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9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION**

11
12 TUCK’S RESTAURANT AND BAR, a
California corporation, KENNETH R. PAIGE;
13 CHAD PAIGE; BUCKMAN ENTERPRISES,
LLC, a California limited liability company;
14 ROBIN BUCKMAN; and THE NEVADA
COUNTY RESTAURANT COALITION, an
15 unincorporated membership association,

16 Plaintiffs,

17 v.

18 NEVADA COUNTY, CALIFORNIA;
KATHARINE ELLIOTT; and DOES 1-10
19 inclusive,

20 Defendants.

Case No. 2:20-cv-02256-KJM-CKD

**NEVADA COUNTY DEFENDANTS’
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, SUMMARY
ADJUDICATION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Judge: Hon. Kimberly J. Mueller

Date: January 26, 2024

Time: 10:00 a.m.

Crtrm: 3

Trial Date: None Set

1 **TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 26, 2024, at 10:00 a.m., or as soon thereafter
3 as counsel may be heard, in the courtroom of the Honorable Kimberly J. Mueller, located in the
4 United States Courthouse, 501 I Street, Sacramento, California 95814, Defendants Nevada County
5 and Katharine Elliott (the “Nevada County Defendants”) will and hereby do move collectively for
6 summary judgment or, in the alternative, summary adjudication, pursuant to Rule 56 of the
7 Federal Rules of Civil Procedure and Local Rule 260.

8 This Motion is made on the grounds that summary judgment, or summary adjudication, is
9 proper because the undisputed material facts show that there is no genuine issue as to any material
10 fact and that the Nevada County Defendants are entitled to judgment, or in the alternative
11 summary adjudication, as a matter of law. Specifically, summary judgment is appropriate
12 because:

13 (1) Plaintiffs’ First Amendment retaliation claim fails because Plaintiffs cannot
14 establish the requisite causal connection between their protected speech and the alleged retaliatory
15 action. Specifically, Plaintiffs cannot establish that the County’s alleged motive to restrict their
16 speech was a but-for cause of the County’s enforcement actions;

17 (2) County Counsel Katharine Elliott is entitled to qualified immunity because
18 Plaintiffs cannot establish the violation of a clearly established right;

19 (3) Plaintiffs cannot support their claims against the County because they cannot
20 establish that the alleged constitutional violations were caused by a County policy or custom; and

21 (4) To the extent Plaintiffs assert claims for injunctive and declaratory relief, such
22 claims are moot.

23 In the alternative, the Nevada County Defendants seek summary adjudication of the
24 following issues:

25 (1) County Counsel Katharine Elliott is entitled to qualified immunity because
26 Plaintiffs cannot establish the violation of a clearly established right;

27 (2) Plaintiffs cannot support their claims against the County because they cannot
28 establish that the alleged constitutional violations were caused by a County policy or custom; and

1 (3) To the extent Plaintiffs assert claims for injunctive and declaratory relief, such
2 claims are moot.

3 This Motion is based on this Notice of Motion, the supporting Memorandum of Points and
4 Authorities attached hereto, the concurrently filed Statement of Undisputed Facts, Request for
5 Judicial Notice, and Declarations of Nevada County Counsel Katharine Elliott, Nevada County
6 Director of Environmental Health Amy Irani, and attorney David Mehretu, all of the pleadings,
7 files, and records in this proceeding, all other matters of which the Court may take judicial notice,
8 and any argument or evidence that may be presented to or considered by the Court prior to its
9 ruling.

10 This Motion is made following a meet and confer pursuant to Section 5.A(c) of the Court's
11 Standing Scheduling Order in this case. (Standing Scheduling Order, ECF No. 50, at 5.A(c).) On
12 November 13, 2023, counsel for the Nevada County Defendants sent an email to counsel for
13 Plaintiffs, detailing the grounds for the instant Motion. Counsel for both parties subsequently
14 discussed these grounds via telephone on November 17, 2023, but were unable to resolve the
15 issues addressed in this Motion. Counsel for Plaintiffs sent a follow-up email on November 20,
16 2023, stating that he had nothing to add to the discussion on November 17, 2023. I therefore
17 certify that meet and confer efforts have been exhausted and that the Nevada County Defendants
18 have complied with the Court's meet and confer requirements.

19 The parties are not currently engaged in settlement negotiations. (Standing Scheduling
20 Order, at 5.A(d).)

21 DATED: November 21, 2023

MEYERS NAVE

22
23 By: /s/ David Mehretu

24 DEBORAH J. FOX

25 DAVID MEHRETU

CATHERINE L. CARLISLE

Attorneys for Defendants

NEVADA COUNTY and KATHARINE

ELLIOTT

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1 **I. INTRODUCTION**

2 Plaintiffs' sole claim for First Amendment retaliation fails because Plaintiffs – two
3 restaurants that persistently and egregiously violated COVID-19 public health orders – cannot
4 establish a causal connection between their alleged protected activity – speaking out and
5 organizing against the public health orders – and the Nevada County Defendants' enforcement of
6 these orders. Instead, there is no genuine dispute that the County's enforcement efforts at issue
7 were caused by the restaurants' repeated failure to comply with the public health orders, including
8 disregarding indoor dining bans, openly flouting masking requirements, failing to enforce capacity
9 and social distancing requirements, and continuing to host live music indoors when prohibited.
10 Although the County made every effort to work cooperatively with the restaurants to bring them
11 into compliance, the County ultimately had to impose fines and permit suspensions due to the
12 restaurants' continued recalcitrance – but even then reduced or eliminated such penalties based on
13 Plaintiffs' representations that they would comply with the public health orders.

14 In a desperate attempt to state a viable claim, Plaintiffs seize on the County's efforts to
15 work with them on their compliance issues and strain to twist these efforts into retaliatory activity,
16 claiming that the Nevada County Defendants conditioned fine reductions and permit
17 reinstatements on Plaintiffs' ceasing public opposition to the public health orders. However, the
18 evidence does not support these allegations. The undisputed, material facts instead demonstrate
19 that the Nevada County Defendants would have enforced the public health orders in the same way
20 regardless of whether Plaintiffs engaged in any speech activity opposing the orders, and the fine
21 reductions and permit reinstatements were directly related to Plaintiffs' representations that they
22 would come into compliance – and not to any cessation of speech activity. In fact, Plaintiffs'
23 public opposition to the public health orders increased after County enforcement efforts started.
24 For this reason, and as further discussed below, Plaintiffs' First Amendment retaliation claim fails
25 as a matter of law.

26 Plaintiffs' claim also fails for two additional and independent reasons. Specifically,
27 County Counsel Katharine Elliott is entitled to qualified immunity because Plaintiffs cannot
28 establish the violation of a clearly established right, and Plaintiffs cannot support their claims

1 against the County because they cannot establish that the alleged constitutional violations were
2 caused by a County policy or custom. Finally, Plaintiffs’ request for injunctive and declaratory
3 relief was previously dismissed by this Court as moot because the public health orders are no
4 longer in effect.

5 Accordingly, the Nevada County Defendants’ motion for summary judgment or, in the
6 alternative, summary adjudication should be granted in its entirety, Plaintiffs’ lawsuit should be
7 dismissed, and judgment should be entered in favor of the Nevada County Defendants.

8 **II. BACKGROUND**

9 **A. Plaintiffs’ Repeated Violations of the Public Health Orders Issued to Combat**
10 **the Spread of COVID-19.**

11 Beginning in early 2020, the COVID-19 pandemic triggered an unprecedented public
12 health crisis. (Exhs. 1, 3.)¹ In order to stem the tide of this highly contagious virus and ensure the
13 safety of citizens, the State of California and Nevada County issued and enforced public health
14 orders and guidance (the “Public Health Orders”) between March 2020 and June 2021, requiring
15 businesses to temporarily alter their operations in order to protect the public. (SUF No. 1, Exhs. 1-
16 11; Exh. 15 at 4 [36:16-19], 5-6 [37:14-38:1]; Exh. 14 at 4 [30:10-16], 5-6 [32:15-33:13], 6
17 [33:22-25]; Exh. 16 at 4 [32:20-24], 5-6 [33:11-34:24].) The restrictions on food service
18 establishments during this time included prohibitions or limitations on onsite or indoor dining,
19 large events, and live music, and requirements that restaurants comply with masking and social
20 distancing measures and capacity limitations. (*Id.*) Nevada County’s sole Public Health Order
21 was rescinded on May 8, 2020, and on June 15, 2021, the State moved beyond its COVID-19
22

23 _____
24 ¹ Citations to the factual record are to exhibits attached to the concurrently-filed Request for
25 Judicial Notice, Declaration of attorney David Mehretu, or Declaration of Nevada County
26 Environmental Health Director Amy Irani (“Irani Decl.”), as well as to the Irani Declaration and
27 Declaration of County Counsel Katharine Elliott (“Elliott Decl.”). Exhibits are consecutively
28 numbered throughout these documents starting at No. 1, with the pagination for each exhibit
starting at Page 1, pursuant to the Court’s Standing Scheduling Order. (Standing Scheduling
Order, ECF No. 50, at 5.B.) For the Court’s convenience, the Nevada County Defendants have
included an Index of Exhibits, concurrently filed herewith, which provides the exhibit name and
location within the record (such as the relevant declaration, etc.).

1 safety framework and fully reopened the economy. (SUF No. 30; Exhs. 4, 10.) The Governor’s
2 state of emergency expired on February 28, 2023. (Exh. 11.)

3 Plaintiffs – two restaurants located in Nevada County, named Tuck’s Restaurant and Bar
4 (“Tuck’s Restaurant”), and Buckman Enterprises, LLC, d/b/a Old Town Café (“Old Town Café”),
5 their respective owners, Kenneth R. Paige, Chad Paige, and Robin Buckman, as well as the
6 Nevada County Restaurant Coalition (the “Coalition”), a local membership association of dining
7 and drinking establishments in Nevada County, (Am. Compl., ECF No. 39, Oct. 25, 2022, at ¶¶ 4-
8 8) – consistently violated the Public Health Orders from the time the initial stay-at-home orders
9 were lifted in May 2020 through June 2021 when the economy was fully reopened. These
10 violations included remaining open for indoor and/or onsite dining when prohibited, disobeying
11 mask mandates, not consistently enforcing capacity limitations and social distancing requirements,
12 hosting prohibited large events, including high school prom parties with DJ music and dancing,
13 and permitting live music indoors. (Exh. 15 at 7 [42:2-6], 8-9 [43:20-44:3], 9 [44:15-18], 10-11
14 [45:23-46:2], 11 [46:11], 12 [48:13-16], 13-14 [50:25-51:6], 14 [51:13-16], 14 [51:20-23], 15-17
15 [52:21-54:4], 17-18 [54:10-55:4], 18 [55:10-13], 18 [55:18-19], 18-19 [55:23-56:8], 20-21 [58:7-
16 59:19]; Exh. 14 at 7 [41:3-23], 8-9 [43:9-44:1], 10 [54:7-10], 10-11 [54:23-55:7], 11 [55:9-19], 12
17 [61:4-8], 13 [62:11-18], 13-14 [62:22-63:12], 15-20 [64:16-69:25]; Exh. 16 at 7 [39:1-12], 8
18 [41:1-7], 9-10 [43:15-44:7], 11 [45:13-16], 11-12 [45:25-46:11], 12-13 [46:25-47:3], 13 [47:9-11],
19 20 [59:18-21], 21 [60:11-14], 22 [61: 7-11], 26 [66:4-11].)

20 This case focuses on the County’s enforcement of the Public Health Orders during July
21 and August of 2020. It is undisputed that Tuck’s Restaurant and Old Town Café violated many of
22 the most significant requirements of the Public Health Orders in place during this time period
23 before representing to the County that they would come into compliance. Specifically:

- 24 • Despite the fact that the Public Health Orders required both restaurant employees and
25 customers to wear face coverings, (SUF No. 2; Exh. 5; Exh. 6 at 2; Exh. 12 at 3 [RFA
26 No. 12]; Exh. 13 at 3-4 [RFA No. 12]), both Tuck’s Restaurant and Old Town Café
27 refused to comply with these requirements, (SUF Nos. 4-5; Exh. 15 at 8-9 [43:20-
28 44:3], 9 [44:15-18]; Exh. 14 at 11 [55:9-19]; Exh. 16 at 7 [39:1-5], 8 [41:9-12], 9

1 [43:15-20], 9-10 [43:25-44:7]; Exh. 12 at 4 [RFA Nos. 13-14]; Exh. 13 at 4 [RFA Nos.
2 13-14]).

- 3 • While the Public Health Orders also required restaurants to implement certain capacity
4 limitations and social distancing measures, (SUF No. 2; RJN Exh. 6 at 2; Exh. 12 at 3-
5 5 [RFA Nos. 10, 15, 21]), Tuck’s Restaurant did not consistently implement these
6 requirements, (SUF No. 4; Exh. 15 at 7 [42:2-6]; Exh. 14 at 10-11 [54:23-55:7]; Exh.
7 12 at 3, 5-6 [RFA Nos. 11, 22]).
- 8 • Tuck’s Restaurant also offered live music indoors in violation of the Public Health
9 Orders. (SUF Nos. 2, 4; Exh. 6 at 3; Exh. 15 at 18 [55:10-13], 18 [55:18-19], 18-19
10 [55:23-56:8]; Exh. 12 at 6 [RFA Nos. 23, 25].)
- 11 • After the State and Nevada County issued Public Health Orders on July 13, 2020,
12 requiring restaurants to cease indoor dining services, (SUF No. 3; Exhs. 6-7; Exh. 12 at
13 2 [RFA No. 4]; Exh. 13 at 2 [RFA No. 4]), both Tuck’s Restaurant and Old Town Café
14 remained open for indoor dining, (SUF Nos. 4-5; Exh. 15 at 10-11 [45:23-46:2], 11
15 [46:11], 12 [48:13-16]; Exh. 14 at 7 [41:3-23], 10 [54:7-10]; Exh. 16 at 7 [39:6-12], 20
16 [59:18-21], 21 [60:11-14], 22 [61:7-11], 26 [66:4-11]; Exh. 12 at 2 [RFA No. 5]; Exh.
17 13 at 2 [RFA No. 5]).

18 As discussed further below, Plaintiffs’ flagrant violations of the Public Health Orders were
19 repeated and persistent despite the Nevada County Defendants’ efforts to work with Plaintiffs to
20 come into compliance.

21 **B. Nevada County’s Enforcement of the Public Health Orders and Response to**
22 **Plaintiffs’ Violations.**

23 Between March 2020 and June 2021, when the Public Health Orders were in place, Nevada
24 County endeavored to ensure that food service establishments within the County complied with
25 the applicable requirements. (SUF No. 6; Irani Decl. at ¶ 4; Elliott Decl. at ¶ 3.) The County’s
26 Environmental Health Department spearheaded this compliance effort through a combination of
27 education and outreach, as well as enforcement measures when voluntary compliance was not
28 achieved. (Irani Decl. at ¶ 4.)

1 In furtherance of this approach, the County provided restaurants – including Plaintiffs
2 Tuck’s Restaurant and Old Town Café – with updates regarding the applicable requirements as
3 well as guidance on compliance. (SUF No. 7; Irani Decl. at ¶ 5; Exh. 19 at 3 [24:12-14]; Exh. 15
4 at 22-23 [64:25-65:18]; Exh. 14 at 21-22 [78:17-79:21]; Exh. 16 at 14 [51:2-14]; Exh. 12 at 8
5 [RFA No. 35]; Exh. 13 at 7 [RFA No. 30].) When the County received complaints from the
6 public that restaurants were not following the Public Health Orders, it attempted to gain voluntary
7 compliance by, inter alia, contacting the restaurants to inform them of the complaints, providing
8 additional information about the requirements, visiting the restaurants to ensure they were meeting
9 the requirements, and meeting with restaurant owners to provide education or assistance to help
10 the restaurants come into compliance. (SUF No. 8; Irani Decl. at ¶¶ 6-7; Exh. 19 at 5 [31:8-18];
11 Exh. 18 at 5-6 [14:24-15:6], 8 [18:10-17], 11-12 [29:16-30:4], 12-13 [30:22-31:11]; Exh. 17 at 3
12 [13:13-22], 4-5 [29:23-30:3], 7 [32:7-23].) Because of the large number of food facilities in the
13 County, County officials did not conduct inspections for compliance with the Public Health
14 Orders in the absence of citizen complaints. (SUF No. 9; Irani Decl. at ¶ 7; Exh. 19 at 5 [31:8-24],
15 6 [32:20-23]; Exh. 18 at 7 [17:8-9].)

16 Most restaurants in violation of the Public Health Orders were willing to work with the
17 County to come into compliance with the requirements. (SUF No. 10; Irani Decl. at ¶ 8.) For the
18 few restaurants that continued to violate the Public Health Orders after discussions with County
19 officials, the County issued Notices of Violation, and, in some cases, imposed fines, issued closure
20 orders, and temporarily suspended the restaurants’ operating permits to prevent the restaurants
21 from continuing to endanger the health of County citizens. (SUF No. 11; Irani Decl. at ¶ 8.)

22 Nevada County received many complaints from citizens and other local businesses about
23 Tuck’s Restaurant’s and Old Town Café’s violations of the Public Health Orders throughout the
24 15-month period during which the orders were in place. (Irani Decl. ¶ 9.) These complaints
25 became particularly acute in July 2020 after both restaurants remained open for indoor dining
26 services when such services were prohibited, and the complaints focused on the restaurants’
27 failure to close indoor dining as well as their violations of mask mandates, social distancing and
28

1 capacity requirements, and the prohibition on live music indoors. (SUF No. 13; Irani Decl. ¶ 9;
2 Exhs. 19-20.)

3 The County contacted the restaurants in July 2020 regarding these complaints and the
4 restaurants' non-compliance with the Public Health Orders. (SUF No. 14; Irani Decl. ¶ 10; Exh.
5 15 at 11 [46:2-7], 24-25 [66:22-67:13], 26 [68:11-25]; Exh. 14 at 24-25 [81:24-82:14], 26 [83:6-
6 9], 27-28 [84:23-85:14]; Exh. 18 at 3-4 [12:12-13:4], 9-10 [24:23-25:8].) County employees also
7 visited Tuck's Restaurant and spoke with the owners about the requirements of the Public Health
8 Orders and the importance of compliance, and provided educational guidance packages with
9 information about the applicable requirements. (Irani Decl. ¶ 10; Exh. 15 at 25 [67:15-24], 27
10 [69:1-3], 27 [69:8-11], 28-30 [70:24-72:4]; Exh. 14 at 31-33 [88:9-90:14].) Despite these efforts
11 by the County, however, both Tuck's Restaurant and Old Town Café continued to violate the
12 Public Health Orders. (Irani Decl. ¶¶ 10-11; Exh. 15 at 31-32 [73:23-74:2].)

13 When the violations persisted, the County issued Tuck's Restaurant and Old Town Café
14 Notices of Violation on July 21, 2020, and ordered their immediate closure to protect the County's
15 citizens. (SUF No. 15; Irani Decl. ¶ 11; Exhs. 23-26; Exh. 12 at 8 [RFA No. 37]; Exh. 13 at 7-8
16 [RFA No. 32].) The County informed the owners of both restaurants – and the owners understood
17 – that the Notices of Violation and closure orders were issued because of the restaurants' non-
18 compliance with the Public Health Orders, and that fines would be imposed and the restaurants'
19 permits would be suspended if the restaurants failed to come into compliance. (Irani Decl. ¶ 11;
20 Exhs. 23-24; Exh. 15 at 33-35 [75:18-77:8], 35-36 [77:17-78:16], 36-37 [78:25-79:8], 49 [95:9-
21 16]; Exh. 14 at 36-37 [93:23-94:12], 38-39 [95:15-96:23], 45 [103:2-5]; Exh. 16 at 27 [68:16-21],
22 28 [70:12-15], 31 [73:9-12], 60 [127:2-13].)

23 But Tuck's Restaurant and Old Town Café still did not comply with the Public Health
24 Orders. (SUF No. 16; Irani Decl. ¶ 12; Exh. 15 at 37 [79:18-23]; Exh. 14 at 40 [97:8-12]; Exh. 16
25 at 30 [72:2-6]; Exh. 12 at 9-10 [RFA Nos. 42, 45]; Exh. 13 at 8-9 [RFA No. 37].) As a result,
26 Nevada County imposed a \$2,883 fine on Tuck's Restaurant, and a \$2,018 fine on Old Town
27 Café, and temporarily suspended each restaurant's operating permits. (SUF No. 17; Irani Decl. ¶
28 12; Exhs. 30-31; Exh. 12 at 9-10 [RFA Nos. 43-44]; Exh. 13 at 9 [RFA Nos. 38-39].) The owners

1 of both Tuck’s Restaurant and Old Town Café admit that they understood the County enforced the
2 requirements of the Public Health Orders with regard to their restaurants in July 2020 because the
3 restaurants were not in compliance with the Public Health Orders. (Exh. 15 at 49 [95:9-16]; Exh.
4 14 at 45 [103:2-5]; Exh. 16 at 31 [73:9-12], 60 [127:2-13].)

5 After the fines were imposed and permits suspended, the County continued to work with
6 both restaurants on achieving compliance with the Public Health Orders. (SUF No. 19.) For
7 example, County officials called Tuck’s Restaurant and Old Town Café and left messages for the
8 owners to reach out to the County so that the County could assist them in the process to reinstate
9 their permits. (Irani Decl. ¶ 13.) This process included the owners updating their operational
10 plans to include a description of how indoor dining would be discontinued and this discontinuation
11 would be maintained until the Public Health Order prohibiting indoor dining was lifted, as well as
12 a site inspection by the County to verify that the operational plan was in play and prohibited
13 indoor dining. (Irani Decl. ¶ 13; Irani Decl. Exh. 27.) The County also put together a document to
14 assist the owners with updating their operational plans to come into compliance with the Public
15 Health Orders. (Irani Decl. ¶ 13; Irani Decl. Exh. 27.) Additionally, Environmental Health
16 Director Amy Irani sent an email to Tuck’s Restaurant’s owner Ken Paige on July 29, 2020,
17 outlining the specific steps the restaurant would need to take to come into compliance with the
18 Public Health Orders, and stating that once compliance was achieved, the restaurant’s permit
19 could be reinstated and fines could be resolved. (Irani Decl. ¶ 14; Exh. 28 at 2-3; Exh. 15 at 67-68
20 [121:15-122:5], 70-72 [124:11-126:8].)

21 Further, when the restaurant owners reached out to the County to discuss their fines and
22 permit suspensions, the County agreed to a meeting which took place on August 3, 2020 to help
23 the restaurants achieve compliance with the applicable Public Health Orders. (SUF No. 20; Irani
24 Decl. ¶ 15; Elliott Decl. ¶ 4; Exh. 15 at 68 [122:18-23], 72 [126:13-21]; Exh. 14 at 61 [131:8-18];
25 Exh. 16 at 49 [93:17-21]; Exh. 12 at 10 [RFA No. 47]; Exh. 13 at 9-10 [RFA No. 42].) Director
26 Irani and County Counsel Katharine Elliott attended the meeting on behalf of the County. (Irani
27 Decl. ¶ 15; Elliott Decl. ¶ 5; Exh. 15 at 73 [127:11-18]; Exh. 14 at 62-63 [134:23-135:17]; Exh. 16
28 at 50-51 [94:13-95:13].) At the August 3, 2020 meeting, Director Irani and County Counsel

1 Elliott reiterated the importance of complying with the Public Health Orders, and explained that if
2 the restaurants committed to complying with the Public Health Orders, their permits could be
3 reinstated and their fines could be reduced. (Irani Decl. ¶ 15; Elliott Decl. ¶ 5; Exh. 15 at 73-74
4 [127:19-128:19], 74-75 [128:23-129:6]; Exh. 14 at 64-65 [137:13-138:15], 66-67 [148:9-149:14];
5 Exh. 16 at 51-52 [95:20-96:12], 52-53 [96:24-97:5], 54 [111:10-21]; Exh. 29.) Plaintiffs
6 understood that reinstatement of their permits and reductions of their fines were being conditioned
7 upon their compliance with the Public Health Orders. (Exh. 15 at 74-75 [128:23-129:6]; Exh. 14
8 at 66-67 [148:22-149:14]; Exh. 16 at 52-53 [96:24-97:5].)

9 The day after the meeting, on August 4, 2020, the County reinstated the permits based on
10 the restaurants' representations that they would comply with the Public Health Orders and their
11 efforts to do so. (SUF No. 21; Irani Decl. ¶ 16; Exhs. 30-31; Elliott Decl. ¶ 6; Exh. 15 at 96
12 [178:10-12], 96-99 [178:15-181:8]; Exh. 14 at 72 [155:6-8], 72-73 [155:15-156:1], 75-77 [158:6-
13 160:9]; Exh. 12 at 11 [RFA No. 52].) In particular, on August 3, 2020, Tuck's Restaurant owner
14 Ken Paige represented that the restaurant had ceased all dine-in operations and provided the
15 County with a specific compliance plan as requested. (Irani Decl. ¶ 17; Exh. 28 at 1-2; Exh. 15 at
16 92-93 [174:8-175:14].) The County subsequently inspected both restaurants and reviewed their
17 compliance plans. (Irani Decl. ¶ 17; Exh. 28 at 1; Exh. 32; Exh. 15 at 93-96 [175:23-178:9]; Exh.
18 14 at 72-75 [155:15-158:14].) The County confirmed that the permits were being reinstated on
19 August 4, 2020 because of the restaurants' efforts to comply with the Public Health Orders. (Irani
20 Decl. ¶ 17; Exhs. 30-31; Exhs. 33-34; Exh. 15 at 96-99 [178:15-181:8], 100 [182:7-22].)

21 The County also agreed to stay enforcement of the fines based on the restaurants'
22 representations that they would come into compliance, which were subsequently reduced to \$961
23 for Friar Tuck's and \$673 for Old Town Café based on their compliance commitment and efforts.
24 (SUF No. 22; Irani Decl. ¶ 18; Exhs. 33-34; Elliott Decl. ¶ 6; Exh. 15 at 99 [181:12-15], 100-101
25 [182:23-183:13]; Exh. 12 at 11 [RFA No. 50]; Exh. 13 at 10 [RFA No. 45].) However, neither
26 restaurant ever paid these fines. (Irani Decl. ¶ 18; Elliott Decl. ¶ 6; Exh. 15 at 101 [183:22-23];
27 Exh. 16 at 55 [116:17-20].)

28

1 **III. PROCEDURAL HISTORY**

2 **A. Plaintiffs' Complaint and Dismissal of All But One of Plaintiffs' Claims.**

3 Plaintiffs filed their original complaint on November 11, 2020, asserting six causes of
4 action based on allegations that the Public Health Orders placed unconstitutional restrictions on
5 indoor dining services that harmed their businesses. These included claims for (1) substantive due
6 process violations; (2) procedural due process violations; (3) equal protection violations; (4)
7 uncompensated takings; (5) commerce clause violations, and (6) First Amendment retaliation.
8 (Compl., ECF No. 1, Nov. 11, 2020, at ¶¶ 90-162.) Plaintiffs originally named as defendants
9 several officials of the State of California and Nevada County. (*Id.* at ¶¶ 22-33.) As against all
10 Defendants, Plaintiffs sought a judicial declaration that the challenged Public Health Orders were
11 unconstitutional and an injunction barring their enforcement. (*Id.* at Prayer, pp. 33-34.) Plaintiffs
12 sought compensatory and punitive damages against the County Defendants. (*Id.*)

13 The Nevada County Defendants moved to dismiss Plaintiffs' Complaint on January 4,
14 2021. (Mot. Dismiss, ECF No. 9, Jan. 4, 2021.) On October 4, 2022, the Court issued an order
15 dismissing Plaintiffs' claims for injunctive and declaratory relief as moot; dismissing Plaintiffs'
16 substantive due process, procedural due process, takings, and commerce clause claims without
17 leave to amend; dismissing Plaintiffs' equal protection claim with leave to amend; granting in part
18 the Nevada County Defendants' motion to dismiss as to the First Amendment retaliation claim
19 with leave to amend; and dismissing Plaintiffs' punitive damages claims on the basis that
20 Plaintiffs failed to oppose the Nevada County Defendants' motion to dismiss as to these claims.
21 (Order, ECF No. 37, Oct. 4, 2022, at 25.) The Court dismissed the State Defendants from the
22 case, and also ordered that all Nevada County Defendants sued in their official capacity be
23 dismissed and Nevada County substituted in their place. (*Id.*)

24 Plaintiffs filed the operative Amended Complaint on October 25, 2022, asserting only one
25 cause of action for First Amendment retaliation against Nevada County and County Counsel
26 Elliott. (Am. Compl. at ¶¶ 38-45.) Despite the Court's dismissal of the claim without leave to
27 amend, Plaintiffs again included a punitive damages claim in their Amended Complaint without
28 adding any new allegations. (*Id.* at Prayer, p. 8.)

1 The County Defendants filed a motion to dismiss Plaintiffs’ Amended Complaint on
2 November 8, 2022 as against the punitive damages claim, on the basis that Plaintiffs were not
3 granted leave to amend this claim, and that claim failed as a matter of law because punitive
4 damages may not be awarded against governmental entities and individuals acting in their official
5 capacity, and because Plaintiffs’ allegations are insufficient to support such damages in any event.
6 (County Defs’ Mot. Dismiss, ECF No. 40, Nov. 8, 2022.) After a hearing and status conference
7 on January 27, 2023, the Court dismissed Plaintiffs’ punitive damages claim with prejudice.
8 (Minutes for Mot. Hr’g, ECF No. 49, Jan. 27, 2023.)

9 **B. Plaintiffs’ Sole Remaining Cause of Action for First Amendment Retaliation.**

10 For their sole remaining claim for First Amendment retaliation, Plaintiffs do not allege in
11 their First Amended Complaint that the Nevada County Defendants’ initial enforcement of the
12 Public Health Orders was in any way retaliatory. And Plaintiffs have admitted that such
13 enforcement was due to their failure to comply with the Public Health Orders. (Exh. 15 at 49
14 [95:9-16]; Exh. 14 at 45 [103:2-5]; Exh. 16 at 28 [70:12-15], 60 [127:2-13].)

15 Instead, Plaintiffs allege that the claimed retaliation occurred during the August 3, 2020
16 meeting – the meeting during which the County discussed with Plaintiffs their request to have
17 their permits reinstated and their fines reduced and the need to come into compliance with the
18 Public Health Orders. (Am. Compl. at ¶¶ 33-34.) Plaintiffs claim that at that time the Nevada
19 County Defendants made certain retaliatory statements about opposition activities that the
20 restaurants began to engage in following the imposition of the penalties, such as encouraging other
21 restaurants to voice opposition to the Public Health Orders. (Am. Compl. at ¶¶ 33-34.) Plaintiffs
22 specifically allege that at the August 3, 2020 meeting the County Defendants: (1) conditioned the
23 reinstatement of the two restaurants’ operating permits and a reduction of the fines on Plaintiffs’
24 “behav[ing]” and ceasing to ask others to write letters to County and local officials; (2) refused to
25 negotiate reductions in fines; and (3) stated that the establishment of the Coalition would be
26 considered grounds for refusing to negotiate a reduction in fines. (*Id.* at ¶¶ 35-36.)

27 Plaintiffs admit, however, that the Nevada County Defendants never refused to negotiate a
28 reduction in their fines. (SUF No. 23; Exh. 15 at 104 [220:4-22]; Exh. 16 at 59 [125:1-4].) They

1 also admit that the Coalition was not even established until after the August 3, 2020 meeting,
2 (SUF No. 24; Exh. 15 at 54-55 [100:11-101:14]; Exh. 14 at 59 [128:4-18], 59-60 [128:25-129:2];
3 Exh. 16 at 37-38 [79:25-80:5]), and that the Nevada County Defendants never stated that the
4 establishment of the Coalition was grounds for refusing to negotiate a reduction in fines, (SUF No.
5 25; Exh. 15 at 110-111 [243:25-244:9]). Thus, the single alleged retaliatory act at issue in this
6 case is an alleged statement or statements during the August 3, 2020 meeting that Plaintiffs had to
7 “behave” and stop asking others to write letters to County and local officials in order for their
8 fines to be reduced and permits reinstated. As discussed below, this does not constitute First
9 Amendment retaliation as a matter of law.

10 **IV. LEGAL STANDARD**

11 Under Federal Rule of Civil Procedure 56(a) the Court “shall grant summary judgment if
12 the movant shows that there is no genuine dispute as to any material fact and the movant is
13 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A party seeking summary
14 judgment bears the initial burden of supporting its motion by demonstrating the “absence of a
15 genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A moving
16 party that does not have the ultimate burden of proof a trial may satisfy its initial burden on
17 summary judgment by either negating an essential element of the non-moving party’s claim or
18 showing that the non-moving party lacks sufficient evidence to carry its ultimate burden of proof
19 at trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir.
20 2000); *Celotex*, 477 US at 325.

21 Once the moving party’s initial burden is satisfied, the burden shifts to the non-moving
22 party to demonstrate that there remains an issue of fact for trial. *Celotex*, 477 U.S. at 324; *Adickes*
23 *v. S.H. Kress & Co.*, 398 U.S. 144, 158-60 (1970). To defeat summary judgment, a non-moving
24 party cannot rest on its mere allegations, but must adduce sufficient admissible evidence to show
25 that a genuine issue of material fact exists. Fed. R. Civ. P. 56(c); *Devereaux v. Abbey*, 263 F.3d
26 1070, 1076 (2001); *Nissan Fire & Marine Ins. Co., Ltd.*, 210 F.3d at 1107; *Celotex*, 477 U.S. at
27 323-24. Notably, “[a] mere ‘scintilla’ of evidence will not be sufficient to defeat a properly
28 supported motion for summary judgment; rather, the nonmoving party must introduce some

1 ‘significant probative evidence tending to support the complaint.’” *Summers v. Teichert & Son,*
2 *Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
3 250 (1986)). If the non-moving party fails to make this showing, and “where the record taken as a
4 whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine
5 issue for trial,’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and
6 the moving party is entitled to summary judgment, *Celotex*, 477 U.S. at 323.

7 A court “may grant summary adjudication as to specific issues if it will narrow the issues
8 for trial.” (*Johnson v. Rush Enters., Inc.*, No. 1:19-cv-00105-JLT-SAB, 2023 WL 5183456, at *4
9 (E.D. Cal. Aug. 11, 2023).

10 **V. ARGUMENT**

11 **A. Plaintiffs’ First Amendment Retaliation Claim Fails as a Matter of Law.**

12 To state a First Amendment retaliation claim, Plaintiffs must prove that: (1) they engaged
13 in a constitutionally protected activity; (2) the Nevada County Defendants took adverse action
14 “that would chill a person of ordinary firmness from continuing to engage in the protected
15 activity”; and (3) “there was a substantial causal relationship between the constitutionally
16 protected activity and adverse action.” *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir.
17 2010). The key issue here is the causal connection element, which requires a showing that the
18 intent to deter the protected speech was a “‘substantial’ or ‘motivating’ factor in the defendant’s
19 decision.” *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008); *Mendocino Env.*
20 *Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300-01 (9th Cir. 1999); *Lacey v. Maricopa Cnty.*, 693
21 F.3d 896, 916 (9th Cir. 2012).

22 If a plaintiff is able to make this initial showing, the “burden shifts to the defendant to
23 establish that it would have reached the same decision even in the absence of the protected
24 conduct.” *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989); *CarePartners,*
25 *LLC*, 545 F.3d at 877. This means that “[i]f there is a finding that retaliation was not the but-for
26 cause of the [alleged harm], the claim *fails* for lack of causal connection between unconstitutional
27 motive and resulting harm, despite proof of some retaliatory animus in the official’s mind.”
28 *Hartman v. Moore*, 547 U.S. 250, 260 (2006) (emphasis added); *see also Nieves v. Bartlett*, 139 S.

1 Ct. 1715, 1722 (2019) (for purposes of a First Amendment retaliation claim “[i]t is not enough to
2 show that an official acted with a retaliatory motive and that the plaintiff was injured – the motive
3 must [have] *cause[d]* the injury. Specifically, it must have been the a ‘but-for’ cause, meaning
4 that the adverse action against the plaintiff would not have been taken absent the retaliatory
5 motive.”) (emphasis in original).

6 Here, Plaintiffs’ First Amendment retaliation claim fails because Plaintiffs cannot establish
7 the requisite causal connection between their protected speech and the alleged retaliatory action.
8 That is, they cannot establish that the County’s alleged motive to restrict their speech was a but-for
9 cause of the County’s enforcement actions. The only alleged retaliatory action at issue in this case
10 is an alleged statement or statements during the August 3, 2020 meeting that Plaintiffs had to
11 “behave” and to stop asking others to write letters to County and local officials in order for the
12 restaurants’ fines to be reduced and permits reinstated. (Am. Compl. at ¶ 35.) However, this
13 alleged conduct by the County occurred *after* the County had already taken enforcement actions
14 against the Plaintiffs – i.e., imposing fines and suspending their permits – which actions Plaintiffs
15 concede were caused by their failure to comply with the Public Health Orders. (Exh. 15 at 49
16 [95:9-16]; Exh. 14 at 45 [103:2-5]; Exh. 16 at 60 [127:2-13].)

17 Additionally, there is scant evidence that the County was even aware of Plaintiffs’ vocal
18 opposition to the Public Health Orders at the time of the August 3, 2020 meeting. For example,
19 County Counsel Elliott testified that she was not even aware that Plaintiffs had publicly opposed
20 the Public Health Orders or had encouraged others to do so prior to the August 3, 2020 meeting.
21 (Elliott Decl. ¶ 7; Exh. 20 at 3-4 [24:18-25:2].) And Plaintiffs are unable to pinpoint exactly when
22 they began publicly voicing opposition and/or encouraging others to publicly oppose the Public
23 Health Orders, but testified that the bulk of this activity, beyond casual conversations with friends
24 and patrons, took place after the August 3, 2020 meeting. (Exh. 15 at 38-45 [83:17-90:5], 46-48
25 [91:2-93:9], 49 [95:17-20], 50-55 [96:24-101:14], 56-58 [106:9-108:10], 59-66 [109:9-116:25],
26 78-86 [149:20-157:23], 87-90 [165:1-168:9], 90-91 [168:17-169:14]; Exh. 14 at 46-53 [105:8-
27 112:16], 53-54 [112:23-113:9], 55-58 [119:16-122:6]; Exh. 16 at 32-46 [74:21-88:3], 47-48
28 [90:17-91:16].)

1 Plaintiffs also testified that no one from the County ever mentioned their opposition to the
2 Public Health Orders in connection with the County’s enforcement efforts at any time before the
3 August 3, 2020 meeting, including when the restaurants’ permits were suspended and fines were
4 assessed. (Exh. 15 at 25-30 [67:15-72:24], 32-35 [74:10-77:8], 37 [79:10-17], 67-72 [121:18-
5 126:12], 76-77 [132:23-133:12]; Exh. 14 at 29-38 [86:24-95:2], 41-43 [99:12-101:5], 44-45
6 [102:8-103:1], 68 [150:15-24], 69 [151:6-12], 69 [151:16-19], 70-71 [152:3-153:1]; Exh. 16 at 15-
7 20 [54:12-59:10], 22-25 [61:12-64:2], 28-30 [70:16-72:2], 31-32 [73:13-74:2], 56 [121:5-17].)
8 Accordingly, it cannot be reasonably concluded that Plaintiffs’ public opposition to the Public
9 Health Orders was a “substantial or motivating factor” in the County’s decision as to whether to
10 reduce Plaintiffs’ penalties for violating the Public Health Orders.

11 But even if Plaintiffs were able to establish that the County was aware of their vocal
12 opposition to the Public Health Orders as of the August 3, 2020 meeting and wanted them to stop
13 such activity, their claim would still fail because Plaintiffs cannot establish that a cessation of
14 Plaintiffs’ speech activities was the “but for” cause of the Nevada County Defendants’
15 determination to reinstate the restaurants’ permits and reduce their fines. Instead, the undisputed,
16 material facts establish that the Nevada County Defendants’ determination was conditioned on
17 Plaintiffs’ compliance with the Public Health Orders, and that Nevada County Defendants would
18 have proceeded in the same fashion regardless of Plaintiffs’ speech activities. Specifically:

- 19
- 20 • County officials testified that the County’s goal for agreeing to reinstate permits or
21 reduce fines was to ensure compliance with the Public Health Orders, and to assist
22 restaurants in coming into compliance, and that if a restaurant committed to comply
23 with the Public Health Orders or took steps to comply, permits would be reinstated and
24 penalties would be reduced. (SUF No. 26; Irani Decl. ¶ 20; Elliott Decl. ¶ 7; Exh. 19 at
25 7 [59:3-4].)
 - 26 • The County reinstated the restaurants’ permits on August 4, 2020 based on the
27 Plaintiffs’ representations that they would comply with the Public Health Orders and
28 their implementation of the necessary steps to cease dine-in operations as required, as
confirmed by County inspections. (SUF No. 21; Irani Decl. ¶ 16; Exhs. 30-31; Exh.

1 28; Exhs. 33-34; Exh. 32; Exh. 15 at 92-93 [174:8-175:14], 93-96 [175:23-178:9], 96-
2 99 [178:15-181:8], 100 [182:7-22]; Exh. 14 at 72 [155:6-8], 72-77 [155:15-160:9].)

- 3 • After the August 3, 2020 meeting, the County stayed enforcement of the fines, and
4 subsequently reduced them based on Plaintiffs' compliance commitment and efforts.
5 (SUF No. 22; Irani Decl. ¶ 18; Exhs. 33-34; Elliott Decl. ¶ 6; Exh. 15 at 99 [181:12-
6 15], 100-101 [182:23-183:13].)
- 7 • Thus, as soon as Tuck's Restaurant and Old Town Café committed to compliance, the
8 County reduced its enforcement activities with regard to the two restaurants. (SUF
9 Nos. 21-22.) By contrast, when another restaurant in the County, Calla Lily Crepes,
10 repeatedly violated the Public Health Orders and continued to refuse to come into
11 compliance, the County was eventually forced to get a court order to prevent the owner
12 of that restaurant from continuing to operate in violation of the Public Health Orders.
13 (Irani Decl. ¶ 22.)
- 14 • There is no evidence that Plaintiffs ever agreed to cease publicly opposing or
15 encouraging others to publicly oppose the Public Health Orders at or after the August
16 3, 2020 meeting.
- 17 • The Nevada County Defendants reinstated the permits and reduced the fines despite
18 that Plaintiffs continued – and in fact increased – their opposition to the Public Health
19 Orders after the August 3, 2020 meeting. (SUF No. 28; Exh. 15 at 54-55 [100:11-
20 101:14], 56-58 [106:9-108:10], 59-66 [109:9-116:25]; Exh. 14 at 55-58 [119:16-
21 122:6]; Exh. 16, at 32-46 [74:21-88:3], 47-48 [90:20-91:19]; Exh. 12 at 11 [RFA No.
22 51]; Exh. 13 at 10 [RFA No. 46].)
- 23 • The Nevada County Defendants never imposed fines on Plaintiffs or suspended their
24 permits at any time after the August 3, 2020 meeting while the Public Health Orders
25 were in place, even though Plaintiffs publicly opposed the Public Health Orders after
26 August 3, 2020. (SUF No. 29; Irani Decl. ¶ 24; Exh. 15 at 102-103 [215:23-216:3];
27 Exh. 12 at 13-16 [RFA Nos. 60, 64, 68, 72]; Exh. 13 at 12-15 [RFA Nos. 55, 59, 63,
28 67].)

1 These undisputed facts establish that the Nevada County Defendants would have continued
2 to enforce the Public Health Orders with regard to Plaintiffs’ restaurants in the same way – that is,
3 reinstated the permits and reduced the fines if, and only if, Plaintiffs committed to comply with
4 the Public Health Orders – regardless of whether Plaintiffs publicly voiced opposition to the
5 Public Health Orders and/or encouraged others to do so. (Irani Decl. ¶ 19; Elliott Decl. ¶ 7.)
6 Thus, Plaintiffs’ opposition to the Public Health Orders was not be the “but-for” cause of any
7 enforcement activity – including Nevada County Defendants’ determinations to reinstate the
8 restaurants’ permits and reduce their fines, and Plaintiffs cannot establish their First Amendment
9 retaliation claim as a matter of law. *Hartman*, 547 U.S. at 260; *Nieves*, 139 S. Ct. at 1722.

10 **B. County Counsel Elliott is Entitled to Qualified Immunity.**

11 Even if Plaintiffs’ First Amendment retaliation claim were not fatally defective, the claim
12 would still fail because County Counsel Elliott is entitled to qualified immunity in her individual
13 capacity. “Qualified immunity [– which] ‘represents the norm’ for government officials
14 exercising discretionary authority,” *Lacey*, 693 F.3d at 915 – protects such officials “from liability
15 for civil damages insofar as their conduct does not violate clearly established statutory or
16 constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457
17 U.S. 800, 818 (1982); *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 (2015). The
18 purpose of qualified immunity is to protect public servants against the costs and risks of litigation,
19 to avoid keeping them from performing their governmental duties, to preclude inhibiting
20 discretionary action, and to avoid deterring able individuals from serving the government.
21 *Harlow*, 457 U.S. at 816; *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

22 An analysis of whether qualified immunity applies involves two inquiries. First, taken in
23 the light most favorable to the plaintiff, the Court must ask whether the facts alleged show that the
24 official’s conduct violated a statutory or constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201
25 (2001); *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Second, the Court must examine whether
26 the official violated a statutory or constitutional right that was “clearly established” at the time of
27 the challenged conduct. *Id.* It is the plaintiff who bears the burden of proving that the rights
28 claimed were clearly established. *Robinson v. York*, 566 F.3d 817, 826 (9th Cir. 2009).

1 A public official “cannot be said to have violated a clearly established right unless the
2 right’s contours were sufficiently definite that any reasonable official in [his or her] shoes would
3 have understood that he [or she] was violating it.” *Plumhoff v. Rickard*, 572 U.S. 765, 778-79
4 (2014). In other words, “existing precedent must have placed the statutory or constitutional
5 question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Reichle v. Howards*, 566
6 U.S. 658, 664 (2012). Thus, in evaluating the “clearly established” prong of qualified immunity,
7 the right allegedly violated must be established, “not as a broad general proposition, ... but in a
8 ‘particularized’ sense so that the ‘contours’ of the right are clear to a reasonable official.” *Reichle*,
9 566 U.S. at 664-65; *see also Ballentine v. Tucker*, 28 F.4th 54, 64 (9th Cir. 2022) (“The Supreme
10 Court has ‘repeatedly stressed that courts must not “define clearly established law at a high level
11 of generality.’””) (quoting *D.C. v. Wesby*, 583 U.S. 48, 63-64 (2018)).

12 Accordingly, except in the rare case of an “obvious” instance of constitutional misconduct,
13 to establish qualified immunity, a plaintiff must not only identify the specific, alleged
14 unconstitutional behavior, but must “identify a case where an offic[ial] acting under similar
15 circumstances as [the defendant official] was held to have violated the [constitutional provision].”
16 *White v. Pauly*, 580 U.S. 73, 79-80 (2017); *see also Sharp v. Cnty. of Orange*, 871 F.3d 901, 912
17 (9th Cir. 2017); *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 455 (9th Cir. 2013).

18 As discussed above, Plaintiffs are unable to establish that their First Amendment rights
19 were violated in this case. But even assuming *arguendo* that they could do so, the undisputed
20 material facts do not show that a clearly established right was violated. The Public Health Orders
21 addressed a once in a century pandemic that presented a severe and unprecedented public health
22 crisis. Plaintiffs were some of the few food service establishments in Nevada County that did not
23 voluntarily comply with these Public Health Orders to protect the community. (Irani Decl. ¶ 8.)
24 There is nothing that would put County Counsel Elliott on notice that meeting with Plaintiffs to
25 discuss reinstating their permits and reducing their fines and allegedly telling Plaintiffs “to
26 behave” and refrain from continuing to violate the Public Health Orders could be deemed First
27 Amendment retaliation. Nor are the Nevada County Defendants aware of any case where public
28

1 officials acting under any type of similar circumstances were held to have engaged in First
2 Amendment retaliation as is required to overcome qualified immunity.

3 Accordingly, County Counsel Elliott is entitled to qualified immunity in her personal
4 capacity.

5 **C. Plaintiffs’ Claim Fails Against Nevada County Because Plaintiffs Cannot**
6 **Establish a County Policy or Custom Caused the Alleged Adverse Action.**

7 Plaintiffs are also unable to support their claim against the County and County Counsel
8 Elliott in her official capacity. Plaintiffs cannot demonstrate an affirmative link between any
9 municipal policy or custom and the alleged adverse action as would be necessary for such a claim.

10 A governmental entity is liable under 42 U.S.C. § 1983 only when the entity itself is a
11 “moving force” behind the Constitutional violation, *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658,
12 694 (1978). Thus, to establish liability against a municipality or an individual in her or his official
13 capacity, a plaintiff must first identify a municipal “policy or custom” which “played a part in the
14 [claimed] violation of federal law.” *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Monell*, 436
15 U.S. at 691. Liability thus only exists where the alleged unconstitutional action “implements or
16 executes a policy statement, ordinance, regulation, or decision officially adopted and
17 promulgated” by those responsible for municipal policy, or where it accords with a practice that is
18 “so persistent and widespread” that it amounts to a “permanent and well settled” policy. *Monell*,
19 436 U.S. at 690-91; *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (“Absent a formal
20 governmental policy, [a plaintiff] must show a longstanding practice or custom which constitutes
21 the standard operating procedure of the local government entity.”) (internal quotation marks
22 omitted). Additionally, a plaintiff must demonstrate an affirmative link between a municipal
23 “policy or custom” and the alleged constitutional violation. *Kentucky*, 473 U.S. at 166; *Monell*,
24 436 U.S. at 691; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985).

25 Here, Plaintiffs cannot identify any policy that, when enforced, caused the alleged
26 violation of their First Amendment rights. Indeed, there was no policy that directed County staff
27 to reduce penalties if a restaurant that had agreed to comply with the Public Health Orders also
28 agreed not to vocally challenge the Public Health Orders. (Irani Decl. ¶ 20; Elliott Decl. ¶ 7.) Nor

1 can Plaintiffs establish the existence of a widespread practice of County officials conditioning the
2 reduction in fines or reinstatement of suspended permits on restaurant owners not speaking out or
3 encouraging others to speak out against the Public Health Orders. In fact, Plaintiffs are unable to
4 identify any other restaurants whose permit reinstatement and/or fine reduction was conditioned
5 on allegedly refraining from voicing public opposition to the Public Health Orders. (Exh. 15 at
6 105-106 [223:12-224:19]; Exh. 14 at 78-80 [173:8-175:22]; Exh. 16 at 56-58 [121:19-123:15].)

7 To the contrary, if a restaurant committed to comply with the Public Health Orders or took
8 steps to comply, permits would be reinstated and penalties would be reduced. (SUF No. 27; Irani
9 Decl. ¶ 20; Elliott Decl. ¶ 7.) Further, any argument that the County had a policy or practice to
10 condition enforcement on refraining from public opposition is belied by the fact that restaurants
11 whose owners did *not* publicly oppose the Public Health Orders but violated the Public Health
12 Orders were still the subject of enforcement efforts, and restaurants whose owners *did* publicly
13 oppose the Public Health Orders yet still complied with the Public Health Orders were not the
14 subject of enforcement efforts. (Irani Decl. ¶¶ 21-23.)

15 Plaintiffs cannot establish liability on the part of Nevada County or County Counsel Elliott
16 in her official capacity, and their First Amendment retaliation claim fails for this reason as well.

17 **D. The Nevada County Defendants Are Entitled to Summary Judgment on**
18 **Plaintiffs' Injunctive and Declaratory Relief Claims Because Such Claims Are**
19 **Moot.**

20 It is not clear whether Plaintiffs still assert claims for injunctive and declaratory relief in
21 their Amended Complaint, despite the Court's dismissal of such claims in its Order on the County
22 Defendants' first Motion to Dismiss. While Plaintiffs do not include injunctive and declaratory
23 relief in their Prayer for Relief, they do state in their First Amendment retaliation cause of action
24 that they are entitled to both. (Am. Compl. at ¶ 44-45 & Prayer.) To the extent Plaintiffs still seek
25 such relief, this relief should be summarily adjudicated in favor of the Nevada County Defendants.

26 As noted above, the Court previously dismissed Plaintiffs' injunctive and declaratory relief
27 claims as moot in its October 4, 2022 Order on Defendants' Motion to Dismiss, noting that the
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1 COVID-19 restrictions at issue had all been lifted. (Oct. 4, 2022 Order, ECF No. 37, at 5-8; *see*
2 *also* SUF No. 30; Exhs. 4, 10-11.) This ruling is dispositive of these claims.

3 Moreover, all Plaintiffs testified at their depositions that they are not claiming any
4 continuing violation of their Constitutional rights or any current retaliation. (Exh. 15 at 107-109
5 [240:15-242:4]; Exh. 14 at 81-82 [181:20-182:23]; Exh. 16 at 61-63 [133:25-135:7].) Thus, in
6 addition to the Court’s governing order – which alone is dispositive here – discovery has revealed
7 no grounds for injunctive or declaratory relief. As such, Plaintiffs’ claims for injunctive and
8 declaratory relief should be summarily adjudicated in favor of the Nevada County Defendants
9 because such claims are moot as a matter of law. *See Burney v. Woodford*, No. CIV S-05-1849
10 FCD EFB P., 2009 WL 499052, at *4 (E.D. Cal. Feb. 26, 2009) (granting summary judgment on
11 injunctive relief claims on mootness grounds); *Nwozuzu v. Runnels*, 338 F. App’x 724, 725 (9th
12 Cir. 2009) (affirming district court’s grant of summary judgment on injunctive relief claims
13 because claims were moot).

14 **VI. CONCLUSION**

15 For all of the foregoing reasons, the Nevada County Defendants’ Motion for Summary
16 Judgment should be granted in its entirety.

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18 DATED: November 21, 2023

MEYERS NAVE

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By: /s/ David Mehretu

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