the Blue Lives Matter movement, [] known to be opposed to the BLM movement, and also be associated with White supremacy." Id. ¶ 79. Ronnie argues that his decision not to arrest Defendant Cheney was due to California Penal Code § 836(a)(1), which prohibits officers from making an arrest without a warrant if a misdemeanor occurs outside of their presence. Motion at 21; Cal. Penal Code § 836(a)(1).

Defendants' argument is unavailing. While simple assault is a misdemeanor, Cal. Penal Code §§ 240, 241, assault with a deadly weapon may be a felony in some instances. Id. § 245(a)(1). A vehicle can be a deadly weapon. See People v. Perez, 4 Cal. 5th 1055, 1065 (2018) (listing cases); see also People v. Bipialaka, 34 Cal. App. 5th 455, 458 (2019) ("Traditionally, cars can be deadly weapons."). The California Penal Code further provides that an officer may arrest a

subject without a warrant if the officer "has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed." Id. § 836(a)(3). Thus, § 836(a)(1) did not prevent officers from arresting Cheney. Rather, § 836(a)(3) applied because James claimed a potential felony assault with a deadly weapon when Cheney drove his truck "across three lanes of opposing traffic and onto a busy sidewalk" and "came just feet away" from hitting James. FAC ¶ 74. Even if Cheney's actions were not felonious, § 836(a)(3) still authorized the officers to make the arrest "whether or not a felony, in fact, ha[d] been committed." Cal. Penal Code § 836(a)(3).

James alleges sufficient facts to survive Defendants' motion as it relates to Ronnie. While James relies on the same conclusory statement deemed insufficient in her claims against Defendants Louie, Perez, and Bartl, she includes the additional fact that Ronnie met to speak with her "wearing a mask with the 'Thin Blue Line' logo," which is "associated with the Blue Lives Matter movement, [] known to be opposed to the BLM movement, and also be associated with White supremacy." FAC ¶ 79. She adds that Defendant Cheney shared this sentiment, as evidenced by his social media posts where he "made a reference to 'lov[ing]' the White supremacist extremist group the Proud Boys" and "reposted a message from another extremist group suggesting that protesters be 'hos[ed]' down with feces from a septic tank." Id. ¶ 83. Accepting these allegations as true for purposes of this motion, James plausibly alleges that Ronnie's decision to order SPPD officers not to arrest or cite Cheney was motivated by his opposition to the BLM movement and he intended to chill or silence James's free speech.

Defendants' motion to dismiss the second claim is DENIED with respect to the October 3 incident.

4. Conspiracy to Violate James's First Amendment Rights

James alleges Defendants Perez, Bartl, and Ronnie conspired with Cheney to intentionally interfere with her First Amendment rights. Id. ¶¶ 122-23.

A conspiracy claim brought under § 1983 requires proof of "an agreement or meeting of the minds to violate constitutional rights," Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002) (quoting United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540-41 (9th Cir. 1989) (citation omitted)), and an actual deprivation of a constitutional right, Hart v. Parks, 450 F.3d 1059, 1071 (9th Cir. 2006) (quoting Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121, 1126 (9th Cir. 1989)). "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." Franklin, 312 F.3d at 441 (quoting United Steelworkers, 865 F.2d at 1541).

James fails to put forth facts that plausibly allege any agreement between the City, Officer Defendants, and Cheney. While Plaintiffs conclude that all defendants "had at least a tacit agreement to infringe" on James's First Amendment rights based on their "mutual bias and animosity toward African Americans and BLM supporters," Plaintiffs have not alleged facts that support this conclusion. With respect to Perez and Bartl, as discussed above, Plaintiffs fail to allege any facts permitting an inference that they had any bias or animosity towards African Americans or BLM supporters. As to Ronnie, Plaintiffs fail to plead facts that support an inference that he and Cheney had a "meeting of the minds to violate constitutional rights."

Defendants' motion to dismiss Plaintiffs' conspiracy claim is GRANTED with leave to amend.

C. Due Process (Claim 5)

Plaintiffs allege the City and Officer Defendants violated their Fourteenth Amendment due process rights by placing them in a known

danger with deliberate indifference to their safety. See FAC ¶¶ 145-155. In short, Plaintiffs base their due process claim on the "state created danger" doctrine. Id. ¶¶ 20, 59.

"As a general rule, members of the public have no constitutional right to sue [public] employees who fail to protect them against harm inflicted by third parties." L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992) (citing DeShaney v. Winnebago Cnty., Dep't of Soc. Servs., 489 U.S. 189, 197 (1989)). An exception to the rule applies when government employees "affirmatively place[ ] the plaintiff in a position of danger, that is, where [their] action[s] create[ ] or expose[ ] an individual to a danger which he or she would not have otherwise faced." Kennedy v. City of Ridgefield, 439 F.3d 1055, 1061 (9th Cir. 2006) (citing DeShaney, 489 U.S. at 197 (internal quotation marks omitted)). The affirmative act must create an actual, particularized danger, id. at 1063, and the ultimate injury to the plaintiffs must be foreseeable, Lawrence v. United States, 340 F.3d 952, 957 (9th Cir. 2003). The employees must have also acted with "deliberate indifference" to a "known or obvious danger." Patel v. Kent Sch. Dist., 648 F.3d 965, 974 (9th Cir. 2011) (simplified).

1. Affirmative Acts

To prevail on a state-created danger claim, Plaintiffs must show that Defendants took affirmative action that "left [them] in a situation that was more dangerous than the one in which [Defendants] found [them]." Hernandez v. City of San Jose, 897 F.3d 1125, 1133 (9th Cir. 2018) (citing Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir. 2000)). The Ninth Circuit has found a wide range of conduct by law enforcement to constitute affirmative acts. See, e.g., Martinez v. City of Clovis, 943 F.3d 1260, 1276-77 (9th Cir. 2019) (revealing domestic violence victim's confidential complaint to abuser and expressing support for abuser); Hernandez, 897 F.3d at 1133-35 (directing rally attendees toward violent crowd); Kennedy, 439 F.3d at 1063 (disclosing child molestation allegations to accused individual's mother); Munger, 227 F.3d at 1087 (ejecting patron from bar); Penilla v. City of Huntington, 115 F.3d 707, 708, 710 (9th Cir. 1997) (canceling

paramedic request, breaking lock on door of plaintiff's home, and placing plaintiff inside).

a. All Defendants

(1) SPPD Hate Crime Policy

Plaintiffs allege Defendants failed to follow the SPPD Hate Crime Policy with respect to the July 8, July 10, August 30, and October 3 Incidents, which Plaintiffs contend exposed them to danger they would not otherwise have faced. FAC ¶ 149(a); Opp'n at 21. Even assuming Defendants were required to follow the SPPD Hate Crime Policy, their failure to do so was not "an affirmative act [that] create[d] an actual, particularized danger." Martinez, 943 F.3d at 1272 (citations omitted). In other words, Defendants "did not make the situation worse for [Plaintiffs]." Id. Rather, Plaintiffs were "left in the same position [they] would have been in had [Defendants] not acted at all." Id. Moreover, "declin[ing] to enforce the law does not transform its non-enforcement from inaction into an affirmative act." Railroad 1900, LLC v. City of Sacramento, No. 2:21-cv-01673-WBS-DB, 2022 WL 1693359, at *4 (E.D. Cal. May 26, 2022). This is because "[m]unicipalities and the officials who enforce their laws are routinely required to make decisions about whether and when to do so" and "to hold that decisions not to enforce laws constitute 'affirmative action' for purposes of state-created danger claims would impermissibly expand the scope of due process liability by allowing any mere omission to be reframed as actionable affirmative conduct." Id. At least under these circumstances, Defendants did not violate Plaintiffs' rights to due process.

(2) SPPD Police Reports and Press Releases

Plaintiffs also allege Wise, Louie, and Ronnie created "false, inaccurate, and biased police reports and press releases" about the assaults against Plaintiffs. FAC ¶ 149(c). Plaintiffs cite no case—and the Court is unaware of none—in which the creation of "false, inaccurate, and biased police reports and press releases" was found to

be an "affirmative act" for purposes of the "state-created danger" doctrine. Ninth Circuit cases regarding state-created danger involve circumstances where the state actors placed a specific person or group in a dangerous situation. Here, Plaintiffs' allegations are dissimilar to the factual circumstances the Ninth Circuit has found constitute an "affirmative act." For example, in Martinez, the Ninth Circuit determined the "affirmative act" prong was satisfied when an officer revealed to an abuser a domestic violence complaint made in confidence, while making disparaging comments about the victim. Martinez, 943 F.3d at 1272, 1276-77. An officer also praised the abuser in the abuser's presence after the abuser had been protected from arrest. Id. at 1273, 1276-77. The Ninth Circuit determined that a reasonable jury could find the officer's conduct could have provoked the abuser and the disparaging comments could have "emboldened" the abuser to believe he could continue to abuse the plaintiff "with impunity." Id. at 1272. In addition, the "positive remarks were communicated against the backdrop that [the defendant officer] knew [the abuser] was an officer and that there was probable cause to arrest." Id. at 1273.

The Ninth Circuit has also held that an officer affirmatively created a danger to the plaintiff by informing her assailant of the accusations her family made against him before they were able to protect themselves as the officer promised he would do, and by failing to patrol the neighborhood as he promised. Kennedy, 439 F.3d at 1063. In Hernandez, police officers directed Trump supporters to walk through anti-Trump protestors rather than turn in a direction of safety. Hernandez, 897 F.3d at 1130. In Wood v. Ostrander, a defendant police officer arrested a driver, impounded the driver's car, and stranded the passenger in a high-crime area at 2:30 a.m. Wood, 879 F.2d 583, 590 (9th Cir. 1989). In Munger, the officers ejected the plaintiff, who was wearing only a t-shirt and jeans and was heavily intoxicated, from a bar late at night in sub-freezing temperatures and prevented him from driving his truck or going back inside the bar. Munger, 227 F.3d at 1087. In Penilla, the officers responded to a 911 call from the plaintiff's neighbors after the plaintiff had "become seriously ill," and upon

arrival, the officers cancelled a call for paramedics, broke the lock on plaintiff's house door, moved the plaintiff inside of the house, locked the door, and then left the plaintiff alone. Penilla, 115 F.3d at 708, 711.

As pleaded here, Plaintiffs fail to allege how Defendants' acts left Plaintiffs in a more dangerous situation. See Martinez, 943 F.3d at 1273 (citing cases). At least under these circumstances, Defendants did not violate Plaintiffs' right to due process.

(3) July 10, 2020 Incident

Plaintiffs allege Wise placed them in greater danger by failing to arrest Richcreek on July 10, 2020. Even assuming Wise's failure to arrest Richcreek was a "dereliction of [his] duties," it was not "an affirmative act [that] create[d] an actual, particularized danger." Martinez, 943 F.3d at 1272 (quoting Hernandez, 897 F.3d at 1133). In other words, Wise "did not make the situation worse" for Plaintiffs. He "simply left [Plaintiffs] in the same position [they were] in before the police had arrived." Id.; see also Pantoja v. Los Angeles County, No. CV 19-2132 JFW (SS), 2019 WL 4280063, at *7 (C.D. Cal. Aug. 13, 2019) (holding that the "danger creation" exception did not apply based on defendant police officers' failure to enforce a protective order and arrest the plaintiff's ex-husband), adopted by 2019 WL 4276633 (C.D. Cal. Sept. 10, 2019). At least under these circumstances, Wise did not violate Plaintiffs' rights to due process.

Plaintiffs also allege Wise essentially blamed Richcreek's arrest on James when he commented to Richcreek that, "'I'm not arresting you man, SHE is," referring to James making a citizens' arrest. FAC ¶ 45. Plaintiffs further allege Defendant Wise stated, "you guys caused this . . . . this is wrong . . . . the cop hating around here." Id. ¶¶ 43, 149(b). Wise communicated his comments "in earshot," of Richcreek, id. ¶ 43, and against the backdrop that Richcreek spit on Plaintiffs at a BLM protest and threw a rock at James. See id. ¶¶ 33, 42. As a result, "[a] reasonable jury could find that [Richcreek] felt emboldened to continue his abuse with impunity" because Wise not only declined to arrest Richcreek, but squarely placed blame for his arrest on James and the

BLM protesters. See Mackie v. County of Santa Cruz, 444 F. Supp. 3d 1094, 1106 (N.D. Cal. 2020) (finding defendant deputy's interaction with a third party aggressor "centered on [plaintiff's] complaints" about the third party, "served to incite [the third party's] aggression towards [the plaintiff] in particular" and the defendant deputy's conduct "served to direct [the third party's] rage toward [the plaintiff], and [the third party] viewed [the plaintiff] as the driving force behind [the defendant deputy's] taunts and 'harassment.'"). In fact, on July 19, 2020, nine days after the July 10 Incident, Richcreek did return to the BLM protest site with "what appeared to be a lead pipe," and threatened to fight Plaintiffs and the BLM protestors. FAC ¶ 58. Under these circumstances, the Court finds that the first requirement of the state-created danger doctrine is satisfied as to Wise.

Plaintiffs further allege that Louie's conduct in supervising Wise, such as witnessing Wise's comments and signing off on his "biased" police report, "left Richcreek with the impression that he could act with impunity." Opp'n at 20-21; FAC ¶ 51. However, Plaintiffs fail to allege facts that demonstrate Richcreek was aware of Louie's position and rank, or that Richcreek was aware Louie approved Wise's police report. Without these facts, Plaintiffs fail to plausibly allege a due process violation against Louie because there is no affirmative act.

(4) September 22, 2020 Incident

Plaintiffs allege on information and belief that Defendants Bartl, Perez, and Ronnie "engaged in the affirmative act of informing Defendant Cheney that Ms. James protest signs were in violation of a City ordinance." FAC ¶ 150. The result of this, Plaintiffs allege, "embolden[ed] Defendant Cheney to act as a vigilante to stop Ms. James from putting up her signs." Id. Taking the allegations in the FAC as true, the Court finds that a reasonable jury could find that Defendants' disclosure that James's signs violated the Sign Ordinance provoked Cheney and that the disclosure emboldened Cheney to believe that he could "act as a vigilante to stop Ms. James from putting up her signs, which he did when he assaulted Ms. James on October 3, 2020." Id.; see Martinez, 943 F.3d at 1272 ("A reasonable jury could find that

[the defendant officer's] disclosure provoked [the third party aggressor], and that [the officer's] disparaging comments emboldened [the third party] to believe that he could further abuse [the plaintiff], including by retaliating against her for her testimony, with impunity."). Under these circumstances, the first requirement of the state-created danger doctrine is satisfied.

(5) October 3, 2020 Incident

Plaintiffs allege that Ronnie "engaged in the affirmative act of deciding not to arrest or cite Defendant Cheney for his October 3, 2020 assault on Ms. James." FAC ¶ 151. Even assuming Ronnie's failure to arrest Cheney—or direction to responding SPPD officers not to arrest Cheney—was a "dereliction of [his] duties," it was not "an affirmative act [that] create[d] an actual, particularized danger." Martinez, 943 F.3d at 1272 (quoting Hernandez, 897 F.3d at 1133). In other words, Ronnie "did not make the situation worse" for Plaintiffs. Ronnie "simply left [Plaintiffs] in the same position [they were] in before the police had arrived." Id.; see also Pantoja, 2019 WL 4280063, at *7 (holding that the "danger creation" exception did not apply based on defendant police officers' failure to enforce a protective order and arrest the plaintiff's ex-husband). At least under these circumstances, Ronnie did not violate Plaintiffs' rights to due process.

2. Foreseeability

To invoke the state-created danger doctrine, Plaintiffs must next allege that their "ultimate injury" was "foreseeable." Hernandez, 897 F.3d at 1133 (citing Lawrence, 340 F.3d at 957). This does not mean that the exact injury must be foreseeable. Rather, "the state actor is liable for creating the foreseeable danger of injury given the particular circumstances." Kennedy, 439 F.3d at 1064 n.5. Therefore, the inquiry is not whether Plaintiffs' exact injury was foreseeable, but rather whether the "overall increased danger of injury to Plaintiffs was foreseeable." Mackie, 444 F. Supp. 3d at 1107.

a. Defendant Wise

Plaintiffs allege that on July 10, 2020, Richcreek called James a derogatory epithet and threw a large rock at her that hit her leg. FAC ¶ 42. Additionally, Plaintiffs allege Richcreek "responded to Wise and the other mostly White SPPD officers at the scene, stating 'I'm doing this for you guys.'" Id. ¶ 43. Plaintiffs further allege that BLM protesters presented Wise with statements and evidence of Richcreek's assault against James both on July 10 and on July 8, 2020. Id. Taking the facts alleged in the FAC as true, the Court finds that Plaintiffs have satisfied the foreseeability prong based on the nature of Richcreek's interaction with Wise and Plaintiffs, as well as Richcreek's aggressive statements to James, Richcreek's comments justifying his actions against James and BLM protestors because he was acting in solidarity with SPPD, and Wise's comment effectively blaming James for Richcreek's arrest.

b. Defendants Ronnie, Perez, and Bartl

Plaintiffs allege that Defendants engaged in affirmative acts and omissions that made Plaintiffs vulnerable to harm they would not otherwise have faced, "including the foreseeable . . . attack by Defendant Cheney." Id. ¶ 148. Plaintiffs further allege that it was foreseeable that informing Cheney that James's protest signs violated the Sign Ordinance "would embolden Defendant Cheney to act as a vigilante to stop Ms. James from putting up her signs, which he did when he assaulted Ms. James on October 3, 2020." Id. ¶ 150. Standing alone, the Court is skeptical that it was foreseeable to SPPD police officers that Cheney would "assault" James because she purportedly violated the Sign Ordinance. However, Plaintiffs also allege that Cheney's actions arose against the backdrop of a "well-documented rise of violent attacks on BLM and racial justice protestors by White supremacists, and supporters of other extremist groups that explicitly oppose BLM, like Defendant Cheney." Id. ¶ 152. Taking the allegations in the Complaint as true, Defendant Cheney's conduct was foreseeable.

3. Deliberate Indifference to a Known Danger

The standard to be applied when evaluating deliberate indifference "is even higher than gross negligence—deliberate indifference requires a culpable mental state." Patel, 648 F.3d at 974. "The state actor must 'recognize an unreasonable risk and actually intend to expose the plaintiff to such risks without regard to the consequences to the plaintiff.'" Martinez, 943 F.3d at 1274. (alterations omitted) (quoting Grubbs, 92 F.3d at 899). In other words, the state actor must have known that something was going to happen, but "ignored the risk and exposed the [plaintiffs] to it anyway." Hernandez, 897 F.3d at 1135 (alterations omitted) (quoting Patel, 648 F.3d at 974).

a. Defendant Wise

Given the foreseeability of Richcreek's assaults, Plaintiffs have plausibly alleged that Wise's failure to arrest Richcreek, and decision to blame James for Richcreek's arrest constitutes deliberate indifference to a known or obvious danger. Plaintiffs allege that when Wise arrived on scene, Plaintiffs and other BLM supporters presented him with statements and evidence of Richcreek's assaults against James earlier that day as well as the assault that took place on July 8, 2020. FAC ¶ 43. Plaintiffs also allege that "SPPD knew Richcreek had a long criminal history." Id. ¶ 152. Taken together, Plaintiffs' allegations plausibly suggest that Richcreek's future conduct was a known or obvious danger and by ignoring the risk created by Richcreek's history and repeated assaults against James and BLM protestors, Wise and SPPD officers acted with deliberate indifference to the risk of future abuse. See, e.g., Martinez, 943 F.3d at 1274 ("[E]ngaging in disparaging small talk with [the abuser], and/or positively remarking on his family while ordering other officers not to make an arrest despite the presence of probable cause, constitutes deliberate indifference to a known or obvious danger."); see Hernandez, 897 F.3d at 1136 (finding officers acted with deliberate indifference when they were warned that assaults had been reported and witnesses the assaults firsthand, yet still directed Trump supporters to walk through an anti-Trump protest).

The Court finds that Plaintiffs have plausibly alleged Wise violated Plaintiffs' due process rights by affirmatively increasing the known and obvious danger Plaintiffs faced.

b. Defendants Ronnie, Perez, and Bartl

Plaintiffs allege that (1) Ronnie, Perez, and Bartl disclosed to Cheney that James's signs violated the Sign Ordinance, and (2) SPPD officers, including Ronnie, were aware of the increase in violence against BLM protestors. FAC ¶¶ 150, 152. Taking the allegations in the FAC as true, Plaintiffs have plausibly alleged that Ronnie, Perez, and Bartl acted with deliberate indifference toward the obvious danger that a White supremacist who opposed the BLM movement, such as Plaintiffs allege Cheney to be, posed to James. See, e.g., Martinez, 943 F.3d at 1274; Hernandez, 897 F.3d at 1136.

D. Equal Protection (Claim 7)

James alleges a violation of the equal protection clause of the Fourteenth Amendment against the City and Officer Defendants.

An equal protection claim for discriminatory enforcement requires plaintiffs to plead that (1) officers' enforcement efforts had a discriminatory effect on plaintiffs due to their race or other protected status, and (2) the police were motivated by a discriminatory purpose. Rosenbaum v. City & Cnty. of San Francisco, 484 F.3d 1142, 1152 (9th Cir. 2007).

James posits two theories for equal protection liability. The first alleges discrimination based on James's race as an African American. ¶ 163. In support of these allegations, James cites the Defendant Officers' conduct on July 8, July 10, July 19, and October 3, 2020. Id. Specifically, James alleges that Defendant Officers' failure to investigate the assaults against James as hate crimes, "affording the White perpetrators protection, preferential treatment, and allowance to act with impunity," issuing false and biased police reports, and "acting in complicity" with Cheney, demonstrates Defendant Officers' "intent or purpose to discriminate against Ms. James on account of her African

American race." Id. Plaintiffs further allege Officer Defendants operated within "a culture of anti-BLM sentiment at SPPD, and support for White supremacist groups throughout the force." Id. ¶ 164.

Here, James impermissibly equates anti-BLM sentiment with discrimination based on race. That is, even assuming Officer Defendants failed to follow the SPPD Hate Crime Policy, issued biased police reports, or allowed her attackers to act with impunity because they were opposed to the BLM movement generally, James does not sufficiently connect Defendant Officers' alleged anti-BLM sentiment with her assertion that they discriminated against her based on her race. See NAACP of San Jose/Silicon Valley v. City of San Jose, 562 F. Supp. 3d 382, 404 (N.D. Cal. 2021) ("[W]hile plaintiffs' complaint does adequately allege that plaintiffs were targeted for their viewpoint, and while that viewpoint relates to the issue of ethnicity, the complaint does not adequately allege that plaintiffs were targeted for their own ethnicity."). James survived Defendants' motion to dismiss her First Amendment claims based on allegations of Defendants' animus against the BLM movement, not race specifically.

James attempts to salvage her claim by stating that "SPPD decided not to identify Ms. James as a victim of the July 8 incident, and only identified her fellow White protester [Patterson] as the victim." Opp'n at 22; FAC ¶ 41. However, the officers responsible for reporting the July 8, 2020 Incident—Officer Roppo and Corporal Carrillo—are not parties to this action, and there are no facts linking the Defendant Officers' conduct to the non-party officers' actions. James further claims that when Patterson followed up with SPPD about the Richcreek assaults, she received responses "assuring her that SPPD would follow up on her concerns," while James's requests were ignored. FAC ¶ 53. However, there are no allegations that SPPD ever followed up with Patterson as promised. In other words, James fails to allege that SPPD fulfilled either of Plaintiffs' requests for information. Without sufficient delineation between viewpoint discrimination and racial discrimination, James's equal protection claim cannot proceed related to this conduct.

James further alleges Perez and Bartl's decision on September 22, 2020 to selectively enforce section 31.2-7 of the City Municipal Code was unconstitutional because they were motivated by James's race, or alternatively Plaintiffs' BLM viewpoints, since they did not enforce the same ordinance against White Trump supporters at the November 1 Trump Rally. Id. ¶ 165; Opp'n at 23-24. Nonetheless, James's equal protection claim suffers for the same reason her First Amendment claim fell. Specifically, James fails to present facts demonstrating Defendants Perez and Bartl's decision not to enforce the sign ordinance against the White Trump supporters was influenced by race or their viewpoints, rather than the updates to the Sign Placement and Enforcement Protocol, which withdrew authority from the SPPD to enforce the sign ordinance. Although she claims the Perez and Bartl made their decision "on account of Ms. James' race," FAC ¶ 164, James offers no facts to support this assertion or overcome the inference that the Sign Placement and Enforcement Protocol dictated Perez and Bartl's actions. Simply put, the allegation that Perez and Bartl acted "on account of Ms. James' race," without more, is a conclusory statement afforded no weight on a motion to dismiss.

Defendants' motion to dismiss James's seventh claim is GRANTED with leave to amend.

E. Municipal Liability

Plaintiffs seek to hold the City liable on the basis that (1) the City has a "practice or custom" of discriminating against BLM protestors; (2) SPPD Police Chief Ortiz had final policymaking authority; (3) Chief Ortiz "ratified" the Defendant Officers' unconstitutional conduct; and (4) the City failed to train its employees with respect to the SPPD Hate Crime Policy. Opp'n at 8-15; FAC ¶¶ 2, 11, 56, 98-99, 147, 166.

"The Supreme Court in Monell held that municipalities may only be held liable under section 1983 for constitutional violations resulting from official . . . policy or custom." Benavidez v. County of San Diego, 993 F.3d 1134, 1153 (9th Cir. 2021) (citing Monell v. Dep't of Soc.

Servs., 436 U.S. 658, 694 (1978)). Under Monell, a plaintiff may establish municipal liability by demonstrating that (1) the constitutional violation was the result of a governmental policy or a longstanding practice or custom; (2) the individual who committed the constitutional violation was an official with final policy-making authority; or (3) an official with final policy-making authority ratified the unconstitutional act. Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992); see also Benavidez, 993 F.3d at 1153 ("[P]olicies can include written policies, unwritten customs and practices, failure to train municipal employees on avoiding certain obvious constitutional violations, . . . and, in rare instances, single constitutional violations [that] are so inconsistent with constitutional rights that even such a single instance indicates at least deliberate indifference of the municipality[.]") (internal citations omitted). The plaintiff must demonstrate that "policy, practice, or custom . . . amounts to deliberate indifference to the plaintiff's constitutional right" and must be "the moving force behind the constitutional violation." Lockett v. County of Los Angeles, 977 F.3d 737, 741 (9th Cir. 2020).

1. Policy, Custom, or Practice

a. Existence of a Policy, Custom, or Practice

A local city may be held liable on the basis of an unconstitutional policy, custom, or practice if a plaintiff can "prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law.'" City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-168 (1970)). A policy within the meaning of Monell exists where official policymakers "consciously" choose a particular course of action or procedure "from among various alternatives." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985); Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) ("[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for

establishing final policy with respect to the subject matter in question"). Moreover, a policy of inaction may be a municipal policy within the meaning of Monell. See Brown v. Lynch, 831 F.3d 1146, 1152 (9th Cir. 2016). To plead the existence of a policy, custom, or practice, Plaintiffs FAC (1) cannot "simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively;" and (2) "must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 637 (9th Cir. 2012) (quoting Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)).

Here, Plaintiffs plausibly allege the existence of an unconstitutional policy, custom, or practice for purposes of Monell liability. First, Plaintiffs allege SPPD has a "policy, practice and custom of free speech repression, discrimination and retaliation against Ms. James, African Americans and BLM protestors." FAC ¶¶ 2, 11, 19, 20, 147, 166. Specifically, Plaintiffs allege SPPD has a policy of "failing to treat reported assaults against them as potential hate crimes, taking steps to protect victims, and creating false, inaccurate and biased police reports of those assaults, in violation of their mandatory duties." Id. ¶ 19. In support of their allegations, Plaintiffs cite several examples over the past year of this purported policy, such as the Defendant Officers' decisions not to arrest Richcreek or Cheney for their respective assaults, id.¶ 11, and the creation and approval of false and biased police reports related to those assaults. Id. ¶¶ 41, 46, 48, 51. Furthermore, Plaintiffs allege that the City was on notice of its unconstitutional policy because (1) the City's public safety commissioner, Alan Ehrlich, wrote to the SPPD police chief and other city officials "to express his concern with SPPD's biased and improper handling of the July 10 incident," Id. ¶ 48, and the September 22 incident, id. ¶ 72; (2) James confronted SPPD officers about the July 8 spitting incident at a city council meeting, id. ¶ 56; and (3) Plaintiffs' attorney sent the SPPD police chief a letter explaining Plaintiffs' inability to exercise their First Amendment rights was due to SPPD's

"biased policing against them because Corporal Wise and the Department disagree with [Plaintiffs'] views." Id. ¶ 63. Moreover, an investigation ordered by the City to review complaints lodged against SPPD officers concluded that twenty-one of fifty-three complaints against nine SPPD officers were meritorious, and found multiple violations in the July 8, July 10, and July 19 Incidents. Id. ¶¶ 97-98. Taking these statements as true for purposes of this motion, Plaintiffs' allegations "give fair notice and [] enable the opposing party to defend itself effectively." AE ex rel. Hernandez, 666 F.3d at 637.

Regarding the second prong of the Ninth Circuit's rule, the Court finds Plaintiffs plausibly suggest an entitlement to relief. The standard at the motion to dismiss stage of litigation "is not that plaintiff's explanation must be true or even probable. The factual allegations of the complaint need only plausibly suggest an entitlement to relief." Starr v. Baca, 652 F.3d 1202, 1216-17 (9th Cir. 2011) (citation omitted). A "complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im*plausible." Id. at 1216. Here, Defendants fail to provide an alternative explanation that renders Plaintiffs' version of the facts implausible at this stage. Plaintiffs therefore sufficiently allege the existence of an unconstitutional policy, practice, or custom.

b. Deliberate Indifference

Deliberate indifference "is a stringent standard of fault," requiring allegations "that a municipal actor disregarded a known or obvious consequence of his action." Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 410 (1997). "Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of Monell are satisfied." Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1076 (9th Cir. 2016) (citation omitted).

Here, Plaintiffs plausibly allege that the City was on notice that their purported policy of repressing First Amendment rights violated the constitution. As previously described, SPPD received various complaints about their policy, including from the City's public safety commissioner, Plaintiffs' counsel, residents within the community, and James herself. FAC ¶¶ 48, 56, 63, 95. Plaintiffs further allege that the former SPPD chief was on notice of the training deficiencies in the City's Hate Crimes Policy "as early as mid July 2020." Id. ¶¶ 11, 56. Nonetheless, the former chief "ignored complaints by the public regarding the bias exhibited by SPPD officers against BLM protesters and Ms. James in particular." Id. Plaintiffs claim that as a result Defendant Officers failed to treat the October 3 incident with Cheney as a hate crime and composed a false police report to document the alleged assault. Id. ¶¶ 82, 84. Accepting these facts as true for purposes of this motion, Plaintiffs plausibly allege deliberate indifference to a policy, custom, or practice.

c. Moving Force

To show that a policy or custom is the "moving force" behind a violation, a plaintiff must allege facts showing that the policy or custom was "closely related to the ultimate injury." City of Canton, Ohio v. Harris, 489 U.S. 378, 391 (1989). "At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." Tuttle, 471 U.S. at 823.

Here, Plaintiffs plausibly allege that SPPD's policy of repressing First Amendment rights was the moving force behind their injuries. As previously discussed, Plaintiffs allege that the City's own investigation found multiple violations with the July 8, July 10, and July 19 Incidents, "which led to repeat attacks including by the same perpetrator." Id. ¶¶ 11, 97-98. The investigation also found that "one-third of SPPD officers, including Defendants, violated these and other department policies in responding to Ms. James and Ms. Patterson's reported assaults." Id. ¶ 99. Taken together, these allegations give rise to the plausible inference the SPPD's policy caused the constitutional violation. See Tuttle, 471 U.S. at 823.

Defendants' motion to dismiss is DENIED as to Plaintiffs' claim against the City for an unlawful policy, practice, or custom.

2. Failure to Train

"To allege a failure to train, a plaintiff must include sufficient facts to support a reasonable inference (1) of a constitutional violation; (2) of a municipal training policy that amounts to a deliberate indifference to constitutional rights; and (3) that the constitutional injury would not have resulted if the municipality properly trained their employees." Benavidez, 993 F.3d at 1153–54. "[W]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." Connick, 563 U.S. at 61. As such, "a pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." Id. at 62.

Here, Plaintiffs plausibly allege a Monell failure to train claim. First, Plaintiffs allege that SPPD violated their First Amendment free speech rights and Fourteenth Amendment due process rights. See FAC ¶¶ 118-125, 145-155. The Court finds these allegations sufficient to survive Defendants' motion to dismiss for the reasons discussed above.

Second, Plaintiffs argue that the City failed to train its employees with respect to the SPPD Hate Crime Policy. Opp'n 13-15; FAC ¶¶ 10-11, 20. They allege five instances where at least ten SPPD officers failed to carry out their duties under the Hate Crimes Policy. Opp'n at 14. Specifically, they allege that SPPD failed to preserve evidence, mitigate further injury or damage, and take reasonable steps to deescalate the situation with regards to the alleged assaults committed by Richcreek and Cheney. FAC ¶¶ 39-43, 84, 149(a). Plaintiffs add that the City was on notice of SPPD's failure to train as early as July 16, when James questioned several City council members and SPPD officers, including the former police chief, at a public Zoom forum on

SPPD's "mishandling of a [recent] racially motivated hate crime against protesters" in relation to the July 8 and July 10 Richcreek assaults. FAC ¶ 56; Opp'n at 14. Plaintiffs plausibly allege that SPPD was on notice of its failures to implement the Hate Crime Policy prior to the July 19 and October 3 alleged assaults. In other words, Plaintiffs' allegations are sufficient to state deliberate indifference by SPPD.

Third, Plaintiffs allege that if SPPD followed the "mandatory" Hate Crime Policy, it "likely would have forestalled the assaults on July 10, 19, and October 3, 2020." FAC ¶ 149(a). Indeed, Richcreek's alleged July 19 assault was his third interaction with Plaintiffs in a two-week span. Plaintiffs add that the City's internal investigation found that "one-third of SPPD officers, including Defendants, violated [the Hate Crime Policy] and other department policies in responding to Ms. James and Ms. Patterson's reported assaults." Id. ¶ 99. Taken together, Plaintiffs' allegations give rise to the plausible inference that the July 19 and October 3 constitutional violations would not have resulted if SPPD properly trained its officers on the Hate Crime Policy.

The City's motion to dismiss Plaintiffs' failure to train claims under Monell is DENIED.

3. Chief Ortiz as a Final Policy-Maker

"[A] municipality may incur section 1983 liability . . . when the individual who committed the constitutional tort was an official with 'final policy-making authority' and that the challenged action itself thus constituted an act of official government policy." Trevino, 99 F.3d at 920 (quoting Gillette, 979 F.2d at 1346). As to matters of police policy, the chief of police under some circumstances may be considered the person possessing final policy-making authority. Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991).

Plaintiffs argue that Chief Ortiz is a final policy-maker, and in that capacity he (1) directed Perez to warn James to take her protest signs down, (2) authorized Ronnie's decision not to arrest Cheney on October 3, and (3) "conspired" with Cheney and Ronnie, which resulted

in SPPD issuing a press release justifying SPPD's failure to arrest Cheney after the October 3 Incident. FAC ¶¶ 68, 75, 123. These allegations do not support Plaintiffs' Monell claim based on Chief Ortiz's actions as a policy-maker because the Court already determined that Plaintiffs failed to allege facts that Perez's actions violated James's First Amendment Rights and that Chief Ortiz entered into a conspiracy to violate Plaintiffs' constitutional rights. Although Plaintiffs allege that Chief Ortiz gave Ronnie the authority not to arrest Cheney, id. ¶ 78, they fail to allege that Chief Ortiz had knowledge of Cheney's purported actions. In other words, Plaintiffs allege that Chief Ortiz granted Ronnie the power to make the decision, not that Chief Ortiz made the decision himself.

Plaintiffs further claim that Chief Ortiz "fostered a culture of anti-BLM, anti-Black, and pro-White supremacy throughout the police force." Opp'n at 12. However, the facts Plaintiffs rely on in support of this notion are unpersuasive. For instance, it is unclear how Chief Ortiz's support for a prayer meeting hosted by a "virulently anti-LGBT" group helped foster a culture of anti-BLM sentiment. FAC ¶ 94(c). It is equally unclear how Wise's comments at the July 10 incident reflect a culture of anti-BLM sentiment, as opposed to Wise's individual opinion at that time. Id. ¶ 94(a).

Defendants' motion to dismiss as to Chief Ortiz as a final policy-maker is GRANTED with leave to amend.

4. Ratification

Plaintiffs argue Chief Ortiz is an official with final policy-making authority and ratified Ronnie's unconstitutional acts. Opp'n at 12-13.

A plaintiff states a claim under Monell if the plaintiff alleges that the "authorized policymakers approve a subordinate's decision and the basis for it." Christie v. Iopa, 176 F.3d 1231, 1239 (9th Cir. 1999) (citing City of St. Louis, 485 U.S. at 127). But ratification "generally requires more than acquiescence." Sheehan v. City & Cnty. of San Francisco, 743 F.3d 1211, 1231 (9th Cir. 2014, overruled on other

grounds by, City and Cnty. of San Francisco v. Sheehan, 575 U.S. 600, 1767-78 (2015)). The mere failure to discipline is insufficient. Id.

Plaintiffs argue that Chief Ortiz ratified Ronnie's "decision not to cite Cheney for his assault on Ms. James" in violation of her Constitutional rights. Opp'n at 12; FAC ¶ 78. However, Plaintiffs fail to plead sufficient facts that Chief Ortiz's involvement was anything "more than acquiescence."

Defendants' motion to dismiss as to ratification is GRANTED with leave to amend.

F. State Law Claims

1. Bane Act (Claim 3)

James also alleges a violation of the Bane Act, Cal. Civ. Code § 52.1 against the Defendants. FAC ¶¶ 128-136.

The Bane Act prohibits interference or attempted interference with a person's rights under federal or California law by "threats, intimidation, or coercion." Cal. Civ. Code § 52.1. "[A] defendant is liable if he or she interfered with the plaintiff's constitutional rights by the requisite threats, intimidation, or coercion." Austin B. v. Escondido Union Sch. Dist., 149 Cal. App. 4th 860, 882 (2007) (citation omitted).

"The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., "threats, intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." Id. "[T]hreat involves the intentional exertion of pressure to make another fearful or apprehensive of injury or harm; intimidation involves putting in fear for the purpose of compelling or deterring conduct; and coercion is the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done." Johnson v. City of Atwater, No. 1:16-CV-1636 AWI SAB, 2019 WL 283707, at *5 (E.D. Cal. Jan. 22, 2019) (citation omitted). The threat, intimidation, or coercion required of a Bane Act claim need not

be independent of the alleged constitutional violation. Reese v. Cnty. of Sacramento, 888 F.3d 1030, 1043 (9th Cir. 2018); Scalia v. Cnty. of Kern, 308 F. Supp. 3d 1064, 1080-84 (E.D. Cal. 2018); Cornell v. City & Cnty. of San Francisco, 17 Cal. App. 5th 766, 799-800 (2017). However, speech alone does not satisfy the threat, intimidation, or coercion requirement unless the speech threatened violence. Cal. Civ. Code § 52.1(k); Ctr. for Bio-Ethical Reform, Inc. v. Irvine Co., 37 Cal. App. 5th 97, 115 (2019).

Additionally, the Bane Act requires a "specific intent" to violate a person's rights. Reese, 888 F.3d at 1043 (quoting Cornell, 17 Cal. App. 5th at 801-02). To plead specific intent, a plaintiff must allege facts demonstrating (1) the right at issue is "clearly delineated and plainly applicable under the circumstances of the case," and (2) "the defendant committed the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that . . . right." Cornell v. City & Cnty. of San Francisco, 17 Cal. App. 5th 766, 803 (2017), as modified (Nov. 17, 2017).

Here, as previously discussed, James plausibly alleges that Wise and Ronnie violated her First and Fourteenth Amendment rights, and that Perez and Bartl violated her Fourteenth Amendment due process rights. She further alleges Monell liability against the City for an unconstitutional policy, practice, and custom, and a failure to train. These allegations are sufficient to satisfy the first element of a Bane Act claim.

However, as to the second element, James fails to plausibly allege Defendants interfered with her rights using threats, intimidation, or coercion. Specifically, James's claim against Wise regarding his "cop hating" comment and statement to Richcreek that, "I'm not arresting you man, SHE is," referring to James, fails because it constitutes speech and James does not allege that it threatened violence. See Cal. Civ. Code § 52.1(k). Similarly, as to the Defendant Officers, James fails to allege how informing Cheney that James's signs violated the Sign Ordinance, failing to arrest either Defendant Cheney or Richcreek for their alleged assaults on James to stop her from putting up her protest

signs, and issuing a subsequent biased press release constitute a threat, intimidation, or coercion for purposes of the Bane Act.

The cases James cites in support of her Bane Act claim are unpersuasive. For instance, in Cuviello v. City of Vallejo, No. 16-cv-02584-KJM-KJN, 2020 WL 6728796, at *8-9 (E.D. Cal. Nov. 16, 2020), the court denied defendants motion to dismiss plaintiff's Bane Act claim because the plaintiff plausibly alleged coercion when the defendant officer threatened to seize plaintiff's bullhorn despite lacking any legal authority to do so. See also Black Lives Matter-Stockton Chapter v. San Joaquin Cnty. Sheriff's Off., 398 F. Supp. 3d 660, 680 (E.D. Cal. 2019) ("[C]ourts have consistently held that a threat of arrest from law enforcement can be 'coercion' under the Bane Act, even without a threat of violence per se."). However, here, James does not allege that Defendant Officers threatened to arrest her, seize her property, or otherwise coerce her. Although James argues that Perez and Bartl threatened to seize her signs regarding the September 22 incident, these allegations were insufficient to support a First Amendment violation, and thus cannot support her Bane Act claim. At bottom, there are no allegations to support a plausible inference that the Defendant Officers coerced James because James fails to allege a threat of arrest, seizure, or other application of force.

Similarly, James cites to Gifford v. Hornbrook Fire Prot. Dist., No. 2:16-CV-0596-JAM-DMC, 2021 WL 4168532, at *28-29 (E.D. Cal. Sept. 14, 2021). But Gifford does not clarify what conduct constitutes threat, intimidation, or coercion for purposes of the Bane Act. Moreover, the facts in Gifford have no relation to James's claims, and James does not attempt to analogize her claim Gifford's. See Opp'n at 26.

Defendants' motion to dismiss James's third claim is GRANTED with leave to amend.

2. Breach of Mandatory Duties (Claim 6)

Plaintiffs allege that Defendants breached their mandatory duties under the SPPD Hate Crime Policy. FAC ¶¶ 156-160.

Section 815.6 of the California Government Code imposes liability on public entities for failing to perform mandatory duties. Cal. Gov't Code § 815.6. "Section 815.6 has three discrete requirements which must be met before governmental entity liability may be imposed under Government Code section 815.6: (1) an enactment must impose a mandatory duty; (2) the enactment must be meant to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered." San Mateo Union High Sch. Dist. v. Cnty. of San Mateo, 213 Cal. App. 4th 418, 428 (2013) (simplified). An "enactment" means "a constitutional provision, statute, charter provision, ordinance or regulation." Cal. Gov't Code § 810.6.

The first prong requires that "the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken." San Mateo Union High Sch. Dist., 213 Cal. App. 4th at 428. "Courts have construed [the] first prong rather strictly, finding a mandatory duty only if the enactment 'affirmatively imposes the duty and provides implementing guidelines.'" Guzman v. County of Monterey, 46 Cal. 4th 887, 898 (2007). "It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. Haggis v. City of Los Angeles, 22 Cal. 4th 490, 498 (2000). "Such an act is mandated only to the extent of the enactment's precise formulation." State Dep't of State Hosps. v. Superior Ct., 61 Cal. 4th 339, 350 (2015). At bottom, "[w]hen the enactment leaves implementation to an exercise of discretion, lend[ing] itself to a normative or qualitative debate over whether [the duty] was adequately fulfilled, an alleged failure in implementation will not give rise to liability. Id. (citation omitted).

Defendants argue that the SPPD Hate Crime Policy is an internal policy that does not impose a mandatory duty under § 815.6. Motion at 27. Plaintiffs contend that the SPPD Hate Crime Policy is an enactment because it was promulgated under California Penal Code §

13519.6(c). Opp'n at 26-29. Indeed, California Penal Code § 13519.6(c) states that the California Commission on Peace Officer Standards and Training (POST) "shall include a framework and possible content of a general order or other formal policy on hate crimes that *all state law enforcement agencies shall adopt*." Cal. Penal Code § 13519.6(c) (emphasis added). The "elements of the framework shall include . . . [a] title-by-title protocol that agency personnel are required to follow, including . . . [p]roviding victim assistance and followup, including community followup." Id. § 13519.6(c)(4)(D). Plaintiffs add that the City's Charter mandates that "[p]ursuant to Section 13510(c), Chapter 1, the South Pasadena police department will adhere to the standards for recruitment and training established by the" POST. FAC ¶ 36. Further, the SPPD Hate Crime Policy states that the "purpose of this policy is to meet or exceed the provisions of Penal Code § 13519.6(c)." Pls.' RJN, Exhibit C at 40.

Even assuming California Penal Code § 13519.6(c) constitutes an enactment and provides implementing guidelines for purposes of section 815.6, the statute still leaves discretion to state law enforcement agencies on *how* to implement its procedures. See Haggis, 22 Cal. 4th at 498. Indeed, how law enforcement agencies investigate potential crimes "is a decision generally committed to an agency's absolute discretion." Gonzalez v. United States, 814 F.3d 1022, 1028 (9th Cir. 2016). California Penal Code § 13519.6(c) offers no details on the procedure state law enforcement agencies are to establish to provide victim assistance and follow-up for alleged hate crimes. See State Dep't of State Hosps., 61 Cal. 4th at 350. Plaintiffs point to the POST Hate Crime Policy as providing the requisite procedure SPPD must follow. However, the POST Hate Crime Policy regarding victim assistance is couched in discretionary terms, listing the procedures officers *should* take. Pls.' RJN, Exhibit B at 21 ("At the scene of a suspected hate or bias crimes, officers *should* take preliminary actions deemed necessary . . . .") (emphasis added), 23 ("Investigators at the scene of or while performing follow-up investigation on a suspected hate or bias crimes (or hate incident if agency policy requires it) *should* take all actions deemed necessary.") (emphasis added)). The Ninth

Circuit acknowledges that the term "should" often connotates a "strong suggestion, not a requirement." See United States v. Montgomery, 462 F.3d 1067, 1069 (9th Cir. 2006) (citing Seltzer v. Chesley, 512 F.2d 1030, 1035-36 (9th Cir. 1975) (construing "should" as a permissive, not a mandatory, word)).

Because Plaintiffs have failed to identify an "enactment" that imposes a mandatory duty, Plaintiffs' section 815.6 claim fails under the first prong. See State Dep't of State Hosps., 61 Cal. 4th at 350.

Defendants' motion to dismiss Plaintiffs' sixth claim is GRANTED with leave to amend.

G. Injunctive Relief

Defendants argue that injunctive relief is inappropriate because Plaintiffs fail to allege facts demonstrating irreparable harm. Motion at 31-32.

"A preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24. On an application for a preliminary injunction, the moving party has the burden to establish that (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm if the preliminary relief is not granted, (3) the balance of equities favors the plaintiff, and (4) the injunction is in the public interest. Id. at 20.

Here, Plaintiffs fail to plausibly allege irreparable harm. Even assuming the existence of an unconstitutional policy, custom, or practice, Plaintiffs fail to allege that this policy continues to exist, such that it presents a likelihood of harm. Indeed, "past wrongs do not in themselves amount to that real and immediate threat of injury." City of Los Angeles v. Lyons, 461 U.S. 95, 103 (1983). Although Plaintiffs allege that the July and October incidents chilled their free speech, FAC ¶¶ 45, 57, there are no allegations of any First or Fourteenth Amendment violations occurring in the two years since the events giving rise to Plaintiffs' FAC. In other words, Plaintiffs do not allege a threat of future injury necessary to warrant injunctive relief.

Defendants' motion to dismiss Plaintiffs' request for injunctive relief is GRANTED with leave to amend.

IV. CONCLUSION

Defendants' Motion is GRANTED in PART and DENIED in PART. Plaintiffs are granted leave to amend in conformity with this Order. An amended complaint may be filed and served no later than November 30, 2022. Failure to file an amended complaint by that date will waive Plaintiffs' right to do so. If Plaintiffs fail to file an amended complaint by that date, Defendants must answer the remaining claims of the FAC within twenty-one days after that date. Leave to amend is granted only to address the specific issues raised by the Motion. Leave to add new claims or new defendants is not granted. Plaintiffs must seek leave to amend to add new defendants or new claims by a properly noticed motion. Plaintiffs must provide a redlined version of any amended complaint to the Court's generic chambers email address.

IT IS SO ORDERED.

Date: November 3, 2022

Dale S. Fischer
United States District Judge