NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID SHENBAUM, an individual; TIMOTHY O'BRIEN, an individual, Plaintiffs - Appellants, v. CITY OF MANHATTAN BEACH, Defendant - Appellee.	No. 25-3501 D.C. No. 2:22-cv-08062-KS MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Karen L. Stevenson, Magistrate Judge, Presiding

Submitted October 19, 2026[**]
Pasadena, California

Before: BUMATAY, VANDYKE, and MENDOZA, JR., Circuit Judges.

Appellants David Shenbaum and Timothy O'Brien appeal the district court's grant of summary judgment in favor of Appellee the City of Manhattan Beach on both of Appellants' First Amendment retaliation claims. The first claim alleges that

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

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

the City entered an agreement altering compensation for the "Battalion Chief" position (the "2020 Agreement") in retaliation for Appellants' role in an early 2018 Vote of No Confidence ("VONC") against a past fire chief. The second claim contends that Appellants' failure on a 2023 promotional exam for the "Division Chief" position was retaliation for filing this lawsuit. We review grants of summary judgment de novo. *Thompson v. Cent. Valley Sch. Dist. No 365*, 163 F.4th 654, 662 (9th Cir. 2025). We affirm.

To allege a First Amendment retaliation claim, public employees must first show (1) that they "spoke on a matter of public concern," (2) that they "spoke as a private citizen or public employee," (3) and that this "protected speech was a substantial or motivating factor in the [imposition of] adverse employment action." *Greisen v. Hanken*, 925 F.3d 1097, 1108 (9th Cir. 2019) (simplified).

1. The district court's summary-judgment ruling in favor of the City on Appellants' 2020-Agreement claim was proper because they failed to create a triable issue on adverse action and causation. First, Appellants argue that the 2020 Agreement served as an adverse action because they would face a lower salary if they were ever promoted to the permanent Battalion Chief position. But it's uncontested that the 2020 Agreement had no effect on a position they actually held and so it could not "negatively affect[]" their compensation. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1060 (9th Cir. 2013) (simplified). Appellants cannot create

a triable issue based on pure speculation on a hypothetical future position that they did not hold.

Second, even assuming an adverse action, Appellants cannot create a triable issue on whether the VONC was a "substantial motivating factor" for the 2020 Agreement. *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 979 (9th Cir. 2002). Appellants rely on an alleged March 2018 text exchange between firefighters regarding the VONC to establish employer opposition to speech, but that exchange occurred more than two years before the 2020 Agreement. *Cf. Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 752 (9th Cir. 2001) (holding that a retaliation claim failed because an employer's knowledge of protected speech occurred over two years before the alleged adverse action). Nor can Appellants show that the City's rationale for the 2020 Agreement was pretextual. *See Ulrich*, 308 F.3d at 980. Uncertainty surrounding the COVID pandemic bolstered the City's financial concerns about the fire chief's compensation and overtime calculations. Appellants suggest that the City restored the 2020 Agreement's cut to longevity pay as soon as the 2023 Exam rendered them ineligible for the position, but that occurred two years after the 2020 Agreement was consummated and almost five years after the VONC.

2. Summary judgment was also appropriate on Appellants' 2023-promotional-exam claim because of the lack of causation. *See Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 804 (9th Cir. 2009). For this claim, Appellants alleged that

the City designed the 2023 exam so that they would fail and that they did in fact fail the exam. But the 2023 exam utilized outside panelists who all attested that they lacked any knowledge of Appellants' lawsuit, and Appellants have not effectively created a material dispute as to these facts. Those panelists unanimously failed Appellants based on multiple non-retaliatory reasons. The use of independent panelists breaks any causation here. *See id.* (holding that a "final decision maker is not liable" when an adverse action was based on a reason "sufficiently independent" from an unlawful motive).

3. Because Appellants' underlying constitutional claims fail, their claims against the City under *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), also fail. *See Lockett v. County of Los Angeles*, 977 F.3d 737, 741 (9th Cir. 2020).

4. Finally, because Appellants' claim based on the 2020 Agreement fails even considering the 2018 text messages by members of the fire department, the district court's refusal to accept them into evidence was harmless. *Cf. L.V. Sands, LLC v. Nehme*, 632 F.3d 526, 534 (9th Cir. 2011) (subjecting evidentiary ruling to harmless error standard).

AFFIRMED.