**United States Court of Appeals for the Ninth Circuit**
**Office of Staff Attorneys**

# Section 1983 Outline

Updated 2015

Office of Staff Attorneys
United States Court of Appeals
for the Ninth Circuit

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# I. GENERAL § 1983 PRINCIPLES

This section of the outline discusses both the elements of a 42 U.S.C. § 1983 cause of action (I.A) and rules common to all § 1983 causes of action (I.B-J). The section concludes with a discussion of *Bivens* actions, the "federal official" analogue to § 1983 (I.K).

Section 1983 provides:

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

42 U.S.C. § 1983.

"[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)); *see also* *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979); *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006).

## A. Elements of a § 1983 Action

"Traditionally, the requirements for relief under [§] 1983 have been articulated as: (1) a violation of rights protected by the Constitution or created by federal statute, (2) proximately caused (3) by conduct of a 'person' (4) acting under color of state law." *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Or, more simply, courts have required plaintiffs to "plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986); *see also* *Pistor v. Garcia*, 791 F. 3d 1104, 1114 (9th Cir. 2015); *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006); *WMX Techs., Inc. v. Miller*, 197 F.3d 367, 372 (9th Cir. 1999) (en banc); *Ortez v. Wash. Cty., Or.*, 88 F.3d 804, 810 (9th Cir. 1996).

### 1. Person

#### a. States

States are not persons for purposes of § 1983. *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Jackson v. Barnes*, 749 F.3d 755, 764 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 980 (2015); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1398 (9th Cir. 1993) (en banc); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir. 1991). Section 1983 claims against states, therefore, are legally frivolous. *See* *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989), *superseded by statute on other grounds as stated in* *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

For a discussion of a state's Eleventh Amendment immunity, see *infra* I.D.3.a.

#### b. Territories

Territories are not persons for purposes of § 1983. *See* *Ngiraingas v. Sanchez*, 495 U.S. 182, 192 (1990); *Magana v. Northern Mariana Islands*, 107 F.3d 1436, 1438 n.1 (9th Cir. 1997); *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371 (9th Cir. 1992); *Bermudez v. Duenas*, 936 F.2d 1064, 1066 (9th Cir. 1991) (per curiam).

#### c. Local Governmental Units

For a discussion of the absence of immunity defenses for local governmental entities, see *infra* I.D.1.g.(1), I.D.2.a.(2), and I.D.3.b.(1).

For a discussion of the element of causation as it applies to local governmental entities, see *infra* I.C.3.

##### (1) Status as Persons

"[M]unicipalities and other local government units . . . [are] among those persons to whom § 1983 applies." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see also* *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997); *Edgerly v. City & Cty. of San Francisco*, 599 F.3d 946, 960 (9th Cir. 2010); *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707, 713 (9th Cir. 2010); *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir. 2008); *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1185

(9th Cir. 2006); *Cortez v. Cty. of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2002); *Fairley v. Luman*, 281 F.3d 913, 916 (9th Cir. 2002) (per curiam); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996). Counties are also persons for purposes of § 1983. *See Jackson v. Barnes*, 749 F.3d 755, 764 (9th Cir. 2015) ("[W]hen a California sheriff's department performs the function of conducting criminal investigations, it is a county actor subject to suit under § 1983"), *cert. denied*, 135 S. Ct. 980 (2015); *Miranda v. Clark Cty., Nev.*, 319 F.3d 465, 469 (9th Cir. 2003) (en banc); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other grounds by Bull v. City & Cty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc). Municipal government officials are also persons for purposes of § 1983. *See Monell*, 436 U.S. at 691 n.55.

**(2) Theory of Liability**

A local governmental unit may not be held responsible for the acts of its employees under a respondeat superior theory of liability. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997); *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir. 2008); *Webb v. Sloan*, 330 F.3d 1158, 1163-64 (9th Cir. 2003); *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1185 (9th Cir. 2002); *Hopper v. City of Pasco*, 241 F.3d 1067, 1082 (9th Cir. 2001).

"Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *see also Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (discussing *Iqbal* and explaining that "when a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates."). Therefore, a plaintiff must go beyond the respondeat superior theory of liability and demonstrate that the alleged constitutional deprivation was the product of a policy or custom of the local governmental unit, because municipal liability must rest on the actions of the municipality, and not the actions of the employees of the municipality. *See Brown*, 520 U.S. at 403; *City of Canton*, 489 U.S. at 385; *Monell*, 436 U.S. at 690-91; *Fogel*, 531 F.3d at 834; *Webb*, 330 F.3d at 1164; *Gibson*, 290 F.3d at 1187; *Hopper*, 241 F.3d at 1082; *Blair v. City of Pomona*, 223 F.3d 1074, 1079 (9th Cir. 2000); *Oviatt v. Pearce*, 954 F.2d 1470, 1473-74 (9th Cir. 1992). *See also Connick v. Thompson*, 563 U.S. 51, 60 (2011) (explaining that to impose liability on a local

government under § 1983 the plaintiffs must prove that an "action pursuant to official municipal policy" caused their injury); *Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154, 1167-68 (9th Cir. 2014) (same). The Supreme Court has emphasized that "[w]here a plaintiff claims that the municipality . . . has caused an employee to [violate plaintiff's constitutional rights], rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown*, 520 U.S. at 405.

The "policy or custom" requirement applies irrespective of whether the remedy sought is money damages or prospective relief. *Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29, 34 (2010).

**(a) Municipal Policy**

"A municipality is responsible for a constitutional violation, … , only when an 'action [taken] pursuant to [an] official municipal policy of some nature' caused the violation." *Castro v. Cty. of Los Angeles*, 797 F.3d 654, 670 (9th Cir. 2015) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). A policy "promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell*'s policy requirement." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other grounds by* *Bull v. City & Cty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc). Moreover, a policy of inaction may be a municipal policy within the meaning of *Monell*. *See* *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707, 713 (9th Cir. 2010); *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006); *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002) (per curiam); *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001); *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992).

A choice among alternatives by a municipal official with final decision-making authority may also serve as the basis of municipal liability. *See* *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986); *Waggy*, 594 F.3d at 713 (explaining that a policy has been defined as a deliberate choice, made from among various alternatives, to follow a course of action); *Long*, 442 F.3d at 1185; *Fairley*, 281 F.3d at 918; *Oviatt*, 954 F.2d at 1477; *Thompson*, 885 F.2d at 1443; *see also* *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (emphasizing that critical inquiry is whether official has final decision-making authority); *Peralta v. Dillard*,

744 F.3d 1076, 1083 (9th Cir. 2014) (en banc) ("Section 1983 also authorizes prisoners to sue municipal entities for damages if the enforcement of a municipal policy or practice, or the decision of a final municipal policymaker, caused the Eighth Amendment violation."), *cert denied*, 135 S. Ct. 946 (2015); *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004) ("municipality can be liable for an isolated constitutional violation when the person causing the violation has final policymaking authority") (citation and internal quotation marks omitted); *Collins v. City of San Diego*, 841 F.2d 337, 341 (9th Cir. 1988) ("municipal liability attaches only when the decisionmaker possesses 'final authority' to establish municipal policy with respect to the action ordered") (quoting *Pembaur*, 475 U.S. at 481). To identify officials with final policy-making authority, the court should look to state law. *See Praprotnik*, 485 U.S. at 124; *Pembaur*, 475 U.S. at 483; *Lytle*, 382 F.3d at 982; *Streit v. Cty. of Los Angeles*, 236 F.3d 552, 560 (9th Cir. 2001); *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). The question of whether an official has final decision-making authority is not a question for the jury. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989), *superseded by statute on other grounds as stated in Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1205 (9th Cir. 1996); *Praprotnik*, 485 U.S. at 126; *Lytle*, 382 F.3d at 982; *Hammer v. Gross*, 932 F.2d 842, 850 n.4 (9th Cir. 1991) (en banc).

Ratification of the decisions of a subordinate by an official with final decision-making authority can also be a policy for purposes of municipal liability under § 1983. *See Praprotnik*, 485 U.S. at 127; *Trevino v. Gates*, 99 F.3d 911, 920-21 (9th Cir. 1996); *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). "[T]he mere failure to investigate the basis of a subordinate's discretionary decisions[,]" however, is not a ratification of those decisions. *Praprotnik*, 485 U.S. at 130. Moreover, mere acquiescence in a single instance of alleged unconstitutional conduct is not sufficient to demonstrate ratification of a subordinate's acts. *See Gillette*, 979 F.2d at 1348. *But see McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986) (suggesting that failure of prison officials to discipline guards after impermissible shakedown search and failure to admit the guards' conduct was in error could be interpreted as a municipal policy).

**(b) Municipal Custom**

Even if there is not an explicit policy, a plaintiff may establish municipal liability upon a showing that there is a permanent and well-settled practice by the municipality which gave rise to the alleged constitutional violation. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Navarro v. Block*, 72 F.3d 712,

714-15 (9th Cir. 1996); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1444 (9th Cir. 1989), *overruled on other grounds by* *Bull v. City & Cty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010). Allegations of random acts, or single instances of misconduct, however, are insufficient to establish a municipal custom. *See* *Navarro*, 72 F.3d at 714; *Thompson*, 885 F.2d at 1444. Once the plaintiff has demonstrated that a custom existed, the plaintiff need not also demonstrate that "official policy-makers had actual knowledge of the practice at issue." *Navarro*, 72 F.3d at 714-15; *Thompson*, 885 F.2d at 1444. *But see* *Blair v. City of Pomona*, 223 F.3d 1074, 1080 (9th Cir. 2000) ("open to the [municipality] to show that the custom was not known to the policy-makers").

**(c) Municipality's Failure to Train**

The plaintiff may also establish municipal liability by demonstrating that the alleged constitutional violation was caused by a failure to train municipal employees adequately. *See* *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-91 (1989); *Price v. Sery*, 513 F.3d 962, 973 (9th Cir. 2008); *Blankenhorn v. City of Orange*, 485 F.3d 463, 484-85 (9th Cir. 2007); *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1186-87 (9th Cir. 2006); *Johnson v. Hawe*, 388 F.3d 676, 686 (9th Cir. 2004); *Miranda v. Clark Cty., Nev.*, 319 F.3d 465, 471 (9th Cir. 2003) (en banc); *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1194 (9th Cir. 2002); *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002) (per curiam); *see especially* *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 409-10 (1997) (discussing limited scope of such a claim). Such a showing depends on three elements: (1) the training program must be inadequate "'in relation to the tasks the particular officers must perform'"; (2) the city officials must have been deliberately indifferent "'to the rights of persons with whom the [local officials] come into contact'"; and (3) the inadequacy of the training "must be shown to have 'actually caused' the constitutional deprivation at issue." *Merritt v. Cty. of Los Angeles*, 875 F.2d 765, 770 (9th Cir. 1989) (internal citations omitted); *see also* *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (stating, "To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.' [] Only then 'can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983.'") (quoting *Canton*, 489 U.S. at 388). Note that "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 563 U.S. at 61.

The indifference of city officials may be shown where, "in light of the duties assigned to specific . . . employees[,] the need for more or different training is so

obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390; *see Long*, 442 F.3d at 1186-87; *Johnson*, 388 F.3d at 686; *Berry v. Baca*, 379 F.3d 764, 767 (9th Cir. 2004); *Lee v. City of Los Angeles*, 250 F.3d 668, 682 (9th Cir. 2001); *Oviatt v. Pearce*, 954 F.2d 1470, 1477-78 (9th Cir. 1992); *Merritt*, 875 F.2d at 770; *see also Henry v. Cty. of Shasta*, 137 F.3d 1372, 1372 (9th Cir. 1998) (order) (amending opinion to include statement that turning blind eye to constitutional violation can demonstrate deliberate indifference). The Supreme Court has explained that "[d]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick*, 563 U.S. at 61 (internal quotation marks and citation omitted). Whether the plaintiff has succeeded in demonstrating such deliberate indifference is generally a question for the jury. *See Lee*, 250 F.3d at 682 (citation omitted); *Alexander v. City of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994); *Oviatt*, 954 F.2d at 1478.

**(d) Pleading Standard**

There is no heightened pleading standard with respect to the "policy or custom" requirement of demonstrating municipal liability. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993); *see also Empress LLC v. City of San Francisco*, 419 F.3d 1052, 1055 (9th Cir. 2005); *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1124 (9th Cir. 2002); *Lee v. City of Los Angeles*, 250 F.3d 668, 679-80 (9th Cir. 2001); *Evans v. McKay*, 869 F.2d 1341, 1349 (9th Cir. 1989). This court previously held that "a claim of municipal liability under [§] 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.'" *Karim-Panahi v. L.A. Police Dep't.*, 839 F.2d 621, 624 (9th Cir. 1988) (quoting *Shah v. Cty. of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986)); *see also Evans*, 869 F.2d at 1349; *Shaw v. Cal. Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 610 (9th Cir. 1986) ("[I]t is enough if the custom or policy can be inferred from the allegations of the complaint."). However, the Supreme Court more recently held in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) that conclusory statements that merely recite the elements of a claim are insufficient for the purpose of Federal Rule of Civil Procedure 12(b)(6). *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide

the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

For discussion of a heightened pleading standard in the context of claims of qualified immunity, see *infra* I.D.2.b.

**d. Agencies**

A governmental agency that is an arm of the state is not a person for purposes of § 1983. *See* *Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1398-99 (9th Cir. 1993) (en banc); *cf.* *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991) (explaining that agencies that are arms of the state are entitled to the same immunity from suit as the state because "'the state is the real, substantial party in interest'" (citation omitted)).

A state's Department of Corrections is most likely an arm of the state under this analysis. *See* *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) (concluding that the suit against the state Board of Corrections was barred by the Eleventh Amendment); *Hale*, 993 F.2d at 1398-99 (concluding that the Arizona Department of Corrections was an arm of the state and, thus, not a person for § 1983 purposes); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir. 1991) (same).

To determine whether a governmental agency is an arm of the state, the court should "look to state law and examine 'whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only in the name of the state, and the corporate status of the entity.'" *Hale*, 993 F.2d at 1399 (quoting *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988)); *see also* *Del Campo v. Kennedy*, 517 F.3d 1070, 1077 (9th Cir. 2008); *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005); *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1180 (9th Cir. 2003); *Aguon v. Commonwealth Ports Auth.*, 316 F.3d 899, 901 (9th Cir. 2003); *Streit v. Cty. of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2001); *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1996).

The first, and most important, factor is "whether a judgment against the defendant entity under the terms of the complaint would have to be satisfied out of

the limited resources of the entity itself or whether the state treasury would also be legally pledged to satisfy the obligation." *Durning*, 950 F.2d at 1424; *see also* *Beentjes*, 397 F.3d at 778; *Holz*, 347 F.3d at 1182; *Streit*, 236 F.3d at 566-67; *ITSI T.V. Prods. v. Agric. Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993); *cf.* *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 (1997) (stating that the first factor is of "considerable importance"). Whether the state will be indemnified by a third party for financial liability is irrelevant to this inquiry. *See* *Regents of the Univ. of Cal.*, 519 U.S. at 431; *cf.* *Schulman v. California (In re Lazar)*, 237 F.3d 967, 975 (9th Cir. 2001); *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 395 (9th Cir. 1997).

When analyzing the second factor, the court should construe "central governmental functions" broadly. *See* *Durning*, 950 F.2d at 1426.

The third factor of the test is entitled to less weight than the first two factors. *See* *Holz*, 347 F.3d at 1187-88; *Aguon*, 316 F.3d at 903.

**e. State Officials**

**(1) Official Capacity**

State officials sued in their official capacity for damages are not persons for purposes of § 1983. *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n.24 (1997); *Hafer v. Melo*, 502 U.S. 21, 27 (1991); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Aguon v. Commonwealth Ports Auth.*, 316 F.3d 899, 901 (9th Cir. 2003); *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992).

State officials sued in their official capacity for injunctive relief, however, are persons for purposes of § 1983. *See* *Will*, 491 U.S. at 71 n.10; *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013); *Flint*, 488 F.3d at 825; *Doe*, 131 F.3d at 839; *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371 (9th Cir. 1992). *See also* *Thornton v. Brown*, 757 F.3d 834, 839 (9th Cir. 2013).

Official-capacity suits filed against state officials are merely an alternative way of pleading an action against the entity of which the defendant is an officer. *See* *Hafer*, 502 U.S. at 25; *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *see also* *Hartmann*, 707 F.3d at 1127; *Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1111 (9th Cir. 2010) (treating suit against state officials in their official capacities as a suit against the state of California). In an official-capacity suit, the plaintiff must

demonstrate that a policy or custom of the governmental entity of which the official is an agent was the moving force behind the violation. *See Hafer*, 502 U.S. at 25; *Graham*, 473 U.S. at 166. For a discussion of how a plaintiff might make such a showing, see *supra* I.A.1.c.(2). Moreover, the only immunity available to the defendant sued in her or his official capacity is the sovereign immunity that the governmental entity may possess. *See Graham*, 473 U.S. at 167. For a discussion of a state's Eleventh Amendment immunity, see *infra* I.D.3.a.

### (2) Personal Capacity

State officials sued in their personal capacity are persons for purposes of § 1983. *See Hafer v. Melo*, 502 U.S. 21, 31 (1991); *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003); *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992).

"Personal-capacity suits seek to impose personal liability upon a government official for actions [the official] takes under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Liability in a personal-capacity suit can be demonstrated by showing that the official caused the alleged constitutional injury. *See id.* at 166. The official in a personal-capacity suit may, depending upon the facts, be able to establish immunity from claims for damages. *See id.* at 166-67. For a discussion of absolute immunities, see *infra* I.D.1; for a discussion of the defense of qualified immunity, see *infra* I.D.2.

### (3) Determining Capacity

Because the plaintiff's complaint will not always clearly indicate the capacity in which the defendants are being sued, the court must sometimes make this determination.

As a first principle, it is important to note that the capacity in which the official acted when engaging in the alleged unconstitutional conduct does not determine the capacity in which the official is sued. *See Hafer v. Melo*, 502 U.S. 21, 26 (1991) (Official capacity "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury."); *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir. 1991).

Courts should examine the nature of the proceedings to determine the capacity in which a defendant is sued. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Eaglesmith v. Ward*, 73 F.3d 857, 859 (9th Cir. 1996). Where the plaintiff is seeking damages against a state official, a strong presumption is created in favor of a personal-capacity suit because an official-capacity suit for damages

would be barred. *See* *Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir. 1999); *Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho*, 42 F.3d 1278, 1284 (9th Cir. 1994); *Cerrato v. S.F. Cmty. Coll. Dist.*, 26 F.3d 968, 973 n.16 (9th Cir. 1994); *Price*, 928 F.2d at 828.

#### f. Federal Officials

"It is well settled that federal officials sued in their official capacity are subject to injunctive relief under § 1983 if they 'conspire with or participate in concert with state officials who, under color of state law, act to deprive a person of protected rights.'" *Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992) (quoting *Scott v. Rosenberg*, 702 F.2d 1263, 1269 (9th Cir. 1983)). For a discussion of the elements of a conspiracy claim, see *infra* I.A.2.b.(5). For a discussion of *Bivens* actions against federal officials in their personal capacity, see *infra* I.K.

### 2. Acting under Color of State Law

#### a. General Principles

The question of whether a person who has allegedly caused a constitutional injury was acting under color of state law is a factual determination. *See* *Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1209 (9th Cir. 2002); *Gritchen v. Collier*, 254 F.3d 807, 813 (9th Cir. 2001); *Lopez v. Dep't of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991) (per curiam); *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983).

A defendant has acted under color of state law where he or she has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also* *Polk Cty. v. Dodson*, 454 U.S. 312, 317-18 (1981); *Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006); *McDade v. West*, 223 F.3d 1135, 1139-40 (9th Cir. 2000); *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997); *Vang v. Xiong*, 944 F.2d 476, 479 (9th Cir. 1991); *see also* *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011) (determining whether private entities operating as contract chaplains within the Washington State prison system were state actors for purposes of § 1983 and RLUIPA).

Moreover, conduct that would amount to state action for purposes of the Fourteenth Amendment is action under the color of state law for purposes of § 1983. *See* *West*, 487 U.S. at 49; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935

(1982); *Johnson*, 113 F.3d at 1118; *Fred Meyer, Inc. v. Casey*, 67 F.3d 1412, 1414 (9th Cir. 1995); *cf. Johnson*, 113 F.3d at 1118-20 (describing tests for finding state action); *Howerton*, 708 F.2d at 382-83 (same).

"Actions taken pursuant to a municipal ordinance are made 'under color of state law.'" *See Coral Constr. Co. v. King Cty.*, 941 F.2d 910, 926 (9th Cir. 1991).

Even if the deprivation represents an abuse of authority or lies outside the authority of the official, if the official is acting within the scope of his or her employment, the person is still acting under color of state law. *See Anderson*, 451 F.3d at 1068-69; *McDade*, 223 F.3d at 1140; *Shah v. Cty. of Los Angeles*, 797 F.2d 743, 746 (9th Cir. 1986). However, "[i]f a government officer does not act within [the] scope of employment or under the color of state law, then that government officer acts as a private citizen." *See Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996) (finding no action under color of state law where a police officer returned to a home where a search had taken place the day before, forced his way in, and tortured the two people residing in the home); *see also Gritchen*, 254 F.3d at 812-13; *Huffman v. Cty. of Los Angeles*, 147 F.3d 1054, 1058 (9th Cir. 1998); *Johnson*, 113 F.3d at 1117-18.

**b. Applications**

**(1) State Employees**

Generally, employees of the state are acting under color of state law when acting in their official capacity. *See West v. Atkins*, 487 U.S. 42, 49 (1988); *Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006); *McDade v. West*, 223 F.3d 1135, 1140 (9th Cir. 2000); *Vang v. Xiong*, 944 F.2d 476, 479 (9th Cir. 1991).

Even where state officials are administering a federally funded program, the state officials are still acting under color of state law. *See Tongol v. Usery*, 601 F.2d 1091, 1097 (9th Cir. 1979).

**(2) Prison Officials**

Prison officials, when acting in their official capacity, are acting under color of state law. *See Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc). The Supreme Court has reserved the question of whether prison guards working for private prison management firms are acting under color of state law. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (holding that employees of private prison are

not entitled to qualified immunity). *But see* *Pollard v. The Geo Group, Inc.*, 629 F.3d 843, 856-58 (9th Cir. 2010) (recognizing in *Richardson* the Court did not address the question of whether private guards acted under color of federal or state law, and holding that employees of a private corporation operating a prison acted under color of federal law for purposes of *Bivens* liability), *reversed by* *Minneci v. Pollard*, 132 S. Ct. 617, 620, 627 n.* (2012) (holding that prisoner could not assert an Eighth Amendment *Bivens* claim for damages against private prison employees; note that Justice Ginsberg dissenting noted that petitioners did not seek Supreme Court review of the Ninth Circuit's determination that petitioners acted under color of federal law).

### (3) Prison Physicians

Physicians who contract with prisons to provide medical services are acting under color of state law. *See* *West v. Atkins*, 487 U.S. 42, 53-54 (1988); *Lopez v. Dep't of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991) (per curiam) (hospital and ambulance service under contract with the state). *Cf.* *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 925-26 (9th Cir. 2011) (distinguishing *West* and determining that contract chaplains were not state actors).

### (4) Public Defenders

When public defenders are acting in their role as advocate, they are not acting under color of state law for § 1983 purposes. *See* *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk Cty. v. Dodson*, 454 U.S. 312, 320-25 (1981); *Jackson v. Brown*, 513 F.3d 1057, 1079 (9th Cir. 2008); *Miranda v. Clark Cty., Nev.*, 319 F.3d 465, 468 (9th Cir. 2003) (en banc); *United States v. De Gross*, 960 F.2d 1433, 1442 n.12 (9th Cir. 1992) (en banc); *see also* *Vermont v. Brillon*, 556 U.S. 81, 91 (2009) (assigned public defender is ordinarily not considered a state actor); *Kirtley v. Rainey*, 326 F.3d 1088, 1093-94 (9th Cir. 2003) (citing *Polk Cty.* to determine that a state-appointed guardian ad litem does not act under color of state law for purposes of § 1983); *Cox v. Hellerstein*, 685 F.2d 1098, 1099 (9th Cir. 1982) (relying on *Polk Cty.* to determine that federal public defenders are not acting under color of federal law for purposes of *Bivens* action). The Supreme Court has concluded that public defenders do not act under color of state law because their conduct as legal advocates is controlled by professional standards independent of the administrative direction of a supervisor. *See* *Brillon*, 556 U.S. at 92; *Polk Cty.*, 454 U.S. at 321; *see also* *Blum v. Yaretsky*, 457 U.S. 991, 1008-09 (1982) (applying similar rationale to determine that administrators of nursing home were not state actors); *Mathis v. Pac. Gas & Elec. Co.*, 891 F.2d 1429, 1432 (9th

Cir. 1989) (applying similar rationale to determine that employees conducting psychiatric evaluation were not state actors). *But cf.* *Gonzalez v. Spencer*, 336 F.3d 832, 834 (9th Cir. 2003) (per curiam) (explaining that a private attorney who is retained to represent state entities and their employees in litigation acts under color of state law because his or her role is "analogous to that of a state prosecutor rather than a public defender" (citing *Polk Cty.*, 454 U.S. at 323 n.13)), *abrogated by* *Filarsky v. Delia*, 132 S. Ct. 1657, 1667-68 (2012).

Where public defenders are performing administrative or investigative functions, they may be acting under color of state law. *See* *Brillon*, 556 U.S. at 91 n.7; *Polk Cty.*, 454 U.S. at 324-25; *Miranda*, 319 F.3d at 469. For a discussion of the distinction between functions performed as an advocate and functions performed as an administrator/investigator, see *infra* I.D.1.c.(1).

**(5) Private Parties**

Generally, private parties are not acting under color of state law. *See* *Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991); *see also* *Simmons v. Sacramento Cty. Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (explaining that a lawyer in private practice does not act under color of state law).

Where a private party conspires with state officials to deprive others of constitutional rights, however, the private party is acting under color of state law. *See* *Tower v. Glover*, 467 U.S. 914, 920 (1984); *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Crowe v. Cty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002); *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000); *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996) (per curiam); *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996); *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983).

"To prove a conspiracy between the state and private parties under [§] 1983, the [plaintiff] must show an agreement or meeting of the minds to violate constitutional rights. To be liable, each participant in the conspiracy need not know the exact details of the plan, but each must at least share the common objective of the conspiracy." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc) (citations and internal quotation marks omitted); *see also* *Crowe*, 608 F.3d at 440; *Franklin*, 312 F.3d at 441; *Mendocino Envt'l Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1301-02 (9th Cir. 1999); *Gilbrook v. City of Westminster*, 177 F.3d 839, 856-57 (9th Cir. 1999); *Taylor v. List*, 880 F.2d 1040, 1048 (9th Cir. 1989). Conclusory allegations are insufficient to state a claim of conspiracy. *See* *Simmons*, 318 F.3d at 1161; *Radcliffe v.*

*Rainbow Constr. Co.*, 254 F.3d 772, 783-84 (9th Cir. 2001); *Price*, 939 F.2d at 708-09. For a discussion of heightened pleading requirements, see *infra* I.D.2.b and II.A.1.b.(1).

#### (6) Federal Employees

Federal employees acting pursuant to federal law are not acting under the color of state law. *See* *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995); *Stonecipher v. Bray*, 653 F.2d 398, 401 (9th Cir. 1981).

Where federal officials conspire with state officials to deprive a person of constitutional rights, however, they may be acting under color of state law. *See* *Billings*, 57 F.3d at 801. For elements of conspiracy, see *supra* I.A.2.b.(5).

For state administration of federally funded programs, see *supra* I.A.2.b.(1).

### 3. Deprivation of a Right

#### a. Rights Guaranteed by the Constitution

Section 1983 provides a cause of action against persons acting under color of state law who have violated rights guaranteed by the Constitution. *See* *Buckley v. City of Redding*, 66 F.3d 188, 190 (9th Cir. 1995); *Demery v. Kupperman*, 735 F.2d 1139, 1146 (9th Cir. 1984).

#### b. Rights Guaranteed by Federal Statutes

Section 1983 can provide a cause of action against persons acting under color of state law who have violated rights guaranteed by federal statutes. *See* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002); *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 978-79 (9th Cir. 2010); *AlohaCare v. Haw., Dep't of Human Servs.*, 572 F.3d 740, 745 (9th Cir. 2009); *Ball v. Rodgers*, 492 F.3d 1094, 1103 (9th Cir. 2007); *Legal Servs. of N. Cal., Inc. v. Arnett*, 114 F.3d 135, 138 (9th Cir. 1997). Some decisions have stated that there is a presumption that § 1983 provides a remedy for violations of federal statutes. *See* *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994); *Almond Hill Sch. v. USDA*, 768 F.2d 1030, 1035 (9th Cir. 1985); *Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1470 (9th Cir. 1984).

Section 1983 can be used as a mechanism for enforcing the rights guaranteed by a particular federal statute only if (1) the statute creates enforceable rights and (2) Congress has not foreclosed the possibility of a § 1983 remedy for violations of the statute in question. *See* *Blessing*, 520 U.S. at 340-41; *Dittman v. California*, 191 F.3d 1020, 1027-28 (9th Cir. 1999); *Arnett*, 114 F.3d at 138; *Almond Hill Sch.*, 768 F.2d at 1035.

To determine whether the federal statute has created rights enforceable through § 1983, the court considers whether the statute (1) is intended to benefit the class of which the plaintiff is a member; (2) sets forth standards, clarifying the nature of the right, that make the right capable of enforcement by the judiciary; and (3) is mandatory, rather than precatory, in nature. *See* *Blessing*, 520 U.S. at 340-41; *Cal. State Foster Parent Ass'n*, 624 F.3d at 979; *Day v. Apoliona*, 496 F.3d 1027, 1035 (9th Cir. 2007); *Ball*, 492 F.3d at 1104; *Sanchez v. Johnson*, 416 F.3d 1051, 1056-57 (9th Cir. 2005); *Dittman*, 191 F.3d at 1028; *Buckley v. City of Redding*, 66 F.3d 188, 190-91 (9th Cir. 1995). "In carrying out this inquiry, [the court should] examine whether particular statutory provisions create specific enforceable rights, rather than considering the statute and purported rights on a more general level." *Arnett*, 114 F.3d at 138 (citing *Blessing*, 520 U.S. at 341-42).

To determine whether the federal statute forecloses the possibility of a § 1983 action, the court considers whether the statute contains (1) an express provision precluding a cause of action under § 1983 or (2) "'a comprehensive enforcement scheme that is incompatible with individual enforcement under section 1983.'" *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 120 (2005) (quoting *Blessing*, 520 U.S. at 341); *Dittman*, 191 F.3d at 1028. Where statutes contain provisions for criminal penalties, citizen suits, judicial review, or even administrative proceedings alone, the Supreme Court has found the remedial scheme sufficiently comprehensive to foreclose an independent § 1983 cause of action. *See* *Abrams*, 544 U.S. at 121-22; *see also* *Buckley*, 66 F.3d at 191-92. Where a statute contains neither judicial nor administrative remedies available to private parties, the statute does not imply the foreclosure of a § 1983 remedy, even where the government retains oversight of statutory compliance. *See* *Blessing*, 520 U.S. at 346-48. *See also* *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252-58 (2009) (stating that the Court has not held that an implied right of action had the effect of precluding suit under § 1983, and holding that Title IX is not an exclusive mechanism for addressing gender discrimination in schools or a substitute for § 1983 suits).

Attorney's fees are available through 42 U.S.C. § 1988 for § 1983 actions alleging violations of federal statutes. *See Maine*, 448 U.S. at 9. For further discussion of availability of attorney's fees under § 1983, see *infra* I.H.1.

#### c. Rights Guaranteed by State Law

Section 1983 does not provide a cause of action for violations of state law. *See Galen v. Cty. of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007); *Ove v. Gwinn*, 264 F.3d 817, 824 (9th Cir. 2001); *Sweaney v. Ada Cty., Idaho*, 119 F.3d 1385, 1391 (9th Cir. 1997); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996); *Ybarra v. Bastian*, 647 F.2d 891, 892 (9th Cir. 1981). Where a violation of state law is also a violation of a constitutional right, however, § 1983 does provide a cause of action. *See Lovell*, 90 F.3d at 370; *Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir. 1986); *see also Weilburg v. Shapiro*, 488 F.3d 1202, 1207 (9th Cir. 2007).

### B. State-of-Mind Requirement

"[Section] 1983 . . . contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986); *see also Maddox v. City of Los Angeles*, 792 F.2d 1408, 1413-14 (9th Cir. 1986).

### C. Causation

#### 1. General Principles

A person deprives another of a constitutional right, "within the meaning of § 1983, 'if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.'" *Preschooler II v. Clark Cty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)); *see also Redman v. Cty. of San Diego*, 942 F.2d 1435, 1439-40 (9th Cir. 1991) (en banc), *abrogated on other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994); *Stevenson v. Koskey*, 877 F.2d 1435, 1438-39 (9th Cir. 1989); *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). "The requisite causal connection may be established when an official sets in motion a 'series of acts by others which the actor knows or reasonably should know would cause others to inflict' constitutional harms." *Preschooler II*, 479 F.3d at 1183 (quoting *Johnson*, 588 F.2d at 743); *see also Wong v. United States*, 373 F.3d 952, 966 (9th Cir. 2004); *Gilbrook v. City of Westminster*, 177 F.3d 839, 854 (9th Cir. 1999); *Harris*

*v. Roderick*, 126 F.3d 1189, 1196 (9th Cir. 1997); *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9th Cir. 1988); *Merritt v. Mackey*, 827 F.2d 1368, 1371 (9th Cir. 1987); *McRorie v. Shimoda*, 795 F.2d 780, 783 (9th Cir. 1986). This standard of causation "closely resembles the standard 'foreseeability' formulation of proximate cause." *Arnold v. Int'l Bus. Mach. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981); *see also* *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008); *Wong*, 373 F.3d at 966; *Stevenson*, 877 F.2d at 1438-39; *Leer*, 844 F.2d at 634.

When making the causation determination, the court "must take a very individualized approach which accounts for the duties, discretion, and means of each defendant." *Leer*, 844 F.2d at 633-34.

**2. Supervisory Liability**

"Liability under [§] 1983 arises only upon a showing of personal participation by the defendant. A supervisor is only liable for the constitutional violations of . . . subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. There is no respondeat superior liability under [§] 1983." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (citations omitted); *see also* *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1097 (9th Cir. 2013) ("[T]here is no respondeat superior liability under § 1983. Rather, a government official may be held liable only for the official's own conduct."); *Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir. 2009); *Preschooler II v. Clark Cty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1182 (9th Cir. 2007) (concluding that allegations that school officials knew of alleged violation and failed to take corrective action were sufficient to state a claim); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) (concluding that allegations that FBI agents developed a plan and then encouraged another agent to shoot a suspect were sufficient to state a claim); *Ortez v. Wash. Cty., Or.*, 88 F.3d 804, 809 (9th Cir. 1996) (concluding proper to dismiss where no allegations of knowledge of or participation in alleged violation); *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (concluding that failure to intervene to stop alleged violation could be sufficient to establish liability); *Redman v. Cty. of San Diego*, 942 F.2d 1435, 1446-47 (9th Cir. 1991) (en banc) (concluding that knowledge of a policy and practice of overcrowding that allegedly resulted in inmate's rape could be sufficient to establish liability), *abrogated on other grounds by* *Farmer v. Brennan*, 511 U.S. 825 (1994).

"A showing that a supervisor acted, or failed to act, in a manner that was deliberately indifferent to an inmate's Eighth Amendment rights is sufficient to demonstrate the involvement – and the liability – of that supervisor. Thus, when a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (holding that "a plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates").

Where state law imposes vicarious liability, however, it may be imposed under § 1983. *See* *Johnson v. Duffy*, 588 F.2d 740, 744 (9th Cir. 1978).

For further discussion of supervisory liability, see *supra* I.A.1.c.(2).

#### 3. Local Governmental Unit Liability

Regardless of what theory the plaintiff employs to establish municipal liability – policy, custom or failure to train – the plaintiff must establish an affirmative causal link between the municipal policy or practice and the alleged constitutional violation. *See* *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 391-92 (1989); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996); *Oviatt v. Pearce*, 954 F.2d 1470, 1473-74 (9th Cir. 1992).

For a discussion of theories of liability applicable to local governmental units, see *supra* I.A.1.c.(2).

#### 4. Relationship to Relief Sought

Where the plaintiff is seeking injunctive or declaratory relief, as opposed to damages, the causation inquiry "is broader and more generalized." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

#### 5. Pleading Standards

"Sweeping conclusory allegations will not suffice to prevent summary judgment. The [plaintiff] must set forth specific facts as to each individual defendant's" causal role in the alleged constitutional deprivation. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (citation omitted).

## D. Immunities

### 1. Absolute Immunity

Immunities that were well established when § 1983 was enacted were not abrogated by § 1983. *See* *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Burns v. Reed*, 500 U.S. 478, 484 (1991); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978); *Miller v. Gammie*, 335 F.3d 889, 895-96 (9th Cir. 2003) (en banc); *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996); *Demery v. Kupperman*, 735 F.2d 1139, 1143 (9th Cir. 1984). In light of this presumption, "absolute immunity [has been granted] to 'the President, judges, prosecutors, witnesses, and officials performing 'quasi-judicial' functions, and legislators.'" *Fry v. Melaragno*, 939 F.2d 832, 836 (9th Cir. 1991) (citation omitted); *see also* *Tower v. Glover*, 467 U.S. 914, 920 (1984); *Procunier*, 434 U.S. at 561; *Miller*, 335 F.3d at 896.

For a discussion of policy arguments in favor of absolute immunity, *see* *Forrester v. White*, 484 U.S. 219, 223 (1988); *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976); *Robichaud v. Ronan*, 351 F.2d 533, 535-36 (9th Cir. 1965).

#### a. Basic Principles

##### (1) Determining Eligibility for Absolute Immunity

"In determining which officials perform functions that might justify a full exemption from liability, [the Court] ha[s] undertaken a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993) (internal quotation marks omitted); *see also* *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); *Tower v. Glover*, 467 U.S. 914, 920 (1984); *Butz v. Economou*, 438 U.S. 478, 508 (1978). "[T]he Court has [also] examined the 'functional comparability' of the role of the official under scrutiny to the role of analogous officials who enjoyed immunity under common law in order to determine whether the modern-day official is entitled to any degree of immunity." *Sellars v. Procunier*, 641 F.2d 1295, 1298 (9th Cir. 1981). Under this "functional approach," the Court "examine[s] the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . seek[s] to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219, 224 (1988); *see also* *Mishler v. Clift*, 191 F.3d 998, 1002 (9th Cir. 1999); *Fry v. Melaragno*, 939 F.2d 832, 835 n.6 (9th Cir. 1991). The eligibility inquiry for absolute immunity, then, turns on "the nature of the function performed, not the identity of the actor

who performed it." *Buckley*, 509 U.S. at 269 (citation and internal quotation marks omitted); *see also* *Clinton v. Jones*, 520 U.S. 681, 695 (1997); *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707, 710-11 (9th Cir. 2010); *Cousins v. Lockyer*, 568 F.3d 1063, 1068 (9th Cir. 2009); *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005); *KRL v. Moore*, 384 F.3d 1105, 1113 (9th Cir. 2004); *cf.* *Richardson v. McKnight*, 521 U.S. 399, 408-09 (1997) (explaining that mere performance of governmental function does not entitle private person to absolute or qualified immunity).

#### (2) Burden of Proof Regarding Eligibility for Absolute Immunity

"The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993); *see also* *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); *Ewing v. City of Stockton*, 588 F.3d 1218, 1234 (9th Cir. 2009); *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005); *Genzler v. Longanbach*, 410 F.3d 630, 636 (9th Cir. 2005). "[A]bsolute freedom from the threat of unfounded lawsuits . . . is the rare exception to the rule." *Meyers v. Contra Costa Cty. Dep't of Soc. Servs.*, 812 F.2d 1154, 1158 (9th Cir. 1987); *see also* *Antoine*, 508 U.S. at 432 n.4; *Burns v. Reed*, 500 U.S. 478, 486-87 (1991); *Botello*, 413 F.3d at 976; *Genzler*, 410 F.3d at 636-37.

#### (3) Effect of Absolute Immunity

"An absolute immunity defeats a suit [for damages] at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976); *see also* *Sellars v. Procunier*, 641 F.2d 1295, 1297 n.4 (9th Cir. 1981).

#### (4) Application to *Bivens* Actions

For purposes of immunity analysis, there is no distinction between § 1983 actions and *Bivens* actions. *See* *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.5 (1993); *Butz v. Economou*, 438 U.S. 478, 499-500 (1978).

### b. Judicial Immunity

#### (1) Basic Principles

"Courts have extended absolute judicial immunity from damage actions under 42 U.S.C. § 1983 not only to judges but also to officers whose functions bear

a close association to the judicial process." *Demoran v. Witt*, 781 F.2d 155, 156 (9th Cir. 1986). "Judges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their official capacities." *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc); *see also* *Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008); *Partington v. Gedan*, 961 F.2d 852, 860 n.8 (9th Cir. 1992); *Houghton v. Osborne*, 834 F.2d 745, 750 (9th Cir. 1987).

Judicial immunity for state defendants does not extend to actions for prospective injunctive relief. *See* *Mireles v. Waco*, 502 U.S. 9, 10 n.1 (1991) (per curiam); *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984); *Lebbos v. Judges of Superior Court, Santa Clara Cty.*, 883 F.2d 810, 813 & n.5 (9th Cir. 1989); *Ashelman*, 793 F.2d at 1075; *see also* *Partington*, 961 F.2d at 860 n.8 (declaratory relief). *But see* *Moore v. Brewster*, 96 F.3d 1240, 1243 (9th Cir. 1996) ("'The judicial or quasi-judicial immunity available to federal officers is not limited to immunity from damages, but extends to actions for declaratory, injunctive and other equitable relief.'") (emphasis added) (citation omitted). In 1996, however, Congress amended § 1983 to prohibit the grant of injunctive relief against any judicial officer acting in her or his official capacity "unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

**(2) Eligibility**

**(a) Judges**

"Judges are absolutely immune from damage actions for judicial acts taken within the jurisdiction of their courts. . . . A judge loses absolute immunity only when [the judge] acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature." *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988) (per curiam) (citations omitted); *see also* *Mireles v. Waco*, 502 U.S. 9, 9 (1991) (per curiam); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Brown v. Cal. Dep't of Corr.*, 554 F.3d 747, 750 (9th Cir. 2009) (absolute immunity is generally accorded to judges functioning in their official capacities); *Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008); *Sadoski v. Mosley*, 435 F.3d 1076, 1079 (9th Cir. 2006); *Mishler v. Clift*, 191 F.3d 998, 1003 (9th Cir. 1999); *Meek v. Cty. of Riverside*, 183 F.3d 962, 965 (9th Cir. 1999); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1301-02 (9th Cir. 1989); *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) ("A seemingly impregnable fortress in American Jurisprudence is the absolute immunity of judges from civil liability for acts done by them within their judicial jurisdiction.").

The court should construe the term "jurisdiction" broadly when making a judicial-immunity inquiry. *See* *Franceschi v. Schwartz*, 57 F.3d 828, 830 (9th Cir. 1995) (per curiam); *Rosenthal v. Justices of the Supreme Court of Cal.*, 910 F.2d 561, 566 (9th Cir. 1990); *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc); *see also* *Stump v. Sparkman*, 435 U.S. 349, 357-60 (1978). The focus is on the court's subject-matter jurisdiction over the dispute, not the court's personal jurisdiction over the parties. *See* *New Alaska Dev. Corp.*, 869 F.2d at 1302; *Ashelman* 793 F.2d at 1076. Finally, a judge retains absolute immunity even when the judge erroneously interprets a jurisdiction-conferring statute. *See* *Sadoski*, 435 F.3d at 1079 (explaining that even where a judge acts in excess of jurisdiction, he or she does not act in clear absence of all jurisdiction); *Schucker*, 846 F.2d at 1204.

"To determine if a given action is judicial . . . , courts [should] focus on whether (1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity." *Ashelman*, 793 F.2d at 1075-76; *see also* *Stump*, 435 U.S. at 362; *Meek*, 183 F.3d at 965-66; *Partington v. Gedan*, 961 F.2d 852, 866 (9th Cir. 1992); *New Alaska Dev. Corp.*, 869 F.2d at 1302.

"Administrative decisions, even though they may be essential to the very functioning of the courts," are not within the scope of judicial immunity. *Forrester v. White*, 484 U.S. 219, 228-30 (1988) (holding that a judge is not absolutely immune from suit in her or his capacity as an employer and that the judge may be liable for unconstitutional conduct regarding the discharge, demotion, and treatment of employees); *see also* *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993); *Meek*, 183 F.2d at 966; *L.A. Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990); *New Alaska Dev. Corp.*, 869 F.2d at 1302.

Judges retain their immunity when they are accused of acting maliciously or corruptly, *see* *Mireles*, 502 U.S. at 11; *Stump*, 435 U.S. at 356-57; *Meek*, 183 F.3d at 965; *Tanner v. Heise*, 879 F.2d 572, 576 (9th Cir. 1989), and when they are accused of acting in error, *see* *Meek*, 183 F.3d at 965; *Schucker*, 846 F.2d at 1204; *Ashelman*, 793 F.2d at 1075.

**(b) Magistrate Judges**

Magistrate judges are entitled to absolute judicial immunity from § 1983 damage actions. *See* *Tanner v. Heise*, 879 F.2d 572, 576-78 (9th Cir. 1989); *Ryan v. Bilby*, 764 F.2d 1325, 1328 n.4 (9th Cir. 1985); *see also* *Atkinson-Baker &*

*Assocs., Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir. 1993) (per curiam) (extending judicial immunity to special masters).

**(c) Administrative Agency Hearing Officers**

"[A]djudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from [§ 1983] suits for damages." *Butz v. Economou*, 438 U.S. 478, 512-13 (1978); *see also* *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985); *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 925-26 (9th Cir. 2004); *Buckles v. King Cty.*, 191 F.3d 1127, 1133-34 (9th Cir. 1999); *Mishler v. Clift*, 191 F.3d 998, 1009 (9th Cir. 1999); *Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir. 1999); *Fry v. Melaragno*, 939 F.2d 832, 836-37 (9th Cir. 1991).

**(d) Court Mediators**

As judicial officers, court mediators of custody and visitation disputes are entitled to absolute judicial immunity from § 1983 damage actions for conduct that is part of their official duties. *See* *Meyers v. Contra Costa Cty. Dep't of Soc. Servs.*, 812 F.2d 1154, 1158-59 (9th Cir. 1987).

**(e) Court-Appointed Psychiatrists**

"[C]ourt-appointed psychiatrists who prepared and submitted medical reports to the state court are . . . immune from liability for damages under [§ 1983]." *Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970) (per curiam).

**(f) Court Employees**

Court employees involved in the jury selection process may be entitled to absolute judicial immunity for actions taken in their official capacity. *Compare* *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1133-35 (9th Cir. 2001) (explaining that employees performing administrative tasks are not entitled to immunity) and *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1108 (9th Cir. 1987) (same), *with* *Pomerantz v. Cty. of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir. 1982) (concluding employees involved in jury-selection process were entitled to quasi-judicial immunity).

**(g) Parole Board Officials**

The Ninth Circuit has held that "parole board officials are entitled to absolute immunity from suits by prisoners for actions taken when processing

parole applications." *Sellars v. Procunier*, 641 F.2d 1295, 1302 (9th Cir. 1981); *see also* *Brown v. Cal. Dep't of Corr.*, 554 F.3d 747, 751 (9th Cir. 2009) ("[P]arole board members are entitled to absolute immunity for parole board decisions."); *Swift v. California*, 384 F.3d 1184, 1189 (9th Cir. 2004); *Bermudez v. Duenas*, 936 F.2d 1064, 1066 (9th Cir. 1991) (per curiam); *cf.* *Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008) (holding that governor's review of parole decisions regarding prisoners convicted of murder pursuant to Article V, § 8(b) of the California Constitution was "functionally comparable" to a judge's role and was therefore entitled to absolute immunity). The immunity does not extend, however, to conduct "taken outside an official's adjudicatory role," or "arising from their duty to supervise parolees." *Anderson v. Boyd*, 714 F.2d 906, 909-10 (9th Cir. 1983), *abrogated in part by* *Swift*, 384 F.3d 1184; *see also* *Swift*, 384 F.3d at 1191 (concluding that parole officers were "not entitled to absolute immunity for their conduct while: (1) investigating parole violations, (2) ordering the issuance of a parole hold and orchestrating [plaintiff's] arrest, and (3) recommending the initiation of parole revocation proceedings").

The Supreme Court "has not decided whether state parole officials enjoy absolute immunity." *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985); *see also* *Swift*, 384 F.3d at 1188-89.

**(h) Probation Officers / Parole Officers**

"In determining which officials perform functions that might justify a full exemption from liability, [the court undertakes] 'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432, (1993) (citation omitted). For example, "[p]robation officers preparing reports for the use of state courts possess an absolute judicial immunity from damage suits under [§] 1983 arising from acts performed within the scope of their official duties." *Demoran v. Witt*, 781 F.2d 155, 157 (9th Cir. 1986); *see also* *Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970) (per curiam). However, "a parole agent acts as a law enforcement official when investigating parole violations and executing parole holds" and cannot be entitled to absolute immunity when performing law enforcement functions. *Swift v. California*, 384 F.3d 1184, 1191 (9th Cir. 2004) (explaining that parole officers are not entitled to absolute immunity for conduct not requiring the exercise of quasi-judicial discretion and holding that parole officers are not absolutely immune from suits arising from conduct distinct from the decision to grant, deny, or revoke parole). Accordingly, parole officials "may be accorded one degree of immunity for one type of activity and a different degree

for a discrete function." *Id*. at 1189 (citation and internal quotation marks omitted). *See also* *Thornton v. Brown*, 757 F.3d 834, 839-40 (9th Cir. 2013) (concluding that parole officers were entitled to absolute immunity from the parolee's damages claims arising out of the imposition of GPS monitoring as a condition of parole pursuant to their discretionary authority under section 3010 of the California Penal Code).

### c. Prosecutorial Immunity

#### (1) Basic Principles

Prosecutorial immunity protects eligible government officials when they are acting pursuant to their official role as advocate for the state performing functions "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *see also Van de Kamp v. Goldstein*, 555 U.S. 335, 341-43 (2009) (giving examples where absolute immunity has applied, including when a prosecutor prepares to initiate a judicial proceeding, or appears in court to present evidence in support of an application for a search warrant); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 912-13 (9th Cir. 2012); *Ewing v. City of Stockton*, 588 F.3d 1218, 1232-33 (9th Cir. 2009); *Kalina v. Fletcher*, 522 U.S. 118, 124-26 (1997); *Botello v. Gammick*, 413 F.3d 971, 975 (9th Cir. 2005); *Genzler v. Longanbach*, 410 F.3d 630, 636-37 (9th Cir. 2005); *KRL v. Moore*, 384 F.3d 1105, 1110 (9th Cir. 2004); *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). "[T]he functional nature of the activities being performed, not the status of the person performing them, is the key to whether absolute immunity attaches." *Stapley v. Pestalozzi*, 733 F.3d 804, 810 (9th Cir. 2013). As such, prosecutorial immunity does not extend to those actions of a prosecutor which are "administrative" or "investigative" in nature. *See Van de Kamp*, 555 U.S. at 342-43 (explaining that prosecutorial immunity does not apply, for example, when prosecutor gives advice to police during a criminal investigation, makes statements to the press, or acts as a complaining witness in support of a warrant application); *Hartman v. Moore*, 547 U.S. 250, 261-62 n.8 (2006); *Buckley v. Fitzsimmons*, 509 U.S. 259, 271-73 (1993); *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707, 710-11 (9th Cir. 2010); *Cousins v. Lockyer*, 568 F.3d 1063, 1068 (9th Cir. 2009); *Botello*, 413 F.3d at 975-76; *Genzler*, 410 F.3d at 636.

The following activities are intimately connected with the judicial phase of the criminal process:

- seeking a grand jury indictment, dismissing claims, deciding whether and when to prosecute, deciding what witnesses and what evidence to present,

*see* *Hartman*, 547 U.S. at 261-62; *Imbler*, 424 U.S. at 431 n.33; *Milstein v. Cooley*, 257 F.3d 1004, 1012 (9th Cir. 2001); *Morley v. Walker*, 175 F.3d 756, 760 (9th Cir. 1999); *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 643 (9th Cir. 1999) (grand jury); *see also* *Van de Kamp*, 555 U.S. at 342-43 (absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding or appears in court to present evidence in support of a search warrant application);

- deciding not to prosecute a defendant, *see* *Botello*, 413 F.3d at 977; *Roe v. City of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997);

- making statements that are alleged misrepresentations and mischaracterizations during hearings, during discovery, and in court papers, *see* *Fry v. Melaragno*, 939 F.2d 832, 837-38 (9th Cir. 1991); conferring with witnesses and allegedly inducing them to testify falsely, *see* *Demery v. Kupperman*, 735 F.2d 1139, 1144 (9th Cir. 1984);

- preparing a case for trial, *see* *KRL*, 384 F.3d at 1112-13; *Milstein*, 257 F.3d at 1008; *Gobel v. Maricopa Cty.*, 867 F.2d 1201, 1204 (9th Cir. 1989), *abrogated on other grounds by* *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989);

- appearing and testifying at a hearing to obtain a search warrant, *see* *Burns v. Reed*, 500 U.S. 478, 487, 491-92 (1991);

- deciding to release previously secured evidence, *see* *Ybarra v. Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 678-79 (9th Cir. 1984);

- selecting a special prosecutor, *see* *Lacey*, 649 F.3d at 1127-1129;

- supervising attorneys in their obligations to disclose evidence, where the decisions are linked to the prosecution of the plaintiff and necessarily require legal knowledge and the exercise of related discretion, *see* *Van de Kamp*, 555 U.S. at 341-343; *Cousins*, 568 F.3d at 1068-69;

- submitting a motion for a bench warrant to court for arrestee's failure to progress in court-imposed treatment program, *see* *Waggy*, 594 F.3d at 709-13; and

- making parole recommendations, because parole decisions are a continuation of the sentencing process, *see* *Brown v. Cal. Dep't of Corr.*, 554 F.3d 747, 750-51 (9th Cir. 2009).

The following activities fall outside of the official role of the prosecutor:

- performing acts which are generally considered functions of the police, *see* *Buckley v. Fitzsimmons*, 509 U.S. 259, 274-76 (1993); *Genzler*, 410 F.3d at 638-43; *Milstein*, 257 F.3d at 1011; *Herb Hallman Chevrolet*, 169 F.3d at 642; *Gobel*, 867 F.2d at 1204;

- advising police officers during the investigative phase of a criminal case, *see* *Burns*, 500 U.S. at 493; *Ewing*, 588 F.3d at 1232-34; *Botello*, 413 F.3d at 977-78;

- acting prior to having probable cause to arrest, *see* *Buckley*, 509 U.S. at 274; *Morley*, 175 F.3d at 760-61; *Herb Hallman Chevrolet*, 169 F.3d at 643;

- preparing a declaration to support an arrest warrant, *see* *Kalina*, 522 U.S. at 129-31; *Morley*, 175 F.3d at 760; *Herb Hallman Chevrolet*, 169 F.3d at 642-43, or bail revocation motion, *see* *Cruz v. Kauai Cty.*, 279 F.3d 1064, 1067 (9th Cir. 2002);

- holding arrestees in detention facilities where the conditions of confinement are constitutionally infirm, *see* *Gobel*, 867 F.2d at 1206;

- making statements to the public concerning criminal proceedings, *see* *Buckley*, 509 U.S. at 277-78; *Milstein*, 257 F.3d at 1013; *Gobel*, 867 F.2d at 1205;

- directing police officers to obtain a search warrant, serving a search warrant, and being present during the search, *see* *Gabbert v. Conn*, 131 F.3d 793, 800 (9th Cir. 1997), *rev'd on other grounds by* *Conn v. Gabbert*, 526 U.S. 286 (1999); *see also* *KRL*, 384 F.3d at 1113-14; and

- acquiring false statements from witnesses for use in a prosecution, *Milstein*, 257 F.3d at 1011.

- *See also* *Tennison v. City & Cty. of San Francisco*, 570 F.3d 1078, 1092 (9th Cir. 2009) (holding that homicide inspectors who were not acting as prosecutors or even directly assisting with the presentation of evidence, were not engaged in conduct "intimately associated with the judicial phase" and thus were not entitled to absolute immunity).

Prosecutorial immunity extends to actions during both the pre-trial and post-trial phase of a case. *See* *Demery*, 735 F.2d at 1144.

"Prosecutorial immunity only protects the defendants from [§] 1983 damage claims; it does not protect them from suits for injunctive relief." *Gobel*, 867 F.2d at 1203 n.6.

### (2) Eligibility

#### (a) Attorneys

State prosecutors are entitled to absolute prosecutorial immunity for acts taken in their official capacity. *See* *Van de Kamp v. Goldstein*, 555 U.S. 335, 342-43 (2009); *Kalina v. Fletcher*, 522 U.S. 118, 123-25 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-70 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 427, 430-31 (1976); *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707, 710-11 (9th Cir. 2010); *Ewing v. City of Stockton*, 588 F.3d 1218, 1232-33 (9th Cir. 2009); *Botello v. Gammick*, 413 F.3d 971, 975 (9th Cir. 2005); *Genzler v. Longanbach*, 410 F.3d 630, 636 (9th Cir. 2005); *KRL v. Moore*, 384 F.3d 1105, 1110 (9th Cir. 2004); *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). Government civil attorneys are also entitled to absolute prosecutorial immunity. *See* *Fry v. Melaragno*, 939 F.2d 832, 837-38 (9th Cir. 1991).

#### (b) Agency Officials

Agency officials who perform functions analogous to those of a prosecutor are entitled to absolute prosecutorial immunity. *See* *Butz v. Economou*, 438 U.S. 478, 515, 516-17 (1978); *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 925-26 (9th Cir. 2004); *Hirsh v. Justices of Supreme Court of State of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995) (per curiam); *Fry v. Melaragno*, 939 F.2d 832, 837-38 (9th Cir. 1991).

#### (c) Social Workers

"[S]ocial workers have absolute immunity when they make 'discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take

custody away from parents.'" *Beltran v. Santa Clara Cty.*, 514 F.3d 906, 908 (9th Cir. 2008) (en banc) (per curiam) (quoting *Miller v. Gammie*, 335 F.3d 889, 896 (9th Cir. 2003) (en banc)); *see also* *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1108-09 (9th Cir. 2010) (concluding social workers were absolutely immune from suit for their involvement in foster care license revocation proceedings); *Meyers v. Contra Costa Cty. Dep't of Soc. Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987). "To the extent, however, that social workers also make discretionary decisions and recommendations that are not functionally similar to prosecutorial or judicial functions, only qualified, not absolute immunity, is available." *Miller*, 335 F.3d at 898; *see also* *Costanich*, 627 F.3d at 1109 (concluding that state social worker not entitled to absolute immunity for investigating charges or for filing declaration in support of guardianship termination proceedings); *Beltran*, 514 F.3d at 908-09 (concluding that social workers are not entitled to absolute immunity for their investigatory conduct).

**d. Presidential Immunity**

The President is absolutely immune from suit for damages for conduct that is part of the President's official duties. *See* *Forrester v. White*, 484 U.S. 219, 225 (1988); *Nixon v. Fitzgerald*, 457 U.S. 731, 756-58 (1982); *Fry v. Melaragno*, 939 F.2d 832, 836 (9th Cir. 1991); *cf.* *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997) (holding no immunity from suit for conduct not taken in official capacity).

**e. Legislative Immunity**

Legislators are absolutely immune from suit for damages for conduct that is part of their official duties. *See* *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998); *Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951); *Norse v. City of Santa Cruz*, 629 F.3d 966, 976-77 (9th Cir. 2010) (en banc) (explaining, "[l]ocal legislators are absolutely immune from liability under § 1983 for their legislative acts[,]" but concluding that defendants were not entitled to absolute immunity where decisions were administrative, not legislative.); *Schmidt v. Contra Costa Cty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 959 (9th Cir. 2010); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163 (9th Cir. 2005); *Kaahumanu v. Cty. of Maui*, 315 F.3d 1215, 1219 (9th Cir. 2003); *Bechard v. Rappold*, 287 F.3d 827, 829 (9th Cir. 2002); *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1220-21 (9th Cir. 1996); *Trevino v. Gates*, 23 F.3d 1480, 1482 (9th Cir. 1994). This immunity extends both to suits for damages and suits for prospective relief. *See* *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732-33 (1980); *Cmty. House, Inc.*, 623 F.3d at 959.

#### f. Witness Immunity

Both private individuals and government officials who serve as witnesses are absolutely immune from suit for damages with respect to their testimony. *See* *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983); *Paine v. City of Lompoc*, 265 F.3d 975, 980 (9th Cir. 2001); *Franklin v. Terr*, 201 F.3d 1098, 1101-02 (9th Cir. 2000); *Bouman v. Block*, 940 F.2d 1211, 1233 (9th Cir. 1991); *Meyers v. Contra Costa Cty. Dep't of Soc. Servs.*, 812 F.2d 1154, 1156 (9th Cir. 1987); *see also* *Lisker v. City of Los Angeles*, 780 F.3d 1237, 1241 (9th Cir. 2015). This immunity extends to testimony given at pre-trial hearings, *see* *Holt v. Castaneda*, 832 F.2d 123, 127 (9th Cir. 1987), to testimony submitted in an affidavit, *see* *Burns v. Cty. of King*, 883 F.2d 819, 823 (9th Cir. 1989) (per curiam), and to testimony before a grand jury, *see* *Little v. City of Seattle*, 863 F.2d 681, 684 (9th Cir. 1988). "Absolute witness immunity also extends to preparatory activities 'inextricably tied' to testimony, such as conspiracies to testify falsely." *Lisker*, 780 F.3d at 1241 (citation omitted). This immunity is limited to participation as a witness in adversarial hearings. *Cruz v. Kauai Cty.*, 279 F.3d 1064, 1068 (9th Cir. 2002); *see also* *Paine*, 265 F.3d at 981-83; *Harris v. Roderick*, 126 F.3d 1189, 1198-99 (9th Cir. 1997).

#### g. Ineligibility

##### (1) Local Governmental Units

Local governmental units are not entitled to absolute immunity. *See* *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993); *Owen v. City of Independence*, 445 U.S. 622, 657 (1980); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 n.6 (9th Cir. 2001); *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9th Cir. 1988).

##### (2) Prison Officials

Prison officials and correctional officers are not entitled to absolute immunity. *See* *Procunier v. Navarette*, 434 U.S. 555, 561 (1978). Members of prison disciplinary committees are also not entitled to absolute immunity. *See* *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985). For a discussion of prison officials acting under color of state law for purposes of § 1983, see *supra* I.A.2.b.(2).

### (3) Defense Counsel

Defense counsel, even if court-appointed and compensated, are not entitled to absolute immunity. *See* *Tower v. Glover*, 467 U.S. 914, 923 (1984); *Sellars v. Procunier*, 641 F.2d 1295, 1299 n.7 (9th Cir. 1981). For a discussion of public defenders not acting under color of state law for purposes of § 1983, see *supra* I.A.2.b.(4).

### (4) Police Officers

Police officers are not entitled to absolute immunity. *See* *Imbler v. Pachtman*, 424 U.S. 409, 418-19 (1976); *Pierson v. Ray*, 386 U.S. 547, 555 (1967); *Elliot-Park v. Manglona*, 592 F.3d 1003, 1006 (9th Cir. 2010) (stating police officers are entitled only to qualified immunity in § 1983 cases, unlike prosecutors who enjoy absolute immunity).

### (5) Court Reporters

Because court reporters – unlike other judicial officers who have been afforded absolute immunity – do not exercise discretion in fulfilling their official duties, but "are required by statute to 'record verbatim' court proceedings," they are not entitled to absolute immunity. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436-37 (1993) (citation omitted); *cf.* *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1134-35 (9th Cir. 2001) (concluding that there was a genuine issue concerning the amount of discretion in the job of the coordinator of accommodations for litigants and witnesses with disabilities).

### (6) Executive Officials

Governors and other high-level state executive officials are not entitled to absolute immunity. *See* *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974), *abrogated on other grounds by* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *but cf.* *Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008) (holding that governor's review of parole decisions regarding prisoners convicted of murder pursuant to Article V, § 8(b) of the California Constitution was "functionally comparable" to a judge's role and was therefore entitled to absolute immunity).

The United States Attorney General is not entitled to absolute immunity for official functions that are not actions taken in her or his role as an attorney. *See* *Mitchell v. Forsyth*, 472 U.S. 511, 520-21 (1985).

Employees of executive branch agencies may also not be entitled to absolute immunity. *See* *Fry v. Melaragno*, 939 F.2d 832, 838 (9th Cir. 1991) (holding that IRS agents are not entitled to absolute immunity).

### 2. Qualified Immunity

"[G]overnment officials performing discretionary functions [are entitled to] a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted); *see also* *Wood v. Moss*, 134 S. Ct. 2056, 2066-67 (2014) ("The doctrine of qualified immunity protects government officials from liability for civil damages … ."); *Krainski v. Nevada ex. Rel. Bd. of Regents*, 616 F.3d 963, 968 (9th Cir. 2010); *Richardson v. McKnight*, 521 U.S. 399, 407-08 (1997); *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002).

Qualified immunity is only an immunity from suit for damages, it is not an immunity from suit for declaratory or injunctive relief. *See* *L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993); *Am. Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991).

#### a. Basic Principles

##### (1) Eligibility

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The Supreme Court has set forth a two-part analysis for resolving government officials' qualified immunity claims. *See* *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other grounds by* *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). First, the court must consider whether the facts "[t]aken in the light most favorable to the party asserting the injury . . . show [that] the [defendant's] conduct violated a constitutional right[.]" *Saucier*, 533 U.S. at 201; *see also* *Scott v. Harris*, 550 U.S. 372, 377 (2007); *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (per curiam); *Hope v. Pelzer*, 536 U.S. 730, 736 (2002); *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060 (9th Cir. 2006); *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002); *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). Second, the court must determine whether the right was clearly established at the time of the alleged

violation. *Saucier*, 533 U.S. at 201; *Wood v. Moss*, 134 S. Ct. 2056, 2066-67 (2014) ("The doctrine of qualified immunity protects government officials from liability for civil damages 'unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.'") (quoting *Ashcroft v. al–Kidd*, 131 S. Ct. 2074, 2080 (2011)); *Brosseau*, 543 U.S. at 199-201; *Hope*, 536 U.S. at 739; *Garcia v. Cty. of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011); *Rodis v. City & Cty. of San Francisco*, 558 F.3d 964, 968 (9th Cir. 2009); *Inouye*, 504 F.3d at 712; *Kennedy*, 439 F.3d at 1060; *Estate of Ford*, 301 F.3d at 1050; *Sorrels*, 290 F.3d at 969.

Even if the violated right was clearly established at the time of the violation, it may be "difficult for [the defendant] to determine how the relevant legal doctrine . . . will apply to the factual situation the [defendant] confronts. . . . [Therefore, i]f the [defendant's] mistake as to what the law requires is reasonable ... the [defendant] is entitled to the immunity defense." *Saucier*, 533 U.S. at 205; *Kennedy*, 439 F.3d at 1061; *Estate of Ford*, 301 F.3d at 1050; *cf. Inouye*, 504 F.3d at 712 n.6 (explaining that the inquiry into the reasonableness of the defendant's mistake is not the "third" step in the *Saucier* analysis, but rather, is part of the second step of *Saucier*'s two-step analysis).

Note that *Saucier*'s framework should not be regarded as an inflexible requirement. *Pearson*, 555 U.S. at 236 (explaining the sequence, while "often appropriate," "should no longer be regarded as mandatory"). Rather, the "judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* However,

> the *Saucier* procedure "is often beneficial" because it "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." 555 U.S., at 236, 129 S. Ct. 808. *Pearson* concluded that courts "have the discretion to decide whether that [*Saucier*] procedure is worthwhile in particular cases." *Id.*, at 242, 129 S. Ct. 808.

*Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014); *Bardzik v. Cty. of Orange*, 635 F.3d 1138, 1145 n.6 (9th Cir. 2011) (recognizing option to address only the clearly-established step, but concluding that addressing whether there was a constitutional violation was proper under the circumstances); *Liberal v. Estrada*,

632 F.3d 1064, 1076 (9th Cir. 2011) (explaining that the court may exercise its discretion in deciding which of the two prongs should be addressed first in light of the particular case's circumstances); *Dunn v. Castro*, 621 F.3d 1196, 1199 (9th Cir. 2010) (recognizing *Pearson* and addressing only the second prong of the qualified immunity analysis, which was dispositive).

The reasonableness inquiry is objective: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). *See also* *Plumhoff*, 134 S. Ct. at 2020-21; *Castro v. Cty. of Los Angeles*, 797 F.3d 654, 663-64 (9th Cir. 2015).

Whether the defendant violated a constitutional right and whether the right was clearly established at the time of the violation are pure legal questions for the court. *See* *Serrano v. Francis*, 345 F.3d 1071, 1080 (9th Cir. 2003); *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003); *see also* *Kennedy*, 439 F.3d at 1059-60 (explaining that whether a clearly established constitutional right was violated is an "abstract issue of law relating to qualified immunity"); *Cunningham v. City of Wenatchee*, 345 F.3d 802, 807-10 (9th Cir. 2003) (same). However, "[i]f a genuine issue of material fact exists that prevents a determination of qualified immunity at summary judgment, the case must proceed to trial." *Serrano*, 345 F.3d at 1077; *see also* *Martinez*, 323 F.3d at 1183-85 (holding that the district court erred by granting summary judgment where there were genuine issues of material fact regarding the reasonableness inquiry of the second *Saucier* prong).

### (a) Identifying the Right

When identifying the right that was allegedly violated, a court must define the right more narrowly than the constitutional provision guaranteeing the right, but more broadly than all of the factual circumstances surrounding the alleged violation. *See* *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087, 1092-93 (9th Cir. 1998); *Carnell v. Grimm*, 74 F.3d 977, 979-80 (9th Cir. 1996); *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995); *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993). For example, the statement that the Eighth Amendment guarantees medical care without deliberate indifference to serious medical needs is a sufficiently narrow statement of the right for conducting the clearly established inquiry. *See* *Kelley*, 60 F.3d at 667; *see also* *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996).

### (b) Clearly Established Right

A government official "cannot be expected to predict the future course of constitutional law, but [the official] will not be shielded from liability" for acts that violate clearly established constitutional rights. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (citations omitted); *see also* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This inquiry must be "undertaken in light of the specific context of the case." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other grounds by* *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). *See also* *Nelson v. City of Davis*, 685 F.3d 867, 883 (9th Cir. 2012); *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1240-41 (9th Cir. 2010). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what [the official] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also* *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Rodis v. City & Cty. of San Francisco*, 558 F.3d 964, 969 (9th Cir. 2009); *Eng v. Cooley*, 552 F.3d 1062, 1075 (9th Cir. 2009); *CarePartners, LLC v. Lashway*, 545 F.3d 867, 876 (9th Cir. 2008); *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008); *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060-61 (9th Cir. 2006); *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002); *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002). The court has stressed that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Dunn v. Castro*, 621 F.3d 1196, 1201 (9th Cir. 2010). "Whether the law was clearly established is an objective standard; the defendant's subjective understanding of the constitutionality of his or her conduct is irrelevant." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011) (internal quotation marks and citation omitted).

To conclude that the right is clearly established, the court need not identify an identical prior action. *See* *Anderson*, 483 U.S. at 640; *see also* *Hope*, 536 U.S. at 739; *Rodis*, 558 F.3d at 969; *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008); *Kennedy*, 439 F.3d at 1065-66; *Sorrels*, 290 F.3d at 970; *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995); *Browning v. Vernon*, 44 F.3d 818, 823 (9th Cir. 1995). First, the court should "'look to … binding precedent. '" *Chappell v. Mandeville*, 706 F.3d 1052, 1056 (9th Cir. 2013) (quoting *See* *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996)). Absent binding precedent, the court should consider all relevant precedents, including decisions from the Supreme Court, all federal circuits, federal district courts, and state courts; in addition, the court should consider the likelihood that the Supreme Court or the Ninth Circuit would decide the issue in favor of the person asserting the right. *See* *Elder v. Holloway*, 510

U.S. 510, 512, 516 (1994); *see also* *Chappell*, 706 F.3d at 1056; *Hope*, 536 U.S. at 739-46; *Dunn*, 621 F.3d at 1203 (stating that court may look to precedent from other circuits); *Inouye*, 504 F.3d at 714-17; *Boyd v. Benton Cty.*, 374 F.3d 773, 781 (9th Cir. 2004); *Osolinski*, 92 F.3d at 936, 938 n.2. For guidance as to when prior law clearly establishes a right, see *Saucier*, 533 U.S. at 202 ("facts not distinguishable in a fair way from facts presented in the case at hand"). *Compare* *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1450-51 (9th Cir. 1995) (concluding that Title VII employment-discrimination law concerning sexual harassment could not serve as the basis for a clearly established right for purposes of a sexual-harassment claim brought under a similarly worded provision of Title IX, which seeks to prohibit sex discrimination in education) *with* *Bator v. Hawaii*, 39 F.3d 1021, 1028 n.7 (9th Cir. 1994) (finding Title VII case law relevant to determination of clearly established rights under Equal Protection Clause because both are directed at ending gender discrimination). *See also* *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087, 1092 n.1 (9th Cir. 1998) (stating that a single district court opinion from out of the circuit is insufficient to demonstrate a clearly established right).

Once a court determines that "the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [the official's] conduct." *Harlow*, 457 U.S. at 818-19.

Even if the plaintiff has alleged violations of a clearly established right, the government official is entitled to qualified immunity if he or she made a reasonable mistake as to what the law requires. *See* *Saucier*, 533 U.S. at 205; *Kennedy*, 439 F.3d at 1061; *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003); *Estate of Ford*, 301 F.3d at 1050; *Newell v. Sauser*, 79 F.3d 115, 118 (9th Cir. 1996); *Schroeder v. McDonald*, 55 F.3d 454, 461-62 (9th Cir. 1995).

The "existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable officer would find that conduct constitutional." *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). Such a statute will not shield the official where it "authorizes official conduct which is patently violative of fundamental constitutional principles[.]" *Id.*; *see also* *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 965 (9th Cir. 2010) (recognizing *Grossman* rule, but choosing to examine the immunity issue according to *Saucier*'s second prong instead). Moreover, unlawful enforcement of an otherwise valid statute demonstrates unreasonable behavior depriving the government official of qualified immunity. *See* *Pierce v. Multnomah*

*Cty., Or.*, 76 F.3d 1032, 1037 (9th Cir. 1996); *Chew v. Gates*, 27 F.3d 1432, 1450 (9th Cir. 1994).

#### (2) Ineligibility

##### (a) Local Governmental Units

Local governmental units are not entitled to a qualified-immunity defense to § 1983 liability. *See* *Brandon v. Holt*, 469 U.S. 464, 473 (1985); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980); *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 (9th Cir. 1992); *L.A. Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990). Local governmental units are also unable to rely on the qualified-immunity defense available to municipal employees as a defense to § 1983 claims. *See* *Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995).

For a discussion of theories of liability applicable to local governmental units, see *supra* I.A.1.c.(2).

##### (b) Municipal Employees

Municipal employees sued in their official capacity are not entitled to qualified immunity. *See* *Eng v. Cooley*, 552 F.3d 1062, 1064 n.1 (9th Cir. 2009); *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 (9th Cir. 1992).

##### (c) Private Individuals

The Ninth Circuit has concluded that private individuals are not entitled to qualified immunity in either § 1983 or *Bivens* actions. *See* *Clement v. City of Glendale*, 518 F.3d 1090, 1096 (9th Cir. 2008); *Franklin v. Fox*, 312 F.3d 423, 444 (9th Cir. 2002); *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492 n.9 (9th Cir. 1990); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989). The Supreme Court has concluded that employees of a private prison management company are not entitled to qualified immunity, but declined to express an opinion as to whether they may have a "good faith" defense. *See* *Richardson v. McKnight*, 521 U.S. 399, 401, 413-14 (1997); *see also* *Jensen v. Lane Cty.*, 222 F.3d 570, 580 (9th Cir. 2000) (concluding that private psychiatrist not entitled to qualified immunity); *Halvorsen v. Baird*, 146 F.3d 680, 685-86 (9th Cir. 1998) (applying *Richardson* and holding that private detoxification center not entitled to qualified immunity); *Ace Beverage Co. v. Lockheed Info. Mgmt. Servs.*, 144 F.3d 1218, 1219-20 (9th Cir. 1998) (per curiam) (applying *Richardson* and holding that private firm with minimal government oversight is not entitled to qualified

immunity); *cf.* *Clement*, 518 F.3d at 1096-97 (concluding that private towing company entitled to invoke "good faith" defense).

The Supreme Court has concluded that private individuals who conspire with state officials to violate others' constitutional rights are not entitled to qualified immunity in § 1983 actions. *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992) (noting in dicta that private defendants could be entitled to a "good faith" defense).

For a discussion of when private individuals are acting under color of state law for purposes of § 1983, see *supra* I.A.2.b.(5).

### b. Pleading: Plaintiff's Allegations

In *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167 (1993), the Supreme Court left open the question whether the Court's "qualified immunity jurisprudence would require a heightened pleading standard in cases involving individual government officials." After *Leatherman*, the Supreme Court concluded that a heightened pleading standard does not apply to constitutional claims brought against individual defendants in which improper motive is a necessary element. *See* *Crawford-El v. Britton*, 523 U.S. 574, 594-97 (1998); *see also* *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-15 (2002) (declining to impose a heightened pleading standard in employment discrimination case, explaining that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions [such as actions brought under Rule 9(b)].").

The Ninth Circuit has also held that a heightened pleading standard does not apply to constitutional claims brought against individual defendants in which improper motive is a necessary element. *See* *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1123-26 (9th Cir. 2002) (overruling *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994) ("*Branch II*"), *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) ("*Branch I*"), and their progeny because they imposed a heightened pleading standard); *see also* *Empress LLC v. City of San Francisco*, 419 F.3d 1052, 1055-56 (9th Cir. 2005) (explaining that "the logical conclusion of *Leatherman*, *Crawford-El*, and *Swierkiewicz* dictates that a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require."); *Miranda v. Clark Cty., Nev.*, 319 F.3d 465, 470 (9th Cir. 2003) (en banc) (same).

### c. Pleading: Affirmative Defense

Qualified immunity has consistently been recognized as an affirmative defense that must be pled by the defendant. *See* *Siegert v. Gilley*, 500 U.S. 226,

231 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993); *Benigni v. City of Hemet*, 879 F.2d 473, 479 (9th Cir. 1988).

Under the amended 28 U.S.C. § 1915, however, "the court shall dismiss the case at any time if the court determines that the action or appeal seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(iii); *see also* 42 U.S.C. § 1997e(c)(1). Although the Ninth Circuit has not addressed the relationship between this provision and the case-law establishing qualified immunity as an affirmative defense, the provision appears to allow the court to raise the qualified-immunity defense sua sponte in actions where the party is proceeding in forma pauperis.

Section 1915A authorizes courts to dismiss complaints on similar grounds "before docketing, if feasible or, in any event, as soon as practicable after docketing" where the complaint concerns a prisoner's conditions of confinement. 28 U.S.C. § 1915A(a) & (b)(2).

**d. Burdens of Proof**

The plaintiff bears the burden of proving that the right allegedly violated was clearly established at the time of the violation; if the plaintiff meets this burden, then the defendant bears the burden of establishing that the defendant reasonably believed the alleged conduct was lawful. *See* *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002); *Trevino v. Gates*, 99 F.3d 911, 916-17 (9th Cir. 1996); *Browning v. Vernon*, 44 F.3d 818, 822 (9th Cir. 1995); *Neely v. Feinstein*, 50 F.3d 1502, 1509 (9th Cir. 1995), *overruled in part on other grounds by* *L.W. v. Grubbs*, 92 F.3d 894 (9th Cir. 1996). *See also* *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011) ("The plaintiff bears the burden to show that the contours of the right were clearly established.").

**e. Discovery**

The court should not allow any discovery until it has resolved the legal question of whether there is a clearly established right. *See* *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Dunn v. Castro*, 621 F.3d 1196, 1199 (9th Cir. 2010) ("Qualified immunity confers upon officials "a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery." (internal quotation marks and citation omitted)); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1450 (9th Cir. 1995); *Romero v. Kitsap Cty.*, 931 F.2d 624, 628 n.6 (9th Cir. 1991).

#### f. Dismissal

If the court determines that an official is entitled to qualified immunity on any § 1983 claims for damages that are part of the action, the court should dismiss those claims prior to discovery. *See* *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also* *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

Under the amended 28 U.S.C. § 1915, the court is authorized to dismiss sua sponte an "action or appeal [if it] seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(iii); *see also* 42 U.S.C. § 1997e(c)(1). The court has been given similar authorization with respect to pre-filing review of complaints concerning a prisoner's conditions of confinement. *See* 28 U.S.C. § 1915A. It is unclear, under the language of these provisions, whether the court should also dismiss claims for injunctive or declaratory relief, to which qualified immunity does not apply, when dismissing an action seeking damages.

#### g. Summary Judgment

Although both the "clearly established right" and "reasonableness" inquiries are questions of law, where there are factual disputes as to the parties' conduct or motives, the case cannot be resolved at summary judgment on qualified immunity grounds. *See* *Lolli v. Cty. of Orange*, 351 F.3d 410, 421 (9th Cir. 2003); *Wilkins v. City of Oakland*, 350 F.3d 949, 955-56 (9th Cir. 2003); *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003); *Martinez v. Stanford*, 323 F.3d 1178, 1183-85 (9th Cir. 2003).

#### h. Interlocutory Appeals

The district court's rejection of a qualified-immunity defense, insofar as it rests on a question of law, is immediately appealable as a collateral order. *See* *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Wilkinson v. Torres*, 610 F.3d 546, 549-50 (9th Cir. 2010); *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 968 (9th Cir. 2010); *Rodis v. City & Cty. of San Francisco*, 558 F.3d 964, 968 (9th Cir. 2009); *Bingue v. Prunchak*, 512 F.3d 1169, 1172 (9th Cir. 2008); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1059-60 (9th Cir. 2006); *Wilkins v. City of Oakland*, 350 F.3d 949, 951-52 (9th Cir. 2003); *Cunningham v. City of Wenatchee*, 345 F.3d 802, 806-09 (9th Cir. 2003). *See also* *Liberal v. Estrada*, 632 F.3d 1064, 1074 (9th Cir. 2011) (explaining no jurisdiction to review denial of summary judgment to officers on state-law claims where officers disagreed with district court's interpretation of the

facts, because they were not appealing the denial of immunity, but rather the denial of summary judgment).

Thus, the appellate court has jurisdiction to determine whether, taking the plaintiff's allegations as true, defendants' conduct violates a clearly established right." *See* *Cmty. House, Inc.*, 623 F.3d at 968; *Rodis*, 558 F.3d at 968; *Bingue*, 512 F.3d at 1172-73; *Kennedy*, 439 F.3d at 1060; *Wilkins*, 350 F.3d at 951-52; *Cunningham*, 345 F.3d at 807-09; *Thomas v. Gomez*, 143 F.3d 1246, 1248 (9th Cir. 1998); *Knox v. Sw. Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997). The appellate court also has jurisdiction to determine whether, even though facts are in dispute, no account of the defendants' conduct could be considered objectively unreasonable. *See* *Knox*, 124 F.3d at 1107; *see also* *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 707 (9th Cir. 2010). Finally, the appellate court retains jurisdiction where it need only determine whether a factual dispute is material. *See* *Bingue*, 512 F.3d at 1173; *Wilkins*, 350 F.3d at 951-52; *Cunningham v. Gates*, 229 F.3d 1271, 1286 (9th Cir. 2000); *Thomas*, 143 F.3d at 1248; *Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1996).

Where, however, the appellate court is being asked to review the record to determine whether there is sufficient evidence to create a genuine issue of fact between the parties, it does not have jurisdiction over the appeal of a denial of qualified immunity. *See* *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995); *Kennedy*, 439 F.3d at 1059-60; *Wilkins*, 350 F.3d at 952; *Cunningham*, 345 F.3d at 807-09; *Gates*, 229 F.3d at 1286; *Thomas*, 143 F.3d at 1248-49; *Knox*, 124 F.3d at 1107.

The denial of qualified immunity may be appealed both at the dismissal and summary judgment stages. *See* *Behrens*, 516 U.S. at 306-11. If a defendant fails to appeal a denial of qualified immunity, the issue is waived on appeal following a jury verdict. *See* *Price v. Kramer*, 200 F.3d 1237, 1244 (9th Cir. 2000).

### 3. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "The Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

#### a. Basic Principles

"The Eleventh Amendment prohibits federal courts from hearing suits brought against an unconsenting state. Though its language might suggest otherwise, the Eleventh Amendment has long been construed to extend to suits brought against a state by its own citizens, as well as by citizens of other states." *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053 (9th Cir. 1991) (internal citations omitted); *see also* *Tennessee v. Lane*, 541 U.S. 509, 517 (2004); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997); *Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997).

The Eleventh Amendment bars suits against state agencies, as well as those where the state itself is named as a defendant. *See* *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 777 (9th Cir. 2005); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 (9th Cir. 2003); *see also* *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam) (stating that Board of Corrections is agency entitled to immunity); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (concluding that Nevada Department of Prisons was a state agency entitled to Eleventh Amendment immunity); *cf.* *Leer v. Murphy*, 844 F.2d 628, 631 (9th Cir. 1988) (stating that Eleventh Amendment requires examination of the complaint and relief sought to determine whether the state is the "real party in interest"); *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987) (same). For a discussion of when an agency is an arm of the state, see *supra* I.A.1.d.

The Eleventh Amendment also bars damages actions against state officials in their official capacity, *see* *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Eaglesmith v. Ward*, 73 F.3d 857, 859 (9th Cir. 1995); *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992) (per curiam), but does not bar suits against state officials seeking prospective relief, see *infra* I.D.3.b.(2).

Except for suits for prospective relief filed against state officials, the Eleventh Amendment bars suit regardless of the relief sought. *See* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Brooks*, 951 F.2d at 1053, 1053 n.1; *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 508 (9th Cir. 1990).

### b. Inapplicability of Amendment

#### (1) Local Governmental Units

"The [E]leventh [A]mendment does not bar actions against cities and counties." *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987); *see also* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 777 (9th Cir. 2005); *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1180 (9th Cir. 2003).

For further discussion of how to establish a local governmental unit's liability under § 1983, see *supra* I.A.1.c.(2).

#### (2) State Officials

##### (a) Official Capacity

The doctrine of *Ex Parte Young*, 209 U.S. 123 (1908) – that the Eleventh Amendment does not bar suits for prospective declaratory or injunctive relief against state officials in their official capacity – is a well-recognized exception to the general prohibition of the Eleventh Amendment. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-06 (1984); *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Armstrong v. Wilson*, 124 F.3d 1019, 1025 (9th Cir. 1997).

"[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996). The Ninth Circuit has concluded that a statute containing citizen-suit provisions could not have been intended to abrogate the *Ex Parte Young* exception. *See* *Nat. Res. Def. Council v. Cal. Dep't of Transp.*, 96 F.3d 420, 423-24 (9th Cir. 1996); *see also* *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (holding that action brought under the Americans with Disabilities Act and the Rehabilitation Act could go forward under the *Ex Parte Young* doctrine). The Supreme Court has noted that "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Coeur d'Alene Tribe*, 521

U.S. at 270; *see* *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183-85 (9th Cir. 1997). Since § 1983 contains no scheme for enforcement, its operation is most likely not affected by *Seminole*'s modification of *Ex Parte Young*.

For a discussion of how to determine the capacity in which an official is sued, see *supra* I.A.1.e.(3).

**(b) Personal Capacity**

The Eleventh Amendment does not bar suits seeking damages against state officials in their personal capacity. *See* *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991); *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003); *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394-95 (9th Cir. 1997); *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992) (per curiam).

For a discussion of how to determine the capacity in which an official is sued, see *supra* I.A.1.e.(3).

**c. Abrogation**

Although Congress can abrogate the states' Eleventh Amendment immunity under § 5 of the Fourteenth Amendment, such abrogation requires an "unequivocal expression" of Congressional intent, *see* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985), *superseded by statute on other grounds*; *see also* *Tennessee v. Lane*, 541 U.S. 509, 517 (2004); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55-56 (1996); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1184-85 (9th Cir. 2003) (per curiam); *Clark v. California*, 123 F.3d 1267, 1269-70 (9th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1391 (9th Cir. 1993) (en banc), and is a limited power, *see* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding that Congress did not have the power, pursuant to § 5 of the Fourteenth Amendment, to impose the Age Discrimination in Employment Act, 29 U.S.C. § 623, on the states); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999) (holding that Congress did not have the power, pursuant to section 5 of the Fourteenth Amendment, to impose patent infringement statute, 35 U.S.C. § 271(a), on the states); *compare* *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that Congress did not have the power, pursuant to § 5 of the Fourteenth Amendment, to impose Title I of the Americans with Disabilities Act on the states), *with* *Clark*, 123 F.3d at 1269-71 (concluding, with discussion of *Flores*, that Congress had power to abrogate Eleventh Amendment immunity when

enacting Title II of the ADA and Rehabilitation Act pursuant to section 5 of Fourteenth Amendment).

Section 1983 does not express the requisite unequivocal intent to abrogate the states' Eleventh Amendment immunity from suit. *See* *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989); *Quern v. Jordan*, 440 U.S. 332, 342 (1979); *Hale*, 993 F.2d at 1398; *Leer v. Murphy*, 844 F.2d 628, 631 (9th Cir. 1988).

Congress cannot abrogate the states' Eleventh Amendment immunity under its Article I powers. *See* *Seminole Tribe*, 517 U.S. at 72-74; *Quillin v. Oregon*, 127 F.3d 1136, 1138 (9th Cir. 1997) (per curiam); *Nat.Res. Def. Council v. Cal. Dep't of Transp.*, 96 F.3d 420, 423 (9th Cir. 1996). *But see* *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 819-20 (9th Cir.) (concluding that acceptance of funds under statutory scheme passed pursuant to Article I Spending Power constitutes a waiver of Eleventh Amendment immunity), *amended by* 271 F.3d 910 (9th Cir. 2001).

**d. Waiver**

States may waive their Eleventh Amendment immunity by making an unequivocal statement that they have consented to suit in federal court. *See* *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06 (1990); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), *superseded by statute on other grounds*; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1021-22 (9th Cir. 2010) (concluding the sovereign immunity defense was waived when community college district failed to pursue that defense while litigating the suit on the merits); *Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 967 (9th Cir. 2010); *Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1111-12 (9th Cir. 2010); *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007); *Quillin v. Oregon*, 127 F.3d 1136, 1138-39 (9th Cir. 1997) (per curiam); *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394 (9th Cir. 1997); *Leer v. Murphy*, 844 F.2d 628, 632 (9th Cir. 1988).

Acceptance of funds under a statute passed pursuant to the Spending Power constitutes a waiver of Eleventh Amendment immunity. *See* *Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 793 (9th Cir. 2004) (per curiam); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam); *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 819-20 (9th Cir.), *amended by* 271 F.3d 910 (9th Cir. 2001); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997).

A state's act of removing a lawsuit from state court to federal court waives its Eleventh Amendment immunity. *See* *Lapides v. Bd. of Regents*, 535 U.S. 613, 616 (2002); *Embury v. King*, 361 F.3d 562, 565-66 (9th Cir. 2004); *Bank of Lake Tahoe v. Bank of Am.*, 318 F.3d 914, 918-19 (9th Cir. 2003).

Waiver in a predecessor lawsuit does not carry over into subsequent actions. *See* *City of S. Pasadena v. Mineta*, 284 F.3d 1154, 1157 (9th Cir. 2002).

#### e. Violations of State Law

The Eleventh Amendment bars suits in federal court against states on the basis of violations of state law. *See* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124-25 (1984); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973-74 (9th Cir. 2004); *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394-95 (9th Cir. 1997).

#### f. Burden of Proof

The party asserting Eleventh Amendment immunity bears the burden of proof. *See* *Del Campo v. Kennedy*, 517 F.3d 1070, 1075 (9th Cir. 2008); *Hill v. Blind Indus. & Servs. of Md.*, 201 F.3d 1186 (9th Cir. 2000) (order); *Hyland v. Wonder*, 117 F.3d 405, 413 (9th Cir.), *amended by* 127 F.3d 1135 (9th Cir. 1997); *ITSI TV Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993).

#### g. Interlocutory Appeals

"It is settled that immediate appeals may be taken from orders denying claims of . . . sovereign immunity granted to the states under the Eleventh Amendment[.]" *Alaska v. United States*, 64 F.3d 1352, 1354 (9th Cir. 1995); *see also* *Del Campo v. Kennedy*, 517 F.3d 1070, 1074 (9th Cir. 2008); *Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792 (9th Cir. 2004) (per curiam); *Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997) (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993)).

## E. Remedies

### 1. Damages

#### a. Compensatory

"A plaintiff who establishes liability for deprivations of constitutional rights actionable under 42 U.S.C. § 1983 is entitled to recover compensatory damages for

all injuries suffered as a consequence of those deprivations." *Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir. 1988); *see also* *Smith v. Wade*, 461 U.S. 30, 52 (1983) ("Compensatory damages . . . are mandatory."). The Supreme Court has held that "no compensatory damages [may] be awarded for violation of [a constitutional] right absent proof of actual injury." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

Compensatory damages include actual losses, mental anguish and humiliation, impairment of reputation, and out-of-pocket losses. *See* *Borunda*, 885 F.2d at 1389; *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760-61 (9th Cir. 1985). "[D]amages in § 1983 actions are not to be assessed on the basis of the abstract 'value' or 'importance' of the infringed constitutional right." *Sloman v. Tadlock*, 21 F.3d 1462, 1472 (9th Cir. 1994).

Municipalities can be held liable for compensatory damages. *See* *Owen v. City of Independence*, 445 U.S. 622, 657 (1980); *Mitchell v. Dupnik*, 75 F.3d 517, 527 (9th Cir. 1996).

Although mental and emotional distress damages are available as compensatory damages under § 1983, no compensatory damages are to be awarded for the mere deprivation of a constitutional right. *See* *Carey v. Piphus*, 435 U.S. 247, 264 (1978). For example, where a plaintiff is alleging a procedural due process violation, the plaintiff will not be entitled to compensatory damages, "[i]f, after post-deprivation procedure, it is determined that the deprivation was justified," because the plaintiff has suffered no actual injuries. *Raditch v. United States*, 929 F.2d 478, 482 n.5 (9th Cir. 1991); *see also* *Merritt v. Mackey*, 932 F.2d 1317, 1322-23 (9th Cir. 1991); *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 781 (9th Cir. 1982). Moreover, under the Prison Litigation Reform Act, "[n]o federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). For further discussion of this provision, see *infra* IV.F.

**b. Punitive**

Punitive damages are available under § 1983. *See* *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991); *Kentucky v. Graham*, 473 U.S. 159, 167 n.13 (1985); *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005); *Morgan v. Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 577 n.21 (1984). Punitive damages are available even when the plaintiff is unable to show compensable injury. *See* *Smith v. Wade*, 461 U.S. 30, 55 n.21

(1983); *Davis v. Mason Cty.*, 927 F.2d 1473, 1485 (9th Cir. 1991), *superseded by statute on other grounds as stated in* *Davis v. City of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), *vacated in part on other grounds by* 984 F.2d 345 (9th Cir. 1993) (order).

Municipalities are not liable for punitive damages. *See Graham*, 473 U.S. at 167 n.13; *Smith*, 461 U.S. at 36 n.5; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); *Mitchell v. Dupnik*, 75 F.3d 517, 527 (9th Cir. 1996). State officials sued in their official capacity are also immune from punitive damages. *See* *Mitchell*, 75 F.3d at 527.

Punitive damages are awarded in the jury's discretion. *See* *Smith*, 461 U.S. at 54; *Woods v. Graphic Commc'ns*, 925 F.2d 1195, 1206 (9th Cir. 1991). The jury must find either that the defendant acted with an evil motive or demonstrated reckless indifference to the constitutional rights of the plaintiff. *See* *Smith*, 461 U.S. at 56; *Dang*, 422 F.3d at 807-09 (holding "that oppressive conduct is a proper predicate for punitive damages under § 1983"); *Mitchell*, 75 F.3d at 527 n.7; *Morgan*, 997 F.2d at 1255; *Bouman v. Block*, 940 F.2d 1211, 1233 (9th Cir. 1991). The jury must also "make 'a discretionary moral judgment' that the 'conduct merit[s] a punitive award.'" *Woods*, 925 F.2d at 1206 (quoting *Smith*, 461 U.S. at 52).

**c. Presumed**

"Damages are not presumed to flow from every constitutional violation. Presumed damages are appropriate when there is a great likelihood of injury coupled with great difficulty in proving damages." *Trevino v. Gates*, 99 F.3d 911, 921 (9th Cir. 1996) (citing *Carey v. Piphus*, 435 U.S. 247, 263 (1978)). Presumed damages should not be awarded where compensatory damages have been awarded. *See* *Trevino*, 99 F.3d at 921-22.

**d. Nominal**

Nominal damages must be awarded if the plaintiff proves that his or her constitutional rights have been violated. *See* *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Hazel v. Crofoot*, 727 F.3d 983, 991-92 n.6 (9th Cir. 2013); *Cummings v. Connell*, 402 F.3d 936, 942-46 (9th Cir. 2005); *Schneider v. Cty. of San Diego*, 285 F.3d 784, 794-95 (9th Cir. 2002); *Trevino v. Gates*, 99 F.3d 911, 922 (9th Cir. 1996); *Wilks v. Reyes*, 5 F.3d 412, 416 (9th Cir. 1993); *Draper v. Coombs*, 792 F.2d 915, 921-22 (9th Cir. 1986). *See also* *Guy v. City of San Diego*, 608 F.3d 582, 587 (9th Cir. 2010); *Mahach-Watkins v. Depee*, 593 F.3d 1054, 1059 (9th Cir.

2010) (explaining that in a civil rights suit for damages, the award of nominal damages highlights the plaintiff's failure to prove actual, compensable injury).

### 2. Injunctive Relief

Section 1983 is an exception to the Anti-Injunction Act, 28 U.S.C. § 2283, which establishes that federal courts may not enjoin state-court proceedings unless expressly authorized to do so by Congress. *See Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 468 (9th Cir. 1984). This does "not displace the normal principles of equity, comity and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities." *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); *Mitchum*, 407 U.S. at 243. In fact, injunctive relief should be used "sparingly, and only . . . in clear and plain case[s]." *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (citation and internal quotation marks omitted).

Where the prisoner is challenging conditions of confinement and is seeking injunctive relief, transfer to another prison renders the request for injunctive relief moot absent some evidence of an expectation of being transferred back. *See Preiser v. Newkirk*, 422 U.S. 395, 402-03 (1975); *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam); *see also Andrews v. Cervantes*, 493 F.3d 1047, 1053 n.5 (9th Cir. 2007). *Compare Pride v. Correa*, 719 F.3d 1130, 1138 (9th Cir. 2013) (instructing, on remand, the district court to consider whether claim for injunctive relief is moot as to a prison official who had been transferred to another prison, and no longer worked at the facility in question).

#### a. Law Prior to Enactment of the Prison Litigation Reform Act

Prior to enactment of the Prison Litigation Reform Act, a court could award permanent injunctive relief "only if the wrongs [were] ongoing or likely to recur." *Fed. Trade Comm'n v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985); *LaDuke v. Nelson*, 762 F.2d 1318, 1323-24 (9th Cir. 1985), *amended by* 796 F.2d 309 (9th Cir. 1986).

Formerly, the court could award preliminary injunctive relief where the plaintiff showed (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the plaintiff's favor. *See Teamsters Joint Council No. 42 v. Int'l Bhd. of Teamsters, AFL-CIO*, 82 F.3d 303, 307 (9th Cir.

1996); *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990); *Oakland Tribune, Inc. v. Chronicle Publ'g Co., Inc.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

Under the former standard, the loss of money – or an injury that could be measured in damages – was not considered irreparable. *See Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1334-35 (9th Cir. 1995), *superseded by statute on other grounds as stated in Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1158-59 (9th Cir. 2011); *Oakland Tribune*, 762 F.2d at 1376-77.

**b. Law after Enactment of the Prison Litigation Reform Act**

The Prison Litigation Reform Act ("PLRA") made three changes with respect to awarding injunctive relief in civil actions concerning prison conditions. "Although the PLRA significantly affects the type of prospective injunctive relief that may be awarded, it has not substantially changed the threshold findings and standards required to justify an injunction." *Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001); *see also Hallett v. Morgan*, 296 F.3d 732, 743-44 (9th Cir. 2002).

First, the PLRA states that:

> [t]he court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A) (1997). For a similar standard with respect to temporary restraining orders and preliminary injunctive relief see 18 U.S.C. § 3626(a)(2).

Second, the PLRA permits a defendant to seek the termination or modification of prospective relief where such relief fails to meet the above standard. *See* 18 U.S.C. § 3626(b)(2). The Ninth Circuit has concluded that this provision is constitutional. *See Gilmore v. California*, 220 F.3d 987, 1008 (9th Cir. 2000). The burden is on the state, however, to show excess of constitutional minimum. *See id.* at 1008.

Third, the standards governing the appropriate scope of injunctive relief also govern the appropriate scope of private settlements unless the private settlement states that it is not subject to court enforcement except for the "reinstatement of the civil proceeding that the agreement settled." 18 U.S.C. § 3626(c)(2).

These new requirements apply to all pending cases. *See Hallett*, 296 F.3d at 742-43; *Oluwa v. Gomez*, 133 F.3d 1237, 1239-40 (9th Cir. 1998). For further discussion of these provisions, see *infra* IV.G.

#### 3. Declaratory Relief

"A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank of Lakewood Vill., Cal.*, 333 U.S. 426, 431 (1948); *see also Hewitt v. Helms*, 482 U.S. 755, 762-63 (1987); *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (per curiam); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 533 (9th Cir. 2008); *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1222-23 (9th Cir. 1998) (en banc); *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1112 (9th Cir. 1987). "Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc) (per curiam); *see also L.A. Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992); *Zolin*, 812 F.2d at 1112. It is unnecessary to settle the entire controversy; it is enough if "a substantial and important question currently dividing the parties" is resolved. *Eu*, 979 F.2d at 703-04.

### F. Exhaustion of Remedies

#### 1. State Remedies

Generally, exhaustion of state judicial or state administrative remedies is not a prerequisite to bringing an action under § 1983. *Patsy v. Bd. of Regents*, 457 U.S. 496, 500 (1982) ("[W]e have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies."); *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005).

Exhaustion of state tort claim procedures is not required. *See Rumbles v. Hill*, 182 F.3d 1064, 1070 (9th Cir. 1999), *overruled on other grounds by Booth v. Churner*, 532 U.S. 731 (2001).

When a state prisoner's otherwise valid § 1983 complaint seeks speedier release from confinement however, the prisoner must proceed by way of a federal habeas corpus proceeding, which *does* require the exhaustion of state remedies. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Likewise, if a prisoner seeks to challenge the validity of a conviction or sentence, the prisoner must first demonstrate that the conviction or sentence has been successfully overturned. *See Edwards v. Balisok*, 520 U.S. 641, 646-48 (1997); *Heck v. Humphrey*, 512 U.S. 477, 483-87 (1994).

For further discussion of the *Preiser* and *Heck* doctrines, see *infra.* I. J.

### 2. Prison Administrative Remedies

Under the former version of 42 U.S.C. § 1997e, a prisoner was required to exhaust administrative remedies prior to filing the § 1983 action where the administrative procedures had been certified by the Attorney General or a federal court as meeting certain statutorily defined criteria. *See* 42 U.S.C. § 1997e(b) (1994).

Currently, under the Prison Litigation Reform Act, "[n]o action shall be brought with respect to prison conditions under . . . [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); *see also McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."), *superseded by statute as stated in Booth v. Churner*, 532 U.S. 731 (2001); *Morton v. Hall*, 599 F.3d 942, 945 (9th Cir. 2010). *But see* 42 U.S.C. § 1997e(c)(2) (where court concludes claim is frivolous, fails to state a claim, or is brought against defendants who are immune from suit for damages, the court may dismiss without first requiring exhaustion).

"[T]he PLRA exhaustion requirement requires proper exhaustion." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); *see also Sapp v. Kimbrell*, 623 F.3d 813, 821 (9th Cir. 2010); *Harvey v. Jordan*, 605 F.3d 681, 683-84 (9th Cir. 2010). Therefore, "a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court[.]" *Woodford v. Ngo*, 548 U.S. at 88;

*see also* *Sapp*, 623 F.3d at 621-27 (explaining proper exhaustion, and recognizing an exception to the requirement where a prison official renders administrative remedies effectively unavailable); *Harvey*, 605 F.3d at 684-86 (concluding that inmate failed to exhaust administrative remedies for excessive force claim, but that he exhausted remedies for due process claim when officials purported to grant relief that resolved his grievance to his satisfaction); *Ngo v. Woodford*, 539 F.3d 1108, 1109-10 (9th Cir. 2008) (on remand from the Supreme Court, court affirmed dismissal for failure to exhaust administrative remedies and rejected continuing violations theory).

Prisoners are required to exhaust prison administrative procedures regardless of the type of relief sought and the type of relief available through administrative procedures. *See* *Booth*, 532 U.S. at 741; *see also* *Morton*, 599 F.3d at 945 (explaining that an inmate seeking only money damages must still complete a prison administrative process that could provide some relief, although no money, in order to exhaust administrative remedies). The exhaustion requirement applies to all claims relating to prison life that do not implicate the duration of the prisoner's sentence. *See* *Porter v. Nussle*, 534 U.S. 516, 524-32 (2002); *see also* *Roles v. Maddox*, 439 F.3d 1016, 1018 (9th Cir. 2006). A prisoner's participation in an internal investigation of official conduct does not constitute constructive exhaustion of administrative remedies. *See* *Panaro v. City of N. Las Vegas*, 432 F.3d 949, 953-54 (9th Cir. 2005).

Prisoners must exhaust their administrative remedies prior to filing suit, not during the pendency of the suit. *See* *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam) (requiring dismissal without prejudice where a prisoner "d[oes] not exhaust his administrative remedies prior to filing suit but is in the process of doing so when a motion to dismiss is filed."); *see also* *Rhodes v. Robinson*, 621 F.3d 1002, 1006-07 (9th Cir. 2010) (holding that exhaustion requirement is satisfied so long as prisoner exhausted his administrative remedies with respect to new claims asserted in second amended complaint before tendering that complaint for filing); *Vaden v. Summerhill*, 449 F.3d 1047, 1150-51 (9th Cir. 2006) (holding that an action is "brought" for purposes of the PLRA when the complaint is tendered to the district clerk, not when it is subsequently filed pursuant to the grant of a motion to proceed in forma pauperis; thus, a prisoner must exhaust his administrative remedies before sending his complaint to the district court).

The PLRA exhaustion requirement "applies with equal force to prisoners held in private prisons." *Roles*, 439 F.3d at 1017.

The PLRA requires administrative exhaustion of Americans with Disabilities Act ("ADA") and Rehabilitation Act claims. *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1059-62 (9th Cir. 2007); *Butler v. Adams*, 397 F.3d 1181, 1182-83 (9th Cir. 2005). For further discussion of the ADA and Rehabilitation Act in the prison context, see *infra* III.B.6.

Exhaustion is not a jurisdictional requirement for bringing an action. *See Rumbles v. Hill*, 182 F.3d 1064, 1067-68 (9th Cir. 1999), *overruled on other grounds by Booth*, 532 U.S. 731. Moreover, failure to exhaust is an affirmative defense that defendants must raise and prove. *See Jones v. Bock*, 549 U.S. 199, 212-17 (2007) (explaining that inmates are not required to plead specifically or demonstrate exhaustion in their complaints); *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir.) (en banc), *cert. denied sub nom. Scott v. Albino*, 135 S. Ct. 403 (2014); *Nunez v. Duncan*, 591 F.3d 1217, 1223-26 (9th Cir. 2010) (explaining that lack of exhaustion must be raised as a defense, and that failure to exhaust may be excused in certain circumstances). "[A] failure to exhaust is more appropriately handled under the framework of the [Federal Rules of Civil Procedure] than under an "unenumerated" (that is, non-existent) rule." *Albino*, 747 F.3d at 1166 (quotation in the original).

> In the rare event that a failure to exhaust is clear on the face of the complaint, a defendant may move for dismissal under Rule 12(b)(6). Otherwise, defendants must produce evidence proving failure to exhaust in order to carry their burden. If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts.

*Albino*, 747 F.3d at 1166.

An inmate's compliance with the PLRA exhaustion requirement as to some, but not all claims does not warrant dismissal of the entire action. *Jones*, 549 U.S. at 219-24; *Lira v. Herrera*, 427 F.3d 1164, 1175 (9th Cir. 2005) (rejecting a total exhaustion requirement and holding that where a prisoner's complaint contains both exhausted and unexhausted claims, a district court should dismiss only the unexhausted claims). A prisoner may amend her or his complaint to allege only exhausted claims. *See Lira*, 427 F.3d 1175-76 (explaining that where the exhausted and unexhausted claims are closely related and difficult to untangle, the

proper approach is to dismiss the defective complaint with leave to amend to allege only fully exhausted claims); *Bennett v. King*, 293 F.3d 1096, 1098 (9th Cir. 2002).

Civil detainees are not "prisoners" within the meaning of the PLRA and therefore are not subject to the exhaustion requirements. *Page v. Torrey*, 201 F.3d 1136, 1139-40 (9th Cir. 2000); *see also* *Talamantes v. Leyva*, 575 F.3d 1021, 1023-24 (9th Cir. 2009).

"[O]nly those individuals who are prisoners (as defined by 42 U.S.C. § 1997e(h)) at the time they file suit must comply with the exhaustion requirements of 42 U.S.C. § 1997e(a)." *Talamantes*, 575 F.3d at 1024 (concluding that because Talamantes was released from custody over a year before filing his action in federal court, he was not required to exhaust administrative remedies before filing his action).

For further discussion of the PLRA, see *infra* IV.E.

Note that because the PLRA requires exhaustion only of those administrative remedies "as are available," the PLRA does not require exhaustion when circumstances render administrative remedies "effectively unavailable." *See Sapp*, 623 F.3d at 822-23; *Nunez*, 591 F.3d at 1223-26 (holding that Nunez's failure to timely exhaust his administrative remedies was excused because he took reasonable and appropriate steps to exhaust his claim and was precluded from exhausting not through his own fault but by the warden's mistake). "[F]ailure to exhaust a remedy that is effectively unavailable does not bar a claim from being heard in federal court." *McBride v. Lopez*, No. 12-17682, --- F.3d ----, 2015 WL 7434623, at *3-4 (9th Cir. Nov. 24, 2015) (as amended) (holding that "the threat of retaliation for reporting an incident can render the prison grievance process effectively unavailable and thereby excuse a prisoner's failure to exhaust administrative remedies").

### G. Statute of Limitations

#### 1. General Principles

Because § 1983 contains no specific statute of limitations, federal courts should borrow state statutes of limitations for personal injury actions in § 1983 suits. *See* *Wallace v. Kato*, 549 U.S. 384, 387 (2007); *Wilson v. Garcia*, 471 U.S. 261, 276 (1985), *superseded by statute on other grounds as stated in* *Jones v. R.R. Donnelley & Sons, Co.*, 541 U.S. 369 (2004); *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031, 1041 (9th Cir. 2011) ("The statute of limitations

applicable to an action pursuant to 42 U.S.C. § 1983 is the personal injury statute of limitations of the state in which the cause of action arose."); *Douglas v. Noelle*, 567 F.3d 1103, 1109 (9th Cir. 2009); *Lukovsky v. City of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008); *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132-33 (9th Cir. 2007); *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir. 2004); *Sain v. City of Bend*, 309 F.3d 1134, 1139 (9th Cir. 2002); *Johnson v. California*, 207 F.3d 650, 653 (9th Cir. 2000) (per curiam); *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999); *cf.* 28 U.S.C. § 1658 (creating a uniform four-year limitations period for civil actions arising under federal statutes that do not specify a limitations period, so long as the cause of action was created by Congress after December 1, 1990).

Federal courts should also borrow all applicable provisions for tolling the limitations period found in state law. *See* *Wallace*, 549 U.S. at 394; *Hardin v. Straub*, 490 U.S. 536, 539 (1989); *Bd. of Regents v. Tomanio*, 446 U.S. 478, 484-85 (1980); *Douglas*, 567 F.3d at 1109; *Canatella*, 486 F.3d at 1132; *Jones*, 393 F.3d at 927; *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 694 (9th Cir. 2003); *Sain*, 309 F.3d at 1138; *Johnson*, 207 F.3d at 653; *TwoRivers*, 174 F.3d at 992. Also, the "statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process." *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005).

On the other hand, "[f]ederal law determines when a cause of action accrues and the statute of limitations begins to run for a § 1983 claim. A federal claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991) (citations and internal quotation marks omitted); *see also* *Wallace*, 549 U.S. at 388; *Rosales-Martinez v. Palmer*, 753 F.3d 890, 895 (9th Cir. 2014); *Douglas*, 567 F.3d at 1109; *Lukovsky*, 535 F.3d at 1048; *Canatella*, 486 F.3d at 1133; *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 926-27 (9th Cir. 2004); *Johnson*, 207 F.3d at 653; *cf.* *S.J. v. Issaquah Sch. Dist. No. 411*, 470 F.3d 1288, 1289-93 (9th Cir. 2006) (holding that "a federal court borrowing a state's time period for filing suit brought under federal law should not also borrow the state's time limits for serving the complaint"); *Sain*, 309 F.3d at 1138 (holding that a § 1983 action is commenced in federal district court for purposes of the statute of limitations when the complaint is filed pursuant to the Federal Rules of Civil Procedure, not pursuant to state civil procedure rules). In *Rosales-Martinez*, the court held the statute of limitations for a prisoner to bring a § 1983 action commenced when the state court vacated the prisoner's convictions. 753 F.3d at 896 (reversing the district court's dismissal of the action as untimely, because the wrongful

conviction claims did not accrue until his convictions were vacated). *See also* *Jackson v. Barnes*, 749 F.3d 755, 761 (9th Cir. 2014) (Fifth Amendment claim accrued when initial conviction overturned).

Federal courts should apply federal law, not state law, in deciding whether to apply an amended statute of limitations retroactively. *See* *Fink v. Shedler*, 192 F.3d 911, 914-15 (9th Cir. 1999) (explaining that where the state has modified or eliminated the tolling provision relating to the disability of incarceration, the court will apply it retroactively only where manifest injustice would not result); *TwoRivers*, 174 F.3d at 993-96.

**2. States' Personal-Injury Statutes of Limitations**

- Alaska: two years, *see* *DeNardo v. Murphy*, 781 F.2d 1345, 1347 (9th Cir. 1986).

- Arizona: two years, *see* *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir. 2004); *De Luna v. Farris*, 841 F.2d 312, 313 (9th Cir. 1988).

- California: two years, *see* *Jackson v. Barnes*, 749 F.3d 755, 761 (9th Cir. 2014); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 701 n.3 (9th Cir. 2009); *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132-33 (9th Cir. 2007) (explaining that the current version of California's personal-injury statute of limitations, which became effective on January 1, 2003, does not apply retroactively; therefore, "any cause of action that was more than one-year old as of January 1, 2003 would be barred under the previous one-year statute of limitations."); *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004) (same); *see also* *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031, 1041 n.8 (9th Cir. 2011) (applying one year limitations period because the extension of the statute of limitations does not apply to claims under § 1983 already barred).

- Guam: two years, *see* *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1375 (9th Cir. 1988), *aff'd on other grounds by* 495 U.S. 182 (1990).

- Hawaii: two years, *see* Haw. Rev. Stat. § 657-7; *cf.* *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996).

- Idaho: two years, *see* *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 926 (9th Cir. 2004); *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1476 (9th Cir. 1992) (citing Idaho Code § 5-219(4)).

- Montana: three years, *see* *Harvey v. Waldron*, 210 F.3d 1008, 1013 (9th Cir. 2000) (citing Mont. Code Ann. § 27-2-204(1)), *overruled in part on other grounds by* *Wallace v. Kato*, 549 U.S. 384 (2007).

- Nevada: two years, *see* *Rosales-Martinez v. Palmer*, 753 F.3d 890, 895 (9th Cir. 2014); *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989) (per curiam) (citing Nev. Rev. Stat. 11.190(4)(c), (e)).

- Northern Mariana Islands: two years, see 7 N. Mar. I. Code § 2503(d); *see also* *Nw. Airlines, Inc. v. Camacho*, 296 F.3d 787, 789 (9th Cir. 2002).

- Oregon: two years, *see* *Douglas v. Noelle*, 567 F.3d 1103, 1109 (9th Cir. 2009); *Sain v. City of Bend*, 309 F.3d 1134, 1139-40 (9th Cir. 2002); *Cooper v. City of Ashland*, 871 F.2d 104, 105 (9th Cir. 1989) (per curiam).

- Washington: three years, *see* *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991); *Joshua v. Newell*, 871 F.2d 884, 886 (9th Cir. 1989).

### 3. Dismissal

"A statute of limitation defense may be raised by a motion to dismiss if the running of the limitation period is apparent on the face of the complaint." *Vaughan v. Grijalva*, 927 F.2d 476, 479 (9th Cir. 1991); *see also* *Rosales-Martinez v. Palmer*, 753 F.3d 890, 895 (9th Cir. 2014) (district court granted motion to dismiss the action as time-barred); *Estate of Blue v. Cty. of Los Angeles*, 120 F.3d 982, 984 (9th Cir. 1997). Where a defendant has not waived the statute of limitations issue, the district court may dismiss the case on timeliness grounds even if the issue is not raised in the motion before the court. *See* *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686-87 (9th Cir. 1993).

Generally, however, the question of equitable tolling cannot be decided on a motion to dismiss. *See* *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995); *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993).

## H. Attorney's Fees

### 1. Prison Litigation Reform Act (42 U.S.C. § 1997e(d))

The Prison Litigation Reform Act ("PLRA") modified the criteria for awarding attorney's fees in cases brought by prisoners.

The fee awarded must be (1) "directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded" under 42 U.S.C. § 1988; and (2) "proportionately related to the court ordered relief for the violation;" or (3) "directly and reasonably incurred in enforcing the relief ordered for the violation." 42 U.S.C. § 1997e(d)(1). Where the action results in a monetary judgment, a portion of the judgment – not to exceed 25 percent – shall be used to pay attorney's fees. *See id.* § 1997e(d)(2). "If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." *Id*. Finally, "[n]o award of attorney's fees in an action [brought by a prisoner] shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U.S.C. § 3006A]." *Id.* § 1997e(d)(3); *see also Dannenberg v. Valadez*, 338 F.3d 1070, 1073-75 (9th Cir. 2003) (holding that § 1997e(d), limiting defendants' liability for attorney's fees to 150 percent of any monetary judgment, is inapplicable where prisoner secures both monetary and injunctive relief).

The PLRA limits attorney's fees for services performed after the effective date, but not for those performed prior to the effective date. *See Martin v. Hadix*, 527 U.S. 343, 347 (1999); *Webb v. Ada Cty.*, 285 F.3d 829, 837-38 (9th Cir. 2002). For further discussion of these provisions, see *infra* IV.I.

### 2. 42 U.S.C. § 1988

For a discussion of limitations on attorney's fees awards to plaintiffs in prisoner cases, see *supra* I.H.

#### a. General Principles

42 U.S.C. § 1988(b) provides for an award of attorney's fees to prevailing parties if the action is brought under certain enumerated statutes, including § 1983. *See Sole v. Wyner*, 551 U.S. 74, 77 (2007); *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1199 (9th Cir. 2013); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010); *Benton v. Or. Student Assistance Comm'n*, 421 F.3d 901, 904 (9th Cir. 2005); *Thomas v. City of Tacoma*,

410 F.3d 644, 647 (9th Cir. 2005); *Cummings v. Connell*, 402 F.3d 936, 946 (9th Cir. 2005); *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997).

"The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citation and internal quotation marks omitted); *see* *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006); *Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir. 1992).

"Accordingly, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley*, 461 U.S. at 429 (citation and internal quotation marks omitted); *see also* *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989); *Thomas*, 410 F.3d at 647; *Friend v. Kolodzieczak*, 72 F.3d 1386, 1389 (9th Cir. 1995) (order).

**b. Determining when a Plaintiff is a "Prevailing Party"**

"In order to qualify as a prevailing party, a plaintiff must have succeeded on the merits of at least some of its claims." *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1489 (9th Cir. 1995); *see also* *Sole v. Wyner*, 551 U.S. 74, 82 (2007); *Hewitt v. Helms*, 482 U.S. 755, 759-60 (1987); *Cummings v. Connell*, 402 F.3d 936, 946 (9th Cir. 2005). "In short, a plaintiff 'prevails' when actual relief on the merits of [the plaintiff's] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992); *see also* *Sole*, 551 U.S. at 82-83; *Tex. Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989); *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803, 806 (9th Cir.), *amended by* 410 F.3d 531 (9th Cir. 2005) (order); *Friend v. Kolodzieczak*, 72 F.3d 1386, 1389 (9th Cir. 1995) (order). "Success is [also] measured . . . in terms of the significance of the legal issue on which the plaintiff prevailed and the public purpose the litigation served." *Morales v. City of San Rafael*, 96 F.3d 359, 365 (9th Cir. 1996), *amended by* 108 F.3d 981 (9th Cir. 1997) (order); *see also* *McCown v. City of Fontana*, 565 F.3d 1097, 1103 (9th Cir. 2009) (holding "that attorney's fees awarded under 42 U.S.C. § 1988 must be adjusted downward where the plaintiff has obtained limited success on his pleaded claims, and the result does not confer a meaningful public benefit."); *Hashimoto v. Dalton*, 118 F.3d 671, 678 (9th Cir. 1997).

This change of status must be "judicially sanctioned" in the form of a judgment or consent decree; voluntary changes in behavior are insufficient. *See* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532

U.S. 598, 604-05 (2001); *see also* *Watson v. Cty. of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (explaining that a "preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buckhannon*."); *Labotest, Inc. v. Bonta*, 297 F.3d 892, 895 (9th Cir. 2002) (holding that "a plaintiff who obtains a court order incorporating an agreement that includes relief the plaintiff sought in the lawsuit is a prevailing party entitled to attorney's fees under 42 U.S.C. § 1988.").

A plaintiff who wins only nominal damages may be a prevailing party under § 1988. *See* *Farrar*, 506 U.S. at 112; *Guy v. City of San Diego*, 608 F.3d 582, 588 (9th Cir. 2010); *Mahach-Watkins v. Depee*, 593 F.3d 1054, 1059 (9th Cir. 2010), *cert. denied*, 562 U.S. 1134 (2011); *Benton v. Or. Student Assistance Comm'n*, 421 F.3d 901, 904 (9th Cir. 2005); *Cummings*, 402 F.3d at 946; *Friend*, 72 F.3d at 1390 n.1; *Wilcox v. City of Reno*, 42 F.3d 550, 554 (9th Cir. 1994). If the plaintiff sought compensatory damages, and only received nominal damages, however, an attorney's fee award may be inappropriate. *See* *Farrar*, 506 U.S. at 115; *Guy*, 608 F.3d at 588-89; *Mahach-Watkins*, 593 F.3d at 1059; *Benton*, 421 F.3d at 904-06; *Cummings*, 402 F.3d at 946-47; *Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1994); *Wilcox*, 42 F.3d at 554-55.

Where the plaintiff sought primarily injunctive relief, the lack of a monetary judgment does not mean that the plaintiff is not a prevailing party. *See* *Friend*, 72 F.3d at 1390; *see also* *Gerling Global Reinsurance Corp.*, 400 F.3d at 806 (holding that plaintiffs were prevailing parties because they obtained "all of the relief they sought in their lawsuit – a permanent injunction"); *Watson*, 300 F.3d at 1095-96 (explaining that a plaintiff who obtains a preliminary injunction but fails to prevail on his or her other claims is a prevailing party for purposes of § 1988 because relief in the form of a permanent injunction had become moot). However, a plaintiff is not a prevailing party if the "achievement of a preliminary injunction . . . is reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole*, 551 U.S. at 83.

Where a declaratory judgment affects the behavior of the defendant towards the plaintiff, it is sufficient to serve as the basis for an award of fees. *See* *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (per curiam). "[A] favorable judicial statement of law in the course of litigation," however, is insufficient "to render [the plaintiff] a 'prevailing party.'" *Hewitt v. Helms*, 482 U.S. 755, 763 (1987); *see also* *Farrar*, 506 U.S. at 110.

"Litigation that results in an enforceable settlement agreement can confer 'prevailing party' status on a plaintiff." *La Asociacion de Trabajadores de*

*Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010). To determine whether a settlement agreement confers prevailing party status on a plaintiff, the court has "used a three-part test, looking at: '(1) judicial enforcement; (2) material alteration of the legal relationship between the parties; and (3) actual relief on the merits of [the plaintiff's] claims.'" *Id*. (quoting *Saint John's Organic Farm v. Gem Cty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1059 (9th Cir. 2009)).

Where the plaintiff is successful on only some claims, the court must determine whether the successful and unsuccessful claims were related. *See Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1063 (9th Cir. 2006); *Dang v. Cross*, 422 F.3d 800, 812-13 (9th Cir. 2005); *O'Neal v. City of Seattle*, 66 F.3d 1064, 1068 (9th Cir. 1995). If the claims are unrelated, then the fee award should not include time spent on unsuccessful claims; if the claims are related, "then the court must . . . [determine] the 'significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended.'" *O'Neal*, 66 F.3d at 1068-69 (citations omitted); *see also Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003). "Claims are related where they involve 'a common core of facts' or are 'based on related legal theories.' '[T]he test is whether relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury upon which the relief granted is premised.'" *O'Neal*, 66 F.3d at 1069 (quoting *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1499 (9th Cir. 1995)); *see also Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005); *Webb*, 330 F.3d at 1168-69.

**c. Determining the Amount of the Fee Award**

> The customary method of determining fees . . . is known as the lodestar method. . . . The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate. After making that computation, the district court then assesses whether it is necessary to adjust the presumptively reasonable lodestar figure on the basis of the *Kerr* [*v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)] factors.

*Morales v. City of San Rafael*, 96 F.3d 359, 363-64 (9th Cir. 1996) (internal citation omitted), *amended by* 108 F.3d 981 (9th Cir. 1997); *see also Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013); *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008); *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006); *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1064 (9th Cir. 2006); *Dang v. Cross*, 422 F.3d 800, 812

(9th Cir. 2005); *Friend v. Kolodzieczak*, 72 F.3d 1386, 1389 (9th Cir. 1995) (order); *Stewart v. Gates*, 987 F.2d 1450, 1452 (9th Cir. 1993). There is a strong presumption in favor of the lodestar and it should be adjusted only in exceptional cases. *See* *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Tutor-Saliba Corp.*, 452 F.3d at 1064-65; *Morales*, 96 F.3d at 364 n.8.

The court should consider the following factors when making the lodestar determination:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

*Morales*, 96 F.3d at 364 n.8 (citing *Kerr*, 526 F.2d at 70); *see also* *Gonzalez*, 729 F.3d at 1209 n.11; *Ballen*, 466 F.3d at 746; *Benton v. Or. Student Assistance Comm'n*, 421 F.3d 901, 904-05 (9th Cir. 2005); *Friend*, 72 F.3d at 1389; *McGrath v. Cty. of Nevada*, 67 F.3d 248, 252 n.4 (9th Cir. 1994); *McGinnis v. Kentucky Fried Chicken of Cal.*, 51 F.3d 805, 809 (9th Cir. 1994) (stating no rote recitation of the factors is necessary). The district court should exclude hours from the fee request that represent work that was "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. The district court may also reduce the lodestar amount in light of the limited success of the plaintiff. *See* *Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Hensley*, 461 U.S. at 434-37; *Benton*, 421 F.3d at 905 (explaining that nominal damages cases are exempted from the general requirements that govern the calculation of attorney's fees); *Dannenberg v. Valadez*, 338 F.3d 1070, 1075 (9th Cir. 2003); *Friend*, 72 F.3d at 1389; *Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1995).

"The 'reasonable hourly rate' must be determined by reference to the prevailing market rates in the relevant legal community." *Stewart*, 987 F.2d at 1453 (citing *Blum*, 465 U.S. at 895); *see also* *Carson v. Billings Police Dep't*, 470 F.3d 889, 891-92 (9th Cir. 2006); *Bell v. Clackamas Cty.*, 341 F.3d 858, 868-69 (9th Cir. 2003); *Barjon v. Dalton*, 132 F.3d 496, 500-02 (9th Cir. 1997).

The party seeking the award bears the burden for documenting the hours spent in preparing the case in a form that will enable the district court to make the relevant determinations. *See* *Carson*, 470 F.3d at 891-92; *Stewart*, 987 F.2d at 1452-53. "Where the documentation of the hours is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433.

The district court must provide some explanation for the amount of attorney's fees it is awarding. *See* *Hensley*, 461 U.S. at 437; *Moreno*, 534 F.3d at 1111-16; *Tutor-Saliba Corp.*, 452 F.3d at 1065; *Cummings v. Connell*, 402 F.3d 936, 947 (9th Cir. 2005); *McGrath*, 67 F.3d at 253-55.

**d. Awarding Attorney's Fees to Defendants**

"Attorneys' fees in civil rights cases should only be awarded to a defendant in exceptional circumstances." *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990); *see also* *Manufactured Home Cmtys. Inc. v. City of San Jose*, 420 F.3d 1022, 1036 (9th Cir. 2005); *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 202 (9th Cir. 1989). "The mere fact that a defendant prevails does not automatically support an award of fees. A prevailing civil rights defendant should be awarded attorney's fees not routinely, not simply because [the defendant] succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless, or vexatious." *Patton v. Cty. of Kings*, 857 F.2d 1379, 1381 (9th Cir. 1988) (citations and internal quotation marks omitted); *see also* *Kentucky v. Graham*, 473 U.S. 159, 165 n.9 (1985); *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983); *Fabbrini v. City of Dunsmuir*, 631 F.3d 1299, 1302 (9th Cir. 2011); *Harris v. Maricopa Cty. Superior Court*, 631 F.3d 963, 971-72 (9th Cir. 2011); *Edgerly v. City & Cty. of San Francisco*, 599 F.3d 946, 962 (9th Cir. 2010); *Gibson v. Office of Att'y Gen., Cal.*, 561 F.3d 920, 929 (9th Cir. 2009); *Galen v. Cty. of Los Angeles*, 477 F.3d 652, 666 (9th Cir. 2007); *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1060 (9th Cir. 2006); *Manufactured Home Cmtys. Inc.*, 420 F.3d at 1036; *Thomas v. City of Tacoma*, 410 F.3d 644, 647-48 (9th Cir. 2005); *Branson v. Nott*, 62 F.3d 287, 292 (9th Cir. 1995); *Maag v. Wessler*, 993 F.2d 718, 719 (9th Cir. 1993). "[A] defendant bears the burden of establishing that the fees for which it is asking are in fact incurred solely by virtue of the need to defend against those frivolous claims." *Harris*, 631 F.3d at 971.

The rule against awarding defendants attorney's fees applies with special force where the plaintiffs are pro se litigants. *See* *Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (stating rule for pro se prisoners); *Miller v. L.A. Cty. Bd. of Educ.*, 827 F.2d 617, 620 (9th Cir. 1987).

"Where a claim is dismissed for lack of subject matter jurisdiction, the defendant is not a prevailing party within the meaning of § 1988, and the district court accordingly lacks jurisdiction to award attorneys' fees." *Elwood v. Drescher*, 456 F. 3d 943, 948 (9th Cir. 2006) (concluding that the district court lacked jurisdiction to award attorneys' fees where dismissal was based on the *Rooker-Feldman* doctrine and the *Younger* abstention doctrine); *see also* *Miles v. California*, 320 F.3d 986, 988 (9th Cir. 2003); *Branson*, 62 F.3d at 292-93.

#### e. Awarding Attorney's Fees to Pro Se Litigants

Pro se litigants are not entitled to an award of attorney's fees under § 1988. *See* *Friedman v. Arizona*, 912 F.2d 328, 333 n.2 (9th Cir. 1990); *Gonzalez v. Kangas*, 814 F.2d 1411, 1412 (9th Cir. 1987); *cf.* *Kay v. Ehrler*, 499 U.S. 432, 438 (1991) (no award to attorneys representing themselves); *Elwood v. Drescher*, 456 F.3d 943, 946-48 (9th Cir. 2006) (pro se attorney-defendant).

#### f. Immunity and Fee Awards

Attorney's fees, under § 1988, are not available "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless such action was clearly in excess of such officer's jurisdiction." 42 U.S.C. § 1988(b).

#### g. Other Work Entitling Attorney to Fees

"Work performed on a motion for fees under § 1988(b) is compensable." *McGrath v. Cty. of Nevada*, 67 F.3d 248, 253 (9th Cir. 1995); *see also* *Harris v. Maricopa Cty. Superior Court*, 631 F.3d 963, 979 (9th Cir. 2011).

Work performed after the judgment which is "'useful' and of a type 'ordinarily necessary' to secure the litigation's final result" is compensable. *Stewart v. Gates*, 987 F.2d 1450, 1452 (9th Cir. 1993) (citation omitted).

A "delay in payment [of fees awarded under § 1988] occasioned by appeal is redressable solely by an award of interest [pursuant to 28 U.S.C. § 1961]." *Corder v. Brown*, 25 F.3d 833, 838 (9th Cir. 1994).

### 3. Equal Access to Justice Act (28 U.S.C. § 2412)

"28 U.S.C. § 2412(d)(1)(A) provides that a court shall, in a civil proceeding brought against the United States, award fees and other expenses to the prevailing party 'unless the court finds that the position of the United States was substantially

justified or that special circumstances make an award unjust.'" *United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996); *see also* *Le v. Astrue*, 529 F.3d 1200, 1201 (9th Cir. 2008); *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005); *United States v. Marolf*, 277 F.3d 1156, 1160-61 (9th Cir. 2002); *Rueda-Menicucci v. INS*, 132 F.3d 493, 494-95 (9th Cir. 1997) (per curiam); *Meinhold v. U.S. Dep't of Def.*, 123 F.3d 1275, 1277 (9th Cir.), *amended by* 131 F.3d 842 (9th Cir. 1997) (order); *Blaylock Elec. v. NLRB*, 121 F.3d 1230, 1233 (9th Cir. 1997).

"The party seeking fees has the burden of establishing its eligibility." *Love v. Reilly*, 924 F.2d 1492, 1494 (9th Cir. 1991). The government has the burden of proving that its position was substantially justified. *See* *Scarborough v. Principi*, 541 U.S. 401, 414-16 (2004); *Meinhold*, 123 F.3d at 1277; *Rubin*, 97 F.3d at 375; *Flores v. Shalala*, 49 F.3d 562, 569 (9th Cir. 1995); *Love*, 924 F.2d at 1495.

The government's position is substantially justified if it has a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see also* *Comm'r v. Jean*, 496 U.S. 154, 158 n.6 (1990); *Le*, 529 F.3d at 1201; *Free Speech Coal.*, 408 F.3d at 618; *Marolf*, 277 F.3d at 1161; *Meinhold*, 123 F.3d at 1277; *Sampson v. Chater*, 103 F.3d 918, 921 (9th Cir. 1996); *Or. Nat. Res. Council v. Madigan*, 980 F.2d 1330, 1331 (9th Cir. 1992). The government's position includes both action giving rise to the litigation and the position taken during litigation. *See* *Marolf*, 277 F.3d at 1161; *Meinhold*, 123 F.3d at 1278 (citing *Or. Nat. Res.*, 980 F.2d at 1331).

The fee should not exceed $125 per hour unless special circumstances exist. *See* 28 U.S.C. § 2412(d)(2)(A). These circumstances include special expertise of counsel, difficulty in obtaining competent counsel, and increases in the cost of living. *See id.*; *Pierce*, 487 U.S. at 571-72; *Rueda-Menicucci*, 132 F.3d at 496; *Love*, 924 F.2d at 1496; *see also* *Nat. Res. Def. Council v. Winter*, 543 F.3d 1152, 1158-62 (9th Cir. 2008).

Pro se litigants are not entitled to fees under the statute, but they are entitled to expenses. *See* *Merrell v. J.R. Block*, 809 F.2d 639, 642 (9th Cir. 1987).

**I. Costs**

Costs may be awarded to the prevailing party under Fed. R. Civ. P. 54(d). *See* *Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1997). Costs may also be awarded as a sanction for discovery abuses under Fed. R. Civ. P. 37. *See* *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1482 (9th Cir. 1992).

The following may be included in an award of costs:

> (1) [f]ees of the clerk and marshal; (2) [f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) [f]ees and disbursements for printing and witnesses; (4) [f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) [d]ocket fees under [28 U.S.C. § 1923]; (6) [c]ompensation of court appointed experts, compensation of interpreters, and salaries,fees, expenses and costs of special interpretation services under [28 U.S.C. § 1828].

28 U.S.C. § 1920.

Pro se litigants are entitled "to recover . . . actual costs reasonably incurred to the extent that an attorney could have received these costs under a [§] 1988 attorney's fees award." *Burt v. Hennessey*, 929 F.2d 457, 459 (9th Cir. 1991).

In forma pauperis litigants can be ordered to pay the costs of the opposing party. *See* *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994) (per curiam).

For a discussion of disciplinary measures the court may take against pro se, in forma pauperis litigants, see *infra* II.C.

### J. Relationship to Habeas Corpus Proceedings

"[W]hen a state prisoner is challenging the very fact or duration of [the prisoner's] physical imprisonment, and the relief [the prisoner] seeks is a determination that [the prisoner] is entitled to immediate release or a speedier release from that imprisonment, [the prisoner's] sole remedy is a writ of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (holding that an injunctive relief action to restore the revocation of good-time credits is not cognizable under § 1983); *see also* *Skinner v. Switzer*, 562 U.S. 521, 525 (2011); *Simpson v. Thomas*, 528 F.3d 685, 692-93 (9th Cir. 2008); *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir. 2003); *Bogovich v. Sandoval*, 189 F.3d 999, 1002-03 (9th Cir. 1999) (applying rule to ADA claim); *Neal v. Shimoda*, 131 F.3d 818, 824 (9th Cir. 1997); *Trimble v. City of Santa Rosa*, 49 F.3d 583, 586 (9th Cir. 1995) (per curiam). "Where the prisoner's claim would not 'necessarily spell speedier release,' however, suit may be brought under § 1983." *Skinner*, 562 U.S. at 525 (citation omitted) (holding that a postconviction claim for DNA testing is properly pursued in a § 1983 action).

Moreover, where a § 1983 action seeking damages alleges constitutional violations that would necessarily imply the invalidity of the conviction or sentence, the prisoner must establish that the underlying sentence or conviction has been invalidated on appeal, by a habeas petition, or through some similar proceeding. *See Heck v. Humphrey*, 512 U.S. 477, 483-87 (1994). The Supreme Court later clarified that *Heck*'s principle (also known as the "favorable termination" rule) applies regardless of the form of remedy sought, if the § 1983 action implicates the validity of an underlying conviction or a prison disciplinary sanction. *See Edwards v. Balisok*, 520 U.S. 641, 646-48 (1997) (holding that a claim for monetary and declaratory relief challenging the validity of procedures used to deprive a prisoner of good-time credits is not cognizable under § 1983); *see also Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) (explaining that "a state prisoner's § 1983 action is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – if success in that action would necessarily demonstrate the invalidity of confinement or its duration."); *Whitaker v. Garcetti*, 486 F.3d 572, 583-85 (9th Cir. 2007) (explaining that the "sole dispositive question is whether a plaintiff's claim, if successful, would imply the invalidity of [the plaintiff's] conviction.").

Accordingly, where the § 1983 action would necessarily imply the invalidity of the conviction or sentence, it may not proceed. *See Balisok*, 520 U.S. at 646-48 (concluding that § 1983 claim was not cognizable because allegation of procedural defect – a biased hearing officer – would result in an automatic reversal of the prison disciplinary sanction); *Heck*, 512 U.S. at 483-87 *(*concluding that § 1983 claim was not cognizable because allegations were akin to malicious prosecution claim which includes as an element that the criminal proceeding was concluded in plaintiff's favor); *Szajer v. City of Los Angeles*, 632 F.3d 607, 611-12 (9th Cir. 2011) (concluding that Fourth Amendment unlawful search claim was not cognizable because a finding that there was no probable cause for the search would necessarily imply the invalidity of plaintiffs' conviction for felony possession of a pistol); *McQuillon v. Schwarzenegger*, 369 F.3d 1091, 1097-99 (9th Cir. 2004) (concluding that § 1983 claims were not cognizable because they relied on "'deceit and bias' on the part of the [parole] decisionmakers, and impl[ied] the invalidity of [the prisoners'] confinement insofar as [the prisoners'] prolonged incarcerations [we]re due to the purported bias of state officials."); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (per curiam) (concluding that claims for false arrest and false imprisonment were not cognizable because a finding that there was no probable cause to arrest plaintiff for disturbing the peace would necessarily imply that plaintiff's conviction for disturbing the peace was invalid);

*Butterfield v. Bail*, 120 F.3d 1023, 1024-25 (9th Cir. 1997) (concluding that § 1983 claim was not cognizable because allegations of procedural defects were clearly an attempt to challenge substantive result in parole hearing); *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997) (affirming dismissal without prejudice of claims relating to disciplinary proceedings where good-time credits were involved); *Trimble*, 49 F.3d at 585 (concluding that § 1983 claims similar to those in *Heck* are not cognizable); *see also* *Muhammad v. Close*, 540 U.S. 749, 754-55 (2004) (per curiam).

Conversely, where the § 1983 action would not necessarily imply the invalidity of the conviction or sentence, it may proceed. *See* *Heck*, 512 U.S. at 482-83; *see also* *Skinner*, 562 U.S. at 533 (determining that success in prisoner's suit for DNA testing would not necessarily imply the invalidity of his conviction, and thus the § 1983 action could proceed); *Wilkinson*, 544 U.S. at 82 (concluding that § 1983 claims were cognizable because granting declaratory and injunctive relief that would render invalid state procedures used to deny parole eligibility and suitability would "[not] necessarily spell speedier release[s]"); *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974); *Weilburg v. Shapiro*, 488 F.3d 1202, 1206-07 (9th Cir. 2007) (concluding that *Heck* does not bar a § 1983 action for violation of extradition rights because such allegations, if proven, would not invalidate plaintiff's incarceration); *Hooper v. Cty. of San Diego*, 629 F.3d 1127, 1132-33 (9th Cir. 2011) (holding that success in § 1983 claim that excessive force was used during arrest would not imply the invalidity of conviction under Cal. Penal Code § 148(a)(1)); *Ramirez*, 334 F.3d at 858 (holding that "the favorable termination rule does not apply to § 1983 suits challenging a disciplinary hearing or administrative sanction that does not affect the overall length of the prisoner's confinement."); *Ove v. Gwinn*, 264 F.3d 817, 823 (9th Cir. 2001) (concluding that civil rights claim regarding manner of obtaining evidence not barred when evidence not introduced to obtain conviction); *Neal*, 131 F.3d at 824 (concluding that § 1983 claim was cognizable because challenge was to conditions for parole eligibility, not to any particular parole determination); *Woratzeck v. Ariz. Bd. of Exec. Clemency*, 117 F.3d 400, 402-03 (9th Cir. 1997) (per curiam) (concluding that § 1983 claim was cognizable because allegations of procedural defects in clemency hearing do not affect the validity of the underlying criminal conviction); *see also* *Hill v. McDonough*, 547 U.S. 573, 580 (2006) (concluding that § 1983 claim was cognizable because challenge to particular method of lethal injection would not prevent state from implementing the sentence; consequently, the suit as presented was not a challenge to the fact of the sentence itself); *Nelson v. Campbell*, 541 U.S. 637, 644-47 (2004) (same).

For example, the prisoner may bring claims for excessive force. *See Hooper*, 629 F.3d at 1132-33 (explaining that § 1983 claim that excessive force was used during arrest would not necessarily imply or demonstrate the invalidity of the conviction); *Guerrero v. Gates*, 442 F.3d 697, 703 (9th Cir. 2006) (explaining that § 1983 claim was cognizable because allegations of excessive force do not affect validity of the criminal conviction); *Smith v. City of Hemet*, 394 F.3d 689, 695-99 (9th Cir. 2005) (en banc); *Sanford v. Motts*, 258 F.3d 1117, 1120 (9th Cir. 2001); *compare Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) (per curiam) (holding that *Heck* did not bar plaintiff's excessive force claim because even though plaintiff had been convicted of assaulting his arresting officers, the officers' alleged excessive force took place after he had been arrested, and thus did not necessarily invalidate his conviction), *with Cunningham v. Gates*, 312 F.3d 1148, 1154-55 (9th Cir. 2002) (holding that *Heck* barred plaintiff's excessive force claim because the jury, in convicting plaintiff of felony-murder, necessarily found that he had intentionally provoked the deadly police response, and therefore a finding of excessive force on the part of the police would have invalidated his conviction). *Heck* is not an evidentiary doctrine and may not be used to bar evidence in a § 1983 claim for excessive force. *See Simpson*, 528 F.3d at 691-96.

Where the complaint states a habeas claim instead of a § 1983 claim, the court should dismiss the claim without prejudice, rather than converting it to a habeas petition and addressing it on the merits. *See Balisok*, 520 U.S. at 649; *Heck*, 512 U.S. at 487; *Blueford*, 108 F.3d at 255; *Trimble*, 49 F.3d at 586. Where the complaint alleges claims that sound in habeas and claims that do not, the court should allow the non-habeas claims to proceed. *See Ybarra v. Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 681-82 (9th Cir. 1984).

*Heck* is only triggered once a person has been convicted. *See Wallace v. Kato*, 549 U.S. 384, 393 (2007).

*Heck* applies to civil detainees under California's Sexually Violent Predators Act. *See Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139-40 (9th Cir. 2005) (explaining that, unlike the exhaustion requirement of the PLRA which does not apply to civil detainees, the habeas statute is not textually limited to prisoners).

The fact that a prisoner's sentence has run is irrelevant to the application of this doctrine. *See Heck*, 512 U.S. at 490 n.10; *see also Guerrero*, 442 F.3d at 704-05; *Cunningham*, 312 F.3d at 1153 n.3. *But see Spencer v. Kemna*, 523 U.S. 1 (1998) (five votes – four concurring and one in dissent – for the opposite proposition); *Nonnette v. Small*, 316 F.3d 872, 876-77 (9th Cir. 2002) (concluding that a § 1983 action for damages can be maintained, even though success in that

action would imply the invalidity of the disciplinary proceedings that caused revocation of a prisoner's good-time credits, where, after the district court had dismissed the action under *Heck*, the prisoner was released from incarceration and on parole).

### K. *Bivens* Actions

"*Bivens* [*v. Six Unknown Named Agents of Federal Bureau of Narcotics* , 403 U.S. 388 (1971)] established that compensable injury to a constitutionally protected interest [by federal officials] could be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts[.]" *Butz v. Economou*, 438 U.S. 478, 486 (1978); *see also* *Wilkie v. Robbins*, 551 U.S. 537, 549-50 (2007); *Carlson v. Green*, 446 U.S. 14, 18 (1980); *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1119 (9th Cir. 2009) (discussing *Bivens*); *cf.* *Hui v. Castaneda*, 559 U.S. 799, 807-11 (2010) (even where a *Bivens* remedy is generally available, an action under *Bivens* will be defeated if defendant is immune from suit).

"[A] *Bivens* action will not lie when Congress has created 'comprehensive procedural and substantive provisions giving meaningful remedies against the United States.'" *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 564 (9th Cir. 1994) (quoting *Bush v. Lucas*, 362 U.S. 367, 368 (1983)); *see also* *Wilkie*, 551 U.S. at 550-54; *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *Carlson*, 446 U.S. at 18-19; *W. Radio Servs. Co.*, 578 F.3d at 1120; *Adams v. Johnson*, 355 F.3d 1179, 1183-84 (9th Cir. 2004); *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003); *Walleri v. Fed. Home Loan Bank of Seattle*, 83 F.3d 1575, 1583 (9th Cir. 1996).

Moreover, a *Bivens* action will not lie against the United States, agencies of the United States, or federal agents in their official capacity. *See* *FDIC v. Meyer*, 510 U.S. 471, 486 (1994); *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007); *Morgan v. United States*, 323 F.3d 776, 780 n.3 (9th Cir. 2003); *Vaccaro v. Dobre*, 81 F.3d 854, 857 (9th Cir. 1996); *Cato v. United States*, 70 F.3d 1103, 1110 (9th Cir. 1995); *see also* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (declining to extend *Bivens* to confer a right of action for damages against a private corporation operating prison facilities under contract with the federal Bureau of Prisons).

"Actions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*." *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991) (borrowing state personal-injury

statute of limitations for *Bivens* action); *see also* *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006); *cf.* *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996) (order) (applying rule of *Heck v. Humphrey*, 512 U.S. 477 (1994) to *Bivens* action)); *Alexander v. Perrill*, 916 F.2d 1392, 1396 (9th Cir. 1990) (stating that failure to perform a duty creates liability under both § 1983 and *Bivens*); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989) (stating that immunities are analyzed the same under § 1983 and *Bivens*).

In *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012), the Court held that a prisoner at a private federal facility could not assert an Eighth Amendment *Bivens* claim for damages against private prison employees where state law authorized adequate alternative damages actions, reversing the Ninth Circuit's decision in *Pollard v. The Geo Grp., Inc.*, 607 F.3d 584 (concluding that a federal prisoner could recover for violations of his constitutional rights by *employees* of private corporations operating federal prisons), *amended by* 629 F.3d 843, 852-68 (9th Cir. 2010).

## II. PROCEDURAL ISSUES CONCERNING PRO SE COMPLAINTS

This section summarizes the rules for processing prisoner pro se complaints. This section also discusses how the Prison Litigation Reform Act (the "PLRA") has changed those rules. For further discussion of the PLRA, see *infra* IV.

### A. General Considerations

#### 1. Pleadings

##### a. Liberal Construction

"The Supreme Court has instructed the federal courts to liberally construe the inartful pleading of pro se litigants. It is settled that the allegations of [a pro se litigant's complaint] however inartfully pleaded are held to less stringent standards than formal pleadings drafted by lawyers." *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987) (citation and internal quotation marks omitted; brackets in original); *see also* *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011); *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010); *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010); *Woods v. Carey*, 525 F.3d 886, 889-90 (9th Cir. 2008); *Johnson v. California*, 207 F.3d 650, 653 (9th Cir. 2000) (per curiam); *Frost v. Symington*, 197 F.3d 348, 352 (9th Cir. 1999).

The rule of liberal construction is "particularly important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992); *see also* *Johnson*, 207 F.3d at 653.

The rule, however, "applies only to a plaintiff's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 330 n.9 (1989). "'[A] liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled.'" *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)); *see also* *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (per curiam).

##### b. Exceptions

###### (1) Heightened Pleading Requirements

"Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." *Ivey v. Bd. of*

*Regents*, 673 F.2d 266, 268 (9th Cir. 1982); *see also* *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997); *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (per curiam).

Where a plaintiff alleges a private party conspired with state officers, the complaint must contain more than conclusory allegations. *See* *Simmons v. Sacramento Cty. Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (conclusory allegations insufficient to consider a private party a state actor for purposes of § 1983); *Price v. Hawaii*, 939 F.2d 702, 707-09 (9th Cir. 1991) (same); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1979) (per curiam). For further discussion, see *supra* I.A.2.b.(5).

In *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167 (1993), the Supreme Court left open the question whether the Court's "qualified immunity jurisprudence would require a heightened pleading standard in cases involving individual government officials." After *Leatherman*, the Supreme Court concluded that a heightened pleading standard does not apply to constitutional claims brought against individual defendants in which improper motive is a necessary element. *See* *Crawford-El v. Britton*, 523 U.S. 574, 594-97 (1998); *see also* *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-15 (2002) (declining to impose a heightened pleading standard in employment discrimination case, explaining that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions [such as actions brought under Rule 9(b)].").

The Ninth Circuit has also held that a heightened pleading standard does not apply to constitutional claims brought against individual defendants in which improper motive is a necessary element. *See* *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1123-26 (9th Cir. 2002) (overruling *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994) ("*Branch II*"), *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) ("*Branch I*"), and their progeny because they imposed a heightened pleading standard); *see also* *Empress LLC v. City of San Francisco*, 419 F.3d 1052, 1055-56 (9th Cir. 2005) (explaining that "the logical conclusion of *Leatherman*, *Crawford-El*, and *Swierkiewicz* dictates that a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require."); *Miranda v. Clark Cty., Nev.*, 319 F.3d 465, 470 (9th Cir. 2003) (en banc) (same).

There is also no heightened pleading standard with respect to the "policy or custom" requirement of demonstrating municipal liability. *See* *Leatherman*, 507 U.S. at 167-68; *see also* *Empress LLC*, 419 F.3d at 1055; *Galbraith*, 307 F.3d at 1124; *Lee v. City of Los Angeles*, 250 F.3d 668, 679-80 (9th Cir. 2001); *Evans v. McKay*, 869 F.2d 1341, 1349 (9th Cir. 1989). "In th[e Ninth C]ircuit, a claim of

municipal liability under [§] 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.'" *Karim-Panahi v. L.A. Police Dep't.*, 839 F.2d 621, 624 (9th Cir. 1988) (quoting *Shah v. Cty. of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986)); *see also* *Evans*, 869 F.2d at 1349; *Shaw v. Cal. Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 610 (9th Cir. 1986) ("[I]t is enough if the custom or policy can be inferred from the allegations of the complaint."). *But see* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

For a discussion of the heightened pleading requirement with respect to the "policy or custom" requirement for establishing municipal liability, see *supra* I.A.1.c.(2)(d); for a discussion of the heightened pleading requirement with respect to qualified immunity defenses, see *supra* I.D.2.b.

#### (2) Procedural Rules

Although the court must construe pleadings liberally, "[p]ro se litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), *overruled on other grounds by* *Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012); *see also* *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (per curiam); *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) (per curiam).

The courts, however, have "a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *see also* *Solis v. Cty. of Los Angeles*, 514 F.3d 946, 957 n.12 (9th Cir. 2008) (construing demand for jury trial in motion for counsel as a continuing demand even though not in a separate filing because plaintiff was pro se); *Waters v. Young*, 100 F.3d 1437, 1441 (9th Cir. 1996); *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984).

### 2. Time Limits

"'[S]trict time limits . . . ought not to be insisted upon' where restraints resulting from a pro se prisoner plaintiff's incarceration prevent timely compliance

with court deadlines." *Eldridge v. Block*, 832 F.2d 1132, 1136 (9th Cir. 1987) (quoting *Tarantino v. Eggers*, 380 F.2d 465, 468 (9th Cir. 1967)); *see also* *McGuckin v. Smith*, 974 F.2d 1050, 1058 (9th Cir. 1992), *overruled on other grounds by* *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997).

With respect to the timeliness of a notice of appeal filed by a prisoner pro se litigant, the notice is deemed filed on the date the prisoner "delivered the notice to prison authorities for forwarding to the [d]istrict [c]ourt." *Houston v. Lack*, 487 U.S. 266, 270 (1988); *see also* *Douglas v. Noelle*, 567 F.3d 1103, 1106 (9th Cir. 2009); *Jenkins v. Johnson*, 330 F.3d 1146, 1149 n.2 (9th Cir. 2003), *overruled on other grounds by* *Pace v. DiGuglielmo*, 544 U.S. 408 (2005); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); *Koch v. Ricketts*, 68 F.3d 1191, 1192 (9th Cir. 1995). Fed. R. App. P. 4(c) codifies the *Houston v. Lack* rule as it applies to notices of appeal. *See* *Koch*, 68 F.3d at 1193. The *Houston v. Lack* rule has been applied to pleadings in addition to notices of appeal. *See* *Douglas*, 567 F.3d at 1106-07; *James v. Madison St. Jail*, 122 F.3d 27, 28 (9th Cir. 1997) (per curiam) (applying rule to filing of trust account statements as required by 28 U.S.C. § 1915(a)(2)); *Schroeder v. McDonald*, 55 F.3d 454, 459 (9th Cir. 1995) (applying rule to filing of motion for reconsideration); *Caldwell v. Amend*, 30 F.3d 1199, 1201 (9th Cir. 1994) (applying rule to deadline for filing a motion under Fed. R. Civ. P. 50(b)); *Faile v. Upjohn Co.*, 988 F.2d 985, 988 (9th Cir. 1993) (applying rule to timely completion of service), *disapproved on other grounds by* *McDowell v. Calderon*, 197 F.3d 1253 (9th Cir. 1999). *But see* *Nigro v. Sullivan*, 40 F.3d 990, 994-95 (9th Cir. 1994) (refusing to apply rule to deadlines for administrative remedies applicable to federal prisons).

The Ninth Circuit has held that the *Houston v. Lack* rule applies whenever the prisoner has utilized an internal prison mail system and the record allows the court to determine the date on which the filing was turned over to prison authorities. *See* *Caldwell*, 30 F.3d at 1202; *see also* *Douglas*, 567 F.3d at 1108-09. "When a pro se prisoner alleges that he [or she] timely complied with a procedural deadline by submitting a document to prison authorities, the district court must either accept that allegation as correct or make a factual finding to the contrary upon a sufficient evidentiary showing by the opposing party." *See* *Faile*, 988 F.2d at 989. Where the prisoner submits an affidavit as to the date the documents were submitted to prison authorities, the burden "shifts to the opposing party . . . [to] produc[e] evidence in support of a contrary factual finding." *Caldwell*, 30 F.3d at 1203; *see* *Koch*, 68 F.3d at 1194; *see also* Fed. R. App. P. 4(c) (stating that a "[t]imely filing may be shown by a declaration in compliance with 28 U.S.C.

§ 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.”).

### 3. Representing Others

Pro se litigants have no authority to represent anyone other than themselves. *See* *Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664 (9th Cir. 2008) (non-attorney plaintiff may not attempt to pursue claim on behalf of others in a representative capacity); *Johns v. Cty. of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997) (parent or guardian cannot bring suit on behalf of minor child); *Cato v. United States*, 70 F.3d 1103, 1105 n.1 (9th Cir. 1995) (non-attorney party may not represent other plaintiffs); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987) (trustee cannot represent trust); *McShane v. United States*, 366 F.2d 286, 288 (9th Cir. 1966) (non-attorney party may not represent other plaintiffs).

### 4. Competency Hearings

Fed. R. Civ. P. 17(c) states that “[t]he court must appoint a guardian ad litem – or issue another appropriate order – to protect a minor or incompetent person who is unrepresented in an action.”

Where there is a substantial question regarding the mental competence of a party proceeding pro se, the court should conduct a hearing to determine whether a guardian or attorney should be appointed under Rule 17(c). *See* *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989); *see also* *Allen v. Calderon*, 408 F.3d 1150, 1153-54 (9th Cir. 2005) (holding that dismissal of inmate’s habeas petition for failure to prosecute without first conducting a competency hearing was an abuse of discretion, and explaining that counsel could be appointed for limited purpose of representing petitioner at competency hearing). If the litigant refuses to participate in the hearing, the district court may dismiss the case or may appoint an attorney to assist the litigant. *See* *Krain*, 880 F.2d at 1121.

### 5. Presence at Hearings

A pro se prisoner who is currently incarcerated has no right to appear at hearings. *See* *Hernandez v. Whiting*, 881 F.2d 768, 770 (9th Cir 1989); *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir. 1986); *see also* 42 U.S.C. § 1997e(f)(1) (requiring, to the extent practicable, that a prisoner’s participation be secured through telecommunications technology instead of through extraction from the prison).

## B. Processing and Resolving Cases

### 1. Applications for In Forma Pauperis Status

"[C]ourt permission to proceed in forma pauperis is itself a matter of privilege and not right." *Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984); *see also* *Andrews v. King*, 398 F.3d 1113, 1123 (9th Cir. 2005); *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir. 1965). The Ninth Circuit reviews for abuse of discretion a district court's denial of in forma pauperis status. *See* *O'Loughlin v. Doe*, 920 F.2d 614, 617 (9th Cir. 1990). *See also* *Escobedo v. Applebees*, 787 F.3d 1226, 1236 (9th Cir. 2015) (abuse of discretion to consider spouse's income without making specific findings about litigant's access to income).

#### a. Application Requirements (28 U.S.C. § 1915(a))

A person may be granted permission to proceed in forma pauperis if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1).

Prisoners seeking in forma pauperis status must also "submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined." 28 U.S.C. § 1915(a)(2).

#### b. Evaluation of Application

"'[T]he supporting affidavits [must] state the facts as to affiant's poverty with some particularity, definiteness, and certainty.'" *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (per curiam) (citing *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). "An affidavit in support of an IFP application is sufficient where it alleges that the affiant cannot pay the court costs and still afford the necessities of life." *Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th Cir. 2015). The litigant need not "be absolutely destitute to enjoy the benefit of the statute." *Adkins v. E.I. du Pont De Nemours & Co.*, 335 U.S. 331, 339 (1948). "[W]here the affidavits are written in the language of the statute it would seem that they should ordinarily be accepted, for trial purposes, particularly where unquestioned and where the judge does not perceive a flagrant misrepresentation."

*Id.* If, however, the district court determines that the allegation of poverty is false, the case should be dismissed. *See* 28 U.S.C. § 1915(e)(2)(A).

Although the Ninth Circuit has stated that the decision to grant or deny in forma pauperis status should be "based on the plaintiff's financial resources alone" with a later independent determination as to whether the complaint should be dismissed as frivolous, *see* *Franklin v. Murphy*, 745 F.2d 1221, 1226 n.5 (9th Cir. 1984); *Brown v. Schneckloth*, 421 F.2d 1402, 1403 (9th Cir. 1970) (per curiam); *Stiltner v. Rhay*, 322 F.2d 314, 317 (9th Cir. 1963), the Prison Litigation Reform Act permits the district court to make the frivolousness determination before granting in forma pauperis status, *see* 28 U.S.C. § 1915A; *see also* *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990); *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir. 1987); *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir. 1965); *Reece v. Washington*, 310 F.2d 139, 140 (9th Cir. 1962) (per curiam). For a discussion of this provision, see *infra* II.B.2, and IV.B.

#### c. Payment of Fee (28 U.S.C. § 1915(b)-(c))

A prisoner proceeding in forma pauperis is "required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1).

> The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of – (A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

*Id.* After paying the initial partial filing fee, the prisoner is required to make "monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid." 28 U.S.C. § 1915(b)(2); *see also* *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) ("[P]risoners proceeding [in forma pauperis] must pay the filing fee as funds become available in their prison accounts.").

"In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." *Id.* § 1915(b)(4); *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002).

These provisions have been upheld in light of constitutional challenge. *See* *Taylor*, 281 F.3d at 849-50.

For further discussion of these provisions, see *infra* IV.B.

#### d. Prior Litigation History (28 U.S.C. § 1915(g))

The PLRA provides:

> [No prisoner shall] bring a civil action or appeal a judgment in a civil action or proceeding [in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

When counting strikes, the Ninth Circuit includes qualifying dismissals entered prior to the enactment of the PLRA. *See* *Tierney v. Kupers*, 128 F.3d 1310, 1311-12 (9th Cir. 1997). Both qualifying actions and appeals should be counted as strikes. *See* *Rodriguez v. Cook*, 169 F.3d 1176, 1178 (9th Cir. 1999). Prior dismissals "qualify as strikes only if, after reviewing the orders dismissing those actions and other relevant information, the district court determine[s] that they had been dismissed because they were frivolous, malicious or failed to state a claim." *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (remanding to the district court to determine on what basis the prior cases were dismissed).

The Ninth Circuit has upheld this provision against a number of constitutional challenges. *See* *Andrews*, 398 F.3d at 1123; *Rodriguez*, 169 F.3d at 1178-82; *Tierney*, 128 F.3d at 1311-12.

For further discussion of this provision, see *infra* IV.D.

#### e. Accompanying Rights

##### (1) Service of Process (28 U.S.C. § 1915(d))

> [A]n incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for service of the summons and complaint, and, having provided the necessary information to help

> effectuate service, plaintiff should not be penalized by having his or her action dismissed for failure to effect service where the U.S. Marshal or the court clerk has failed to perform the duties required of each of them under 28 U.S.C. § 1915[(d)] and [Fed. R. Civ. P. 4(c)(3)].

*Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990); *see also* 28 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3); *Terrell v. Brewer*, 935 F.2d 1015, 1018 n.4 (9th Cir. 1991).

For this rule to apply, the prisoner must (1) "request that the marshal serve [the] complaint," *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991), and (2) "furnish[ ] the information necessary to identify the defendant," *Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). Where the prisoner has met these conditions, the reliance on the marshals to effect service is "good cause" within the meaning of Fed. R. Civ. P. 4(m). *See Walker*, 14 F.3d at 1422.

**(2) Appointment of Counsel (28 U.S.C. § 1915(e)(1))**

"The court may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). Federal courts do not, however, have the authority "to make coercive appointments of counsel." *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 310 (1989); *see also United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995) (forfeiture proceedings).

"The court may appoint counsel . . . only under 'exceptional circumstances.'" *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (*Bivens* action); *see also Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (§ 1983 action); *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004) (*Bivens* action); *Burns v. Cty. of King*, 883 F.2d 819, 824 (9th Cir. 1989) (per curiam) (§ 1983 action); *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984) (§ 1983 action). "A finding of exceptional circumstances requires an evaluation of both the likelihood of success on the merits and the ability of the petitioner to articulate his claims pro se in light of the complexity of the issues involved. Neither of these factors is dispositive and both must be viewed together before reaching a decision." *Terrell*, 935 F.2d at 1017 (citing *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (§ 1983 action)); *see also Palmer*, 560 F.3d at 970; *$292,888.04 in U.S. Currency*, 54 F.3d at 569; *Wood v. Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990) (§ 1983 claims). Appointment of counsel may

be justified when proceedings will go forward "more efficiently and effectively." *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) (per curiam).

The Ninth Circuit reviews for abuse of discretion a district court's decision whether to appoint counsel under § 1915. *See Palmer*, 560 F.3d at 970 (concluding no abuse of discretion in denying request for appointment of counsel); *Terrell*, 935 F.2d at 1017. It is an abuse of discretion to grant defendant's motion to dismiss or motion for summary judgment prior to ruling on plaintiff's motion for appointment of counsel. *See Miles v. Dep't of Army*, 881 F.2d 777, 784 (9th Cir. 1989) (dismissal); *McElyea v. Babbitt*, 833 F.2d 196, 199 (9th Cir. 1987) (summary judgment). Where, however, the motion to dismiss is based on failure to prosecute the action, it may be decided prior to ruling on the motion to appoint counsel because counsel cannot correct the error. *See Johnson v. U.S. Dep't of Treasury*, 939 F.2d 820, 824-25 (9th Cir. 1991).

### 2. Screening of Complaints (28 U.S.C. § 1915A)

"The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). "On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint – (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." *Id.* § 1915A(b). For further discussion of this provision, see *infra* IV.C.

### 3. Frivolousness (28 U.S.C. § 1915(e)(2)(B)(i))

#### a. Sua Sponte Dismissal

The Prison Litigation Reform Act (the "PLRA") states that "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that the action or appeal is frivolous or malicious." 28 U.S.C. § 1915(e)(2)(B)(i); *see also* 28 U.S.C. § 1915A(b)(1); 42 U.S.C. § 1997e(c)(1).

The Ninth Circuit has concluded that this provision applies to all appeals pending on or after the enactment of the PLRA. *See Anderson v. Angelone*, 123 F.3d 1197, 1199 (9th Cir. 1997); *Marks v. Solcum*, 98 F.3d 494, 495 (9th Cir. 1996) (per curiam). This provision is "not limited to prisoners." *See Calhoun v.*

*Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam). For further discussion of this provision, see *infra* IV.C.

**b. Standard**

"[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact. . . . [The] term 'frivolous,' when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996) (order) (prisoner *Bivens* action); *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (non-prisoner § 1983 action); *Lopez v. Dep't of Health Servs.*, 939 F.2d 881, 882 (9th Cir. 1991) (per curiam) (prisoner § 1983 action).

Where "there is no controlling authority requiring a holding that the facts as alleged fail to establish even an arguable claim as a matter of law," the complaint cannot be dismissed as legally frivolous. *Guti v. INS*, 908 F.2d 495, 496 (9th Cir. 1990) (per curiam) (citing *Pratt v. Sumner*, 807 F.2d 817, 820 (9th Cir. 1987)); *see also* *Iasu v. Smith*, 511 F.3d 881, 892 (9th Cir. 2007).

When determining whether a complaint is frivolous, the court need not accept the allegations as true, but must "pierce the veil of the complaint's factual allegations," *Neitzke*, 490 U.S. at 327, to determine whether they are "'fanciful,' 'fantastic,' [or] 'delusional,'" *Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (quoting *Neitzke*, 490 U.S. at 328). A complaint may not, however, be dismissed as frivolous merely because the allegations are unlikely. *See* *Denton*, 504 U.S. at 33.

A complaint may be dismissed as frivolous where a defense is obvious on the face of the complaint, but the court may not anticipate defenses. *See* *Franklin v. Murphy*, 745 F.2d 1221, 1228-29 (9th Cir. 1984).

A complaint may be dismissed as frivolous if it "merely repeats pending or previously litigated claims." *Cato*, 70 F.3d at 1105 n.2 (citations and internal quotation marks omitted).

**c. Leave to Amend**

In the Ninth Circuit, "[p]ro se plaintiffs proceeding [in forma pauperis] must . . . be given an opportunity to amend their complaint [prior to dismissal] unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Franklin v. Murphy*, 745 F.2d 1221, 1228 n.9 (9th Cir. 1984)

(citation and internal quotation marks omitted); *see also* *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995); *Rizzo v. Dawson*, 778 F.2d 527, 529-30 (9th Cir. 1985); *cf.* *Denton v. Hernandez*, 504 U.S. 25, 34 (1992) (suggesting that if the complaint's deficiencies could be remedied by amendment, then it may be abuse of discretion to dismiss complaint without granting leave to amend). The plaintiff must also be given some notice of the complaint's deficiencies prior to dismissal. *See* *Cato*, 70 F.3d at 1106; *cf.* *Denton*, 504 U.S. at 34 (declining to address the Ninth Circuit's notice and leave-to-amend rule for frivolous complaints).

For further discussion of the leave-to-amend doctrine with respect to dismissals for failure to state a claim, see *infra* II.B.4.d.

#### d. Review on Appeal

The appellate court reviews for abuse of discretion a lower court's dismissal of a complaint as frivolous. *See* *Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (prisoner § 1983 action); *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996) (order) (prisoner *Bivens* action); *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (non-prisoner § 1983 action); *Trimble v. City of Santa Rosa*, 49 F.3d 583, 584 (9th Cir. 1995) (per curiam) (prisoner § 1983 action).

### 4. Failure to State a Claim (28 U.S.C. § 1915(e)(2)(B)(ii))

#### a. Sua Sponte Dismissal

The PLRA states that "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that the action or appeal fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii); *see also* 28 U.S.C. § 1915A(b)(1); 42 U.S.C. § 1997e(c)(1); *cf.* Fed. R. Civ. P. 12(b)(6) (defendant may raise as a defense plaintiff's "failure to state a claim"). The Ninth Circuit has concluded that this provision applies to all appeals pending on or after the enactment of the PLRA. *See* *Anderson v. Angelone*, 123 F.3d 1197, 1199 (9th Cir. 1997); *Marks v. Solcum*, 98 F.3d 494, 495-96 (9th Cir. 1996) (per curiam); *see also* *Franklin v. Oregon*, 662 F.2d 1337, 1340-41 (9th Cir. 1981) (discussing procedural requirements for sua sponte dismissal for failure to state a claim). This provision is "not limited to prisoners." *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam). For further discussion of the meaning of the provision, see *infra* IV.C.

### b. Standard

"In determining whether a complaint states a claim, all allegations of material fact are taken as true and construed in the light most favorable to the plaintiff." *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam); *see also* *Estelle v. Gamble*, 429 U.S. 97, 99 (1976). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). In *Twombly*, the Supreme Court held that the standard for stating a claim does not require the appearance, beyond a doubt, that "no set of facts" would entitle the plaintiff to relief. 550 U.S. at 561-63. (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957), and adopting "plausibility" standard). The Court further explained in *Twombly* and *Iqbal* that conclusory statements that merely recite the elements of a claim are insufficient for the purpose of 12(b)(6). *See* *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do).

### c. Materials to be Considered

When resolving a motion to dismiss for failure to state a claim, a district court may not consider materials outside the complaint and the pleadings. *See* *Gumataotao v. Dir. of Dep't of Revenue & Taxation*, 236 F.3d 1077, 1083 (9th Cir. 2001); *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1998).

The court may, however, consider materials properly submitted as part of the complaint, *see Gumataotao*, 236 F.3d at 1083; *Cooper*, 137 F.3d at 622-23, as well as "document[s] the authenticity of which [are] not contested, and upon which the plaintiff's complaint necessarily relies," even if they are not attached to the complaint, *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds as recognized in* *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006); *see also* *Dunn v. Castro*, 621 F.3d 1196, 1204 n.6 (9th Cir. 2010); *Dent v. Cox Commc'ns Las Vegas, Inc.*, 502 F.3d 1141, 1143 (9th Cir. 2007); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

The court may also review "materials of which the court may take judicial notice." *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994); *see also United States v. 14.02 Acres of Land More or Less in Fresno Cty.*, 547 F.3d 943, 955 (9th Cir. 2008); *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007); *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995); *Gemtel Corp. v. Cmty. Redevelopment Agency*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994). This includes "[r]ecords and reports of administrative bodies," *Barron*, 13 F.3d at 1377, but appears not to include prison regulations, *see Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

For discussion of how consideration of matters outside the pleadings converts a motion to dismiss into a motion for summary judgment, see *infra* II.B.5.e.

#### d. Leave to Amend

"Unless it is absolutely clear that no amendment can cure the defect . . . , a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action." *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam); *see also Lopez v. Smith*, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc); *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) ("[B]efore dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." (citation and internal quotation marks omitted)); *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1196 (9th Cir. 1998); *McGuckin v. Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997); *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623-24 (9th Cir. 1988); *Eldridge v. Block*, 832 F.2d 1132, 1135-36 (9th Cir. 1987).

"While [the] statement of deficiencies need not provide great detail or require district courts to act as legal advisors to pro se plaintiffs, district courts must at least draft a few sentences explaining the [complaint's] deficiencies." *Eldridge*, 832 F.2d at 1136; *see also Karim-Panahi*, 839 F.2d at 625.

#### e. Effect of Amendment

The court held in *Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012), that "[f]or claims dismissed with prejudice and without leave to amend, [it is] not require[d] that they be repled in a subsequent amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, … those claims [will be

considered] to be waived if not repled." *Id*. (overruling prior cases that held a plaintiff waives all claims alleged in a dismissed complaint which are not repled in an amended complaint).

#### f. Review on Appeal

The Ninth Circuit reviews de novo the district court's dismissal of a complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *See Fayer v. Vaughn*, 649 F.3d 1061 (9th Cir. 2011) (per curiam) (arrestee § 1983 claim); *Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011) (prisoner §1983 claim); *Nelson v. Heiss*, 271 F.3d 891, 893 (9th Cir. 2001) (prisoner § 1983 claim); *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001) (non-prisoner § 1983 claim); *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam) (prisoner § 1983 claim). The Ninth Circuit also reviews de novo the district court's dismissal of a complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). *See Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order). The same standard is applied to dismissals for failure to state a claim under 28 U.S.C. § 1915A. *See Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).

### 5. Summary Judgment (Fed. R. Civ. P. 56)

#### a. Sua Sponte Entry of Summary Judgment

The district court may sua sponte enter summary judgment if the parties are given notice of the district court's intention to do so and are given an opportunity to develop a factual record. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); *Oluwa v. Gomez*, 133 F.3d 1237, 1238-39 (9th Cir. 1998); *O'Keefe v. Van Boening*, 82 F.3d 322, 324 (9th Cir. 1996); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 971-73 (9th Cir. 2010) (en banc) (recognizing that district court has authority to enter summary judgment sua sponte, but concluding that district court erred by granting summary judgment sua sponte without providing adequate notice and opportunity to be heard, and without ruling on evidentiary objections).

For the general rule concerning notice that must be provided to pro se prisoner litigants prior to entry of summary judgment, see *infra* II.B.5.c.

#### b. Standard

When considering a motion for summary judgment, the district court's role is not to weigh the evidence, but merely to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *May*

*v. Baldwin*, 109 F.3d 557, 560 (9th Cir. 1997). Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the party opposing the motion, the court determines that there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Vander v. U.S. Dep't of Justice*, 268 F.3d 661, 663 (9th Cir. 2001); *Morrison v. Hall*, 261 F.3d 896, 900 (9th Cir. 2001); *May*, 109 F.3d at 560; *Tellis v. Godinez*, 5 F.3d 1314, 1316 (9th Cir. 1993).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also Anderson*, 477 U.S. at 256; *Avalos v. Baca*, 596 F.3d 583, 587 (9th Cir. 2010); *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

"A party opposing a properly supported motion for summary judgment must set forth specific facts showing that there is a genuine issue for trial." *Harper*, 877 F.2d at 731. To establish the existence of a genuine issue of material fact, the non-moving party must make an adequate showing as to each element of the claim on which the non-moving party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 322-23; *see also Barnett v. Centoni*, 31 F.3d 813, 815 (9th Cir. 1994) (per curiam); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Harper*, 877 F.2d at 731. The opposing party may not rest on conclusory allegations or mere assertions, *see Taylor*, 880 F.2d at 1045; *Leer v. Murphy*, 844 F.2d 628, 631 (9th Cir. 1988); *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986), but must come forward with significant probative evidence, *see Anderson*, 477 U.S. at 249-50; *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989); *Franklin v. Murphy*, 745 F.2d 1221, 1235 (9th Cir. 1984). The evidence set forth by the non-moving party must be sufficient, taking the record as a whole, to allow a rational jury to find for the non-moving party. *See Ricci v. DeStefano*, 557 U.S. 557, 586 (2009); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Taylor*, 880 F.2d at 1045. Where "the factual context renders [the nonmoving party's] claim implausible . . . , [that party] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary" to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *see also Tanner v. Heise*, 879 F.2d 572, 577 (9th Cir. 1989); *Harper*, 877 F.2d at 731.

The materiality of facts is determined by looking to the substantive law that defines the elements of the claim. *See Anderson*, 477 U.S. at 248; *Nidds v.*

*Schindler Elevator Corp.*, 113 F.3d 912, 916 (9th Cir. 1996); *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987).

#### c. Informing Pro Se Litigants about Summary Judgment Requirements

Prisoner litigants proceeding pro se must be informed of the requirements of Fed. R. Civ. P. 56 and the consequences for failing to meet those requirements prior to granting summary judgment. *See Rand v. Rowland*, 154 F.3d 952, 955-56 (9th Cir. 1998) (en banc); *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988). Either the district court or the summary judgment movant can provide the notice. *See Rand*, 154 F.3d at 959-60. In addition to providing this warning when there is a pending summary judgment motion, pro se litigants must be provided with additional notice of their obligations when any procedural event "undermine[s] th[e] earlier notice." *Wyatt v. Terhune*, 315 F.3d 1108, 1115 (9th Cir. 2003), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014), *cert. denied sub nom. Scott v. Albino*, 135 S. Ct. 403 (2014); *see also Marella v. Terhune*, 568 F.3d 1024, 1028 (9th Cir. 2009) (per curiam) (concluding second *Rand* notice was required following order requesting supplemental briefing). In *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012), the court held "that *Rand* and *Wyatt* notices must be served concurrently with motions to dismiss and motions for summary judgment so that pro se prisoner plaintiffs will have fair, timely and adequate notice of what is required of them in order to oppose those motions."

The Ninth Circuit has published a model notice which will meet this requirement. *See Rand*, 154 F.3d at 962-63.[1] The notice must, however, be

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[1] **NOTICE – WARNING**

***This Notice is Required to be Given to You by The Court***

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact – that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary

tailored to the precise procedural circumstances of the at-issue litigation. *See Wyatt*, 315 F.3d at 1114-15, *overruled on other grounds by Albino*, 747 F.3d 1162.

This notice must (1) "be phrased in ordinary, understandable language calculated to apprise an unsophisticated prisoner of his or her rights and obligations under Rule 56," *Rand*, 154 F.3d at 960; (2) inform the prisoner "of his or her right to file counter-affidavits or other responsive evidentiary materials," *id.*; (3) alert the prisoner that failure to provide affidavits or evidence may result in the entry of summary judgment, *see id.* at 960-61; (4) explain that entry of summary judgment will result in the termination of the case, *see id.* at 960; and (5) include a statement of any special requirements imposed by local rules, *see id.* at 961. In addition, when the notice is provided by the summary judgment movant instead of the district court, the notice must (1) be in a document filed separately from "the summary judgment motion or . . . the papers ordinarily filed in support of the motion," *id.* at 960; and (2) "indicate that [the notice] is required to be given by the court," *id.* at 961. *See also Solis v. Cty. of Los Angeles*, 514 F.3d 946, 952 (9th Cir. 2008). For further discussion of the contents of the notice, *see Anderson v. Angelone*, 86 F.3d 932, 935 (9th Cir. 1996).

Although recognizing that such circumstances would only be present in "unusual" cases, the Ninth Circuit has stated that it would not reverse a grant of

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judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e),* that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

[Local Rule ____ of the District Court also requires, in addition, that you include as a part of your opposition to a motion for summary judgment _____.]

* Note that in 2010 Rule 56 was amended and subdivision (c)(4) now carries forward some of the provisions of former subdivision (e). Fed. R. Civ. P. 56 advisory committee's note (2010).

summary judgment due to failure to provide this notice where failure to do so was harmless error. *See* *Rand*, 154 F.3d at 961-62; *see also* *Solis*, 514 F.3d at 953. For example, "judicial notice by the district court of its own records . . . may disclose that the plaintiff had recently been served with [the required] notice in prior litigation" or "an objective examination of the record [by the appellate court] may disclose that the pro se prisoner litigant has a complete understanding of Rule 56's requirements gained from some other source." *Rand*, 154 F.3d at 961-62.

The obligation to provide this notice does not extend to non-prisoner pro se litigants. *See* *Jacobsen v. Filler*, 790 F.2d 1362, 1364-67 (9th Cir. 1986).

**d. Materials Submitted in Opposition to Summary Judgment Motion**

The court should "treat the opposing party's papers more indulgently than the moving party's papers." *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985) (citing *Doff v. Brunswick Corp.*, 372 F.2d 801, 804 (9th Cir. 1966)).

"A verified complaint may be treated as an affidavit to oppose summary judgment to the extent it is 'based on personal knowledge' and 'sets forth specific facts admissible in evidence.'" *Keenan v. Hall*, 83 F.3d 1083, 1090 n.1 (9th Cir. 1996) (quoting *McElyea v. Babbitt*, 833 F.2d 196, 197-98 & n.1 (9th Cir. 1987) (per curiam)), *amended by* 135 F.3d 1318 (9th Cir. 1998) (order); *see also* *Jones v. Blanas*, 393 F.3d 918, 922-23 (9th Cir. 2004); *Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc); *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir. 1998) (applying rule to a verified motion); *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995); *Lew*, 754 F.2d at 1423. Where the plaintiff states that the facts in the complaint are true under the pains and penalties of perjury, *see* *Schroeder*, 55 F.3d at 460 n.10, or avers that they are "true and correct," *Johnson*, 134 F.3d at 1399, the pleading is "verified."

Relying on a prior version of Rule 56, this court has held that "unauthenticated documents cannot be considered on a motion for summary judgment. In order to be considered by the court, documents must be authenticated by and attached to an affidavit that meets the requirements of [Fed. R. Civ. P.] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (citation and internal quotation marks omitted); *see also* *Bias v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550-51 (9th Cir. 1990). *But see* *Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003) (court may consider

hearsay statements in support of summary judgment if contents could be presented in admissible form at trial).

Note that in 2010 Rule 56 was amended. The amended subdivision (c)(4) carries forward some of the provisions of former subdivision (e), however, other provisions were omitted. "The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration [was] omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record." Fed. R. Civ. P. 56 advisory committee's note (2010). Additionally, "A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit." Fed. R. Civ. P. 56 advisory committee's note (2010).

### e. Conversion of Motion to Dismiss

If, when reviewing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the district court considers matters outside the pleadings, then the motion is converted to a motion for summary judgment. *See Friedman v. Boucher*, 580 F.3d 847, 852 n.3 (9th Cir. 2009); *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996); *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985); *Garaux v. Pulley*, 739 F.2d 437, 438 (9th Cir. 1984). For discussion of materials that can be considered part of the pleadings, see *supra* II.B.4.c.

Upon such conversion, the parties must be notified and given a reasonable opportunity to present evidence. *See Anderson*, 86 F.3d at 934-35; *see also Lucas*, 66 F.3d at 248; *Grove*, 753 F.2d at 1532-33; *Garaux*, 739 F.2d at 438. Where the non-moving party is a pro se prisoner, the party must receive the same information about summary judgment the party would receive upon the filing of a formal summary judgment motion. *See Anderson*, 86 F.3d at 935; *see also Lucas*, 66 F.3d at 248; *Garaux*, 739 F.2d at 439-40. For a discussion of this notice, see *supra* II.B.5.c. Where the non-moving party is represented by counsel, notice of conversion need not be formal if the record demonstrates the party was "fairly apprised" of the conversion. *Grove*, 753 F.2d at 1532-33 (citation and internal quotation marks omitted); *see Garaux*, 739 F.2d at 439 (citation omitted).

### f. Requests for Additional Discovery Prior to Summary Judgment (Fed. R. Civ. P. 56(d))[2]

Generally, summary judgment should not be granted before the completion of discovery. *See* *Harris v. Duty Free Shoppers Ltd. P'ship*, 940 F.2d 1272, 1276 (9th Cir. 1991); *Klingele v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988).

Note that due to amendments to Rule 56 in 2010, the provisions of former subdivision (f) are now provided for in subdivision (d).

The non-moving party may seek a continuance of decision on the summary judgment motion in order to conduct additional discovery. *See* Fed. R. Civ. P. 56(d). To obtain additional discovery, the non-moving party must submit "affidavits setting forth the particular facts expected from the movant's discovery. . . . Under Rule 56(f), an opposing party must make clear what information is sought and how it would preclude summary judgment." *Barona Grp. of the Capitan Grande Band of Mission Indians v. Am. Mgmt. & Amusement, Inc.*, 840 F.2d 1394, 1400 (9th Cir. 1987) (citation and internal quotation marks omitted) (relying on former subdivision (f)) ; *see also* *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) (former subdivision (f)); *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991). The party seeking additional discovery must also make a Rule 56(d) motion; "'[r]eferences in memoranda and declarations to a need for discovery do not qualify.'" *Barona Grp.*, 840 F.2d at 1400 (quoting *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986)); *see also* *Campbell*, 138 F.3d at 779; *Fuller v. Frank*, 916 F.2d 558, 563 (9th Cir. 1990) (former subdivision (f)); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 277 (9th Cir. 1988).

The district court may deny the request for additional discovery where the party has not pursued prior discovery opportunities diligently, *see* *Byrd v. Guess*, 137 F.3d 1126, 1135 (9th Cir. 1998), *superseded by statute on other grounds as recognized in* *Moreland v. Las Vegas Metropolitan Police Dep't*, 159 F.3d 365 (9th Cir. 1998); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 920 (9th Cir. 1997), or where the request is not relevant to the issues presented on the motion for summary judgment, *see* *Self Directed Placement Corp. v. Control Data Corp.*, 908

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[2] "Subdivision (d) carries forward without substantial change the provisions of former subdivision (f)." Fed. R. Civ. P. 56 advisory committee's note (2010).

F.2d 462, 465 (9th Cir. 1990); *City of Springfield v. Wash. Pub. Power Supply Sys.*, 752 F.2d 1423, 1427 (9th Cir. 1985).

#### g. Local Rules Concerning Summary Judgment

"A district court may not grant a motion for summary judgment simply because the nonmoving party does not file opposing material, even if the failure to oppose violates a local rule. However, when the local rule does not require, but merely permits the court to grant a motion for summary judgment, the district court has discretion to determine whether noncompliance should be deemed consent to the motion." *Brydges v. Lewis*, 18 F.3d 651, 652 (9th Cir. 1994) (per curiam) (citation omitted); *see also* *Henry v. Gill Indus.*, 983 F.2d 943, 949-50 (9th Cir. 1993); *cf.* *Cristobal v. Siegel*, 26 F.3d 1488, 1493 (9th Cir. 1994) (concluding that district court abused its discretion by following mandatory local rule). Even in this situation, however, the district court must review the moving party's submission to determine whether it establishes the absence of a genuine issue; failure to do so is an abuse of discretion. *See* *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003); *Evans v. Indep. Order of Foresters*, 141 F.3d 931, 932 (9th Cir. 1998) (order); *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995); *Henry*, 983 F.2d at 950.

#### h. Review on Appeal

The Ninth Circuit reviews de novo a district court's grant of summary judgment. *See* *Ward v. Ryan*, 623 F.3d 807, 810 (9th Cir. 2010) (prisoner § 1983 action); *Morrison v. Hall*, 261 F.3d 896, 900 (9th Cir. 2001) (prisoner § 1983 action); *Picray v. Sealock*, 138 F.3d 767, 770 (9th Cir. 1998) (non-prisoner § 1983 action); *Barnett v. Centoni*, 31 F.3d 813, 815 (9th Cir. 1994) (per curiam) (prisoner § 1983 action).

### 6. Other Kinds of Dismissal

#### a. Subject-matter Jurisdiction

Generally, a dismissal for lack of subject-matter jurisdiction should be without prejudice. *See* *Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam); *Lou v. Belzberg*, 834 F.2d 730, 734-35 (9th Cir. 1987). Where there is no way to cure the jurisdictional defect, however, dismissal with prejudice is proper. *See* *Frigard*, 862 F.2d at 204 (lack of subject-matter jurisdiction based on defendant's sovereign immunity).

### b. Personal Jurisdiction

Dismissal for lack of personal jurisdiction should be without prejudice. *See* *Grigsby v. CMI Corp.*, 765 F.2d 1369, 1372 n.5 (9th Cir. 1985).

### c. Service of Process (Fed. R. Civ. P. 4(m))[3]

"[A]n action against a defendant shall be dismissed without prejudice if that defendant is not served with a copy of the summons and complaint within 120 days after the filing of the complaint, unless the plaintiff can show good cause why service was not made within the 120 day period." *Townsel v. Cty. of Contra Costa, Cal.*, 820 F.2d 319, 320 (9th Cir. 1987); *see also* Fed. R. Civ. P. 4(m); *De Tie v. Orange Cty.*, 152 F.3d 1109, 1111 (9th Cir. 1998); *Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir. 1992), *overruled on other grounds by* *Saucier v. Katz*, 533 U.S. 194 (2001), *overruled in part on other grounds by* *Pearson v. Callahan*, 555 U.S. 223 (2009); *Fimbres v. United States*, 833 F.2d 138, 139 (9th Cir. 1987).

Good cause "applies only in limited circumstances." *Hamilton*, 981 F.2d at 1065. Neither ignorance of the rule, nor negligence by the party is good cause. *See id.*; *McGuckin v. Smith*, 974 F.2d 1050, 1058 (9th Cir. 1992) (finding good cause), *overruled on other grounds by* *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997); *Townsel*, 820 F.2d at 320; *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985) (per curiam). Good cause "must apply [with] considerable leeway" to pro se litigants, especially if incarcerated. *McGuckin*, 974 F.2d at 1058.

It is irrelevant to the good cause determination that dismissal of the claim for failure to serve in a timely fashion may result in the loss of the cause of action because a statute of limitations has run. *See* *Townsel*, 820 F.2d at 320-21.

The district court may grant an extension of time for service of process in absence of showing good cause for delay. *See* *Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007). "District courts have broad discretion to extend time for service under Rule 4(m)." *Id.* at 1041. In determining whether to extend the time for service, the district court may consider factors such as "a statute of limitations

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[3] The current Fed. R. Civ. P. 4(m) was previously designated as Rule 4(j). Note that, effective December 1, 2015, the time limit specified by Fed. R. Civ. P. 4 (m) has been changed from 120 days to 90 days.

bar, prejudice to the defendant, actual notice of a lawsuit, and eventual service." *Id*. (citation and internal quotation marks omitted).

#### d. Short and Plain Statement (Fed. R. Civ. P. 8(a))

"The Federal Rules require that averments be simple, concise and direct." *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996) (internal quotation marks omitted).

A complaint that fails to comply with Rule 8 may be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b). *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 673 (9th Cir. 1981); *cf. Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1130-33 (9th Cir. 2008) (concluding complaint did not violate Rule 8(a) even though it was lengthy).

"All that is required [by Fed. R. Civ. P. 8(a)] is that the complaint gives 'the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.'" *Kimes v. Stone*, 84 F.3d 1121, 1129 (9th Cir. 1996) (quoting *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 870 (9th Cir. 1991)); *see also Alvarez v. Hill*, 518 F.3d 1152, 1157-59 (9th Cir. 2008) (concluding pro se inmate's complaint was sufficient to state a claim under RLUIPA even though he did not cite the statute); *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980).

*See also Skinner v. Switzer*, 532 U.S. 521, 529-30 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (discussing the requirements of Rule 8(a)); *Cook v. Brewer*, 649 F.3d 915, 916-18 (9th Cir. 2011) (per curiam) (concluding that Cook's allegations failed to state a facially plausible claim upon reviewing the sufficiency of Cook's claims under Rule 8(a)); *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys. Inc.*, 637 F.3d 1047, 1058-59 (9th Cir. 2011) (no abuse of discretion in denying leave to amend qui tam complaint that failed to comply with Rule 8(a)).

#### e. Voluntary Dismissal (Fed. R. Civ. P. 41(a))

Prior to the filing of an answer or a motion for summary judgment, the plaintiff may, without order of the court, dismiss the action without prejudice. *See* Fed. R. Civ. P. 41(a)(1); *United States v. Real Property Located at 475 Martin Lane, Beverly Hills, CA*, 545 F.3d 1134, 1145 (9th Cir. 2008); *see also Commercial Space Mgmt. Co. v. Boeing Co.*, 193 F.3d 1074, 1076 (9th Cir. 1999)

(holding voluntary dismissal of second action containing same claims is with prejudice); *cf.* *Concha v. London*, 62 F.3d 1493, 1506 (9th Cir. 1995) (discussing distinction between Rule 41(a)(1) and Rule 41(a)(2)).

"Federal Rule of Civil Procedure 41(a)(2) allows a plaintiff, pursuant to an order of the court, and subject to any terms and conditions the court deems proper, to dismiss an action without prejudice at any time. When ruling on a motion to dismiss without prejudice, the district court must determine whether the defendant will suffer some plain legal prejudice as a result of the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996) (citations omitted); *see also* *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 748 (9th Cir. 2008); *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001); *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1399-1400 (9th Cir. 1995); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994); *Stevedoring Servs. of Am. v. Armilla Int'l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989); *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982).

"[L]egal prejudice is just that – prejudice to some legal interest, some legal claim, some legal argument." *Westlands*, 100 F.3d at 97. The expense of having defended the lawsuit is not legal prejudice. *See id.*; *Hamilton*, 679 F.2d at 146; *cf.* *Hyde & Drath*, 24 F.3d at 1169 (stating that the fact that trial preparations had begun is not legal prejudice). The possibility of a second lawsuit is also not legal prejudice. *See* *Smith*, 263 F.3d at 976; *Westlands*, 100 F.3d at 97; *Hyde & Drath*, 24 F.3d at 1169; *Mechmetals Corp. v. Telex Computer Prods., Inc.*, 709 F.2d 1287, 1294 (9th Cir. 1983); *Hamilton*, 679 F.2d at 145; *cf.* *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 217 (1947) (discussing that party could dismiss under Rule 41(a)(2) instead of losing a directed verdict motion).

As a term or condition of dismissal, a district court may, but is not required to, award attorney's fees and costs to the defendant. *See* *Westlands*, 100 F.3d at 97; *Stevedoring Servs.*, 889 F.2d at 921. If the district court does award such fees and costs, they should not be awarded for work that can be used in future litigation. *See* *Westlands*, 100 F.3d at 97; *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993); *cf.* *In re Lowenschuss*, 67 F.3d at 1401 (noting that any prejudice from dismissal was lessened because work could be used in another action).

#### f. Involuntary Dismissal (Fed. R. Civ. P. 41(b))

"If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision . . . operates

as an adjudication on the merits." Fed. R. Civ. P. 41(b). Upon dismissal for failure to prosecute, the party may not challenge any interlocutory orders entered by the district court. *See* *Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir. 1996); *Ash v. Cvetkov*, 739 F.2d 493, 497-98 (9th Cir. 1984); *cf.* *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996) (stating that where the complaint has been dismissed properly under Fed. R. Civ. P. 8, the court need not look at other alleged problems with dismissal).

"[D]ismissal is a harsh penalty and, therefore, it should only be imposed in extreme circumstances." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992); *see also* *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1132 (9th Cir. 2008) (vacating dismissal order); *Bautista v. Los Angeles Cty.*, 216 F.3d 837, 841 (9th Cir. 2000); *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998); *Johnson v. U.S. Dep't of Treasury*, 939 F.2d 820, 825 (9th Cir. 1991).

Five factors should guide the court's decision whether to dismiss: (1) the public's interest in expeditiously resolving litigation; (2) the court's interest in managing its docket; (3) the defendant's interest in avoiding prejudice; (4) the public policy interest favoring disposition of cases on the merits; and (5) the availability of less drastic alternatives. *See* *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010); *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002); *Bautista*, 216 F.3d at 841; *Hernandez*, 138 F.3d at 399; *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam); *Ferdik*, 963 F.2d at 1260-61.

Factual findings as to these factors are not required, but such findings are helpful in the process of appellate review. *See* *Bautista*, 216 F.3d at 841; *Al-Torki*, 78 F.3d at 1384; *Ferdik*, 963 F.2d at 1261.

Similarly, an explicit discussion of alternatives to dismissal is favored. *See* *Hernandez*, 138 F.3d at 400; *Ferdik*, 963 F.2d at 1262. A warning that the complaint will be dismissed may be considered as a less drastic alternative sufficient to meet the fifth factor. *See* *Ferdik*, 963 F.2d at 1262; *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 132-33 & n.1 (9th Cir. 1987); *cf.* *Hernandez*, 138 F.3d at 401 (concluding dismissal was an abuse of discretion because parties were not on notice of risk of dismissal). A warning may not be necessary where dismissal is pursuant to a noticed motion instead of sua sponte. *See* *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1455-56 (9th Cir. 1994).

Dismissal may be appropriate for failure to follow local rules, *see* *Ghazali*, 46 F.3d at 53; for failure to comply with an order to file an amended complaint, *see* *Ferdik*, 963 F.2d at 1260-61; for failure to inform the district court of a change of

address pursuant to a local rule, *see* *Carey v. King*, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (per curiam); and for failure to appear at trial, *see* *Al-Torki*, 78 F.3d at 1385; *Hernandez v. Whiting*, 881 F.2d 768, 771-72 (9th Cir. 1989) (reversing dismissal of prisoner's case for failure to appear at trial due to trial court's failure to pursue alternatives for securing prisoner's presence at trial). Dismissal may be an appropriate sanction for discovery abuses. *See* Fed. R. Civ. P. 37(b); *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993). *But see* *Johnson*, 939 F.2d at 825-26 (holding dismissal was too severe a sanction for failure to appear at a deposition and settlement conference where court had failed to employ or threaten to employ less drastic alternatives). "[D]ismissal for lack of prosecution must be supported by a showing of unreasonable delay." *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); *see also* *Al-Torki*, 78 F.3d at 1384; *In re Eisen*, 31 F.3d at 1451. Dismissal for judge-shopping may be acceptable, but may be an abuse of discretion where entered sua sponte without considering alternatives. *See* *Hernandez*, 138 F.3d at 399-400. Dismissal of an action after a "bare bones" order regarding the defects of a second amended complaint is an abuse of discretion. *Bautista*, 216 F.3d at 841-42.

#### g. Default Judgments (Fed. R. Civ. P. 55(b))

Federal Rule of Civil Procedure 55(b) allows for the entry of default judgment under limited conditions. Ordinarily, default judgments are disfavored. *See* *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986).

When considering whether to enter a default judgment, the court should consider "(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Id.* at 1471-72; *see also* *Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996); *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1989).

### C. Disciplining Pro Se Litigants

#### 1. Vexatious Litigant Orders

"Flagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990); *see also* *Molski v. Evergreen Dynasty Corp.*, 500

F.3d 1047, 1057 (9th Cir. 2007); *O'Loughlin v. Doe*, 920 F.2d 614, 618 (9th Cir. 1990). To prevent such abuses, the court may enter a pre-filing review order requiring a vexatious litigant to submit complaints for review prior to filing. *See Molski*, 500 F.3d at 1057; *De Long*, 912 F.2d at 1147; *see also In re McDonald*, 489 U.S. 180, 184 (1989) (per curiam); *Demos v. U.S. Dist. Court*, 925 F.2d 1160, 1161 (9th Cir. 1991) (order). "[S]uch pre-filing review orders should rarely be filed." *De Long*, 912 F.2d at 1147; *see also Molski*, 500 F.3d at 1057; *Moy v. United States*, 906 F.2d 467, 470 (9th Cir. 1990).

Before the court enters a vexatious litigant order, the plaintiff must be given adequate notice and an opportunity to oppose entry of the order, the court must develop an adequate record by listing the case filings that support its finding of vexatiousness, the court must make findings concerning the frivolous or harassing nature of the prior litigation, and the pre-filing review order must be narrowly tailored to remedy only the specific litigation abuses supported by the record. *See Molski*, 500 F.3d at 1057; *O'Loughlin*, 920 F.2d at 617; *De Long*, 912 F.2d at 1147-48; *Moy*, 906 F.2d at 470-71.

A vexatious litigant order cannot be entered against an attorney. *See Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1197 (9th Cir. 1999).

#### 2. Sanctions

Courts may impose sanctions on pro se litigants proceeding in forma pauperis. *See Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1177 (9th Cir. 1996); *Warren v. Guelker*, 29 F.3d 1386, 1389-90 (9th Cir. 1994) (per curiam). Prior to imposing Rule 11 sanctions pursuant to a party's motion, the court must follow the procedures outlined in Fed. R. Civ. P. 11(c)(1)(A). *See Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 788-79 (9th Cir. 2001); *Barber v. Miller*, 146 F.3d 707, 710-11 (9th Cir. 1998); *see also Holgate v. Baldwin*, 425 F.3d 671, 677-78 (9th Cir. 2005).

Pro se status is relevant to the reasonableness determination under Fed. R. Civ. P. 11. *See Warren*, 29 F.3d at 1390. The court can also consider the pro se litigant's ability to pay as one factor in assessing sanctions. *See id.*

### D. Using Magistrate Judges

"The power of federal magistrate judges is limited by 28 U.S.C. § 636." *Estate of Conners ex rel. Meredith v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993) (citing *Reynaga v. Cammisa*, 971 F.2d 414, 416 (9th Cir. 1992)).

Under 28 U.S.C. § 636(b)(1)(A), a district court judge may designate a magistrate judge:

> . . . to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

Under 28 U.S.C. § 636(b)(1)(B), a district court may designate a magistrate judge "to conduct hearings, including evidentiary hearings, and . . . submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) . . . and of prisoner petitions challenging conditions of confinement." The distinction between subparagraphs (A) and (B) is that the former confers a power to make a final disposition and the latter only confers a power to *recommend* a final disposition. *See* *Meredith*, 6 F.3d at 658.

"A district judge may not designate a magistrate judge to hear and determine a motion to involuntarily dismiss an action." *Hunt v. Piller*, 384 F.3d 1118, 1123 (9th Cir. 2004). However, the district court may "designate a magistrate judge to hear a motion to dismiss and submit proposed findings of fact and recommendations for the disposition of such a motion" under § 636(b)(1)(B). *Hunt*, 384 F.3d at 1123.

The magistrate judge may not make a final determination on an application for in forma pauperis status unless the parties have consented. *See* *Tripati v. Rison*, 847 F.2d 548, 549 (9th Cir. 1988) (order).

The magistrate judge has no power to consider post-trial motions, such as motions for attorney's fees, under § 636(b)(1)(A). *See* *Meredith*, 6 F.3d at 659. If the district court conducts a de novo review of the order, however, the review corrects this error. *See id.*

When the magistrate judge has submitted recommended findings of fact and conclusions of law to the court, a party has 14 days after service to file written objections. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72. A party, however, has no right to file objections to a magistrate judge's recommendation that an

application to proceed in forma pauperis be denied. *See* *Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 (9th Cir. 1998) (per curiam).

"It is clear that failure to object to proposed findings of fact entered by magistrate[ judge]s in matters referred to them under 28 U.S.C. § 636(b)(1) (1982) waives the opportunity to contest those findings on appeal." *Greenhow v. Sec'y of Health & Human Servs.*, 863 F.2d 633, 635 (9th Cir. 1988) (citing *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983) (order)), *overruled on other grounds by* *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) (en banc) (per curiam); *see also* *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991); *Smith v. Frank*, 923 F.2d 139, 141 (9th Cir. 1991).

Similarly, "a party who fails to file timely objections to a magistrate judge's nondispositive order with the district judge to whom the case is assigned forfeits its right to appellate review of that order." *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996) (concluding that party had waived its right to challenge discovery sanctions).[4]

The Ninth Circuit's law as to the waiver of a right to challenge a magistrate judge's conclusions of law is not settled. *See* *Smith*, 923 F.2d at 141. The court has stated that failure to object is not a waiver of the right to challenge conclusions of law, but rather a factor to consider in determining whether the challenge has been waived. *See* *Martinez v. Ylst*, 951 F.2d 1153, 1156 & n.4 (9th Cir. 1991); *see also* *Pollard v. The GEO Grp., Inc.*, 629 F.3d 843, 853 (9th Cir. 2010), *reversed on other grounds by* *Minneci v. Pollard*, 132 S. Ct. 617 (2011); *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007); *United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 903 (9th Cir. 2004); *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Simpson*, 77 F.3d at 1174 n.2; *FDIC v. Zook Bros. Constr. Co.*, 973 F.2d 1448, 1450 n.2 (9th Cir. 1992).

"Consent, …, is the touchstone of magistrate judge jurisdiction." *Wilhelm v. Rotman*, 680 F.3d 1113, 1119 (9th Cir. 2012) (internal citation and quotation marks omitted). If the parties consent, a magistrate judge "may conduct any or all

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[4] The court in *Simpson* relied heavily on the language of Fed. R. Civ. P. 72(a), which contains explicit language concerning waiver for failure to object. *See* *Simpson*, 77 F.3d at 1173-74. Rule 72(b), which governs objections from magistrate judge orders in conditions-of-confinement cases, contains no similar language.

proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . ." 28 U.S.C. § 636(c)(1); *see* *Meredith*, 6 F.3d at 658. "[A] court may infer consent where 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge.'" *Wilhelm*, 680 F.3d at 1119-20 (quoting *Roell v. Withrow*, 538 U.S. 580, 590 (2003)). As this court recognized in *Wihelm v. Rotman*, to the extent the Ninth Circuit previously held that consent could never be inferred, the court was overruled by the Supreme Court in *Roell*. *Wilhelm*, 680 F.3d at 1120; *see also* *Roell*, 538 U.S. at 582, 590-91 (concluding that parties' general appearances before the magistrate judge after they had been told of their right to be tried by a district judge supplied necessary consent); *see also* *Anderson*, 351 F.3d at 918-19.

The Ninth Circuit has concluded that a magistrate judge may not enter an order for criminal contempt, but has not decided the question with regard to civil contempt. *See* *Bingman v. Ward*, 100 F.3d 653, 658 & n.1 (9th Cir. 1996); *cf.* 28 U.S.C. § 636(e) (discussing magistrate judge's powers with regard to contempt proceedings). For a discussion of the difference between civil and criminal contempt, *see* *Bingman*, 100 F.3d at 656.

### E. Recusal/Disqualification of Judges

A judge may be disqualified where she or he "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1); *see also* *United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010). Judicial rulings in the present or former proceedings are not enough to demonstrate bias unless they "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also* *Pesnell v. Arsenault*, 543 F.3d 1038, 1043 (9th Cir. 2008); *United States v. Sutcliffe*, 505 F.3d 944, 958 (9th Cir. 2007); *Poland v. Stewart*, 117 F.3d 1094, 1103-04 (9th Cir. 1997). Moreover, information gained from prior proceedings cannot usually be the basis for a finding of judicial bias. *See* *Liteky*, 510 U.S. at 551; *see also* *Johnson*, 610 F.3d at 1147; *Rhoades v. Henry*, 598 F.3d 511, 519 (9th Cir. 2010); *Pesnell*, 543 F.3d at 1044. *But see* *United States v. Chischilly*, 30 F.3d 1144, 1149 (9th Cir. 1994) (explaining that facts from prior litigation can establish bias if exceptional), *overruled on other grounds by* *United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014) (en banc).

For other grounds for the disqualification of judges, *see* 28 U.S.C. § 455(b)(2)-(5).

A judge accused of bias may determine the sufficiency of an affidavit supporting the motion for disqualification, but must proceed no further in ruling on the motion. *See* 28 U.S.C. § 144; *see also* *Pesnell*, 543 F.3d at 1043; *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1388 (9th Cir. 1988); *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978).

### F. Considerations on Appeal

#### 1. Granting In Forma Pauperis Status

A district court may revoke the appellant's in forma pauperis status by certifying that the appeal was not taken in good faith. *See* 28 U.S.C. § 1915(a)(3). If the district court does so certify, then the appellant may apply to the appellate court for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a). "Unless the issues raised [on appeal] are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, the request of an indigent for leave to appeal in forma pauperis must be allowed." *Ellis v. United States*, 356 U.S. 674, 675 (1958) (per curiam) (citation omitted); *accord* *Gardner v. Pogue*, 558 F.2d 548, 551 (9th Cir. 1977).

The appellate court must dismiss the appeal if it is frivolous, fails to state a claim, or is brought against defendants immune from suit for monetary damages. *See* 28 U.S.C. § 1915(e)(2); *Marks v. Solcum*, 98 F.3d 494, 495-96 (9th Cir. 1996) (per curiam).

For a discussion of the relationship between the amended § 1915(a)(3) (1996) and Fed. R. App. P. 24(a), see *infra* IV.B. For payment of filing fees on appeal, see 28 U.S.C. § 1915(a)(2). For additional discussion, see *supra* II.B.1.c.

#### 2. Appointment of Counsel

Counsel should be appointed on appeal only in exceptional circumstances. *See* *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (per curiam). For a discussion of "exceptional circumstances," see *supra* II.B.1.e.(2).

#### 3. Transcripts

A litigant who has been granted in forma pauperis status may move to have transcripts produced at government expense. *See* 28 U.S.C. § 753(f); *Henderson v. United States*, 734 F.2d 483, 484 (9th Cir. 1984) (order).

If any issue raised on appeal depends on the review of a transcript, it is the appellant's responsibility to provide the relevant portions of the transcript. *See* Fed. R. App. P. 10(b)(2); *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991) (per curiam); *Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169 (9th Cir. 1991) (per curiam); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 877 F.2d 787, 789-90 (9th Cir. 1989); *Thomas v. Computax Corp.*, 631 F.2d 139, 143 (9th Cir. 1980) (holding inability to afford production of transcripts is insufficient to excuse this obligation). The appellate court may dismiss or decline to consider the appeal, or portions thereof, where a transcript is necessary for review and the party who raised the issue has failed to provide a transcript. *See Jones v. City of Santa Monica*, 382 F.3d 1052, 1056-57 (9th Cir. 2004); *Hall*, 935 F.2d at 165; *Syncom Capital Corp.*, 924 F.2d at 169; *Portland Feminist Women's Health Ctr.*, 877 F.2d at 789-90.

## III. ANALYSIS OF SUBSTANTIVE LAW

This section discusses the basic analytical frameworks for claims commonly raised by prisoners. The majority of the section is devoted to the rights guaranteed to prisoners by the Constitution (III.A), with a brief portion on statutory claims often raised by prisoners (III.B). The section also includes brief discussions of parole and probation (III.C) and the rights of pretrial detainees (III.D).

### A. Constitutional Claims

"There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974); *see also* *Beard v. Banks*, 548 U.S. 521, 528 (2006); *Shaw v. Murphy*, 532 U.S. 223, 228-29 (2001); *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009); *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004); *Ashker v. Cal. Dep't of Corr.*, 350 F.3d 917, 922 (9th Cir. 2003); *Morrison v. Hall*, 261 F.3d 896, 900-01 (9th Cir. 2001); *Mauro v. Arpaio*, 188 F.3d 1054, 1058 (9th Cir. 1998) (en banc); *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990); *Michenfelder v. Sumner*, 860 F.2d 328, 331 (9th Cir. 1988). "[S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . ." *Bell*, 441 U.S. at 545-46 (citation and internal quotation marks omitted); *see also* *Shaw*, 532 U.S. at 229; *Gerber v. Hickman*, 291 F.3d 617, 620 (9th Cir. 2002) (en banc); *Morrison*, 261 F.3d at 901; *Michenfelder*, 860 F.2d at 331.

Courts should accord prison officials great deference when analyzing the constitutional validity of prison regulations. *See* *Beard*, 548 U.S. at 528-30; *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987); *Turner*, 482 U.S. at 84-85; *Dunn v. Castro*, 621 F.3d 1196, 1202 (9th Cir. 2010); *Bahrampour*, 356 F.3d at 973; *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001); *Gilmore v. California*, 220 F.3d 987, 992 n.5 (9th Cir. 2000); *Anderson v. Cty. of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *Michenfelder*, 860 F.2d at 331; *see also* *Noble v. Adams*, 646 F.3d 1138, 1143 (9th Cir. 2011) (explaining that the court should "defer to prison officials' *judgment* so long as that judgment does not manifest either deliberate indifference or an intent to inflict harm."). The issue of deference to prison officials is more acute when state prison officials are defendants in federal court. *See* *Turner*, 482 U.S. at 85; *Mauro*, 188 F.3d at 1058; *Royse v. Superior Court*, 779 F.2d 573, 574 (9th Cir. 1986); *Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981).

Despite limitations on prisoners' constitutional rights and the deference to be accorded prison officials, "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974), *limited by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *see also* *Morrison*, 261 F.3d at 901; *Mauro*, 188 F.3d at 1058.

### 1. First Amendment

#### a. Speech Claims

##### (1) General Principles

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his [or her] status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *see also* *Jones v. Williams*, 791 F.3d 1023, 1035 (9th Cir. 2015); *Clement v. Cal. Dep't. of Corr.*, 364 F.3d 1148, 1151 (9th Cir. 2004) (per curiam); *Ashker v. Cal. Dep't of Corr.*, 350 F.3d 917, 922 (9th Cir. 2003); *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). A regulation that impinges on First Amendment rights "is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *see also* *Beard v. Banks*, 548 U.S. 521, 528 (2006); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *Shaw v. Murphy*, 532 U.S. 223, 229 (2001); *Lewis v. Casey*, 518 U.S. 343, 361 (1996); *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005); *Ashker*, 350 F.3d at 922; *Morrison v. Hall*, 261 F.3d 896, 901 (9th Cir. 2001); *Mauro v. Arpaio*, 188 F.3d 1054, 1058 (9th Cir. 1999) (en banc). The prisoner may challenge whether her or his speech fits within the regulation in addition to challenging the regulation on its face. *See* *Hargis v. Foster*, 312 F.3d 404, 410 (9th Cir. 2002).

In determining whether a prison regulation is reasonably related to a legitimate penological interest, the court should consider the following factors: (1) whether there is a valid, rational connection between the regulation and the interest used to justify the regulation; (2) whether prisoners retain alternative means of exercising the right at issue; (3) the impact the requested accommodation will have on inmates, prison staff, and prison resources generally; and (4) whether the prisoner has identified easy alternatives to the regulation which could be implemented at a minimal cost to legitimate penological interests. *See* *Beard*, 548 U.S. at 529; *Overton*, 539 U.S. at 132; *Shaw*, 532 U.S. at 229-30; *Turner*, 482 U.S. at 89-91; *Hrdlicka v. Reniff*, 631 F.3d 1044, 1049-50 (9th Cir. 2011); *Prison Legal News*, 397 F.3d at 699; *Clement*, 364 F.3d at 1151-52; *Bahrampour v. Lampert*,

356 F.3d 969, 975-76 (9th Cir. 2004); *Ashker*, 350 F.3d at 922; *Morrison*, 261 F.3d at 901; *Frost v. Symington*, 197 F.3d 348, 354 (9th Cir. 1999); *Mauro*, 188 F.3d at 1058-59.

The first of these factors is the most important. *See* *Prison Legal News*, 397 F.3d at 699; *Ashker*, 350 F.3d at 922; *Morrison*, 261 F.3d at 901; *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001); *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990); *see also* *Hrdlicka*, 631 F.3d at 1051.

Legitimate penological interests include "the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." *Procunier v. Martinez*, 416 U.S. 396, 412 (1974) (footnote omitted), *limited by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Beard*, 548 U.S. at 530-31 (motivating better behavior on the part of particularly difficult prisoners); *Mauro*, 188 F.3d at 1059 (protecting guards; preventing prisoners from sexually harassing guards); *Witherow v. Paff*, 52 F.3d 264, 265-66 (9th Cir. 1995) (per curiam) (protecting public officials; preventing prisoners from sending dangerous or highly offensive items in the mail).

Prison regulations may be content-based when the regulation is related to legitimate security concerns, but regulations must otherwise be content-neutral. *See* *Thornburgh*, 490 U.S. at 415-16; *Turner*, 482 U.S. at 90, 93; *Bahrampour*, 356 F.3d at 975; *Mauro*, 188 F.3d at 1059; *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996), *superseded by statute on other grounds by* the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5; *Harper v. Wallingford*, 877 F.2d 728, 732-33 (9th Cir. 1989); *McCabe v. Arave*, 827 F.2d 634, 638 (9th Cir. 1987).

Where the plaintiff presents evidence of a lack of a rational relationship between a legitimate penological interest and a prison regulation, then "[p]rison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point." *Walker*, 917 F.2d at 386; *see also* *Ashker*, 350 F.3d at 922; *Cook*, 238 F.3d at 1150; *Frost*, 197 F.3d at 356-57. Where the plaintiff has not presented evidence, but only alleged, that there is a lack of a rational relationship between a legitimate penological interest and a prison regulation, then it is enough that a reasonable prison official would think that the policy would serve a legitimate penological interest even if there is

no evidence of problems in the past or the likelihood of problems in the future. *See* *Ashker*, 350 F.3d at 922-23; *Frost*, 197 F.3d at 356-57; *Mauro*, 188 F.3d at 1060.

### (2) Applications

#### (a) Personal Correspondence

Prisoners have "a First Amendment right to send and receive mail." *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam). Prison regulations concerning incoming mail should be analyzed under the *Turner* factors. *See* *Thornburgh v. Abbott*, 490 U.S. 401, 411-13 (1989); *Witherow*, 52 F.3d at 265. For a description of the *Turner* factors, see *supra* III.A.1.a.(1). Prison regulations concerning outgoing prisoner mail may need to further "important or substantial governmental interest[s] unrelated to the suppression of expression," *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *limited by* *Thornburgh*, 490 U.S. at 413-14, but they must at least more closely fit the interest served than regulations concerning incoming mail, *see* *Thornburgh*, 490 U.S. at 412; *Barrett v. Belleque*, 544 F.3d 1060, 1062 (9th Cir. 2008) (per curiam); *O'Keefe v. Van Boening*, 82 F.3d 322, 326 (9th Cir. 1996); *Witherow*, 52 F.3d at 265; *see also* *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 878-79 (9th Cir. 2002). Prison officials do not need to show that there is no less restrictive mail policy that could serve the same penological interests. *See* *Thornburgh*, 490 U.S. at 412; *Witherow*, 52 F.3d at 265.

Prison officials may justifiably censor outgoing mail concerning escape plans, containing information about proposed criminal activity, or transmitting encoded messages. *See* *Procunier*, 416 U.S. at 413. Prison officials may also visually inspect outgoing mail to determine whether it contains contraband material that threatens prison security or material threatening the safety of the recipient. *See* *Witherow*, 52 F.3d at 266; *Royse v. Superior Court*, 779 F.2d 573, 574-75 (9th Cir. 1986).

Prison officials may prohibit correspondence between inmates based on security concerns. *See* *Turner v. Safley*, 482 U.S. 78, 93 (1987).

Prison officials may not prohibit inmates from receiving mail containing material downloaded from the internet. *See* *Clement v. Cal. Dep't. of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (per curiam).

### (b) Legal Correspondence

Prison officials are not permitted to review prisoners' legal papers for legal sufficiency before sending them to the court. *See* *Ex Parte Hull*, 312 U.S. 546, 549 (1941).

Prison officials may, however, consistent with the First Amendment, (1) require that mail from attorneys be identified as such and (2) open such correspondence in the presence of the prisoner for visual inspection. *See* *Wolff v. McDonnell*, 418 U.S. 539, 576-77 (1974); *Sherman v. MacDougall*, 656 F.2d 527, 528 (9th Cir. 1981). Whether prison officials may open and visually inspect legal mail outside the presence of the inmate is an open question in the Ninth Circuit. *See* *Sherman*, 656 F.2d at 528; *cf.* *Mann v. Adams*, 846 F.2d 589, 590-91 (9th Cir. 1988) (per curiam) (concluding that mail from public agencies, public officials, civil rights groups and news media may be opened outside the prisoners' presence in light of security concerns).

"Mail from the courts, as contrasted to mail from a prisoner's lawyer, is not legal mail." *Keenan v. Hall*, 83 F.3d 1083, 1094 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998). A prison need not treat all mail sent to government agencies and officials as legal mail. *See* *O'Keefe v. Van Boening*, 82 F.3d 322, 326 (9th Cir. 1996).

### (c) Publications

"[P]ublishers and inmates have a First Amendment interest in communicating with each other." *Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011). Furthermore, "[a] First Amendment interest in distributing and receiving information does not depend on a recipient's prior request for that information." *Id.*

A prisoner's right to receive publications from outside the prison should be analyzed in light of the *Turner* factors. *See* *Beard v. Banks*, 548 U.S. 521, 531-33 (2006); *Bahrampour v. Lampert*, 356 F.3d 969, 975-76 (9th Cir. 2004); *Morrison v. Hall*, 261 F.3d 896, 901-02 (9th Cir. 2001); *Mauro v. Arpaio*, 188 F.3d 1054, 1058-59 (9th Cir. 1999) (en banc); *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996), *superseded by statute on other grounds by* the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5; *Harper v. Wallingford*, 877 F.2d 728, 732 (9th Cir. 1989); *see also* *Hrdlicka*, 631 F.3d at 1049-51. For a description of the *Turner* factors, see *supra* III.A.1.a.(1).

The Supreme Court has concluded that "a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores does not violate [a prisoner's] First Amendment rights." *Bell v. Wolfish*, 441 U.S. 520, 550 (1979). Whether such a rule is constitutional when applied to soft-cover books and magazines is not clearly established. *See* *Beard*, 548 U.S. at 531-33 (upholding prison policy of denying newspapers, magazines, and photographs to a group of specially dangerous and recalcitrant inmates); *Ashker v. Cal. Dep't of Corr.*, 350 F.3d 917, 923-24 (9th Cir. 2003) (holding that prison policy requiring books and magazines mailed to the prison to have an approved vendor label affixed to the package was not rationally related to a legitimate penological objective); *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998); *Johnson v. Moore*, 948 F.2d 517, 520 (9th Cir. 1991) (per curiam); *Pratt v. Sumner*, 807 F.2d 817, 819-20 (9th Cir. 1987).

When considering prison regulations on incoming publications, "[s]ome content regulation is permissible in the prison context." *McCabe v. Arave*, 827 F.2d 634, 638 (9th Cir. 1987); *see also* *Thornburgh v. Abbott*, 490 U.S. 401, 415-16 (1989); *Mauro*, 188 F.3d at 1059; *Stefanow*, 103 F.3d at 1472; *Harper*, 877 F.2d at 732-33.

In light of security concerns, the Ninth Circuit has affirmed censorship of materials containing role-playing or similar fantasy games, *Bahrampour*, 356 F.3d at 976; advocating anti-Semitic violence, *see* *Stefanow*, 103 F.3d at 1472-75, and materials from the North American Man/Boy Love Association, *see* *Harper*, 877 F.2d at 734.

In light of concerns about preventing the sexual harassment of prison guards and other inmates, prison officials may prohibit receipt of sexually explicit materials. *See* *Bahrampour*, 356 F.3d at 976; *Frost v. Symington*, 197 F.3d 348, 357 (9th Cir. 1999); *Mauro*, 188 F.3d at 1060.

The Ninth Circuit has concluded, however, that prison officials may not prohibit receipt of *Hustler* when they allow prisoners to receive *Playboy*. *See* *Pepperling v. Crist*, 678 F.2d 787, 790 (9th Cir. 1982). The Ninth Circuit has also stated that prison officials may not prohibit materials which merely advocate racial supremacy, *see* *Stefanow*, 103 F.3d at 1472; *McCabe*, 827 F.2d at 638, or which merely advocate homosexual activity, *see* *Harper*, 877 F.2d at 733.

Prison officials may not prohibit receipt of gift publications when sent directly from the publisher. *See* *Crofton v. Roe*, 170 F.3d 957, 961 (9th Cir. 1999); *see also* *Hrdlicka*, 631 F.3d at 1050. Prison officials may not prohibit receipt of

subscription publications even when sent bulk rate or third or fourth class. *See* *Morrison*, 261 F.3d at 905; *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001); *see also* *Hrdlicka*, 631 F.3d at 1050; *Prison Legal News v. Lehman*, 397 F.3d 692, 700 (9th Cir. 2005) (explaining that prison officials may not prohibit receipt of non-subscription bulk mail or catalogs because "it is the fact that a request was made by the recipient, and not the fact that the recipient is paying to receive the publication, that is important.").

When prison officials intercept publications, it "must be accompanied by minimum procedural safeguards." *Sorrels v. McKee*, 290 F.3d 965, 972 (9th Cir. 2002) (citation omitted); *see also* *Krug v. Lutz*, 329 F.3d 692, 696-98 (9th Cir. 2003).

### (d) Telephones

"Prisoners have a First Amendment right to telephone access, subject to reasonable security limitations." *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (citing *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986)), *amended by* 135 F.3d 1318 (9th Cir. 1998); *see also* *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) (per curiam) (concluding no right to a specific phone rate).

### (e) Access to Media

Prison officials may prohibit face-to-face interviews with journalists and may restrict entry of journalists into the prison environment, *see* *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 826 (1974); *Cal. First Amendment Coalition v. Woodford*, 299 F.3d 868, 874-75 (9th Cir. 2002), as "long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved," *Pell*, 417 U.S. at 826. *Cf.* *Cal. First Amendment Coal.*, 299 F.3d at 870-71 (holding that the public and the press have a "First Amendment right to view executions from the moment the condemned is escorted into the execution chamber.").

### (f) Associational Rights

The prisoner's incarcerated status, by necessity, restricts the scope of the prisoner's First Amendment associational rights. *See* *Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003) (holding that prison officials' restrictions on noncontact visits bore a rational relation to legitimate penological interests); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125-26 (1977) (holding that prison

officials' prohibition of prison labor unions is reasonably related to legitimate interests in security); *see also* *Dunn v. Castro*, 621 F.3d 1196, 1201-05 (9th Cir. 2010); *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985); *Franklin v. Murphy*, 745 F.2d 1221, 1230 (9th Cir. 1984).

#### (g) Jailhouse Lawyers

A prisoner's legal assistance to other inmates deserves no more First Amendment protection than any other prisoner speech. *See* *Shaw v. Murphy*, 532 U.S. 223, 231-32 (2001).

#### (h) Prison Grievances

"The First Amendment guarantees a prisoner a right to seek redress of grievances from prison authorities and as well as a right of meaningful access to the courts." *Jones v. Williams*, 791 F.3d 1023, 1035 (9th Cir. 2015); *see also* *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) ("[P]risoners have a First Amendment right to file prison grievances."); *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). "Retaliation against prisoners for their exercise of this right is itself a constitutional violation, and prohibited as a matter of 'clearly established law.'" *Brodheim*, 584 F.3d at 1269 (citing *Rhodes*, 408 F.3d at 567 and *Pratt v. Rowland*, 65 F.3d 802, 806 & n.4 (9th Cir. 1995)). There are five basic elements for a viable claim of First Amendment retaliation in the prison context:

> (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.

*Brodheim*, 584 F.3d at 1269 (quoting *Rhodes*, 408 F.3d at 567-68). *See also* *Jones*, 791 F.3d at 1035-36 (concluding that Jones made a showing in support of his retaliation claim sufficient to overcome summary judgment).

### b. Religion Claims

#### (1) Free Exercise Clause

"The right to exercise religious practices and beliefs does not terminate at the prison door. The free exercise right, however, is necessarily limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security." *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th

Cir. 1987) (per curiam) (citations omitted); *see also* *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Walker v. Beard*, 789 F.3d 1125 (9th Cir. 2015) (upholding prison classifications used to cell inmates with individuals of a different race, where placement allegedly interferes with inmate's religious practice); *Shakur v. Schriro*, 514 F.3d 878, 883-84 (9th Cir. 2008); *Ward v. Walsh*, 1 F.3d 873, 876 (9th Cir. 1993); *Friend v. Kolodzieczak*, 923 F.2d 126, 127 (9th Cir. 1991). In order to implicate the Free Exercise Clause, the prisoner's belief must be both sincerely held and rooted in religious belief. *See* *Shakur*, 514 F.3d at 884-85. "A person asserting a free exercise claim must show that the government action in question substantially burdens the person's practice of her religion." *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015).

In analyzing the legitimacy of regulation of prisoners' religious expression, the court should utilize the *Turner* factors. *See* *O'Lone*, 482 U.S. at 349; *Shakur*, 514 F.3d at 884 (analyzing Muslim inmate's challenge to the denial of his request for kosher meat, which he believed would be consistent with Islamic Halal requirements); *Henderson v. Terhune*, 379 F.3d 709, 713 (9th Cir. 2004); *Mayweathers v. Newland*, 258 F.3d 930, 937-38 (9th Cir. 2001) (analyzing Muslim inmates' challenge to prison work rule and limiting *O'Lone* to its facts); *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997), *abrogated on other grounds by* *Shakur*, 514 F.3d at 884-85; *Anderson v. Angelone*, 123 F.3d 1197, 1198 (9th Cir. 1997); *Ward*, 1 F.3d at 876-77; *Friend*, 923 F.2d at 127. For a description of the *Turner* factors, see *supra* III.A.1.a.(1).

In light of the evidence submitted in support of a legitimate penological interest in security, the Ninth Circuit has upheld policies prohibiting long hair, *see* *Henderson*, 379 F.3d at 713-14; growing beards, *see* *Friedman v. Arizona*, 912 F.2d 328, 331-32 (9th Cir. 1990); preaching of racial hatred and violence, *see* *McCabe v. Arave*, 827 F.2d 634, 637 (9th Cir. 1987); wearing headbands, *see* *Standing Deer v. Carlson*, 831 F.2d 1525, 1528-29 (9th Cir. 1987); attendance of sweat-lodge ceremonies by Native American prisoners in disciplinary segregation, *see* *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987); and inmate-led religious services, *see* *Anderson*, 123 F.3d at 1198-99. In light of the evidence of generalized safety concerns, the Ninth Circuit upheld a prohibition on prisoners keeping candles in their cells. *See* *Ward*, 1 F.3d at 879. The Ninth Circuit also concluded that the interest in a simplified food service may allow a prison to provide a pork-free diet, instead of a fully kosher diet, to an Orthodox Jewish inmate. *See id.* at 877-79; *see also* *Resnick v. Adams*, 348 F.3d 763, 769 (9th Cir. 2003) (concluding that the interest in "the orderly administration of a program that allows federal prisons to accommodate the religious dietary needs of thousands of

prisoners" allows a prison to require submission of a standard prison form in order to receive kosher food). Prison officials have a legitimate interest in getting inmates to their work and educational assignments. *See* *Mayweathers*, 258 F.3d at 938.

With respect to the connection between the regulation of religious exercise and the legitimate penological interest, evidence concerning anticipated problems, even though no actual problems have arisen from the prisoner's conduct, is sufficient to meet this standard. *See* *Friedman*, 912 F.2d at 332-33; *Standing Deer*, 831 F.2d at 1528. For a further discussion of the burden of proof regarding the connection between the challenged regulation and the legitimate penological interest it purportedly serves, see *supra* III.A.1.a.(1).

Under the second *Turner* factor – availability of alternatives – "[t]he relevant inquiry . . . is not whether the inmate has an alternative means of engaging in the particular religious practice that he or she claims is being affected; rather, [the court must] determine whether the inmates have been denied all means of religious expression." *Ward*, 1 F.3d at 877 (citing *O'Lone*, 482 U.S. at 351-52); *see also* *Mayweathers*, 258 F.3d 938; *Friend*, 923 F.2d at 128; *cf.* *Allen*, 827 F.2d at 568 (stating that prisoner must establish denial of access to a religious ceremony to support a free exercise claim). "Also relevant to the evaluation of the second factor is a distinction *O'Lone* had no occasion to make: the distinction between a religious practice which is a positive expression of belief and a religious commandment which the believer may not violate at peril of his [or her] soul." *Ward*, 1 F.3d at 878; *see also* *Henderson*, 379 F.3d at 714 (explaining that where a prisoner, by cutting his hair, would be considered "'defiled' and therefore unworthy or unable to participate in the other major practices of his religion," the prisoner would "thus be denied all means of religious expression."). *Compare* *Ward*, 1 F.3d at 878 (concluding that where prison officials have deprived Orthodox Jewish prisoner of kosher diet, a rabbi, and religious services, the second factor weighs in the prisoner's favor), *with id.* at 880 (concluding that prisoner's request not to be transported on the Sabbath was not reasonable under second factor because prisoner had many opportunities to observe the Sabbath).

Under the third *Turner* factor – the effect of the accommodation on prison staff and other inmates – the court may consider security concerns. *See* *McCabe*, 827 F.2d at 637. The court may also consider "an appearance of favoritism that could generate resentment and unrest." *Standing Deer*, 831 F.2d at 1529 (citing *O'Lone*, 482 U.S. at 353); *see also* *Mayweathers*, 258 F.3d at 938; *Ward*, 1 F.3d at 880; *Friend*, 923 F.2d at 128. The appearance of favoritism cannot be dispositive,

however, because such appearance will be present in every case where accommodations are made. *See* *Henderson*, 379 F.3d at 714; *Ward*, 1 F.3d at 878.

Finally, with respect to the fourth *Turner* factor – presence of alternative regulations that will accommodate the religious expression – prison officials do not bear the burden of disproving the availability of alternatives. *See* *O'Lone*, 482 U.S. at 350.

Although the prisoner's free exercise right is still subject to the legitimate penological interests of the prison, an inmate who adheres to a minority religion must be given a "reasonable opportunity of pursuing his [or her] faith comparable to the opportunity afforded fellow prisoners who adhere to the conventional religious precepts." *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam); *see also* *Jones v. Bradley*, 590 F.2d 294, 296 (9th Cir. 1979). "[R]easonable opportunities," however, are not the same as identical treatment. *Cruz*, 405 U.S. at 322 n.2; *Allen*, 827 F.2d at 568; *Jones*, 590 F.2d at 296.

"Inmates . . . have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." *McElyea*, 833 F.2d at 198; *see also* *Ashelman v. Wawrzaszek*, 111 F.3d 674, 677-78 (9th Cir. 1997); *Ward*, 1 F.3d at 877. This rule does not apply if dietary requirements do not stem from religious sentiments. *See* *Johnson v. Moore*, 948 F.2d 517, 520 (9th Cir. 1991) (per curiam).

Prison officials have no affirmative obligations to provide appropriate clergy for inmates. *See* *Ward*, 1 F.3d at 880; *Reimers v. Oregon*, 863 F.2d 630, 631-32 (9th Cir. 1989); *Allen*, 827 F.2d at 568-69.

**(2) Religious Freedom Restoration Act (42 U.S.C §§ 2000bb to 2000bb-4); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5**

The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 ("RFRA"), which imposes a more stringent standard on government regulations that burden religious expression, has been declared unconstitutional as applied to local and state laws, because it exceeded Congress' powers. *See* *Freeman v. Arpaio*, 125 F.3d 732, 735-36 (9th Cir. 1997) (discussing effect of *City of Boerne v. Flores*, 521 U.S. 507 (1997)), *abrogated on other grounds by* *Shakur v. Schriro*, 514 F.3d 878, 883-84 (9th Cir. 2008). The Supreme Court has stated that the RFRA "continues to apply to the Federal Government." *Sossamon v. Texas*, 563

U.S. 277, 281 (2011) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005)). Additionally, the Ninth Circuit has held that the RFRA remains operative "as applied in the federal realm." *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002).

Congress resurrected the RFRA's standards as applied to state prisons using its power under the Spending and Commerce Clauses. *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000) ("RLUIPA"); *Cutter*, 544 U.S. at 714 (explaining that "RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens . . . ."); *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011) (explaining that Congress passed RLUIPA in response to the Supreme Court's partial invalidation of the RFRA). Section 3 of the RLUIPA provides that "[no] [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1(a); *see also* *Cutter*, 544 U.S. at 715; *Florer*, 639 F.3d at 921-22; *Khatib v. Cty. of Orange*, 639 F.3d 898, 900 (9th Cir. 2011) (en banc). The RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *see also* *Cutter*, 544 U.S. at 715.

The Supreme Court has held that "States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA because no statute expressly and unequivocally includes such a waiver." *Sossamon v. Texas*, 563 U.S. 277, 293 (2011); *cf.* *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1168-69 (9th Cir. 2011) (distinguishing *Sossamon* on basis that it is grounded on Eleventh Amendment authority, and explaining that the City of Yuma could be liable for monetary damages under RLUIPA because the Eleventh Amendment requirement does not apply to municipalities).

The Ninth Circuit has held that RLUIPA claims for damages may proceed only for injunctive relief against defendants acting within their official capacities. *See* *Wood v. Yordy*, 753 F.3d 899, 904 (9th Cir. 2014) (RLUIPA does not contemplate liability of government employees in individual capacity); *see also* *Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1114 (9th Cir. 2010) ("The Eleventh Amendment bars [a prisoner's] suit for official-capacity damages under RLUIPA.").

The "inquiry to determine whether a defendant acted 'under color of state law' is the same under RLUIPA as it is under § 1983." *Florer*, 639 F.3d at 922.

As opposed to traditional First Amendment jurisprudence, where prisoners' free exercise claims are analyzed under the deferential rational basis standard of *Turner v. Safley*, 482 U.S. 78 (1987), "RLUIPA requires the government to meet the much stricter burden of showing that the burden it imposes on religious exercise is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." *Greene v. Solano Cty. Jail*, 513 F.3d 982, 986 (9th Cir. 2008) (citation and internal quotation marks omitted); *see also* *Alvarez v. Hill*, 518 F.3d 1152, 1156-57 (9th Cir. 2008).

For cases applying RLUIPA to prisoners' free exercise claims, *see* *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (grooming policy substantially burdened prisoner's exercise of religion); *Walker v. Beard*, 789 F.3d 1125, 1134-37 (9th Cir. 2015) (prisoner's rights not violated under RLUIPA); *Florer*, 639 F.3d at 921-27; *Shakur*, 514 F.3d at 888-91; *Greene*, 513 F.3d at 986-90; *Warsoldier v. Woodford*, 418 F.3d 989, 994-1001 (9th Cir. 2005); *see also* *Khatib*, 639 F.3d at 901-05 (applying RLUIPA to former detainee who was required to remove headscarf in public against her religious beliefs and practice while held in county courthouse holding facility).

The Ninth Circuit has held that "RLUIPA claims need satisfy only the ordinary requirements of notice pleading." *Alvarez*, 518 F.3d at 1159 (explaining that "[u]nder this pleading standard, it is sufficient that the complaint, alone or supplemented by any subsequent filings before summary judgment, provides the defendant fair notice that the plaintiff is claiming relief under RLUIPA as well as the First Amendment.").

### 2. Fourth Amendment

#### a. General Principles

The reasonableness of searches and seizures by prison officials should be analyzed in light of the *Turner* factors. *See* *Thompson v. Souza*, 111 F.3d 694, 699 (9th Cir. 1997); *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990); *Michenfelder v. Sumner*, 860 F.2d 328, 331 (9th Cir. 1988). For a description of the *Turner* factors, see *supra* III.A.1.a.(1).

Prison officials must present evidence that a search served a legitimate penological interest. *See* *Walker*, 917 F.2d at 386-88.

### b. Cell Searches

Prisoners have no Fourth Amendment right of privacy in their cells. *See* *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984); *Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996); *Portillo v. U.S. Dist. Court*, 15 F.3d 819, 823 (9th Cir. 1994) (per curiam); *Nakao v. Rushen*, 766 F.2d 410, 412 (9th Cir. 1985); *see also* *Seaton v. Mayberg*, 610 F.3d 530, 534 (9th Cir. 2010) (recognizing a right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the continual surveillance of inmates and their cells required to ensure security and internal order).

### c. Body Searches

The Ninth Circuit has not yet recognized a Fourth Amendment right of prisoners not to be subjected to cross-gender, clothed, body searches. *See* *Jordan v. Gardner*, 986 F.2d 1521, 1524-25 (9th Cir. 1993) (en banc); *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985). However, in *Byrd v. Maricopa Cty. Sheriff's Department*, 629 F.3d 1135, 1142 (9th Cir. 2011) (en banc), this court did conclude that a cross-gender, strip search of a pretrial detainee was unreasonable as a matter of law given the nature of the search in that case.

Prisoners retain a very limited Fourth Amendment right to shield themselves from being observed nude. *See* *Michenfelder v. Sumner*, 860 F.2d 328, 333-34 (9th Cir. 1988); *cf.* *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998) (per curiam) (relying on prisoners' privacy right in not being viewed by guards of the opposite sex to conclude that gender may be a bona fide occupational qualification in a Title VII sex discrimination action brought by male guards). This right is not violated if guards only make casual observations of the prisoner or if the observations are made from a distance. *See* *Michenfelder*, 860 F.2d at 334; *Grummett*, 779 F.2d at 495-96.

Generally, strip searches do not violate the Fourth Amendment rights of prisoners. *See* *Michenfelder*, 860 F.2d at 332-33. Strip searches that are "excessive, *vindictive*, harassing, or unrelated to any legitimate penological interest," however, may be unconstitutional. *Id*. at 332. In the case of a pretrial detainee, this court determined in *Byrd* that a cross-gender, strip search was unreasonable as a matter of law, where the female cadet touched the detainee's inner and outer thighs, buttocks, and genital area. 629 F.3d at 1142.

Routine visual body cavity searches do not violate prisoners' Fourth Amendment rights. *See* *Bell v. Wolfish*, 441 U.S. 520, 558 (1979); *Thompson v.*

*Souza*, 111 F.3d 694, 700 (9th Cir. 1997); *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997); *Michenfelder*, 860 F.2d at 332; *Rickman v. Avaniti*, 854 F.2d 327, 328 (9th Cir. 1988). Moreover, it was not clearly established, as of September 1994, that prisoners had a right for such searches to be performed by prison officials of the same gender. *See Somers v. Thurman*, 109 F.3d 614, 620-22 (9th Cir. 1997) (explaining that it was "highly questionable even as of [March 25, 1997] whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex, or from viewing of their unclothed bodies by officials of the opposite sex."). A digital body cavity search, however, must "be conducted with reasonable cause and in a reasonable manner," *Vaughan v. Ricketts*, 950 F.2d 1464, 1468-69 (9th Cir. 1991), to serve a legitimate penological interest, *see Tribble v. Gardner*, 860 F.2d 321, 325 (9th Cir. 1988); *see also Somers*, 109 F.3d at 622 n.5.

Extraction of blood to create a DNA bank for prisoners convicted of a felony, a crime of violence, a sexual abuse crime, or an attempt or conspiracy to commit a felony does not violate prisoners' Fourth Amendment rights. *See Hamilton v. Brown*, 630 F.3d 889, 894 (9th Cir. 2011); *United States v. Kriesel*, 508 F.3d 941, 943, 946-47 (9th Cir. 2007); *United States v. Kincade*, 379 F.3d 813, 831-32 (9th Cir. 2004) (en banc).

Drug testing through urinalysis can be a reasonable search under the Fourth Amendment. *See Thompson*, 111 F.3d at 702-03 (concluding that search was reasonable where a large number of prisoners were tested, the prisoners were selected using legitimate criteria, and the sample was collected outside the presence of other inmates and in the presence of a guard of the same gender).

#### d. Phone-Call Monitoring

"[N]o prisoner should reasonably expect privacy in his [or her non-legal] outbound telephone calls." *United States v. Van Poyck*, 77 F.3d 285, 290-91 (9th Cir. 1996); *see also United States v. Monghur*, 588 F.3d 975, 979, 981 (9th Cir. 2009) (recognizing that there is no expectation of privacy in telephone calls made from jail, but determining that defendant did not waive expectation of privacy in a closed container stored in an apartment that was not specifically identified in the telephone calls).

### 3. Eighth Amendment

#### a. General Principles

The Eighth Amendment prohibits the imposition of cruel and unusual punishments and "embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and internal quotation marks omitted); *see also* *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979). "No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

"The Constitution 'does not mandate comfortable prisons.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes*, 452 U.S. at 349); *see also* *Hallett v. Morgan*, 296 F.3d 732, 745 (9th Cir. 2002); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982), *abrogated on other grounds by* *Sandin v. Conner*, 515 U.S. 472 (1995). The Eighth Amendment is also not a mandate for broad prison reform or excessive federal judicial involvement. *See* *Hallett*, 296 F.3d at 745; *Hoptowit*, 682 F.2d at 1246.

> [A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious[;]' a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities'[.] . . .
>
> The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.'

*Farmer*, 511 U.S. at 834 (citations omitted); *see also* *Hope v. Pelzer*, 536 U.S. 730, 737-38 (2002); *Wilson v. Seiter*, 501 U.S. 294, 299-300 (1991) (discussing subjective requirement); *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009); *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005); *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004); *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002); *Hallett*, 296 F.3d at 744; *Johnson v. Lewis*, 217

F.3d 726, 731 (9th Cir. 2000); *Osolinski v. Kane*, 92 F.3d 934, 937 (9th Cir. 1996); *Wallis v. Baldwin*, 70 F.3d 1074, 1076-77 (9th Cir. 1995); *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1995); *Anderson v. Cty. of Kern*, 45 F.3d 1310, 1312-13 (9th Cir. 1995). *See also* *Peralta v. Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015) ("Prison officials violate the Eighth Amendment if they are 'deliberate[ly] indifferen[t] to [a prisoner's] serious medical needs." (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

Both the Supreme Court and the Ninth Circuit have held that the *Turner* factors are not relevant to Eighth Amendment analyses. *See* *Johnson v. California*, 543 U.S. 499, 511 (2005); *Ward v. Walsh*, 1 F.3d 873, 876-77 (9th Cir. 1993); *Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993) (en banc); *see also* *Spain*, 600 F.2d at 193-94.

Prior to *Peralta*, the Ninth Circuit had held that neither cost nor the prison's security interests are relevant to the finding of an Eighth Amendment violation, although they are relevant to the fashioning of a remedy. *See* *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 473 (9th Cir. 1989) (security interests); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (costs); *Hoptowit*, 682 F.2d at 1247 (relevant to fashioning a remedy); *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981) (security interests; relevant to fashioning a remedy); *Spain*, 600 F.2d at 200 (costs). In *Peralta*, the en banc court explained that while "[t]he Supreme Court has not said whether juries and judges may consider a lack of resources as a defense in section 1983 actions[,]" it has instructed that prison officials are not deliberately indifferent unless they act wantonly, which is dependent upon the constraints facing the officials. *Peralta*, 744 F.3d at 1082. The *Peralta* court held that it is appropriate to consider the constraints, including lack of resources, under which an individual doctor who lacks authority over budgeting decisions is operating when determining whether such an official is liable for money damages in a section 1983 action. *See* *Peralta*, 744 F.3d at 1082-84. In so holding, the court overruled *Jones v. Johnson*, 781 F.2d 769 (9th Cir. 1986) and *Snow v. McDaniel*, 681 F.3d 978 (9th Cir. 2012), to the extent they could be read to apply to monetary damages against an official who lacks authority over budgeting decisions. *See* *Peralta*, 744 F.3d at 1083.

Relevant to the kinds of injuries that may give rise to an Eighth Amendment claim, the Prison Litigation Reform Act states that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury while in custody without a prior showing of physical injury . . . ." 42 U.S.C. § 1997e(e). The PLRA contains a similar provision

amending the FTCA. *See* 28 U.S.C. § 1346(b)(2). For further discussion of these provisions, see *infra* IV.F.

**b. Safety**

"Prison officials have a duty to take reasonable steps to protect inmates from physical abuse." *Hoptowit v. Ray*, 682 F.2d 1237, 1250 (9th Cir. 1982), *abrogated on other grounds by* *Sandin v. Conner*, 515 U.S. 472 (1995); *see also* *Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005); *Robinson v. Prunty*, 249 F.3d 862, 866 (9th Cir. 2001).

To establish a violation of this duty, the prisoner must establish that prison officials were "deliberately indifferen[t]" to serious threats to the inmate's safety. *See* *Farmer*, 511 U.S. at 834.[5] To demonstrate that a prison official was deliberately indifferent to a serious threat to the inmate's safety, the prisoner must show that "the official [knew] of and disregard[ed] an excessive risk to inmate . . . safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference." *Farmer*, 511 U.S. at 837; *see also* *Simmons v. Navajo Cty.*, 609 F.3d 1011, 1017 (9th Cir. 2010); *Gibson v. Cty. of Washoe, Nev.*, 290 F.3d 1175, 1187-88 (9th Cir. 2002); *Jeffers v. Gomez*, 267 F.3d 895, 913 (9th Cir. 2001) (per curiam); *Anderson v. Cty. of Kern*, 45 F.3d 1310, 1313 (9th Cir. 1995). To prove knowledge of the risk, however, the prisoner may rely on circumstantial evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge. *See* *Farmer*, 511 U.S. at 842; *Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995).

Prison officials may not escape liability because they cannot, or did not, identify the specific source of the risk; the serious threat can be one to which all prisoners are exposed. *See* *Farmer*, 511 U.S. at 843.

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[5] A prisoner may also establish an Eighth Amendment violation by demonstrating that prison officials were deliberately indifferent to threats to the inmate's health. *See* *Farmer*, 511 U.S. at 834, 837; *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993); *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004); *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002); *Wallis v. Baldwin*, 70 F.3d 1074, 1076-77 (9th Cir. 1995). For further discussion of deliberate indifference to risks to an inmate's health, see *infra* III.A.3.c.(1) and III.A.3.d.(2).

Prison officials may, however, avoid liability by presenting evidence that they lacked knowledge of the risk. *See id.* at 844; *Gibson*, 290 F.3d at 1187-88. Moreover, prison officials may avoid liability by presenting evidence of a reasonable, albeit unsuccessful, response to the risk. *See Farmer*, 511 U.S. at 844-45; *see generally Berg v. Kincheloe*, 794 F.2d 457, 462 (9th Cir. 1986).

To grant injunctive relief concerning serious risks to the inmate's safety, the court must find that at the time the relief will be granted there is still a serious, present risk to the inmate and that the prison officials are still acting with deliberate indifference to that risk. *See Farmer*, 511 U.S. at 845-47; *see also Helling v. McKinney*, 509 U.S. 25, 35-36 (1993) (discussing injunctive relief where there is a threat of harm to inmate's health). For a discussion of limitations on injunctive relief under the Prison Litigation Reform Act, see *supra* I.E.2.b, and *infra* IV.G.

The Supreme Court has held that placing a pre-operative transsexual, who acts and dresses effeminately, in the prison's general population evinced deliberate indifference to an inmate's safety. *See Farmer*, 511 U.S. at 848-49; *cf. Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (concluding that sexual abuse of transsexual prisoner by prison guard violated the Eighth Amendment); *Redman v. Cty. of San Diego*, 942 F.2d 1435, 1444-45 (9th Cir. 1991) (en banc) (concluding that placing a young pre-trial detainee in a cell with a known, aggressive sexual offender was deliberate indifference to the detainee's safety).

The Ninth Circuit has held that allegations that prison officials called a prisoner a "snitch" in the presence of other inmates were sufficient to state a claim of deliberate indifference to an inmate's safety. *See Valandingham v. Bojorquez*, 866 F.2d 1135, 1139 (9th Cir. 1989). *But see Morgan v. MacDonald*, 41 F.3d 1291, 1293-94 (9th Cir. 1994) (rejecting Eighth Amendment claim where prisoner who had been labeled a snitch had not been retaliated against by other inmates). The Ninth Circuit has also held that allegations that prison officials knew of the risks of religiously motivated attacks on inmates, and in fact, created the risks and facilitated the attacks, were sufficient to state a claim of deliberate indifference to an inmate's safety. *See Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005). Where jail officials placed a pre-trial detainee who was using crutches in a unit with non-handicapped accessible showers and the detainee complained about falling, jail officials demonstrated deliberate indifference to the detainee's safety. *See Frost v. Agnos*, 152 F.3d 1124, 1129 (9th Cir. 1998). *But see id.* at 1129-30 (holding that no deliberate indifference existed where detainee did not inform jail officials of problems with managing his crutches and his food tray). Where prison

officials placed an African-American prisoner in an integrated exercise yard where frequent attacks had taken place, made jokes about the possibility of attacks and failed to intervene quickly when an attack did occur, they violated their Eighth Amendment duty to protect the inmate. *See* *Robinson*, 249 F.3d at 867.

### c. Medical Needs

#### (1) General Principles

"[D]eliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." *Estelle v. Gamble*, 429 U.S. 97, 105 (1976); *see also* *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004); *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002); *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc); *Johnson v. Meltzer*, 134 F.3d 1393, 1398 (9th Cir. 1998); *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995); *Anderson v. Cty. of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by* *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). This rule applies to "physical, dental, and mental health." *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982), *abrogated on other grounds by* *Sandin v. Conner*, 515 U.S. 472 (1995); *see also* *Hallett*, 296 F.3d at 744, 746-48 (discussing prison officials' treatment of mentally ill inmates); *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (noting importance of providing dental care to prisoners). Prisoners must also be protected from serious risks to their health. *See* *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994); *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993); *Wallis v. Baldwin*, 70 F.3d 1074, 1076-77 (9th Cir. 1995). The deliberate indifference standard applies to due process claims that correction facility officials failed to address the medical needs of a pretrial detainee. *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1241-44 (9th Cir. 2010).

"The requirement of deliberate indifference is less stringent in cases involving a prisoner's medical needs than in other cases involving harm to incarcerated individuals because '[t]he State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.'" *McGuckin*, 974 F.2d at 1060 (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)). However, in some cases, it may be important to balance the "competing tensions" between "the prisoners' need for medical attention and the government's need to maintain order and discipline," in determining the prison officials' subjective intent. *Clement*, 298 F.3d at 905 n.4. "In deciding whether

there has been deliberate indifference to an inmate's serious medical needs, [the court] need not defer to the judgment of prison doctors or administrators." *Hunt*, 865 F.2d at 200 (citation omitted). "[S]tate prison authorities have wide discretion regarding the nature and extent of medical treatment." *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986), *overruled by* *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015) (overruling *Jones*, "[t]o the extent *Jones* … can be read to apply to monetary damages against an official who lacks authority over budgeting decisions … ."). "Budgetary constraints, however, do not justify cruel and unusual punishment." *Jones*, 781 F.2d at 771. For a general discussion of "deliberate indifference," see *supra* III.A.3.a.

"A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin*, 974 F.2d at 1059 (quoting *Estelle*, 429 U.S. at 104); *see also* *Jett*, 439 F.3d at 1096; *Clement*, 298 F.3d at 904; *Doty v. Cty. of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994). The court should consider whether a reasonable doctor would think that the condition is worthy of comment, whether the condition significantly affects the prisoner's daily activities, and whether the condition is chronic and accompanied by substantial pain. *See* *Lopez*, 203 F.3d at 1131-32; *Doty*, 37 F.3d at 546 n.3 (citing *McGuckin*, 974 F.2d at 1059-60).

#### (2) Denial of, Delay of, or Interference with Treatment

"Denial of medical attention to prisoners constitutes an [E]ighth [A]mendment violation if the denial amounts to deliberate indifference to serious medical needs of the prisoners." *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *see also* *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Clement v. Gomez*, 298 F.3d 898, 905 (9th Cir. 2002); *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by* *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc).

Delay of, or interference with, medical treatment can also amount to deliberate indifference. *See* *Jett*, 439 F.3d at 1096; *Clement*, 298 F.3d at 905; *Hallett*, 296 F.3d at 744; *Lopez*, 203 F.3d at 1131; *Jackson*, 90 F.3d at 332; *McGuckin*, 974 F.2d at 1059; *Hutchinson v. United States*, 838 F.2d 390, 394 (9th

Cir. 1988). Where the prisoner is alleging that delay of medical treatment evinces deliberate indifference, however, the prisoner must show that the delay led to further injury. *See* *Hallett*, 296 F.3d at 745-46; *McGuckin*, 974 F.2d at 1060; *Shapley v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam).

Where the prisoner alleged that a three-month delay in replacing dentures was causing pain, this was sufficient to state a claim of deliberate indifference to serious medical needs. *See* *Hunt v. Dental Dep't*, 865 F.2d 198, 200-01 (9th Cir. 1989). Where the prisoner alleged that an almost two-month delay in receiving any treatment for a fractured thumb, and a nineteen-month delay in being seen by a hand specialist, had caused pain and the diminished use of his hand because the fracture had healed improperly, this was sufficient to state a claim of deliberate indifference to serious medical needs. *See* *Jett*, 439 F.3d at 1097-98. Where prison officials used pepper spray to quell a fight and the pepper spray vapors migrated into other inmates' cells, a four-hour delay in providing showers and medical attention to inmates suffering from harmful effects from the pepper spray vapors may violate the Eighth Amendment. *See* *Clement*, 298 F.3d at 905-06.

Prison officials may violate the Eighth Amendment when they fail to "respond to the legitimate medical needs of a [pre-trial] detainee whom [they] ha[ve] reason to believe is diabetic." *Lolli v. Cty. of Orange*, 351 F.3d 410, 420 (9th Cir. 2003). Prison officials "must provide an outgoing prisoner who is receiving and continues to require medication with a supply sufficient to ensure that [the prisoner] has that medication available during the period of time reasonably necessary to permit [the prisoner] to consult a doctor and obtain a new supply." *Wakefield v. Thompson*, 177 F.3d 1160, 1164 (9th Cir. 1999).

**(3) Qualified Medical Personnel**

If the prison's medical staff is not competent to examine, diagnose, and treat inmates' medical problems, they must "refer prisoners to others who can." *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995); *see also* *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989) (per curiam); *Toussaint v. McCarthy*, 801 F.2d 1080, 1111-12 (9th Cir. 1986), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995).

### (4) Informing Medical Personnel of Medical Problems

"Prison officials show deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to the medical staff." *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995); *see also* *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995).

### (5) Negligence/Medical Malpractice

"[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see also* *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Toguchi v. Chung*, 391 F.3d 1051, 1057, 1060 (9th Cir. 2004) (stating that "[d]eliberate indifference is a high legal standard."); *Clement v. Gomez*, 298 F.3d 898, 904-05 (9th Cir. 2002); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc); *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998); *Anderson v. Cty. of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by* *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc); *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988); *Toussaint v. McCarthy*, 801 F.2d 1080, 1113 (9th Cir. 1986), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995).

Isolated occurrences of neglect do not constitute deliberate indifference to serious medical needs. *See* *Jett*, 439 F.3d at 1096; *McGuckin*, 974 F.2d at 1060; *O'Loughlin v. Doe*, 920 F.2d 614, 617 (9th Cir. 1990); *18 Unnamed "John Smith" Prisoners v. Meese*, 871 F.2d 881, 883 n.1 (9th Cir. 1989); *Toussaint*, 801 F.2d at 1111.Even gross negligence is insufficient to establish deliberate indifference to serious medical needs. *See* *Toguchi*, 391 F.3d at 1060.

### (6) Difference of Opinion about Medical Treatment

A difference of opinion between medical professionals concerning the appropriate course of treatment generally does not amount to deliberate indifference to serious medical needs. *See* *Toguchi v. Chung*, 391 F.3d 1051,

1059-60 (9th Cir. 2004); *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). To establish that a difference of opinion amounted to deliberate indifference, the prisoner "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and "that they chose this course in conscious disregard of an excessive risk to [the prisoner's] health." *See Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.1996); *see also Toguchi*, 391 F.3d at 1058; *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992) (stating that prisoner may demonstrate deliberate indifference if prison officials relied on the contrary opinion of a non-treating physician), *abrogated on other grounds as stated in Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043 (9th Cir. 2002), *overruled on other grounds by Saucier v. Katz*, 533 U.S. 194 (2001), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

A difference of opinion between the physician and the prisoner concerning the appropriate course of treatment does not amount to deliberate indifference to serious medical needs. *See Toguchi*, 391 F.3d at 1058; *Jackson*, 90 F.3d at 332; *Franklin v. Or., State Welfare Div.*, 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a prisoner has no constitutional right to outside medical care to supplement the medical care provided by the prison even where the prisoner is willing to pay for the treatment. *See Roberts v. Spalding*, 783 F.2d 867, 870 (9th Cir. 1986).

**(7) Fees for Medical Services**

Charging prisoners fees for medical services does not violate the Eighth Amendment unless it prevents prisoners from receiving medical care. *See Shapley v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 408 (9th Cir. 1985) (per curiam).

**(8) Transfers**

Where the record establishes that the prisoner will eventually be transferred, a delay in transferring a prisoner to another facility where a medically necessary diet is available does not violate the Eighth Amendment. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1112 (9th Cir. 1986), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995).

### d. Conditions of Confinement

#### (1) General Principles

"It is undisputed that the treatment a prisoner receives in prison and the conditions under which [the prisoner] is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993); *see also* *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

Conditions of confinement may, consistent with the Constitution, be restrictive and harsh. *See* *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006); *Osolinski v. Kane*, 92 F.3d 934, 937 (9th Cir. 1996); *Jordan v. Gardner*, 986 F.2d 1521, 1531 (9th Cir. 1993) (en banc). Prison officials must, however, provide prisoners with "food, clothing, shelter, sanitation, medical care, and personal safety." *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995); *see also* *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000); *Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981).

When determining whether the conditions of confinement meet the objective prong of the Eighth Amendment analysis, the court must analyze each condition separately to determine whether that specific condition violates the Eighth Amendment. *See* *Toussaint*, 801 F.2d at 1107; *Wright*, 642 F.2d at 1133. "Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise – for example, a low cell temperature at night combined with a failure to issue blankets." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *see also* *Thomas v. Ponder*, 611 F.3d 1144, 1151 (9th Cir. 2010); *Osolinski*, 92 F.3d at 938-39; *Toussaint*, 801 F.2d at 1107; *Wright*, 642 F.2d at 1133. When considering the conditions of confinement, the court should also consider the amount of time to which the prisoner was subjected to the condition. *See* *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978); *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005).

As to the subjective prong of the Eighth Amendment analysis, prisoners must establish prison officials' "deliberate indifference" to unconstitutional conditions of confinement to establish an Eighth Amendment violation. *See* *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 303. For a description of "deliberate indifference," see *supra* III.A.3.a.

### (2) Specific Conditions

#### (a) Crowding

Allegations of overcrowding, alone, are insufficient to state a claim under the Eighth Amendment. *See* *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981); *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 471 (9th Cir. 1989); *Akao v. Shimoda*, 832 F.2d 119, 120 (9th Cir. 1987) (per curiam) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1249 (9th Cir. 1982)). Where crowding causes an increase in violence or reduces the provision of other constitutionally required services, or reaches a level where the institution is no longer fit for human habitation, however, the prisoner may be able to state a claim. *See* *Balla*, 869 F.2d at 471; *Toussaint v. Yockey*, 722 F.2d 1490, 1492 (9th Cir. 1984); *Hoptowit*, 682 F.2d at 1248-49.

#### (b) Sanitation

"[S]ubjection of a prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment." *Anderson v. Cty. of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995); *see also* *Johnson v. Lewis*, 217 F.3d 726, 731-32 (9th Cir. 2000); *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985).

#### (c) Food

"The Eighth Amendment requires only that prisoners receive food that is adequate to maintain health; it need not be tasty or aesthetically pleasing." *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993); *see also* *Foster v. Runnels*, 554 F.3d 807, 812-13, 813 n.2 (9th Cir. 2009); *Johnson v. Lewis*, 217 F.3d 726, 732 (9th Cir. 2000); *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998). "The fact that the food occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation." *LeMaire*, 12 F.3d at 1456 (citation and internal quotation marks omitted); *see also* *Foster*, 554 F.3d at 813 n.2.

#### (d) Noise

"[P]ublic conceptions of decency inherent in the Eighth Amendment require that [inmates] be housed in an environment that, if not quiet, is at least reasonably free of excess noise." *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (citations and internal quotation marks omitted; brackets in original), *amended by* 135 F.3d 1318 (9th Cir. 1998).

### (e) Exercise

"Deprivation of outdoor exercise violates the Eighth Amendment rights of inmates confined to continuous and long-term segregation." *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) (citing *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979)), *amended by* 135 F.3d 1318 (9th Cir. 1998); *see also* *Thomas v. Ponder*, 611 F.3d 1144, 1151-52 (9th Cir. 2010); *Richardson v. Runnels*, 594 F.3d 666, 672 (9th Cir. 2010); *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005); *Lopez v. Smith*, 203 F.3d 1122, 1133 (9th Cir. 2000) (en banc); *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1995); *Allen v. City of Honolulu*, 39 F.3d 936, 938-39 (9th Cir. 1994); *LeMaire v. Maass*, 12 F.3d 1444, 1457-58 (9th Cir. 1993); *Toussaint v. Yockey*, 722 F.2d 1490, 1492-93 (9th Cir. 1984). "[A] temporary denial of outdoor exercise with no medical effects [, however,] is not a substantial deprivation." *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997); *see also* *Noble v. Adams*, 636 F.3d 525, 531 (9th Cir. 2011) (concluding prison officials were entitled to qualified immunity from § 1983 claim that post-riot lockdown of prison resulted in denial of Eighth amendment right to exercise); *Norwood v. Vance*, 591 F.3d 1062, 1070 (9th Cir. 2010) (recognizing that temporary denial of outdoor exercise with no medical effects is not a substantial deprivation); *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998).

Prison officials may restrict outdoor exercise on the basis of weather, unusual circumstances, or disciplinary needs. *See* *Spain*, 600 F.2d at 199. "The cost or inconvenience of providing adequate [exercise] facilities[, however,] is not a defense to the imposition of a cruel punishment." *Id.* at 200.

### (f) Vocational and Rehabilitative Programs

"Idleness and the lack of [vocational and rehabilitative] programs" does not violate the Eighth Amendment. *See* *Hoptowit v. Ray*, 682 F.2d 1237, 1254-55 (9th Cir. 1982), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995); *see also* *Toussaint v. McCarthy*, 801 F.2d 1080, 1106-08 (9th Cir. 1986), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995).

In the prison work context, the Eighth Amendment is implicated only when "prisoners are compelled to perform physical labor which is beyond their strength, endangers their lives or health, or causes undue pain." *Berry v. Bunnell*, 39 F.3d 1056, 1057 (9th Cir. 1994) (per curiam); *see also* *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006) (finding Eighth Amendment violation where inmate's thumb was torn off by a defective printing press).

### (g) Temperature of Cells

"The Eighth Amendment guarantees adequate heating." *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)), *amended by* 135 F.3d 1318 (9th Cir. 1998); *see also* *Graves v. Arpaio*, 623 F.3d 1043, 1049 (9th Cir. 2010) (per curiam) (noting the Eighth Amendment requires adequate heating, but not necessarily a "comfortable" temperature); *Johnson v. Lewis*, 217 F.3d 726, 732 (9th Cir. 2000) (exposure to excessive heat).

### (h) Ventilation

"Inadequate 'ventilation and air flow' violates the Eighth Amendment if it 'undermines the health of inmates and the sanitation of the penitentiary.'" *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (quoting *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985)), *amended by* 135 F.3d 1318 (9th Cir. 1998).

### (i) Lighting

"'Adequate lighting is one of the fundamental attributes of "adequate shelter" required by the Eighth Amendment.' Moreover, '[t]here is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination.'" *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (citations omitted; brackets in original), *amended by* 135 F.3d 1318 (9th Cir. 1998); *see also* *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985); *Hoptowit v. Ray*, 682 F.2d 1237, 1257-58 (9th Cir. 1982) *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995).

### (j) Environmental Tobacco Smoke

Assigning an inmate to live in a cell with an inmate who smokes may give rise to an Eighth Amendment claim. *See* *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993) (remanding for consideration of whether a civilized society's norms were violated by such behavior); *Franklin v. Or., State Welfare Div.*, 662 F.2d 1337, 1346-47 (9th Cir. 1981) (concluding that prisoner who had pre-existing medical condition that was exacerbated by cigarette smoke had stated a claim). The prisoner must show that the level of exposure to environmental tobacco smoke has unreasonably endangered the prisoner's health, "that it is contrary to current standards of decency for anyone to be so exposed against his [or her] will," and that "prison officials are deliberately indifferent to [the prisoner's] plight." *Helling*, 509 U.S. at 35-36.

### (k) Asbestos

A prisoner's exposure to asbestos is sufficient to meet the objective prong of the Eighth Amendment. *See* *Wallis v. Baldwin*, 70 F.3d 1074, 1076-77 (9th Cir. 1995).

### (l) Personal Hygiene

"Indigent inmates have the right to personal hygiene supplies such as toothbrushes and soap." *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998).

### (m) Clothing

"The denial of adequate clothing can inflict pain under the Eighth Amendment." *Walker v. Sumner*, 14 F.3d 1415, 1421 (9th Cir. 1994) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982)), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995).

### (n) Searches

Searches intended to harass may violate the Eighth Amendment. *See* *Hudson v. Palmer*, 468 U.S. 517, 530 (1984). Prison officials' knowledge of the risk of psychological trauma from body searches of female inmates by male guards makes such searches a violation of the Eighth Amendment. *See* *Jordan v. Gardner*, 986 F.2d 1521, 1526-30 (9th Cir. 1993) (en banc). *But see* *Somers v. Thurman*, 109 F.3d 614, 622-24 (9th Cir. 1997) (concluding that allegations that female guards conducted visual searches of a male inmate or saw the male inmate nude are insufficient, by themselves, to state a claim under the Eighth Amendment).

### (o) Verbal Harassment

"[V]erbal harassment generally does not violate the Eighth Amendment." *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (implying that harassment "calculated to . . . cause [the prisoner] psychological damage" might state an Eighth Amendment claim) (citing *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987)), *amended by* 135 F.3d 1318 (9th Cir. 1998); *see also* *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (explaining that "the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment.").

### (p) Safety Cell

Because prison officials must have means of protecting and controlling suicidal and mentally ill inmates, temporary placement of prisoners in "safety cells" – even where the cells are small, dark, and scary – does not violate the Eighth Amendment. *See* *Anderson v. Cty. of Kern*, 45 F.3d 1310, 1313-15 (9th Cir. 1995).

### e. Excessive Force

"[W]henever prison officials stand accused of using excessive physical force in violation of the [Eighth Amendment], the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *see also* *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *Watts v. McKinney*, 394 F.3d 710, 711 (9th Cir. 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003); *Marquez v. Gutierrez*, 322 F.3d 689, 691-92 (9th Cir. 2003); *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002); *Jeffers v. Gomez*, 267 F.3d 895, 900 (9th Cir. 2001) (per curiam); *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000); *Robins v. Meecham*, 60 F.3d 1436, 1441 (9th Cir. 1995); *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986).

Where prison officials have acted in response to an immediate disciplinary need, because of the risk of injury to inmates and prison employees and because prison officials will not have time to reflect on the nature of their actions, the "malicious and sadistic" standard, as opposed to the "deliberate indifference" standard, applies. *See* *Whitley*, 475 U.S. at 320-21; *Hamilton v. Brown*, 630 F.3d 889, 897 (9th Cir. 2011); *Clement*, 298 F.3d at 903-04; *Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc); *Berg*, 794 F.2d at 460. The excessive force standard also applies when analyzing practices used in disciplinary segregation to respond to repeat offenders. *See* *LeMaire v. Maass*, 12 F.3d 1444, 1452-53 (9th Cir. 1993).

When determining whether the force is excessive, the court should look to the "extent of injury . . . , the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.'" *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321); *see also* *Wilkins v. Gaddy*, 559 U.S. 34, 37-38 (2010) (per curiam); *Martinez*, 323 F.3d at 1184. Although the Supreme Court has never required a showing that an emergency situation existed, "the absence of an emergency may be probative of

whether the force was indeed inflicted maliciously or sadistically." *Jordan*, 986 F.2d at 1528 n.7; *see also* *Hope v. Pelzer*, 536 U.S. 730, 738, 747 (2002) (holding that "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment."); *Jeffers*, 267 F.3d at 913 (deliberate indifference standard applies where there is no "ongoing prison security measure"); *Johnson v. Lewis*, 217 F.3d 726, 734 (9th Cir. 2000). Moreover, there is no need for a showing of a serious injury as a result of the force, but the lack of such an injury is relevant to the inquiry. *See* *Hudson*, 503 U.S. at 7-9; *Martinez*, 323 F.3d at 1184; *Schwenk*, 204 F.3d at 1196.

Because the use of force relates to the prison official's legitimate interest in maintaining security and order, the court must be deferential when reviewing the necessity of using force. *See* *Whitley*, 475 U.S. at 321-22; *see also* *Norwood v. Vance*, 591 F.3d 1062, 1066-67 (9th Cir. 2010). *But see* *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986) (describing circumstances in which the prison official's use of force was unconstitutionally excessive).

#### f. Capital Punishment

The Supreme Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Baze v. Rees*, 553 U.S. 35, 48 (2008). "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Id*. at 50. *See also* *Cook v. Brewer*, 649 F.3d 915 (9th Cir. 2011) (per curiam) (noting that, to establish an Eighth Amendment violation, prisoner must show that the use of sodium thiopental in carrying out his death sentence was sure or very likely to cause needless suffering and to give rise to sufficiently imminent dangers). Furthermore, "[w]here an execution protocol contains sufficient safeguards, the risk of not adopting an additional safeguard is too 'remote and attenuated' to give rise to a substantial risk of serious harm." *Dickens v. Brewer*, 631 F.3d 1139, 1149 (9th Cir. 2011).

### 4. Fourteenth Amendment

#### a. Equal Protection Claims

"Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974); *see also* *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Bell v.*

*Wolfish*, 441 U.S. 520, 545 (1979); *Serrano v. Francis*, 345 F.3d 1071, 1081-82 (9th Cir. 2003); *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000) (per curiam). Racial segregation is unconstitutional within prisons "save for 'the necessities of prison security and discipline.'" *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam) (quoting *Lee v. Washington*, 390 U.S. 333, 334 (1968) (per curiam)); *see Johnson v. California*, 543 U.S. 499, 512-15 (2005) (holding that strict scrutiny is the proper standard of review for a prisoner's equal protection challenge to racial classifications); *Johnson v. Avery*, 393 U.S. 483, 486 (1969).

Prisoners are also protected by the Equal Protection Clause from intentional discrimination on the basis of their religion. *See Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997) (citing *Cruz*, 405 U.S. at 321-22), *abrogated on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008).

To establish a violation of the Equal Protection Clause, the prisoner must present evidence of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 239-40 (1976); *Serrano*, 345 F.3d at 1082; *Freeman*, 125 F.3d at 737.

### b. Procedural Due Process Claims

The procedural guarantees of the Fifth and Fourteenth Amendments' Due Process Clauses apply only when a constitutionally protected liberty or property interest is at stake. *See Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977); *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003); *Neal v. Shimoda*, 131 F.3d 818, 827 (9th Cir. 1997); *Erickson v. United States*, 67 F.3d 858, 861 (9th Cir. 1995); *Schroeder v. McDonald*, 55 F.3d 454, 462 (9th Cir. 1995); *Tellis v. Godinez*, 5 F.3d 1314, 1316 (9th Cir. 1993).

#### (1) Defining Liberty Interests

Liberty interests can arise both from the Constitution and from state law. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *Hewitt v. Helms*, 459 U.S. 460, 466 (1983), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995); *Meachum v. Fano*, 427 U.S. 215, 224-27 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Pearson v. Muntz*, 606 F.3d 606, 609 (9th Cir. 2010) (per curiam) (recognizing right arising from state law), *overruled on other grounds by Swarthout v. Cooke*, 131 S. Ct. 859 (2011) (per curiam); *Smith v. Sumner*, 994 F.2d 1401, 1405 (9th Cir. 1993).

### (a) Interests Protected by the Constitution

When deciding whether the Constitution itself protects an alleged liberty interest of a prisoner, the court should consider whether the practice or sanction in question "is within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum v. Fano*, 427 U.S. 215, 225 (1976); *see also* *Hewitt v. Helms*, 459 U.S. 460, 466-70 (1983), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995).

Using this standard, the Supreme Court has concluded that prisoners' First Amendment rights are liberty interests protected by the Constitution, *see* *Procunier v. Martinez*, 416 U.S. 396, 418 (1974), *limited on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989), and that prisoners have a liberty interest in not being transferred for involuntary psychiatric treatment, *see* *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

The Supreme Court has also concluded that the Due Process Clause itself does not grant prisoners a liberty interest in good-time credits, *see* *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); in remaining in general population, *see* *Sandin*, 515 U.S. at 485-86 and *Hewitt*, 459 U.S. at 468; in not losing privileges, *Baxter v. Palmigiano*, 425 U.S. 308, 323 (1976); in staying at a particular institution, *see* *Meachum*, 427 U.S. at 225-27; or in remaining in a prison in a particular state, *see* *Olim v. Wakinekona*, 461 U.S. 238, 245-47 (1983). The Court has held that prisoners may be treated with anti-psychotic drugs against their will if they are a threat to themselves or others and the treatment is in the prisoner's medical interest. *See* *Washington v. Harper*, 494 U.S. 210, 227 (1990); *Kulas v. Valdez*, 159 F.3d 453, 455-56 (9th Cir. 1998); *see also* *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998); *cf.* *Johnson v. Meltzer*, 134 F.3d 1393, 1397-98 (9th Cir. 1998) (concluding that giving a prisoner an experimental drug which may not have a medical benefit may violate the Due Process Clause).

### (b) Interests Protected by State Law

In *Sandin v. Conner*, 515 U.S. 472 (1995), the Supreme Court held that "[s]tates may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 483-84 (citations omitted); *see also* *Myron v. Terhune*, 476 F.3d 716, 718 (9th Cir. 2007); *Jackson v. Carey*,

353 F.3d 750, 755 (9th Cir. 2003); *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003); *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Neal v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir. 1997); *Mujahid v. Meyer*, 59 F.3d 931, 932 (9th Cir. 1995) (per curiam).[6] This test applies to inmates who have been convicted but not sentenced. *See* *Resnick v. Hayes*, 213 F.3d 443, 448 (9th Cir. 2000).

*Sandin* "refocused the test for determining the existence of a liberty interest away from the wording of prison regulations and toward an examination of the hardships caused by the prison's challenged action relative to 'the basic conditions' of life as a prisoner." *Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996) (quoting *Sandin*, 515 U.S. at 485); *see also* *Jackson*, 353 F.3d at 755; *Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998); *cf.* *Jacks v. Crabtree*, 114 F.3d 983, 986 n.4 (9th Cir. 1997) (suggesting that both regulatory language and the nature of the deprivation are relevant to the liberty interest inquiry). *Sandin* reminds federal courts that they should be circumspect when asked to intervene in the operation of state prisons. *See* *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995).

When conducting the *Sandin* inquiry, courts should look to Eighth Amendment standards as well as the prisoners' conditions of confinement, the duration of the sanction, and whether the sanctions will affect the length of the prisoners' sentence. *See* *Serrano*, 345 F.3d at 1078; *Ramirez*, 334 F.3d at 861; *Keenan*, 83 F.3d at 1089. The "atypicality" prong of the analysis requires not merely an empirical comparison, but turns on the importance of the right taken

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[6] Although the Ninth Circuit has stated that *Sandin* "overruled" cases using the "mandatory language" approach to defining liberty interests, *Mujahid v. Meyer*, 59 F.3d 931, 932 (9th Cir. 1995) (per curiam), the *Sandin* court in fact "rejected [the] prior test" for identifying liberty interests, *Keenan v. Hall*, 83 F.3d 1083, 1088 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998), without technically overruling any of its precedents, *Sandin*, 515 U.S. at 483 n.5. In post-*Sandin* cases, both the Supreme Court and the Ninth Circuit have concluded that there is no liberty interest in clemency proceedings because the decision to grant or deny clemency is solely within the discretion of the executive, without conducting the "atypical and significant deprivation" inquiry established by *Sandin*. *See* *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 283-84 (1998); *Woratzeck v. Ariz. Bd. of Exec. Clemency*, 117 F.3d 400, 404 (9th Cir. 1997) (per curiam).

away from the prisoner. *See* *Carlo v. City of Chino*, 105 F.3d 493, 499 (9th Cir. 1997).

The Supreme Court has held that prisoners have a state-created liberty interest in avoiding assignment to a state's "Supermax" facility. *See* *Wilkinson v. Austin*, 545 U.S. 209, 223-24, 228 (2005) (finding that Ohio's placement procedures were "adequate to safeguard an inmate's liberty interest in not being assigned to [the Supermax facility].").

The Ninth Circuit has held that prisoners have a state-created liberty interest in two published, post-*Sandin* decisions. In *Neal*, the Ninth Circuit concluded that labeling a prisoner a sex offender and mandating treatment because of the stigmatizing label gave rise to a liberty interest deserving Fourteenth Amendment protection. *See* *Neal*, 131 F.3d at 829 (applying *Vitek v. Jones*, 445 U.S. 480 (1980)). In *Serrano*, the Ninth Circuit concluded that a disabled prisoner has a protected liberty interest in being free from confinement in a non-handicapped-accessible administrative housing unit. *See* *Serrano*, 345 F.3d at 1078-79.

The Ninth Circuit has held that prisoners do not have a state-created liberty interest in publishing and distributing an inmate publication. *See* *Myron*, 476 F.3d at 719.

### (2) Defining Property Interests

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . [The person] must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather[,] they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

*Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also* *Town of Castle Rock, CO v. Gonzales*, 545 U.S. 748, 756 (2005); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1030 (9th Cir. 2010); *Doyle v. City of Medford*, 606 F.3d 667, 672 (9th Cir. 2010); *Gerhart v. Lake Cty.*, 637 F.3d 1013, 1019 (9th Cir. 2011); *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1199-1201 (9th Cir. 1998) (clarifying that property interests can be created by common law principles even when in conflict with state statutes); *Nunez*

*v. City of Los Angeles*, 147 F.3d 867, 872 (9th Cir. 1998); *Brooks v. United States*, 127 F.3d 1192, 1194 (9th Cir. 1997); *Erickson v. United States*, 67 F.3d 858, 862 (9th Cir. 1995); *Tellis v. Godinez*, 5 F.3d 1314, 1316 (9th Cir. 1993).

### (3) Procedural Guarantees

> Prisoners may . . . not be deprived of life, liberty or property without due process of law. . . . [T]he fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. . . . [T]here must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

*Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (citations omitted); *see also* *Sandin v. Conner*, 515 U.S. 472, 478 (1995) ("*Wolff*'s contribution . . . derive[s] . . . from its intricate balancing of prison management concerns with prisoners' liberty in determining the amount of process due.").

#### (a) Administrative Segregation

When a prisoner is placed in administrative segregation,[7] prison officials must, within a reasonable time after the prisoner's placement, conduct an informal, non-adversary review of the evidence justifying the decision to segregate the prisoner.[8] *See* *Hewitt v. Helms*, 459 U.S. 460, 476 (1983), *abrogated in part on*

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[7] "Administrative segregation" is a catch-all phrase for any form of non-punitive segregation. For example, prisoners may be segregated to protect them from other inmates, to protect other inmates from the segregated prisoner, or pending investigation of disciplinary charges, transfer, or re-classification. *See* *Hewitt v. Helms*, 459 U.S. 460, 468 (1983), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995).

[8] Since the Supreme Court re-formulated the test for identifying liberty interests in *Sandin v. Conner*, 515 U.S. 472 (1995), the Ninth Circuit has addressed a prisoner's liberty interest in avoiding administrative segregation. In one case, the Ninth Circuit concluded that the prisoner failed to a state a claim of deprivation of liberty in violation of the Due Process Clause because placement in administrative segregation was "'action taken within the sentence imposed.'" *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (quoting *Sandin*, 515 U.S. at 480). In another

*other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995); *Mendoza v. Blodgett*, 960 F.2d 1425, 1430 (9th Cir. 1992), *abrogated in part on other grounds by* *Sandin*, 515 U.S. 472; *Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986), *abrogated in part on other grounds by* *Sandin*, 515 U.S. 472. The Supreme Court has stated that five days is a reasonable time for the post-placement review. *See* *Hewitt*, 459 U.S. at 477. The prisoner must receive some notice of the charges and be given an opportunity to respond to the charges. *See id.* at 476; *Mendoza*, 960 F.2d at 1430-31; *Toussaint*, 801 F.2d at 1100. The prisoner, however, is not entitled to "detailed written notice of charges, representation of counsel or counsel-substitute, an opportunity to present witnesses, or a written decision describing the reasons for placing the prisoner in administrative segregation." *Toussaint*, 801 F.2d at 1100-01 (citations omitted). Due process also "does not require disclosure of the identity of any person providing information leading to the placement of a prisoner in administrative segregation." *Id*. After the prisoner has been placed in administrative segregation, prison officials must periodically review the initial placement. *See* *Hewitt*, 459 U.S. at 477 n.9; *Toussaint*, 801 F.2d at 1101. Annual review of the placement is insufficient, *see* *Toussaint*, 801 F.2d at 1101, but a court may not impose a 90-day review period where prison officials have suggested a

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case, the Ninth Circuit, implicitly recognizing the continuing viability of such a claim, remanded to the district court for further development of the record and a determination whether the conditions of confinement in administrative segregation gave rise to a liberty interest. *See* *Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998). In *Richardson v. Runnels*, 594 F.3d 666, 672 (9th Cir. 2010), applying *Sandin*, the court determined that the prison official's imposition of administrative segregation for sixteen days did not "constitute atypical and significant hardship in relation to the ordinary incidents of prison life." *See also* *Myron v. Terhune*, 476 F.3d 716, 718 (9th Cir. 2007) (determining California regulations governing security classification of prisoners and subsequent prison placement, on the record before the court, did not give rise to a protected liberty interest). In two other post-*Sandin* cases, the Ninth Circuit held that where the prisoner alleged material differences between the conditions in general population and administrative segregation, the prisoner's procedural due process claim should not be dismissed on the pleadings but should proceed to summary judgment. *See* *Jackson v. Carey*, 353 F.3d 750, 755-57 (9th Cir. 2003); *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003).

120-day review period, *see* *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1991).

### (b) Disciplinary Hearings

When a prisoner faces disciplinary charges, prison officials must provide the prisoner with (1) a written statement at least twenty-four hours before the disciplinary hearing that includes the charges, a description of the evidence against the prisoner, and an explanation for the disciplinary action taken; (2) an opportunity to present documentary evidence and call witnesses, unless calling witnesses would interfere with institutional security; and (3) legal assistance where the charges are complex or the inmate is illiterate. *See* *Wolff v. McDonnell*, 418 U.S. 539, 563-70 (1974); *see also* *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985); *Serrano v. Francis*, 345 F.3d 1071, 1077-78 (9th Cir. 2003); *Neal v. Shimoda*, 131 F.3d 818, 830-31 (9th Cir. 1997); *Walker v. Sumner*, 14 F.3d 1415, 1419-20 (9th Cir. 1994), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995); *McFarland v. Cassady*, 779 F.2d 1426, 1428 (9th Cir. 1986), *abrogated in part on other grounds by* *Sandin*, 515 U.S. 472.

"When prison officials limit an inmate's efforts to defend himself [or herself], they must have a legitimate penological reason." *Koenig v. Vannelli*, 971 F.2d 422, 423 (9th Cir. 1992) (per curiam) (concluding that prisoners do not have a right to have an independent drug test performed at their own expense). The right to call witnesses may legitimately be limited by "the penological need to provide swift discipline in individual cases . . . [or] by the very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff." *Ponte v. Real*, 471 U.S. 491, 495 (1985); *see also* *Serrano*, 345 F.3d at 1079; *Mitchell v. Dupnik*, 75 F.3d 517, 525 (9th Cir. 1996); *Koenig*, 971 F.2d at 423; *Zimmerlee v. Keeney*, 831 F.2d 183, 187-88 (9th Cir. 1987) (per curiam). Prison officials must make individualized determinations to limit the calling of witnesses, *see* *Serrano*, 345 F.3d at 1079; *Mitchell*, 75 F.3d at 525; *Bartholomew v. Watson*, 665 F.2d 915, 917-18 (9th Cir. 1982), and must eventually explain their reasons for so limiting the prisoner's ability to defend her- or himself, *see* *Ponte*, 471 U.S. at 497. Where the record does not contain such an explanation, it is error to grant summary judgment. *See Serrano*, 345 F.3d at 1079-80; *Walker*, 14 F.3d at 1421; *McFarland*, 779 F.2d at 1429; *cf.* *Ponte*, 471 U.S. at 499 (allowing in camera review of prison officials' reasons for limiting prisoner's defense).

"[T]he requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board . . . ." *Hill*, 472 U.S. at 455; *see also* *Bruce v. Ylst*, 351 F.3d 1283, 1287-88 (9th Cir. 2003); *Toussaint v. McCarthy*, 926 F.2d 800, 802-03 (9th Cir. 1991); *Jancsek v. Or. Bd. of Parole*, 833 F.2d 1389, 1390 (9th Cir. 1987); *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987); *see especially* *Burnsworth v. Gunderson*, 179 F.3d 771, 774-75 (9th Cir. 1999) (where there is no evidence of guilt, it may be unnecessary to demonstrate existence of a liberty interest). *But see* *Hines v. Gomez*, 108 F.3d 265, 268-69 (9th Cir. 1997) (holding that this standard does not apply to original rules violation report where prisoner alleges the report is false). The disciplinary officers may rely on the testimony of an unidentified informant in reaching their conclusion. *See* *Zimmerlee*, 831 F.2d at 186-87. Prison disciplinary proceedings may also rely on the silence of the prisoner as evidence. *See* *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976).

Prisoners have no right to cross-examine witnesses in prison disciplinary hearings. *See Wolff*, 418 U.S. at 567-68; *Walker*, 14 F.3d at 1420. Accordingly, the hearing officials need not provide an explanation as to why cross-examination was denied. *See* *Baxter*, 425 U.S. at 322.

Prisoners have no automatic right to counsel in prison disciplinary hearings, but if the inmate is illiterate, the issues are complex, or the prisoner is unable to gather evidence, the prisoner must be provided with some legal assistance. *See* *Vitek v. Jones*, 445 U.S. 480, 495-96 (1980); *Baxter*, 425 U.S. at 315; *Wolff*, 418 U.S. at 570; *Walker*, 14 F.3d at 1420; *Clardy v. Levi*, 545 F.2d 1241, 1246-47 (9th Cir. 1976).

A violation of the prison's regulations does not violate the Due Process Clause as long as the minimal protections outlined in *Wolff* have been provided. *See* *Walker*, 14 F.3d at 1419-20.

### (4) Effect of State Remedies

Where a prisoner alleges the deprivation of a liberty or property interest, caused by the unauthorized negligent or intentional action of a prison official, the prisoner cannot state a constitutional claim where the state provides an adequate post-deprivation remedy. *See* *Zinermon v. Burch*, 494 U.S. 113, 129-32 (1990); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981), *overruled on other grounds by* *Daniels v. Williams*, 474 U.S. 327 (1986); *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam); *Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir. 1989); *New Alaska Dev. Corp. v.*

*Guetschow*, 869 F.2d 1298, 1305 (9th Cir. 1989). This rule applies to the Fifth Amendment's Due Process Clause as well. *Raditch v. United States*, 929 F.2d 478, 481 (9th Cir. 1991).

A state post-deprivation remedy may be adequate even though it does not provide relief identical to that available under § 1983. *See Hudson*, 468 U.S. at 531 n.11; *Lake Nacimiento Ranch Co. v. Cty. of San Luis Obispo*, 841 F.2d 872, 879 (9th Cir. 1988).

The existence of an adequate post-deprivation remedy is irrelevant where the prisoner is challenging conduct taken pursuant to an established state procedure, rule, or regulation – *i.e.*, where the prison official's conduct is authorized by the state. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982); *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987); *Merritt v. Mackey*, 827 F.2d 1368, 1371-72 (9th Cir. 1987); *San Bernardino Physicians' Servs. Med. Grp., Inc. v. Cty. of San Bernardino*, 825 F.2d 1404, 1410 n.6 (9th Cir. 1987); *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc); *see also Bretz v. Kelman*, 773 F.2d 1026, 1031-32 (9th Cir. 1985) (en banc) (holding that a challenge to state law enforcement procedures themselves is not precluded by the post-deprivation rule); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985) (same).

The "post-deprivation rule" does not apply to claims alleging a deprivation of a right guaranteed by the substantive Due Process Clause, *see Zinermon*, 494 U.S. at 125; *Wood v. Ostrander*, 879 F.2d 583, 588-89 (9th Cir. 1989); *Smith v. City of Fontana*, 818 F.2d 1411, 1415 (9th Cir. 1987), *overruled in part on other grounds by Hodgers-Durgin v. De la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc), or to allegations of official assault or callous disregard to safety, *see Wood*, 879 F.2d at 589; *McRorie v. Shimoda*, 795 F.2d 780, 786 (9th Cir. 1986), or to Fourth Amendment claims, *see Taylor*, 871 F.2d at 806; *Robins v. Harum*, 773 F.2d 1004, 1009 (9th Cir. 1985).

### (5) State-of-Mind Requirement

Negligent conduct by a prison official is insufficient to state a claim under the Due Process Clause. *See Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989); *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989); *Woodrum v. Woodward Cty.*, 866 F.2d 1121, 1126 (9th Cir. 1989).

It is unclear whether reckless or grossly negligent conduct states a claim under the Due Process Clause. *See* *Daniels*, 474 U.S. at 334 n.3; *Wood*, 879 F.2d at 587-88.

#### c. Substantive Due Process Claims

> To establish a violation of substantive due process . . . , a plaintiff is ordinarily required to prove that a challenged government action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. However, where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing a plaintiff's claims.

*Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996) (citations, internal quotation marks, and brackets omitted), *overruled in part on other grounds as recognized by* *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086 (9th Cir. 2007); *see also* *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 841-42 (1998); *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002).

#### d. Vagueness Claims

Basic conceptions of due process require that legal rules, including prison regulations, be defined with sufficient clarity such that people of reasonable intelligence will be able to discern what conduct is prohibited. *See* *Grayned v. City of Rockford*, *Christopher v. Harbury*, 536 U.S. 403, 415, 417 (2002), 108 (1972); *United States v. Kim*, 449 F.3d 933, 941-92 9th Cir. 2006); *Gospel Missions of Am., A Religious Corp. v. City of Los Angeles*, 419 F.3d 1042, 1047 (9th Cir. 2005); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 n.11 (9th Cir. 1996); *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996); *United States v. Ayala*, 35 F.3d 423, 424-25 (9th Cir. 1994).

### 5. Access to Court Claims

Prisoners have a constitutional right of access to the courts. *See* *Lewis v. Casey*, 518 U.S. 343, 346 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 (1977), *limited in part on other grounds by* *Lewis*, 518 U.S. at 354; *Phillips v. Hust*, 588 F.3d 652, 655 (9th Cir. 2009); *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990) (per curiam).

This right "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828; *see also* *Phillips*, 588 F.3d at 655; *Madrid v. Gomez*, 190 F.3d 990, 995 (9th Cir. 1999). The right, however, "guarantees no particular methodology but rather the conferral of a capability – the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts. . . . [It is this capability] rather than the capability of turning pages in a law library, that is the touchstone" of the right of access to the courts. *Lewis*, 518 U.S. at 356-57. Prison officials may select the best method to ensure that prisoners will have the capability to file suit. *See id.* at 356. Prisons "might replace libraries with some minimal access to legal advice and a system of court-provided forms . . . that asked the inmates to provide only the facts and not to attempt any legal analysis." *Id.* at 352. Under this formulation, the Ninth Circuit decisions that concluded that prisons have an obligation to provide photocopies and ink pens, where such services and materials were necessary to filing an action or appeal, are arguably still good law. *See* *Hiser v. Franklin*, 94 F.3d 1287, 1294 n.6 (9th Cir. 1996); *Allen v. Sakai*, 48 F.3d 1082, 1089-90 (9th Cir. 1995). *See also* *Hebbe v. Pliler*, 627 F.3d 338, 342-43 (9th Cir. 2010).

To establish a violation of the right of access to the courts, a prisoner must establish that he or she has suffered an actual injury, a jurisdictional requirement that flows from the standing doctrine and may not be waived.[9] *See* *Lewis*, 518 U.S. at 349; *Madrid*, 190 F.3d at 996. An "actual injury" is "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim." *Lewis*, 518 U.S. at 348 (citation and internal

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[9] Prior to the Supreme Court's decision in *Lewis*, the Ninth Circuit did not require prisoners to allege an "actual injury" resulting from the denial of court access for a claim involving "either of the two *Bounds* 'core requirements'" – the right of access to (1) adequate law libraries or (2) adequate legal assistance from trained individuals. *Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *see also* *Keenan v. Hall*, 83 F.3d 1083, 1093-94 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998); *Allen v. Sakai*, 48 F.3d 1082, 1089-90 (9th Cir. 1995); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989). *Lewis* eliminated the distinction between "core" and "non-core" *Bounds* requirements, and explained that a prisoner must establish that he or she has suffered an actual injury in any claim alleging denial of access to the courts. *See* *Lewis*, 518 U.S. at 348.

quotation marks omitted); *see also* *Hebbe*, 627 F.3d at 342-43; *Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008) (explaining that "[f]ailure to show that a 'non-frivolous legal claim ha[s] been frustrated' is fatal" to a claim for denial of access to legal materials) (citing *Lewis*, 518 U.S. at 353 & n.4); *Madrid*, 190 F.3d at 996. Delays in providing legal materials or assistance that result in actual injury are "not of constitutional significance" if "they are the product of prison regulations reasonably related to legitimate penological interests." *Lewis*, 518 U.S. at 362.

Where a prisoner asserts a backward-looking denial of access claim – one seeking a remedy for a lost opportunity to present a legal claim – he or she must show the loss of a "nonfrivolous" or "arguable" underlying claim, "the official acts frustrating the litigation," and "a remedy that may be awarded as recompense but [that is] not otherwise available in some suit that may yet be brought." *Christopher v. Harbury*, 536 U.S. 403, 415, 417 (2002) (noting that a backward-looking denial of access complaint "should state the underlying claim in accordance with Federal Rule of Civil Procedure 8(a), just as if it were being independently pursued."); *see also* *Avalos v. Baca*, 596 F.3d 583, 591 n.8 (9th Cir. 2010).

The right of access to the courts is limited to non-frivolous direct criminal appeals, habeas corpus proceedings, and § 1983 actions. *See* *Lewis*, 518 U.S. at 353 n.3, 354-55; *Simmons v. Sacramento Cty. Super. Ct.*, 318 F.3d 1156, 1159-60 (9th Cir. 2003) (explaining that "a prisoner has no constitutional right of access to the courts to litigate an unrelated civil claim."); *Madrid*, 190 F.3d at 995. The right of access to the courts is only a right to bring complaints to the federal court and not a right to discover such claims or to litigate them effectively once filed with a court. *See* *Lewis*, 518 U.S. at 354-55; *Madrid*, 190 F.3d at 995; *Cornett v. Donovan*, 51 F.3d 894, 898 (9th Cir. 1995) ("[W]e conclude the Supreme Court has clearly stated that the constitutional right of access requires a state to provide a law library or legal assistance only during the pleading stage of a habeas or civil rights action.").

The right of access to courts also applies to prison grievance proceedings. *See* *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995), *abrogated in part on other grounds by* *Shaw v. Murphy*, 532 U.S. 223 (2001).

### 6. Miscellaneous Constitutional Claims

#### a. Classification

Prisoners have no liberty interest in their classification status or in their eligibility for rehabilitative programs. *See* *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976); *Myron v. Terhune*, 476 F.3d 716, 718 (9th Cir. 2007); *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998); *Duffy v. Riveland*, 98 F.3d 447, 457 (9th Cir. 1996); *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987).

#### b. Transfers

Prisoners have no liberty interest in avoiding being transferred to another prison. *See* *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983); *Meachum v. Fano*, 427 U.S. 215, 225-27 (1976); *United States v. Brown*, 59 F.3d 102, 105 (9th Cir. 1995) (per curiam); *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam); *Coakley v. Murphy*, 884 F.2d 1218, 1221 (9th Cir. 1989).

Prisoners do, however, have a liberty interest in not being transferred for involuntary psychiatric treatment. *See* *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

Prisoners also may not be transferred in retaliation for exercising their First Amendment rights. *See* *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995); *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985); *cf.* *Gomez v. Vernon*, 255 F.3d 1118, 1127-28 (9th Cir. 2001) (explaining that where an inmate quit his law library job in the face of repeated threats of transfer, the inmate demonstrated a chilling effect in violation of his First Amendment rights).

#### c. Visitation

The Due Process Clause does not guarantee a right of unfettered visitation. *See* *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460-61 (1989); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998).[10]

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[10] The Third and Fourth Circuits have concluded that a denial of all visitation may violate the Eighth Amendment. *See* *Thomas v. Brierley*, 481 F.2d 660, 661 (3d Cir. 1973) (per curiam); *Almond v. Kent*, 459 F.2d 200, 204 (4th Cir. 1972); *cf.* *Toussaint v. McCarthy*, 801 F.2d 1080, 1113-14 (9th Cir. 1986) (rejecting constitutional right to contact visitation, but noting that not all visitation

Prisoners also have no right to contact visitation. *See* *Dunn v. Castro*, 621 F.3d 1196, 1202-03 (9th Cir. 2010); *Barnett v. Centoni*, 31 F.3d 813, 817 (9th Cir. 1994) (per curiam); *Casey v. Lewis*, 4 F.3d 1516, 1523 (9th Cir. 1993); *Toussaint v. McCarthy*, 801 F.2d 1080, 1113-14 (9th Cir. 1986), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995); *see also* *Overton v. Bazzetta*, 539 U.S. 126, 133-36 (2003) (upholding prison officials' restrictions on noncontact visits by children, and for prisoners who have committed multiple substance-abuse violations, because restrictions bore a rational relationship to legitimate penological interests). *Cf.* *Whitmire v. Arizona*, 298 F.3d 1134, 1135-36 (9th Cir. 2002) (explaining that challenge to prison regulation prohibiting same-sex kissing and hugging during prison visits did not survive rational basis review and thus, could not be dismissed on the pleadings). Prisoners have a right of contact visitation with their attorneys, however, that is encompassed by their right of access to the courts. *See* *Barnett*, 31 F.3d at 816; *Casey*, 4 F.3d at 1523-24.

**d. Verbal Harassment**

"[V]erbal harassment or abuse . . . [alone] is not sufficient to state a constitutional deprivation under 42 U.S.C. § 1983." *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (citation and internal quotation omitted); *see also* *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (explaining that "the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment."); *Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997), *abrogated on other grounds by* *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998). "A mere threat may not state a cause of action" under the Eighth Amendment, even if it is a threat against exercising the right of access to the courts. *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (per curiam); *see also* *Corales v. Bennett*, 567 F.3d 554, 564-65 (9th Cir. 2009).

Verbal harassment intended to humiliate or endanger the inmate, however, may violate the Constitution. *See* *Somers v. Thurman*, 109 F.3d 614, 622 (9th Cir. 1997); *Keenan*, 83 F.3d at 1092; *Valandingham v. Bojorquez*, 866 F.2d 1135, 1139 (9th Cir. 1989).

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had been denied), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995).

#### e. Vocational and Rehabilitative Programs

There is no constitutional right to rehabilitation. *See* *Coakley v. Murphy*, 884 F.2d 1218, 1221 (9th Cir. 1989); *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985).

For cases stating that a lack of vocational and rehabilitative programs does not violate the Eighth Amendment, see *supra* III.A.3.d.(2)(f).

#### f. Right to Marry/Procreate

Prisoners possess a constitutionally protected interest in the marital relationship. *See* *Turner v. Safley*, 482 U.S. 78, 96 (1987). This right, however, does not include a right to artificially inseminate one's wife. *See* *Gerber v. Hickman*, 291 F.3d 617, 621-22 (9th Cir. 2002) (en banc).

#### g. Takings

There is a constitutionally protected property right to accrued interest on inmate accounts. *See* *Schneider v. Cal. Dep't of Corr.*, 345 F.3d 716, 720 (9th Cir. 2003); *Vance v. Barrett*, 345 F.3d 1083, 1088 n.6 (9th Cir. 2003); *McIntyre v. Bayer*, 339 F.3d 1097, 1099-1100 (9th Cir. 2003); *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1199-1201 (9th Cir. 1998); *Tellis v. Godinez*, 5 F.3d 1314, 1316-17 (9th Cir. 1993). However, in *Ward v. Ryan*, 623 F.3d 807, 811-13 (9th Cir. 2010) the court held that the Arizona statutes that created a protected property interest in wages did not give inmates a full and unfettered right to their property.

### B. Statutory Claims

#### 1. 42 U.S.C. § 1981

Section 1981 prohibits racial discrimination by private actors. *See* *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Cerrato v. S.F. Cmty. Coll. Dist.*, 26 F.3d 968, 971 n.4 (9th Cir. 1994); *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989).

Section 1981 only prohibits intentional discrimination. *See* *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982); *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 839 (9th Cir. 2006) (en banc); *Evans*, 869 F.2d at 1344; *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987).

### 2. 42 U.S.C. § 1985(3)

> To state a cause of action under § 1985(3), a complaint must allege (1) a conspiracy, (2) to deprive any person or a class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States.

*Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)); *see also* *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992).

"The language requiring intent to deprive of equal protection . . . means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102; *see also* *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 (9th Cir. 2002); *Butler v. Elle*, 281 F.3d 1014, 1028 (9th Cir. 2002) (per curiam); *Sever*, 978 F.2d at 1536. Animus toward union members does not meet the "otherwise class-based" factor of *Griffin*. *See* *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 835 (1983). The Supreme Court has declined to address whether gender is an "otherwise class-based" category under § 1985(3). *See* *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993).

The Ninth Circuit has extended § 1985(3) "beyond race only when the class in question can show that there has been a governmental determination that its members require and warrant special federal assistance in protecting their civil rights." *Sever*, 978 F.2d at 1536 (citation and internal quotation marks omitted). "More specifically, [the Ninth Circuit] require[s] 'either that the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection.'" *Id.* (quoting *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (per curiam)); *see also* *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005); *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994); *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 720 (9th Cir. 1981).

"A claim under this section must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988); *see also* *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039 (9th

Cir. 1991). For further discussion of proving conspiracy claims, see *supra* I.A.2.b.(5).

### 3. 42 U.S.C. § 1986

"Section 1986 authorizes a remedy against state actors who have negligently failed to prevent a conspiracy that would be actionable under § 1985." *Cerrato v. S.F. Cmty. Coll. Dist.*, 26 F.3d 968, 971 n.7 (9th Cir. 1994). "A claim can be stated under [§] 1986 only if the complaint contains a valid claim under [§] 1985." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988); *see also Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1040 (9th Cir. 1991).

### 4. Religious Freedom Restoration Act (42 U.S.C §§ 2000bb to 2000bb-4); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5

The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (the "RFRA") has been declared unconstitutional as applied to local and state laws as enacted in excess of Congress' powers. *See Freeman v. Arpaio*, 125 F.3d 732, 735-36 (9th Cir. 1997) (discussing effect of *City of Boerne v. Flores*, 521 U.S. 507 (1997)). The Supreme Court has stated that the RFRA "continues to apply to the Federal Government." *Sossaman v. Texas*, 563 U.S. 277, 281 (2011) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005)). Additionally, the Ninth Circuit has held that the RFRA remains operative "as applied in the federal realm." *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002).

Congress resurrected the RFRA's standards as applied to state prisons using its power under the Spending and Commerce Clauses. *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000) ("RLUIPA"); *Cutter*, 544 U.S. at 714 *(*explaining that "RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens."). For a discussion of prisoners' free exercise of religion rights, see *supra* III.A.1.b.

### 5. Fair Labor Standards Act (29 U.S.C. §§ 201-19)

Although the Ninth Circuit has stated that the Fair Labor Standards Act may not "categorically exclude[ ] all labor of any inmate," *Hale v. Arizona*, 993 F.2d 1387, 1392 (9th Cir. 1993) (en banc), the weight of authority is that prisoners are not "employees" within the meaning of the Act, *see Coupar v. U.S. Dep't of Labor*, 105 F.3d 1263, 1265-66 (9th Cir. 1997); *Burleson v. California*, 83 F.3d 311, 313

(9th Cir. 1996); *Morgan v. MacDonald*, 41 F.3d 1291, 1293 (9th Cir. 1994); *Hale*, 993 F.2d at 1394-95.

### 6. Rehabilitation Act ( 29 U.S.C. §§ 701-97b); Americans with Disabilities Act (42 U.S.C. §§ 12101-12213)

Both the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794, apply in the prison context. *See United States v. Georgia*, 546 U.S. 151, 154 (2006); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1063 (9th Cir. 2010); *Simmons v. Navajo Cty.*, 609 F.3d 1011, 1021 (9th Cir. 2010); *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1214 (9th Cir. 2008) (applying the ADA to pre-trial detainees); *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007); *Thompson v. Davis*, 295 F.3d 890, 895-99 (9th Cir. 2002) (per curiam); *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997); *Duffy v. Riveland*, 98 F.3d 447, 453-56 (9th Cir. 1996); *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988).

The rights guaranteed under the Rehabilitation Act must be analyzed in light of the *Turner* factors. *See Pierce*, 526 F.3d at 1216-17; *Gates*, 39 F.3d at 1447. For a description of the *Turner* factors, see *supra* III.A.1.a.(1).

The Ninth Circuit has concluded that these Acts can constitutionally be applied to state prisons. *See Simmons*, 609 F.3d at 1021; *Thompson*, 295 F.3d at 895-99; *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997).

The Prison Litigation Reform Act (the "PLRA") requires administrative exhaustion of American with Disabilities Act and Rehabilitation Act claims. *O'Guinn*, 502 F.3d at 1059-62; *Butler v. Adams*, 397 F.3d 1181, 1182-83 (9th Cir. 2005). However, because these Acts have their own attorney's fees provisions, the PLRA cap on attorney's fees does not apply to fees awarded under these Acts. *See Armstrong v. Davis*, 318 F.3d 965, 974 (9th Cir. 2003).

### 7. Title VII (42 U.S.C. §§ 2000e to 2000e-17)

A prisoner could be considered an "employee" within the meaning of Title VII. *See Baker v. McNeil Island Corr. Ctr.*, 859 F.2d 124, 128-29 (9th Cir. 1988). Regardless of employee status, Title VII retaliation claims may be available to prisoners. *See Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994).

### 8. Title IX (20 U.S.C. §§ 1681-88)

"[A]lthough the application of Title IX's requirements must be analyzed in the context of the prison environment, state prisons which receive federal financial assistance are bound by the mandates of Title IX." *See* *Jeldness v. Pearce*, 30 F.3d 1220, 1225 (9th Cir. 1994).

### 9. Federal Tort Claims Act (28 U.S.C. §§ 2671-2680)

Under the Prison Litigation Reform Act, no prisoner convicted of a felony bringing a claim under the Federal Tort Claims Act (the "FTCA") "may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 28 U.S.C. § 1346(b)(2). For further discussion of this provision, see *infra* IV.F.

The FTCA is a limited waiver of sovereign immunity by the United States. *See* 28 U.S.C. §§ 2674, 2680; *Graham v. United States*, 96 F.3d 446, 448 (9th Cir. 1996); *Hines v. United States*, 60 F.3d 1442, 1446 (9th Cir. 1995), *abrogated in part on other grounds by* *United States v. Olson*, 546 U.S. 43 (2005).

The FTCA provides the exclusive remedy for tortious conduct by employees of the United States; it is a remedy against the United States and not against individual employees. *See* 28 U.S.C. § 2679(b); *Billings v. United States*, 57 F.3d 797, 799 (9th Cir. 1995).

Before bringing an FTCA claim in federal court, the plaintiff must timely exhaust administrative remedies. *See* 28 U.S.C. § 2675; *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1019 (9th Cir. 2007); *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006); *Jerves v. United States*, 966 F.2d 517, 519 (9th Cir. 1992); *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985).

The FTCA contains a two-year statute of limitations. *See* 28 U.S.C. § 2401(b); *Erlin v. United States*, 364 F.3d 1127, 1130, 1133 (9th Cir. 2004) (holding that "a civil action under the [FTCA] for negligently calculating a prisoner's release date, or otherwise wrongfully imprisoning the prisoner, does not accrue until the prisoner has established, in a direct or collateral attack on [the prisoner's] imprisonment, that [the prisoner] is entitled to release from custody."); *Arcade Water Dist. v. United States*, 940 F.2d 1265, 1267 (9th Cir. 1991); *Fernandez v. United States*, 673 F.2d 269, 271 (9th Cir. 1982).

Because the United States has not waived its sovereign immunity from liability for attorney's fees, they are not recoverable under the FTCA. *See* *Anderson v. United States*, 127 F.3d 1190, 1191-92 (9th Cir. 1997).

Prisoners may not bring a claim under the FTCA for work-related injuries; 18 U.S.C. § 4126(c)(4) is their exclusive remedy. *See* *United States v. Demko*, 385 U.S. 149, 152-53 (1966); *Vaccaro v. Dobre*, 81 F.3d 854, 857 (9th Cir. 1996).

### C. Parole/Probation

Parolees and probationers have a liberty interest in not having their parole or probation revoked. *See* *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *United States v. Silver*, 83 F.3d 289, 291 (9th Cir. 1996). *But see* *Jago v. Van Curen*, 454 U.S. 14, 16-17 (1981) (per curiam) (holding that where the release decision has been made, but the prisoner has not yet been released, there is no liberty interest). *See also* *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011) (stating that the Ninth Circuit's holding that California law creates a liberty interest in parole "is a reasonable application of [Supreme Court] cases").

Parolees and probationers possess the same procedural rights to protect revocation of their respective release statuses. *See* *Gagnon*, 411 U.S. at 782. These procedures were discussed extensively by the Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972). There are two stages to the revocation procedure: first, shortly after the arrest for an alleged violation, a probable cause hearing should be conducted to determine whether there are reasonable grounds to support the allegation of a violation, *see id.* at 485; later, there should be a revocation hearing, *see id.* at 487-88. The procedures at both stages are similar: the parolee or probationer should receive notice of the alleged violation, be given an opportunity to appear and present evidence, and be granted an opportunity to cross-examine witnesses if there is no risk to the witnesses of harm or intimidation. *See id.* at 486-87, 489; *see also* *United States v. Martin*, 984 F.2d 308, 310 (9th Cir. 1993) (stating that right of confrontation in revocation hearings is weaker than the right in criminal proceedings); *United States v. Simmons*, 812 F.2d 561, 564 (9th Cir. 1987) (same). The hearings should be conducted by impartial persons and written findings should be made, *see* *Morrissey*, 408 U.S. at 485-87, 489, but the hearing can be informal, *see* *Simmons*, 812 F.2d at 564-65 (flexible evidentiary rules); *cf.* *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 368 (1998) (holding that Fourth Amendment's exclusionary rule does not apply in revocation proceedings). The right to appointment of counsel for revocation hearings should be made on a case-by-case basis. *See* *Gagnon*, 411 U.S. at 790 (explaining factors).

For procedural rights of federal parolees, *see* *Thompson v. Crabtree*, 82 F.3d 312, 314 (9th Cir. 1996) (per curiam); for the procedural rights of federal probation revokees, *see* *United States v. Tham*, 884 F.2d 1262, 1265 (9th Cir. 1989).

The provision of a parole or probation hearing is a "benefit or service" within the meaning of the Americans with Disabilities Act. *See* *Thompson v. Davis*, 295 F.3d 890, 895-99 (9th Cir. 2002) (per curiam); *Armstrong v. Davis*, 275 F.3d 849, 861-63 (9th Cir. 2001), *abrogated on other grounds by* *Johnson v. California*, 543 U.S. 499 (2005).

There is no liberty interest in being released on parole. *See* *Hewitt v. Helms*, 459 U.S. 460, 467 (1983), *abrogated in part on other grounds by* *Sandin v. Connor*, 515 U.S. 472 (1995); *Vitek*, 445 U.S. at 488; *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979); *Neal v. Shimoda*, 131 F.3d 818, 828 (9th Cir. 1997); *Weaver v. Maass*, 53 F.3d 956, 960 (9th Cir. 1995). A state's statutory scheme for parole can give rise to a constitutional liberty interest if it uses mandatory language and creates a presumption that parole release will be granted. *See* *Greenholtz*, 442 U.S. at 12; *Miller v. Or. Bd. of Parole & Post-Prison Supervision*, 642 F.3d 711, 714 (9th Cir. 2011); *Carver v. Lehman*, 558 F.3d 869, 872-73 (9th Cir. 2009); *McQuillion v. Duncan*, 306 F.3d 895, 901-03 (9th Cir. 2002) (explaining that the test for liberty interests articulated in *Sandin*, 515 U.S. 472, does not apply to prisoners' liberty interests in parole); *see also* *Roberts v. Hartley*, 640 F.3d 1042, 1045-46 (9th Cir. 2011); *McCullough v. Kane*, 630 F.3d 766, 770-71(9th Cir. 2010).

Extraction of blood to create a DNA bank for parolees and probationers convicted of a felony, a crime of violence, a sexual abuse crime, or an attempt or conspiracy to commit a felony, a crime of violence, or a sexual abuse crime does not violate parolees' or probationers' Fourth Amendment rights. *See* *Hamilton v. Brown*, 630 F.3d 889, 894 (9th Cir. 2011); *United States v. Kriesel*, 508 F.3d 941, 943, 946-47 (9th Cir. 2007); *United States v. Kincade*, 379 F.3d 813, 831-32 (9th Cir. 2004) (en banc).

The Fourth Amendment does not prohibit a police officer from conducting a warrantless, suspicionless search of a parolee under a state parole-search statute. *See* *Samson v. California*, 547 U.S. 843, 850, 857 (2006) (holding parolees have fewer expectations of privacy than probationers); *United States v. Betts*, 511 F.3d 872, 876 (9th Cir. 2007) (applying rule to people on supervised release). However, "before conducting a warrantless search pursuant to a parolee's parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched." *Motley v. Parks*, 432 F.3d 1072, 1080 (9th

Cir. 2005) (en banc), *overruled in part by* *United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc) (per curiam) (overruling *Motley* to the extent it held there was no constitutional difference between probation and parole for purposes of the Fourth Amendment); *see also* *Cuevas v. De Roco*, 531 F.3d 726, 732 (9th Cir. 2008) (per curiam). Moreover, "police officers cannot retroactively justify a suspicionless search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole condition." *Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005), *overruled in part by* *King*, 687 F.3d 1189 (overruling *Moreno* to the extent it held there was no constitutional difference between probation and parole for purposes of the Fourth Amendment); *see also* *United States v. Caseres*, 533 F.3d 1064, 1075-76 (9th Cir. 2008).

Note that the Supreme Court has held that parolees have fewer expectations of privacy than probationers. *See* *Samson v. California*, 547 U.S. 843, 850 (2006). In *United States v. King*, recognizing the Supreme Court's decision in *Samson*, the Ninth Circuit overruled a line of Ninth Circuit cases to the extent that they found no constitutional difference between probation and parole for purposes of the Fourth Amendment. *King* specifically overruled:

> *Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2005), the precedent on which it relies, *Moreno v. Baca*, 400 F.3d 1152 (9th Cir. 2005), and *United States v. Harper*, 928 F.2d 894 (9th Cir. 1991), and later cases that rely on it, including *United States v. Baker*, 658 F.3d 1050 (9th Cir. 2011), *Sanchez v. Canales*, 574 F.3d 1169 (9th Cir. 2009), and *United States v. Lopez*, 474 F.3d 1208 (9th Cir. 2007), to the extent they [held] that "there is no constitutional difference between probation and parole for purposes of the fourth amendment."

687 F.3d 1189 (quoting *Motley*, 432 F.3d at 1083 n.9).

### D. Rights of Pretrial Detainees

"[P]retrial detainees . . . possess greater constitutional rights than prisoners." *Stone v. City of San Francisco*, 968 F.2d 850, 857 n.10 (9th Cir. 1992); *see also* *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987). "[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (citation and internal quotation marks omitted). A "pretrial detainee['s] … right to be free from violence at the hands of other inmates arises from the Fourteenth Amendment rather than the Eighth Amendment." *Castro v. Cty. of Los Angeles*, 797 F.3d 654, 664 (9th Cir. 2015). While a pretrial detainee's right to be free from punishment is

grounded in the Due Process Clause, courts borrow from Eighth Amendment jurisprudence when analyzing the rights of pretrial detainees. *See* *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008); *Lolli v. Cty. of Orange*, 351 F.3d 410, 418-19 (9th Cir. 2003); *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003); *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998); *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996); *Anderson v. Cty. of Kern*, 45 F.3d 1310, 1312-13 (9th Cir. 1995); *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1414-15 (9th Cir. 1986). For example, where the pretrial detainee is claiming that prison officials are liable for a breach of the duty to protect the detainee from attack by other inmates and detainees, the court should utilize Eighth Amendment standards. *See* *Redman v. Cty. of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc), *abrogated on other grounds as recognized by* *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015); *see also* *Pierce*, 526 F.3d at 1209-13 (explaining that detainees in administrative segregation are entitled under the First and Eighth Amendments to ongoing participation in religious activities and adequate opportunities for exercise); *Johnson v. Meltzer*, 134 F.3d 1393, 1398 (9th Cir. 1998) (stating that Eighth Amendment establishes minimum standard of medical care for pretrial detainees).

Unless there is evidence of intent to punish, then those conditions or restrictions that are reasonably related to legitimate penological objectives do not violate pretrial detainees' right to be free from punishment. *See* *Block v. Rutherford*, 468 U.S. 576, 584 (1984) (citing *Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979)); *Pierce*, 526 F.3d at 1205; *Demery v. Arpaio*, 378 F.3d 1020, 1028-29 (9th Cir. 2004) (holding that streaming live images of pretrial detainees to internet users around the world through the use of world-wide web cameras was not reasonably related to a non-punitive purpose, and thus, violated the Fourteenth Amendment); *Simmons v. Sacramento Cty. Super. Ct.*, 318 F.3d 1156, 1160-61 (9th Cir. 2003); *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002); *White v. Roper*, 901 F.2d 1501, 1504 (9th Cir. 1990). Order and security are legitimate penological interests. *See* *White*, 901 F.2d at 1504. Note that:

> *Bell* 's focus on "punishment" does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, …, a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.

*Kingsley*, 135 S. Ct. at 2473-74 (pretrial detainee must only show that the force purposely or knowingly used against him was unreasonable to demonstrate it was excessive in violation of the Fourteenth Amendment's due process clause).

The test for liberty interests articulated in *Sandin v. Conner*, 515 U.S. 472 (1995), does not apply to the liberty interests of pretrial detainees. *See* *Pierce*, 526 F.3d at 1205 n.15; *Valdez*, 302 F.3d at 1044 n.3, 1045 (concluding that pretrial detainee did not have a state-created liberty interest in using a telephone during his pretrial confinement); *Carlo v. City of Chino*, 105 F.3d 493, 498-99 (9th Cir. 1997) (citing *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996)).

"[T]he Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest." *Pierce v. Multnomah Cty.*, 76 F.3d 1032, 1043 (9th Cir. 1996); *see also* *Tatum v. City of San Francisco*, 441 F.3d 1090, 1098-99 (9th Cir. 2006); *Lolli*, 351 F.3d at 415. Arrestees who are not classified for housing in the general jail or prison population cannot routinely be subjected to strip searches and visual body cavity searches. *See* *Way v. Cty. of Ventura*, 445 F.3d 1157, 1161-62 (9th Cir. 2006); *see also* *Edgerly v. City & Cty. of San Francisco*, 599 F.3d 946, 957 (9th Cir. 2010). However, this court has held that the rights of arrestees who are "placed in custodial housing with the general jail population are not violated by a policy or practice of strip searching each one of them as part of the booking process, provided that the searches are no more intrusive on privacy interests than those upheld in [*Bell v. Wolfish*, 441 U.S. 550 (1979)], and the searches are not conducted in an abusive manner." *See* *Bull v. City & Cty. of San Francisco*, 595 F.3d 964, 981 (9th Cir. 2010) (en banc) (internal quotation marks and citations omitted). In *Byrd v. Maricopa Cty. Sheriff's Department*, 629 F.3d 1135, 1142 (9th Cir. 2011) (en banc), this court concluded that a cross-gender, strip search of a pretrial detainee was unreasonable as a matter of law in violation of the Fourth Amendment given the nature of the search in that case.

## IV. PRISON LITIGATION REFORM ACT

When the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (the "PLRA"), was enacted on April 26, 1996, it changed many of the familiar rules and procedures relating to prisoner civil rights litigation. Because the impact and meaning of some of the PLRA's provisions still remains unclear, this section, unlike others in the outline, refers to published decisions from other circuits when an issue has not been decided by a published decision of the Ninth Circuit.

For general discussions of the provisions of the PLRA, see Federal Judicial Center, RESOURCE GUIDE FOR MANAGING PRISONER CIVIL RIGHTS LITIGATION (1996); Susan V. Gelmis, Office of Staff Attorneys for the United States Court of Appeals for the Ninth Circuit, PRO SE HANDBOOK FOR DISTRICT COURTS (Revised ed. 2010)

### A. Application of the In Forma Pauperis Provisions (28 U.S.C. §§ 1915 & 1915A)

The in forma pauperis provisions do not apply to habeas corpus proceedings. *See* *Andrews v. King*, 398 F.3d 1113, 1122 (9th Cir. 2005); *Naddi v. Hill*, 106 F.3d 275, 277 (9th Cir. 1997) (order).

The provisions also do not apply to persons who are civilly confined as sexually violent predators. *See* *Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam); *Page v. Torrey*, 201 F.3d 1136, 1139-40 (9th Cir. 2000) (holding that the PLRA does not apply to those civilly confined as sexually violent predators).

An alien in detention is not a prisoner within the meaning of the PLRA, so long as the detainee did not also face criminal charges. *Andrews*, 398 F.3d at 1122; *Agyeman v. INS*, 296 F.3d. 871, 885-86 (9th Cir. 2002).

It is the practice of the Ninth Circuit not to apply the fee provisions to mandamus petitions where the petitions are denied on the merits. If the mandamus petition were granted in a prisoner civil-rights action proceeding in forma pauperis, it would be treated as any other prisoner civil-rights action. The Second, Third, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits have looked to the nature of the underlying action when considering the application of the PLRA to mandamus petitions and concluded that the PLRA applies when the writ of mandamus relates to a civil action, but not when it relates to a criminal action or habeas corpus proceeding. *See* *In re Grant*, 635 F.3d 1227, 1230 (D.C. Cir. 2011);

*In re Phillips*, 133 F.3d 770, 771 (10th Cir. 1998) (order); *In re Stone*, 118 F.3d 1032, 1034 (5th Cir. 1997); *In re Smith*, 114 F.3d 1247, 1250 (D.C. Cir. 1997); *In re Tyler*, 110 F.3d 528, 529 (8th Cir. 1997); *Madden v. Myers*, 102 F.3d 74, 77-79 (3d Cir. 1996) (superseded by statute); *Martin v. United States*, 96 F.3d 853, 854-55 (7th Cir. 1996); *In re Nagy*, 89 F.3d 115, 116-17 (2d Cir. 1996).

The Fifth Circuit has concluded that the fee provisions apply to an action for return of property whether it is brought under Fed. R. Crim. P. 41(e) or 28 U.S.C. § 1331. *See* *Pena v. United States*, 122 F.3d 3, 4-5 (5th Cir. 1997). The Eighth Circuit has concluded that the fee provisions apply to bankruptcy petitions. *See* *Lefkowitz v. Citi-Equity Group, Inc.*, 146 F.3d 609, 612 (8th Cir. 1998).

The Eighth Circuit has concluded that where a juvenile has filed a complaint concerning conditions in a detention center, after release from the center, the juvenile is not a "prisoner" within the meaning of the Act. *See* *Doe v. Washington Cty.*, 150 F.3d 920, 924 (8th Cir. 1998).

### B. Fee Provisions (28 U.S.C. § 1915(a)(2)-(3), (b))

Under the amended § 1915, the prisoner must submit "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal" in addition to an affidavit of indigency. 28 U.S.C. § 1915(a)(1)-(2). Relying on this information, and a statutorily defined calculation, the court assesses an initial fee and installment payments to cover the entire filing fee. *See* 28 U.S.C. § 1915(b). For further discussion, see *supra* II.B.1.

"[Section] 1915(b) provides that prisoners proceeding [in forma pauperis] must pay the filing fee as funds become available in their prison accounts." *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007). In other words, "[t]he PLRA dramatically alter[s] the consequences attached to in forma pauperis status for prisoners. An incarcerated in forma pauperis litigant now must pay the full filing fee when [the prisoner] brings a civil action or files an appeal, although [the prisoner] may pay on an installment plan." *Madden v. Myers*, 102 F.3d 74, 76 (3d Cir. 1996) (citations omitted) (superseded by statute). Under the amended statute, "the only issue [is] whether the inmate pays the entire filing fee at the initiation of the proceeding or in installments over a period of time." *Ashley v. Dilworth*, 147 F.3d 715, 716 (8th Cir. 1998) (per curiam).

The Ninth Circuit has upheld the fee provisions against constitutional challenge. *See* *Taylor v. Delatoore*, 281 F.3d 844, 848-50 (9th Cir. 2002).

The Second, Third, Fifth, and Seventh Circuits have concluded that the obligation to pay the filing fee is incurred by filing the notice of appeal – in other words, even if the appeal is dismissed as frivolous or for some jurisdictional defect, the prisoner will still be liable to pay the entire filing fee. *See* *Porter v. Dep't of Treasury*, 564 F.3d 176, 179-80 (3d Cir. 2009) (concluding that appellant is not entitled to return of filing and docketing fee, regardless of whether an appeal is voluntarily dismissed, dismissed due to a jurisdictional defect, or dismissed on the merits); *Williams v. Roberts*, 116 F.3d 1126, 1128 (5th Cir. 1997) (per curiam); *Martin v. United States*, 96 F.3d 853, 856 (7th Cir. 1996); *Leonard v. Lacy*, 88 F.3d 181, 186 (2d Cir. 1996); *see also* *Copley v. Henderson*, 980 F. Supp. 322, 323 (D. Neb. 1997) (concluding that prisoner was liable for entire filing fee even where prisoner voluntarily dismissed complaint); *see also* *In re Alea*, 286 F.3d 378, 381-82 (6th Cir. 2002) (order) (implying the same). *But see* *Smith v. District of Columbia*, 182 F.3d 25, 29 (D.C. Cir. 1999). The Eighth Circuit has stated that filing a motion under Fed. R. App. P. 24(a) to proceed on appeal in forma pauperis triggers responsibility for the entire filing fee. *See* *Henderson v. Norris*, 129 F.3d 481, 484 (8th Cir. 1997) (per curiam). The Seventh Circuit has also concluded that a court should count dismissals under 28 U.S.C. § 1915(g) prior to authorizing installment payments under the in forma pauperis provisions. *See* *Lucien v. DeTella*, 141 F.3d 773, 775 (7th Cir. 1998).

The Seventh Circuit has concluded that nonpayment of the filing fee, for any reason other than destitution, will serve "as a voluntary relinquishment of the right to file future suits in forma pauperis – just as if the prisoner had a history of frivolous litigation, and [28 U.S.C.] § 1915(g) required prepayment." *Thurman v. Gramley*, 97 F.3d 185, 188 (7th Cir. 1996), *overruled in part on other grounds by* *Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2000); *see also* *Campbell v. Clarke*, 481 F.3d 967, 969 (7th Cir. 2007).

It is the practice of the Ninth Circuit to apply Fed. R. App. P. 24(a) as it did prior to the enactment of the PLRA. The Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits follow a similar practice. *See* *Rolland v. Primesource Staffing, L.L.C.*, 497 F.3d 1077, 1079 (10th Cir. 2007); *Owens v. Keeling*, 461 F.3d 763, 773-76 (6th Cir. 2006); *Walker*, 216 F.3d at 631; *Henderson*, 129 F.3d at 484; *Wooten v. D.C. Metro. Police Dep't*, 129 F.3d 206, 207 (D.C. Cir. 1997).

The Ninth Circuit has concluded that "§ 1915(a)(3) and Rule 24(a) can be read harmoniously" because, "[a]lthough a litigant is not entitled to proceed in forma pauperis on appeal when a district court has entered a certification under

§ 1915(a)(3), the litigant may challenge that certification by filing a motion in [the Ninth Circuit] pursuant to Rule 24(a)(5)." *O'Neal v. Price*, 531 F.3d 1146, 1150 (9th Cir. 2008) (agreeing with the Fifth Circuit in *Baugh v. Taylor*, 117 F.3d 197, 200-02 (5th Cir. 1997)).

The Fifth Circuit appears to have concluded that the PLRA requires that prisoners must always file a new application for in forma pauperis status on appeal, repealing the portion of Rule 24(a) which carries forward in forma pauperis status unless revoked by the district court. *See* *Jackson v. Stinnett*, 102 F.3d 132, 134-36 (5th Cir. 1996). The Eleventh Circuit has adopted the Fifth Circuit's holding in *Jackson*. *See* *Mitchell v. Farcass*, 112 F.3d 1483, 1489 (11th Cir. 1997).[11]

The Second, Fourth and Sixth Circuits have concluded that prisoners are only responsible for paying installments on the filing fee for as long as they are in prison. *See* *DeBlasio v. Gilmore*, 315 F.3d 396, 397(4th Cir. 2003); *In re Prison Litig. Reform Act*, 105 F.3d 1131, 1139 (6th Cir. 1997) (administrative order); *McGann v. Comm'r, Soc. Sec. Admin.*, 96 F.3d 28, 29-30 (2d Cir. 1996). *But see* *In re Smith*, 114 F.3d 1247, 1251-52 (D.C. Cir. 1997); *Robbins v. Switzer*, 104 F.3d 895, 898 (7th Cir. 1997). The Fifth Circuit has concluded that the fee provisions apply where the notice of appeal was filed while the appellant was incarcerated despite the appellant's subsequent release. *See* *Gay v. Tex. Dep't of Corr. State Jail Div.*, 117 F.3d 240, 241 (5th Cir. 1997). The Tenth Circuit has concluded that the fee provisions do not apply where the notice of appeal was filed while the appellant was not incarcerated even if previously incarcerated. *See* *Whitney v. New Mexico*, 113 F.3d 1170, 1172 n.1 (10th Cir. 1997).

With respect to the fee application, the Fifth Circuit has concluded that a form authorizing withdrawal of funds from a prisoner's trust account need not perfectly track the language of the statute, and assumed that prison officials would follow the dictates of the statute irrespective of the language of the authorization form. *See* *Chachere v. Barerra*, 135 F.3d 950, 951 (5th Cir. 1998). The Fifth Circuit also affirmed the dismissal of a prisoner's complaint for failure to submit the account statement, even though the prisoner alleged retaliatory non-compliance with the obligation to provide such a statement, and took judicial notice of a state policy for obtaining such statements. *See* *Morrow v. Collins*, 111 F.3d 374, 375

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[11] It is important to note, when assessing these arguments, that the language of § 1915(a)(3) is not new to the statute, but is merely a recodification of language which was in the former § 1915.

(5th Cir. 1997) (per curiam). Finally, the Fifth, Sixth and Eleventh Circuits have concluded that non-prisoners are also subject to the new, more exacting affidavit standards of 28 U.S.C. § 1915(a)(1). *See* *Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1306 n.1 (11th Cir. 2004) (per curiam); *Haynes v. Scott*, 116 F.3d 137, 140 (5th Cir. 1997); *Floyd v. U.S. Postal Serv.*, 105 F.3d 274, 275 (6th Cir. 1997), *superseded in part on other grounds by rule as stated in* *Callihan v. Schneider*, 178 F.3d 800 (6th Cir. 1999).

### C. Procedural Aspects of §§ 1915 and 1915A

The PLRA changes the processing of prisoner pro se complaints in three important ways: (1) the court should "before docketing, if feasible, or, in any event, as soon as practicable after docketing," review a complaint to determine whether it is frivolous, fails to state a claim, or seeks relief from a defendant who is immune from monetary relief, 28 U.S.C. § 1915A; (2) the court may, at any time, dismiss the action or appeal if it determines that the action or appeal is frivolous, fails to state a claim, or seeks relief from a defendant who is immune from monetary relief, *see* 28 U.S.C. § 1915(e)(2); 42 U.S.C. § 1997e(c)(1); and (3) defendants are no longer obligated to reply to a prisoner complaint, *see* 42 U.S.C. § 1997e(g). For a further discussion of the effects of the PLRA on processing appeals, see *supra* II.B.1, 2, 3.a, 3.c., 4.a, and 4.d.

The Ninth Circuit has concluded that the sua sponte dismissal provisions of § 1915(e)(2) apply to pending appeals. *See* *Anderson v. Angelone*, 123 F.3d 1197, 1199 (9th Cir. 1997); *Marks v. Solcum*, 98 F.3d 494, 496 (9th Cir. 1996) (per curiam); *see also* *Mitchell v. Farcass*, 112 F.3d 1483, 1485 (11th Cir. 1997). The Ninth Circuit has also concluded that these provisions apply to both prisoner and non-prisoner litigants. *See* *Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

Dismissals for failure to state a claim under § 1915(e)(2)(B)(ii) shall be reviewed de novo. *See* *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order). The same standard is applied to dismissals for failure to state a claim under 28 U.S.C. § 1915A. *See* *Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).

The Eighth Circuit has concluded that the sua sponte dismissal provisions do not violate the Equal Protection Clause. *See* *Christiansen v. Clarke*, 147 F.3d 655, 657-58 (8th Cir. 1998).

### D. Three-Strikes Provision (28 U.S.C. § 1915(g))

The PLRA provides:

> [No prisoner shall] bring a civil action or appeal a judgment in a civil action or proceeding [in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

The Ninth Circuit has upheld the provision against constitutional challenge. *See* *Andrews v. King*, 398 F.3d 1113, 1123 (9th Cir. 2005); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999); *Tierney v. Kupers*, 128 F.3d 1310, 1311-12 (9th Cir. 1997).

When counting strikes, however, the Ninth Circuit includes qualifying dismissals entered prior to the enactment of the PLRA. *See* *Tierney*, 128 F.3d at 1311-12. Both actions and appeals count as strikes. *See* *Rodriguez*, 169 F.3d at 1178. Prior dismissals "qualify as strikes only if, after reviewing the orders dismissing those actions and other relevant information, the district court determine[s] that they had been dismissed because they were frivolous, malicious or failed to state a claim." *Andrews*, 398 F.3d at 1121 (remanding to the district court to determine on what basis the prior cases were dismissed).

The Ninth Circuit has concluded that a plaintiff has "brought" an action for purposes of § 1915(g) when he or she "submits a complaint and request to proceed in forma pauperis to the court," and that an action is "dismissed" for purposes of § 1915(g) "when the court denies the prisoner's application to file the action without prepayment of the filing fee on the ground that the complaint is frivolous, malicious or fails to state a claim." *O'Neal v. Price*, 531 F.3d 1146, 1152 (9th Cir. 2008). Thus, "even if the district court styles [a] dismissal as [a] denial of the prisoner's application to file the action without prepayment of the full filing fee," the dismissal counts as a strike for purposes of § 1915(g). *Id.* at 1153.

"[D]ismissals of actions brought while a plaintiff was in the custody of the INS do not count as 'strikes' within the meaning of § 1915(g), so long as the detainee did not also face criminal charges." *Andrews*, 398 F.3d at 1121-22.

"[D]ismissed habeas petitions [also] do not count as strikes under § 1915(g)." *Id.* at 1122-23 & n.12 (recognizing, however, that where habeas petitions are "little more than 42 U.S.C. § 1983 actions mislabeled as habeas petitions so as to avoid the penalties imposed by [§ 1915(g)], . . . the district court may determine that the dismissal of the habeas petition does in fact count as a strike for purposes of § 1915(g).").

"[W]hen the defendant challenges a prisoner's right to proceed [in forma pauperis], the defendant bears the burden of producing sufficient evidence to establish that § 1915(g) bars the plaintiff's [in forma pauperis] status. Once the defendant has made out a prima facie case, the burden shifts to the plaintiff to persuade the court that § 1915(g) does not apply." *Andrews*, 398 F.3d at 1116.

When applying § 1915(g)'s "imminent danger" exception, the Ninth Circuit has agreed with several other circuits "on two pertinent points: Prisoners qualify for the exception based on the alleged conditions at the time the complaint was filed. And qualifying prisoners can file their entire complaint [in forma pauperis]; the exception does not operate on a claim-by-claim basis or apply to only certain types of relief." *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007). Further, a prisoner's complaint can demonstrate "imminent danger" by alleging "an ongoing danger." *Id.* at 1056-57 (holding that "a prisoner who alleges that prison officials continue[d] with a practice that has injured him or others similarly situated in the past will satisfy the 'ongoing danger' standard."). The Ninth Circuit noted that its holding "is quite narrow: [the Court holds] only that the district court should have accepted [the plaintiff's] lawsuit without demanding an upfront . . . payment based on the allegations appearing on the face of the complaint." *Id.* at 1050.

### E. Exhaustion Requirement (42 U.S.C. § 1997e(a))

The PLRA states that prisoners must exhaust available administrative remedies before filing § 1983 actions in federal court. *See* 42 U.S.C. § 1997e(a). *But see* 42 U.S.C. § 1997e(c)(2) (exhaustion is not required if court concludes that claim is frivolous, fails to state a claim, or brought against a defendant who is immune from suit for monetary damages).

"[T]he PLRA exhaustion requirement requires proper exhaustion." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); *see also* *Sapp v. Kimbrell*, 623 F.3d 813, 821 (9th Cir. 2010); *Harvey v. Jordan*, 605 F.3d 681, 683-84 (9th Cir. 2010). Proper exhaustion means that "a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as

a precondition to bringing suit in federal court." *Woodford v. Ngo*, 548 U.S. at 88; *see also* *Harvey*, 605 F.3d at 684-86 (concluding inmate failed to exhaust administrative remedies for excessive force claim, but that he had exhausted remedies for due process claim); *see also* *Ngo v. Woodford*, 539 F.3d 1108, 1109-10 (9th Cir. 2008) (on remand from the Supreme Court, court affirmed dismissal for failure to exhaust administrative remedies and rejected continuing violations theory).

Exhaustion is required under this provision regardless of the type of relief sought and the type of relief available through administrative procedures. *See* *Booth v. Churner*, 532 U.S. 731, 741 (2001); *Morton v. Hall*, 599 F.3d 942, 945 (9th Cir. 2010) (explaining that an inmate seeking only money damages must still complete a prison administrative process that could provide some relief, but no money, in order to exhaust administrative remedies). The exhaustion requirement applies to all claims relating to prison life that do not implicate the duration of the prisoner's sentence. *See* *Porter v. Nussle*, 534 U.S. 516, 524-32 (2002); *see also* *Roles v. Maddox*, 439 F.3d 1016, 1018 (9th Cir. 2006).

Exhaustion is not a jurisdictional requirement for bringing an action. *See* *Rumbles v. Hill*, 182 F.3d 1064, 1067-68 (9th Cir. 1999), *overruled on other grounds by* *Booth v. Churner*, 532 U.S. 731 (2001). Moreover, failure to exhaust is an affirmative defense which defendants must raise and prove. *See* *Jones v. Bock*, 549 U.S. 199, 211-217 (2007); *Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010) ("lack of exhaustion must be asserted as a defense"); *Brown v. Valoff*, 422 F.3d 926, 936-37 (9th Cir. 2005). *In Albino v. Baca*, this court held that an unenumerated motion under Rule 12(b) is not the appropriate procedural device for pretrial determination of whether administrative remedies have been exhausted under the PLRA. 747 F.3d 1162, 1168-69 (9th Cir. 2014), *cert. denied sub nom.* *Scott v. Albino*, 135 S. Ct. 403 (2014) (overruling *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003)).

A prisoner may amend her or his complaint to allege only exhausted claims. *See* *Lira v. Herrera*, 427 F.3d 1164, 1175 (9th Cir. 2005); *Bennett v. King*, 293 F.3d 1096, 1098 (9th Cir. 2002).

Note that because the PLRA requires exhaustion only of those administrative remedies "as are available," the PLRA does not require exhaustion when circumstances render administrative remedies "effectively unavailable." *See* *Sapp*, 623 F.3d at 823; *Nunez*, 591 F.3d at 1224-26. "[F]ailure to exhaust a remedy that is effectively unavailable does not bar a claim from being heard in federal court." *McBride v. Lopez*, No. 12-17682, --- F.3d ----, 2015 WL 7434623, at *3-4

(9th Cir. Nov. 24, 2015) (holding that "the threat of retaliation for reporting an incident can render the prison grievance process effectively unavailable and thereby excuse a prisoner's failure to exhaust administrative remedies.").

For further discussion of exhaustion, see *supra* I.F.

### F. Physical-Injury Requirement (42 U.S.C. § 1997e(e))

The PLRA states that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e); *see also* 28 U.S.C. § 1346(b)(2) (similar provision added to the Federal Tort Claims Act). This provision "requires a prior showing of physical injury that need not be significant but must be more than de minimus." *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002); *see also* *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1223-24 (9th Cir. 2008); *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

The provision does not apply to allegations of constitutional violations not premised on mental or emotional injury. *See* *Oliver*, 289 F.3d at 630 (Fourteenth Amendment claims); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (First Amendment claims).

### G. Injunctive Relief (18 U.S.C. § 3626)

The PLRA contains new standards for awarding prospective relief, *see* 18 U.S.C. § 3626(a), and provides a mechanism for defendants to seek termination of prospective relief, *see* 18 U.S.C. § 3626(b).

The Ninth Circuit has concluded that the provisions allowing for termination of injunctive relief are constitutional. *See* *Gilmore v. California*, 220 F.3d 987, 990 (9th Cir. 2000). The burden is on the state, however, to show excess of the constitutional minimum to justify the termination of injunctive relief. *See id.* at 1008.

The Ninth Circuit has also concluded that the provisions concerning standards for entering injunctive relief apply to pending actions. *See* *Oluwa v. Gomez*, 133 F.3d 1237, 1240 (9th Cir. 1998).

"Although the PLRA significantly affects the type of prospective injunctive relief that may be awarded, it has not substantially changed the threshold findings and standards required to justify an injunction." *Gomez v. Vernon*, 255 F.3d 1118,

1129 (9th Cir. 2001); *see also* *Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2001), *abrogated on other grounds by* *Johnson v. California*, 543 U.S. 499 (2005).

For further discussion of these provisions, see *supra* I.E.2.b.

### H. Special Masters (18 U.S.C. § 3626(f))

The PLRA contains provisions concerning the appointment, compensation, and powers of special masters. *See* 18 U.S.C. § 3626(f). The provisions concerning compensation provide that special masters shall be paid "an hourly rate not greater than the hourly rate established under [18 U.S.C. §] 3006A . . . . Such compensation and costs shall be paid with funds appropriated to the Judiciary." *See id.* § 3626(f)(4).

### I. Attorney's Fees (42 U.S.C. § 1997e(d))

The PLRA establishes new criteria regarding the award of attorney's fees in prisoner civil rights cases. *See* 42 U.S.C. § 1997e(d). These provisions establish that an attorney in a prisoners' civil rights case may not receive a fee award "based on an hourly rate greater than 150 percent of the hourly rate established under" 18 U.S.C. § 3006A. *See* 42 U.S.C. § 1997e(d)(3). Paralegal fees are subject to the same cap under the PLRA as attorney's fees. *Perez v. Cate*, 632 F.3d 553, 557 (9th Cir. 2011).

The PLRA limits attorney's fees for services performed after the effective date but not for those performed prior to the effective date. *See* *Martin v. Hadix*, 527 U.S. 343, 347 (1999); *Webb v. Ada Cty.*, 285 F.3d 829, 837-38 (9th Cir. 2002).

The PLRA cap on attorney's fees does not apply to fees awarded under the American with Disabilities Act and the Rehabilitation Act. *See* *Armstrong v. Davis*, 318 F.3d 965, 974 (9th Cir. 2003).

For further discussion of these provisions, see *supra* I.H.1.