

1 TEMPE CITY ATTORNEY'S OFFICE
 2 ANDREW B. CHING, #016144
 3 CLARENCE E. MATHERSON, JR., #021211
 4 CATHERINE M. BOWMAN, #011713
 5 21 E. Sixth Street, Suite 201
 6 P.O. Box 5002
 7 Tempe, Arizona 85280
 8 Phone: (480) 350-8227
 9 Fax: (480) 350-8645
 10 Cityattorney_administrator@tempe.gov
 11 Attorneys for Tempe Defendants

12 **IN THE UNITED STATES DISTRICT COURT**
 13 **FOR THE DISTRICT OF ARIZONA**

14 Daniel Arthur Gutenkauf,
 15 Plaintiff,
 16 v.
 17 City of Tempe, et al.,
 18 Defendants.

No. CV 10-2129-PHX-FJM

**TEMPE DEFENDANTS' MOTION TO
 DISMISS PLAINTIFF'S FIRST
 AMENDED COMPLAINT**

19 Defendants City of Tempe, Hugh Hallman, Susan Hallman, Joel Navarro, Mark W.
 20 Mitchell, Debra Mitchell, P. Ben Arredondo, Ruthann Albrighton-Arredondo, Shana Ellis,
 21 Richard Antonio, Onnie Shekerjian, Brian Hart Shekerjian, Corey D. Woods, Jan Hort,
 22 Gerald J. Hort, Charlie W. Meyer, Deborah W. Meyer, Thomas Ryff, Rose Ann Ryff,
 23 Noah Johnson, Jennifer Johnson, Aaron Colombe, Susan Colombe, Bianca Gallego,
 24 Kerby Rapp, Lillian Rapp, Shelly Seyler, Louraine C. Arkfeld, Mary Jo Barsetti, David E.
 25 Nerland, Nancy Rodriguez, David J. McAllister, Jaquelina McAllister, and Michael
 26 Greene (collectively the "Tempe Defendants"), pursuant to Federal Rule of Civil
 27 Procedure 12(b)(6), hereby moves the Court for its Order dismissing Plaintiff's Complaint
 28 for failing to state a claim upon which relief can be granted. This Motion is supported by
 the attached Memorandum of Points and Authorities.

Tempe City Attorney's Office
 21 East Sixth Street, Suite 201
 P.O. Box 5002
 Tempe, Arizona 85280

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS.¹

On or about July 19, 2007, the Tempe City Council approved and entered into a valid contract for services with Redflex Traffic Systems, Inc., to operate a photo enforcement system in the City. On September 4, 2008, Plaintiff received an Arizona Traffic Ticket and Complaint in the mail alleging a violation of A.R.S. 28-701(A), which occurred on August 19, 2008, at 200 South Rural Road in Tempe. The speeding ticket was certified by Tempe Police Officer Aaron Colombe. Plaintiff did not respond to the ticket, and he was subsequently personally served with process on October 21, 2008.

Plaintiff requested a hearing on the traffic ticket. On February 17, 2009, Judge Pro Tem Mary Jo Barsetti held a hearing on Plaintiff's traffic ticket in the Tempe Municipal Court. Bianca Gallego, a traffic enforcement aide for the Tempe Police Department, testified on behalf of the City. During the hearing, Plaintiff cross-examined Ms. Gallego, testified on his own behalf, and introduced exhibits. At the close of the evidence, Judge Barsetti found Plaintiff responsible for the traffic ticket and fined him \$171.00, plus \$26 for the service of process costs.

On May 1, 2009, Plaintiff appealed the decision of Judge Barsetti to the Maricopa County Superior Court. On October 6, 2009, the superior court reversed Judge Barsetti's ruling and dismissed the charges against Plaintiff. The City subsequently refunded Plaintiff's payment of \$197.00 for the fine and the service of process costs.

Plaintiff filed a notice of claim with the City pursuant to Arizona Revised Statute § 12-821.01. In his notice of claim, Plaintiff stated that he would settle his claims against the City for \$699.00. David McAllister, a claims adjuster for the City, notified Plaintiff that the City accepted his claim and agreed to pay Plaintiff the \$699.00 he requested. Mr. McAllister, on several occasions, attempted to mail Plaintiff a check for \$699.00 along with a release of all claims Plaintiff had regarding the issuance of the traffic ticket. However, Plaintiff refused to sign the release agreement and returned the check to Mr.

¹ Tempe bases its facts on the facts contained in Plaintiff's Complaint as it is required to do for a motion to dismiss.

1 McAllister. Plaintiff never accepted the settlement from Tempe and argued that there was
2 no meeting of the minds between him and Mr. McAllister.

3 **II. LEGAL STANDARD GOVERNING MOTIONS TO DISMISS.**

4 If a pleading does not comply with Rule 8, an opposing party may move to dismiss
5 the action for “[f]ailure to state a claim upon which relief can be granted.” Ariz. R. Civ.
6 P. 12(b)(6). Although all well-pleaded allegations of material fact are taken as true and
7 construed in the light most favorable to the nonmoving party on a motion to dismiss for
8 failure to state a claim, the Court is not required to accept as true Plaintiff’s allegations
9 that are merely conclusory, unwarranted deductions of fact, and unreasonable inferences.
10 *See Cullen v. Auto-Owners Insurance Co.*, 189 P.3d 344 (Ariz. 2008); *Clegg v. Cult*
11 *Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994); *Ashcroft v. Iqbal*, 129 S.Ct.
12 1937, 1950 (2009) (“[O]nly a complaint that states a plausible claim for relief survives a
13 motion to dismiss.”). “Dismissal is appropriate where the complaint lacks either a
14 cognizable legal theory or facts sufficient to support a cognizable legal theory.”
15 *Automotive Holdings, L.L.C. v. Phoenix Corners Portfolio, L.L.C.*, No. 09-01843, 2010
16 WL 1781007, at *1 (D.Ariz., May 4, 2010) (internal citations omitted).

17 **III. PLAINTIFF HAS NOT ALLEGED A PROPER CAUSE OF ACTION**
18 **UNDER 42 U.S.C. § 1983 AGAINST THE TEMPE DEFENDANTS.**

19 Section 1983 does not create its own independent cause of action. It only
20 “provides a mechanism for enforcing individual rights ‘secured’ elsewhere, i.e., rights
21 independently ‘secured by the Constitution and laws’ of the United States. *Save Our*
22 *Valley v. Sound Transit*, 335 F.3d 932, 936 (9th Cir. 2003). A plaintiff states a valid claim
23 under § 1983, when he is able to show “that (1) the conduct about which he complains
24 was committed by a person acting under the color of state law and (2) the conduct
25 deprived him of a federal constitutional or statutory right.” *Jones v. Rosell*, 2009 WL
26 531870, 1 (D.Ariz. 2009) (citing *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir.1989)).

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1 **A. Tempe Defendants Did Not Violate Plaintiff's Fourth Amendment**
2 **Rights.**

3 Initially, Plaintiff alleges that Defendant Colombe violated his “clearly established
4 Constitutional right to Substantive and Procedural Due Process of law, protected under the
5 Fourteenth Amendment . . . , and by his malicious prosecution . . . violated and his Fourth
6 Amendment right[s] by issuing the traffic citation in the absence of probable cause and in
7 ‘deliberate indifference’ to [his] Constitutional rights.” Compl. at ¶ 106.

8 Tempe Defendants did not violate Plaintiff's Fourth Amendment rights because
9 there was no seizure. The Fourth Amendment of the United States Constitution states:

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

16 “A seizure of the person within the meaning of the Fourth and Fourteenth Amendments
17 occurs when, “taking into account all of the circumstances surrounding the encounter, the
18 police conduct would have communicated to a reasonable person that he was not at liberty
19 to ignore the police presence and go about his business.” *Kaupp v. Texas*, 538 U.S. 626,
20 629 (2003) (internal quotations omitted); *see also Hopkins v. Bonvicino*, 573 F.3d 752,
21 773 (9th Cir. 2009) (same); *Aguilera v. Baca*, 510 F.3d 1161, 1167 (9th Cir. 2007) (“A
22 seizure occurs when an individual submits to a show of lawful authority or an application
23 of physical force by a law enforcement agent.”)

24 Plaintiff was never seized by Officer Colombe or any other Tempe Defendant.
25 According to Plaintiff, he received the traffic citation in the mail, which he ignored.
26 Plaintiff then states that he was eventually served with the traffic citation by a private
27 process server and he eventually appeared at the traffic hearing on the date requested. At
28 no time was Plaintiff contacted by Tempe Defendants regarding his traffic citation. The
 mere issuance of the traffic citation alone does not constitute a seizure under the Fourth
 Amendment. *White v. City of Laguna Beach*, 679 F.Supp.2d 1143, 1155-56 (C.D. Cal.
 2010). “The issuance of a citation must also result in the individual's freedom of

1 movement being restrained.” *See Morales v. Tavares*, 2007 WL 172392, (E.D. Pa. 2007).
 2 Likewise, the issuance of a summons to appear later in court does not rise to the level of a
 3 seizure under the Fourth Amendment. *See Burg v. Gosselin*, 591 F.3d 95, 98 (2d Cir.
 4 2010) (“[T]he issuance of a pre-arraignment, non-felony summons requiring a later court
 5 appearance, without further restrictions, does not constitute a Fourth Amendment
 6 seizure.”); *see also Mangino v. Incorporated Village of Patchogue*, 739 F.Supp.2d 205,
 7 227 (E.D. N.Y. 2010) (same). Thus, Plaintiff’s § 1983 claim cannot be based upon a
 8 violation of his Fourth Amendment rights.

9 **B. The Sixth Amendment Does Not Apply To Civil Traffic Hearings.**

10 Plaintiff alleges that Defendant Gallego violated his Sixth Amendment right to
 11 confront the witnesses against him by appearing on behalf of Officer Colombe. He also
 12 alleges that Officer Colombe violated his rights by not appearing at the hearing. By its
 13 plain language, the Sixth Amendment only applies in the criminal context. The Sixth
 14 Amendment states, in relevant part: “In all criminal prosecutions, the accused shall enjoy
 15 the right . . . to be confronted with the witnesses against him. U.S. Const. amend VI.
 16 “[T]he Confrontation Clause does not come into play until the initiation of criminal
 17 proceedings.” *S.E.C. v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 742 (1984) (citing *Hannah*
 18 *v. Larche*, 363 U.S. 420, 440, n. 16 (1960)).

19 In this case, Plaintiff was cited for a violation of A.R.S. § 28-701(A), which is a
 20 civil traffic violation. *See State v. Poli*, 161 Ariz. 151, 152, 776 P.2d 1077, 1078 (App.
 21 1989) (finding that a violation of A.R.S. § 28-701(A) is treated as a civil matter). Arizona
 22 law also states that a person who violates a civil traffic offense is subject to a maximum
 23 civil penalty of two hundred fifty dollars. A.R.S. § 28-1598. If the penalty is not paid, the
 24 only repercussion for the responsible party is the suspension of his driving privileges.
 25 A.R.S. § 1601(A). It is clear that Plaintiff was not subject to criminal prosecution;
 26 therefore, he had no Sixth Amendment right to confront Officer Colombe at the civil
 27 traffic hearing.

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2 **C. Plaintiff Was Provided Procedural Due Process By Tempe Defendants.**

3 Plaintiff alleges a violation of his procedural and substantive due process rights
4 under the Fourteenth Amendment. The Due Process Clause of the Fourteenth
5 Amendment states, “nor shall any State deprive any person of life, liberty, or property,
6 without due process of law.” The Supreme Court, in *Hudson v. Palmer*, held that “an
7 unauthorized intentional deprivation of property by a state employee does not constitute a
8 violation of the procedural requirements of the Due Process Clause of the Fourteenth
9 Amendment if a meaningful post deprivation remedy for the loss is available.” 468 U.S.
10 517, 533 (1984). In this case, Plaintiff was given his procedural due process. Plaintiff
11 received a traffic ticket in the mail and attended a civil traffic hearing and was allowed to
12 present testimony regarding why he believed he was not responsible. After Judge Barsetti
13 found Plaintiff responsible for the violation, he had the opportunity to appeal the decision,
14 which he did. And after he won on appeal, Plaintiff’s payment to Tempe was refunded to
15 him. Plaintiff is not entitled to any further procedure under the Due Process Clause.

16 **D. Plaintiff Has Not Stated A Valid Substantive Due Process Claim
17 Against Tempe Defendants.**

18 “Substantive due process forbids the government from depriving a person of life,
19 liberty, or property in such a way that shocks the conscience or interferes with the rights
20 implicit in the concept of ordered liberty.” *Corales v. Bennett*, 567 F.3d 554, 568 (9th
21 Cir. 2009). Substantive due process is implicated only in those situations where the
22 official government conduct is highly egregious and can be said to be “arbitrary in a
23 constitutional sense.” *Brittain v. Hansen*, 451 F.3d 982, 991(9th Cir. 2006). “It is not
24 enough to allege conscience shocking action, however. As a threshold matter, to establish
25 a substantive due process claim a plaintiff must show a government deprivation of life,
26 liberty, or property. This is because there is no general liberty interest in being free from
27 capricious government action.” *Id.* (internal quotations and citation omitted).

28 Plaintiff has no substantive due process right to be free from prosecution without
probable cause. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069 (9th Cir. 2004) (citing

1 *Albright v. Oliver*, 510 U.S. 266, 271, 275, 277, 282-83, 291 (1994)). Plaintiff does not
 2 have a constitutional right “to be free of erroneous[ly] issued traffic tickets.” *Gibson v.*
 3 *Inacio*, No. 09-6356(SDW), 2010 WL 3943684, at *4 (D.N.J. Oct. 5, 2010).

4 Even if Defendant Colombe erroneously certified the traffic ticket, Plaintiff cannot
 5 assert a substantive due process claim because none of his civil rights were violated.
 6 Moreover, Plaintiff cannot show that Tempe Defendants’ actions, even if wrong or
 7 erroneous, were anything more than “capricious government action,” or was conduct that
 8 “shocks the conscious” in a constitutional sense.

9 **IV. PLAINTIFF FAILS TO STATE A VIABLE CONSPIRACY CLAIM UNDER**
42 U.S.C. § 1985.²

10 In Count XI of his Complaint, Plaintiff alleges that Tempe Defendants engaged in a
 11 conspiracy to deprive him and others similarly situated to him of the right to a fair trial.
 12 “A claim under section 1985(2) . . . is composed of three essential elements: (1) a
 13 conspiracy between two or more persons, (2) to deter a witness by force, intimidation, or
 14 threat from attending . . . court or testifying freely in a matter there pending, which (3)
 15 causes injury to the claimant.” *Rutledge v. Arizona Bd. of Regents*, 859 F.2d 732, 735 (9th
 16 Cir. 1988). A mere allegation without more is insufficient to sustain a plaintiff’s burden
 17 under the civil rights conspiracy statute. *Sanchez v. City of Santa Ana*, 936 F.2d 1027,
 18 1039 (9th Cir. 1990). Broad conclusory allegations devoid of factual allegations
 19 necessary to support a conspiracy are insufficient. *Jaco v. Bloechle*, 739 F.2d 239, 245
 20 (6th Cir. 1984). “To adequately plead a conspiracy, the plaintiff must set forth facts

21 _____
 22 ² Section 1985(2) states:

23 If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat,
 24 any party or witness in any court of the United States from attending such court, or from
 25 testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or
 26 witness in his person or property on account of his having so attended or testified, or to influence
 27 the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure
 28 such juror in his person or property on account of any verdict, presentment, or indictment
 lawfully assented to by him, or of his being or having been such juror; or if two or more persons
 conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due
 course of justice in any State or Territory, with intent to deny to any citizen the equal protection
 of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the
 right of any person, or class of persons, to the equal protection of the laws;

1 supporting a conclusion that the defendants actually shared the same conspiratorial
 2 objective or motive.” *LaBoy v. Zuley*, 747 F.Supp. 1284, 1289, n.6 (N.D.Ill. 1990)
 3 (internal citations omitted). “While the plaintiff does not have to allege an express
 4 agreement between the defendants, mere conclusory allegations that the defendants
 5 ‘conspired’ to violate his rights are insufficient.” *Id.*

6 Plaintiff has failed to allege a proper conspiracy against Tempe Defendants. First,
 7 Plaintiff has not alleged that he was deterred by force or intimidation from participating in
 8 his civil traffic hearing. Plaintiff alleges that the conspiracy here consists of the
 9 defendants “preparing and presenting to Tempe City Court judges and witnesses a Court
 10 Administration Module (CAM) which ‘presents and assesses common dispute and defense
 11 tactics and appropriate counter-measures required for successful prosecution’ of the
 12 alleged traffic violation.” (Compl. at ¶ 184) In other words, the conspirators discussed
 13 common tactics used to defeat the prosecution of photo enforcement tickets. Nothing
 14 Plaintiff describes amounts to a conspiracy between Tempe Defendants and the other
 15 named defendants. Additionally, Plaintiff has not stated with the required specificity that
 16 Tempe Defendants and the other alleged conspirators shared the same conspiratorial
 17 motive or objective. Plaintiff’s allegations amount to the same mundane conclusory
 18 allegations that will not support a violation of § 1985 or survive a motion to dismiss.

19 **V. PLAINTIFF FAILS TO STATE A VIABLE RACKETER INFLUENCED**
AND CORRUPT ORGANIZATIONS ACT VIOLATION.

20 “To establish a claim under RICO, a plaintiff generally must establish a “pattern of
 21 racketeering activity” under 18 U.S.C. § 1962(c).” *Durning v. Citibank, Int’l*, 990 F.2d
 22 1133, 1138 -39 (9th Cir. 1993). A pattern of racketeering activity requires at least two
 23 acts of activity. *Id.* “The Supreme Court has explained that the ‘pattern’ requirement can
 24 be met by showing (1) ‘that the racketeering predicates are related,’ and (2) that the
 25 predicates ‘amount to or pose a threat of continued criminal activity.’” *Id.* (citing *H.J.,*
 26 *Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)).

27 Here, Plaintiff cannot establish that Tempe Defendants committed any of the
 28 predicate acts to support his RICO claim. Plaintiff alleges that Tempe Defendants

1 engaged in wire fraud, mail fraud and extortion. "To allege a violation of the mail fraud
 2 statute, it is necessary to show that (1) the defendants formed a scheme or artifice to
 3 defraud; (2) the defendants used the United States mails or caused a use of the United
 4 States mails in furtherance of the scheme; and (3) the defendants did so with the specific
 5 intent to deceive or defraud." *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*,
 6 806 F.2d 1393, 1399 -1400 (9th Cir. 1986). "Similarly, a wire fraud violation consists of
 7 (1) the formation of a scheme or artifice to defraud (2) use of the United States wires or
 8 causing a use of the United States wires in furtherance of the scheme; and (3) specific
 9 intent to deceive or defraud." *Id.* Plaintiff fails to state his claims against Tempe
 10 Defendants with the specificity required in any fraud claim. In addition, Plaintiff fails to
 11 allege that Tempe Defendants acted with the specific intent to deceive or defraud that is
 12 necessary to allege a proper wire or mail fraud claim.

13 Finally, Plaintiff has not alleged a proper extortion claim against Tempe
 14 Defendants because Tempe Defendants cannot commit extortion on behalf of Tempe. *See*
 15 *Wilkie v. Robbins*, 551 U.S. 537 (2007) (the Hobbs Act does not apply when the National
 16 Government is the intended beneficiary). In this case, the intended beneficiary of any
 17 monies collected by Tempe Defendants was the City of Tempe; thus, a claim of extortion
 18 cannot lie against Tempe Defendants.

19 **VI. DEFENDANTS BARSETTI, ARKFELD, GALLEGO AND RODRIGUEZ**
 20 **ARE ENTITLED TO JUDICIAL IMMUNITY.**

21 Judicial immunity provides absolute protection from civil suits to judicial officials
 22 and others intimately related to the judicial process for their judicial acts. *Burke v. State*,
 23 215 Ariz. 6, 9, ¶ 7, 156 P.3d 423, 426 (App. 2007). Judicial immunity applies no matter
 24 how "erroneous the act may have been, and however injurious in its consequences it may
 25 have proved to the plaintiff." *Bradley v. Fisher*, 80 U.S. 335, 347 (1872). "Nor can this
 26 exemption be affected by the motives with which their judicial acts are performed." *Id.*
 27 The purpose behind the judicial immunity doctrine is to "assure that judges will exercise
 28 their functions with independence and without fear of consequences." *Acevedo v. Pima*
County Adult Probation Dept., 142 Ariz. 319, 320, 600 P.2d 38, 39 (1984). Judicial

1 immunity protects all "those who perform functions intimately related to or which amount
2 to an integral part of the judicial process." *Id.* (internal citations and quotations omitted).
3 Witnesses, including police officers, enjoy the protections of judicial immunity because
4 they are "integral parts of the judicial process." *Cleavinger v. Saxner*, 474 U.S. 193, 200
5 (1985) (quoting *Briscoe v. LaHue*, 490 U.S. 325, 335 (1983)). "[J]udicial immunity is an
6 immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*,
7 502 U.S. 9, 11 (1991). "Accordingly, judicial immunity is not overcome by allegations of
8 bad faith or malice, the existence of which ordinarily cannot be resolved without engaging
9 in discovery and eventual trial." *Id.*; *see also Stump v. Sparkman*, 435 U.S. 349, 356
10 (1978) ("A judge will not be deprived of immunity because the action he took was in
11 error, was done maliciously, or was in excess of his authority; rather, he will be subject to
12 liability only when he has acted in the clear absence of all jurisdiction."); *Burk*, 215 Ariz.
13 at 9, ¶ 7, 156 P.3d at 426 (immunity applies even when judicial officer is alleged to have
14 acted maliciously or corruptly).

15 Mary Jo Barsetti is a judge pro tem for the City of Tempe and presided over
16 Plaintiff's civil traffic hearing. In his Complaint, Plaintiff alleged, among other things,
17 that Judge Barsetti: presided over his hearing; admitted the State's evidence against him
18 over his objections; denied his motion to dismiss the ticket; and found him responsible for
19 violating A.R.S. § 28-701 (A). It is clear from reading Plaintiff's Complaint that all of the
20 alleged actions taken by Judge Barsetti that, in Plaintiff's mind, subjected her to suit were
21 taken while she was serving as a judge in the Tempe Municipal Court. Because she was
22 serving as a judicial officer, she is cloaked in judicial immunity. Plaintiff seems to allege
23 that Judge Barsetti was acting "in absence of all jurisdiction." however, Judge Barsetti had
24 jurisdiction to hear civil traffic cases as a Tempe Municipal Court judge. The fact that she
25 may have been erroneous in her ruling or was acting in excess of her authority does not
26 mean that she was acting in absence of all jurisdiction. *See Stump*, 435 U.S. at 359-60
27 (circuit court judge, presiding in a court of general jurisdiction, was not acting in absence
28 of all jurisdiction when he granted petition to have mentally disabled minor sterilized even

1 though no specific statute authorized his actions). "A judge is absolutely immune from
2 liability for his judicial acts even if his exercise of authority is flawed by the commission
3 of grave procedural errors." *Id.* at 359.

4 At the time of the incident complained of by Plaintiff, Louraine Arkfeld was the
5 presiding judge at the Tempe City Court and Nancy Rodriguez was the deputy court
6 administrator. It seems that Judge Arkfeld's only action in this matter was signing the
7 traffic ticket issued to Plaintiff. (Compl. at ¶ 221.) The signing of the traffic ticket by the
8 Judge Arkfeld is clearly a judicial function; therefore, she is entitled to immunity.

9 Defendants have been unable to determine what specific acts Defendant Rodriguez
10 committed that subject her to suit by Plaintiff; however, because she is the deputy court
11 administrator and supports the judicial functions of the Tempe City Court and its judges,
12 she is also entitled to immunity.

13 Likewise, Defendant Gallego is entitled to immunity. Her only involvement in the
14 case was the testimony she presented at Plaintiff's civil traffic hearing. Because she was a
15 witness in a judicial proceeding, she is cloaked in immunity. *See* Cleavinger, 474 U.S. at
16 200 (witnesses in judicial proceedings are entitled to immunity.)

17 **VII. DEFENDANTS HALLMAN, ARREDONDO, WOODS, NAVARRO,**
18 **SHEKERJIAN, ELLIS, AND MITCHELL ARE ENTITLED TO**
19 **LEGISLATIVE IMMUNITY.**

20 Plaintiff alleges that Defendants Hallman, Arredondo, Woods, Navarro,
21 Shekerjian, Ellis and Mitchell, who were members of the Tempe City Council at the time
22 Plaintiff received his traffic ticket, "indirectly 'aided and abetted' the conspiracy to
23 deprive [him] of his Constitutionally protected rights" . . . "by the knowing, intentional
24 and deliberate 'overt act' of awarding the Photo Enforcement contract to [Redflex], on 7-
25 19-2007." (Compl. at ¶ 190.) Plaintiff also alleges that Defendants Arredondo and
26 Navarro aided and abetted the conspiracy on April 23, 2009, by making and seconding a
27 motion during the city council meeting to increase the contract amount with Redflex for
28

1 the photo enforcement program, which was approved by the entire city council.³ (Compl.
 2 at ¶ 192.) All of the actions taken by the city council were taken during official city
 3 council meetings, and, as such, the council members are entitled to absolute legislative
 4 immunity. *See Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (holding that local
 5 legislators are entitled to absolute immunity from suit under § 1983 for their legislative
 6 activities). In explaining the rationale for extending legislative immunity to local
 7 legislators, the Supreme Court stated,

8 Regardless of the level of government, the exercise of
 9 legislative discretion should not be inhibited by judicial
 10 interference or distorted by the fear of persona liability.
 11 Furthermore, the time and energy required to defend against a
 12 lawsuit are of particular concern at the local level, where the
 13 part-time citizen-legislator remains commonplace. And the
 14 threat of liability may significantly deter service in local
 15 government, where prestige and pecuniary rewards may pale
 16 in comparison to the threat of civil liability.

17 *Id.* at 52 (internal citations omitted). Legislative immunity “attaches to all actions taken
 18 ‘in the sphere of legitimate legislative activity.’” *Id.* (citing *Tenney v. Brandhove*, 341
 19 U.S. 367, 376 (1951)). When determining whether an act is legislative, courts must look
 20 at the nature of the act itself, rather than any alleged motive or intent of the official
 21 performing it. *Id.* at 54.

22 The Tempe City Council is charged with, “Policy making and all other powers of
 23 the city shall be vested in the council, except as otherwise provided by law or this Charter,
 24 and the council shall provide for the exercise thereof and for the performance of all duties
 25 and obligations imposed on the city by law.” Tempe City Charter Sec. 2.04. Thus, their
 26 powers would include entering into contracts on behalf of Tempe. At the time Plaintiff
 27 alleges that the city council Defendants aided and abetted the conspiracy against him, they
 28 were considering awarding the photo enforcement contract to Redflex. The consideration

3 Even if Plaintiff were able to allege a valid conspiracy against the city council Defendants for violating his civil rights when he received his traffic ticket, the April 23, 2009 council meeting would not support his claims against them because the vote on April 23, 2009, occurred *after* alleged violation took place, which occurred either at the time he received his ticket or at the time he was found responsible for the ticket.

1 of the contract, and voting on the contract, are quintessential legislative functions.
 2 Therefore, the city council Defendants are entitled to absolute legislative immunity for
 3 their actions and Plaintiff's claims against them must be dismissed.

4 **VIII. DEFENDANTS MEYER, RAPP, SEYLER, JOHNSON, HORT RYFF,
 5 MCALLISTER AND GREENE SHOULD BE DISMISSED.**

6 Plaintiff's Complaint fails to state sufficient facts against the above-named
 7 defendants that should survive a motion to dismiss. For example, it appears that Mr.
 8 McAllister's only involvement in this case was to receive Plaintiff's notice of claim
 9 against Tempe and attempt to resolve it for the amount of money requested. Mr.
 10 McAllister's actions do not amount to a civil cause of action. Likewise, the other
 11 defendants' only conduct in this case was to have the misfortune to have their name
 12 attached to some document that was presented to the city council or sent to Plaintiff at his
 13 request. Again, their conduct does not amount to a valid federal cause of action.

14 **IX. PLAINTIFF LACKS STANDING TO DEMAND THAT THE COURT
 15 DECLARE THAT TEMPE DEFENDANTS LOYALTY OATHS DO NOT
 16 COMPLY WITH ARIZONA LAW.**

17 In ¶¶ 383 through 400, Plaintiff alleges that the loyalty oaths of Tempe Defendants
 18 are invalid and demands that the Court declare that they do not comply with A.R.S. § 38-
 19 231 and the Arizona Constitution. However, Plaintiff lacks standing to raise the
 20 argument. "To establish standing, the party invoking federal jurisdiction must establish,
 21 at a minimum, three elements: (1) that it suffered an injury to a legally protected interest,
 22 or injury in fact, that is concrete and particularized, as well as actual or imminent, rather
 23 than conjectural or hypothetical; (2) that there is a causal connection between the injury
 24 and the conduct complained of, i.e., that the injury is fairly ... traceable to the challenged
 25 action of the defendant; and (3) that it is likely ... that the injury will be 'redressed by a
 26 favorable decision.'" *Hoekstra v. City of Arnold, Mo.*, No. 4:08CV267TCM, 2009 WL
 27 259857, at *5 (E.D. Mo. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-
 28 61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) (internal quotations omitted). To establish

1 the “particularized” aspect of the injury, “the injury must affect the plaintiff in a personal
2 and individual way.” *Id.*

3 Here, Plaintiff has not shown that he has suffered an injury to a legally protected
4 interest, or injury in fact, that is concrete and particularized. As state previously, Plaintiff
5 is unable to show that Tempe Defendants violated his constitutional rights. Plaintiff also
6 cannot show that the injury affected him in an individual and personal way. Moreover,
7 Plaintiff cannot show that there is a causal connection between any injury he did suffer
8 and the fact that Tempe Defendants’ loyalty oaths may be improper.

9 Plaintiff’s cause of action should also be dismissed because Tempe Defendants’
10 loyalty oaths comply with Arizona law. See A.R.S. §§ 38-231, 231 and 233.

11 **X. TEMPE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.**

12 Even if Tempe Defendants violated Plaintiff’s constitutional rights by issuing the
13 traffic ticket without first verifying his identification with the motor vehicle department,
14 they are entitled to qualified immunity because the right was not clearly established at the
15 time. The defense of qualified immunity protects “government officials . . . from liability
16 for civil damages insofar as their conduct does not violate clearly established statutory or
17 constitutional rights of which a reasonable person would have known.” *Harlow v.*
18 *Fitzgerald*, 457 U.S. 800, 818 (1982). A court considering a claim of qualified immunity
19 must first determine whether the Plaintiff has alleged the deprivation of an actual
20 constitutional right, then proceed to determine if the right was “clearly established.” See
21 *Conn v. Gabbert*, 526 U.S. 286, 290 (1999).

22 The threshold question must be: Taken in the light most favorable to the party
23 asserting the injury, do the facts alleged show the officer's conduct violated a
24 constitutional right? See *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no constitutional
25 right would have been violated were the allegations established, there is no necessity for
26 further inquiries concerning qualified immunity. *Id.* On the other hand, if a violation
27 could be made out on the allegations, the next sequential step is to ask whether the right
28 was clearly established. *Id.* The relevant, dispositive inquiry in determining whether a

1 right is clearly established is whether it would be clear to a reasonable officer that his
2 conduct was unlawful in the situation he confronted. *Id.* If the law is determined to be
3 clearly established, the next question is whether, under that law, a reasonable official
4 could have believed his conduct was lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868,
5 871-72 (9th Cir. 1993). When determining whether a person is cloaked in qualified
6 immunity, district court’s now have discretion in deciding which prong to analyze first.
7 *See Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (“The judges of the district court . . .
8 should be permitted to exercise their sound discretion in deciding which of the two prongs
9 of the qualified immunity analysis should be addressed first in light of the circumstances
10 in the particular case at hand.”).

11 In this case, Tempe Defendants have not violated any of Plaintiff’s constitutional
12 rights. Plaintiff does not have a protected constitutional right under the Fourth, Sixth or
13 Fourteenth Amendment as he has so alleged. Plaintiff was not seized by Tempe
14 Defendants; the Sixth Amendment right to confront witnesses does not apply in the civil
15 context; and Plaintiff’s due process rights were not violated. Even if Plaintiff can allege
16 an actual deprivation of a constitutional right, he has not shown that his right was clearly
17 established at the time of the alleged deprivation. Although Plaintiff asserts that Officer
18 Colombe, Ms. Gallego and Tempe Defendant knew or should have known that Arizona
19 law required them to match the picture in the photo enforcement ticket with his driver’s
20 license photo, there is no reported court case or other law that would have alerted them to
21 that fact. Therefore, if Plaintiff’s constitutional rights were violated, Tempe Defendants
22 are entitled to immunity.

23 **XI. CONCLUSION.**

24 Based on the foregoing, Tempe Defendants respectfully request that Plaintiff’s
25 Complaint against them be dismissed in its entirety.

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28 ///

Tempe City Attorney’s Office
21 East Sixth Street, Suite 201
P.O. Box 5002
Tempe, Arizona 85280

1 DATED this 28th day of March, 2011.

2 TEMPE CITY ATTORNEY'S OFFICE

3
4 /s/ Clarence E. Matherson, Jr. _____

5 Andrew B. Ching
6 Clarence E. Matherson, Jr.
7 Catherine M. Bowman
8 21 E. Sixth Street, Suite 201
9 P.O. Box 5002
10 Tempe, Arizona 85280
11 Attorneys for Tempe Defendants

12 CERTIFICATE OF SERVICE

13 I hereby certify that on March 28, 2011, I electronically transmitted the attached
14 document to the Clerk's Office using the CM/ECF System for filing and mailed a copy of
15 same to:

16 Daniel Arthur Gutenkauf
17 1847 E. Apache Blvd., #41
18 Tempe, AZ 85281
19 Plaintiff

20 I further certify that on March 28, 2011, the attached document was hand-delivered
21 to:

22 HONORABLE FREDERICK J. MARTONE
23 United States District Court
24 Sandra Day O'Connor U.S. Courthouse, Suite 526
25 401 W. Washington Street, SPC 62
26 Phoenix, AZ 85003

27 /s/ Erin Fillmore _____
28

Tempe City Attorney's Office
21 East Sixth Street, Suite 201
P.O. Box 5002
Tempe, Arizona 85280