

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

XIAO YE BAI,

Plaintiff - Appellee,

v.

CALVIN JOHNSON; BOB FAULKNER;
JEREMY BEAN; JAYMIE CABRERA;
JACOB HOLGUIN, erroneously named as
Jacob Holquin; RONALD OLIVER;
KENNETH WILLIAMS; JUAN ZELAYA;
SAM QADERI; PAULA RUDOLPH,
erroneously named as Paula Rudoph,

Defendants - Appellants,

SCALLEY, ONTIVEROS, OWENS,
MICHAEL MINEV, JORJA POWERS,
CHARLES DANIELS, DAVID RIVAS,
HEATHER GARRETT, LARRY
TREADWELL, KEITH MCKEEHAN,
RIGNEY, CHRISTY, Nurse, STALK,

Defendants.

No. 25-2479

D.C. No.

2:20-cv-02192-RFB-EJY

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware, II, District Judge, Presiding

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

Argued and Submitted June 9, 2026
San Francisco, California

Before: NGUYEN and VANDYKE, Circuit Judges, and HUIE, District Judge.**
Partial Concurrence and Partial Dissent by Judge VANDYKE

Defendants-Appellants (“Defendants”) appeal the district court’s denial of their motion to dismiss Plaintiff-Appellee Xiao Ye Bai’s (“Bai”) Third Amended Complaint. Bai, an inmate at a Nevada state correctional institution, sued numerous prison officials for alleged federal and state constitutional violations. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand.

We review de novo questions of qualified immunity, *Polanco v. Diaz*, 76 F.4th 918, 925 (9th Cir. 2023), and Eleventh Amendment sovereign immunity, *Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1152 (9th Cir. 2018).

State Law Claims

1. The district court lacked jurisdiction over Bai’s state law claims. To perfect a waiver of Nevada’s sovereign immunity, Bai was required to include Nevada as a defendant in his tort action arising out of an act “within the scope of a person’s public duties or employment.” Nev. Rev. Stat. §§ 41.0337(1), 41.031. Nevada has not waived its Eleventh Amendment immunity from suit in federal

** The Honorable Robert Steven Huie, United States District Judge for the Southern District of California, sitting by designation.

court, and Congress has not abrogated state sovereign immunity for actions brought under 42 U.S.C. § 1983. *See O'Connor v. State of Nev.*, 686 F.2d 749, 750 (9th Cir. 1982). Because Nevada is an indispensable party to the state law claims, and the district court lacked jurisdiction over Nevada, the district court erred in failing to dismiss Bai's state law claims. *See Hirst v. Gertzen*, 676 F.2d 1252, 1264 (9th Cir. 1982); *see also Cardenas-Ornelas v. Johnson*, No. 24-6755, 2026 WL 237695 (9th Cir. Jan. 29, 2026).

Bai argues that Section 41.0337 does not apply to his claims raised against the Defendants in their individual capacities. But Bai's complaint alleges that "[a]ll mentioned defendants were acting within the scope of their employment at the times of the incidents giving rise to the causes of action."¹ Sovereign immunity, therefore, applies. We reverse the district court's denial of the motion to dismiss Bai's state law claims.

Qualified Immunity

2. As a preliminary matter, Bai argues that we lack jurisdiction to review the district court's denial of qualified immunity because "the fact-bound disputes in Defendants' brief are not appropriate for an interlocutory appeal." *See Johnson v. Jones*, 515 U.S. 304, 307 (1995). However, we have jurisdiction because our

¹ We also find that Defendants did not waive their Eleventh Amendment sovereign immunity defense because they explicitly raised this issue below.

review rests on legal and not factual disputes. *See Morales v. Fry*, 873 F.3d 817, 821 (9th Cir. 2017) (“We hold that the ‘clearly established’ inquiry [for qualified immunity] is a question of law that only a judge can decide.”); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 674–75 (2009) (“Evaluating the sufficiency of a complaint is not a ‘fact-based’ question of law, so the problem the Court sought to avoid in *Johnson* is not implicated here.”).

In determining whether the officers are entitled to qualified immunity, we ask: (1) “[t]aken in the light most favorable to the party asserting the injury,” whether “the facts alleged show the officer’s conduct violated a constitutional right”; and (2) “if a violation could be made out on a favorable view of the parties’ submissions,” whether the right was “clearly established.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Due Process Claim

a. Defendants argue that Bai’s Fourteenth Amendment due process claim should be dismissed for three reasons: (1) Bai did not sufficiently allege the personal involvement of Defendants Zelaya, Garret, or Rudolph; (2) the deprivation of Bai’s funds did not violate due process; and (3) Bai had an adequate post-deprivation remedy under state law. We reject each of these arguments.

First, Bai sufficiently alleges the personal involvement of Defendants Zelaya, Garret, and Rudolph. Bai alleges that Zelaya conducted the hearing

leading to a finding of restitution, Garret communicated with Bai about his restitution amount and charged his account, and Rudolph is the Inmate Banking Officer at the prison. Second, Bai sufficiently alleges that the deprivation of his inmate trust account funds violated due process. Defendants claim that Bai has “been provided all that due process requires” because prison officials are allowed to deduct funds from an inmate’s trust account to fulfill restitution obligations, *see Craft v. Ahuja*, 475 Fed. Appx. 649, 650, 2012 WL 688411, at *1 (9th Cir. 2012), including for medical treatment relating to self-inflicted injuries, *see Nev. Rev. Stat. § 209.246*. However, this does not resolve Bai’s dispute regarding the prison’s determination and calculation of the restitution amount, his inability to contest the amount, or the hearing process which led to the determination that his injuries were self-inflicted. At this stage in the proceedings, Bai has sufficiently alleged a violation of his clearly established Fourteenth Amendment right. *See Shinault v. Hawks*, 782 F.3d 1053, 1059 (9th Cir. 2015) (“At a minimum, due process requires that inmates be informed of their financial liability (including the basis for the calculation), and have a meaningful opportunity to contest the assessment before significant assets are deducted or frozen.”).

Finally, the availability of a post-deprivation remedy under Nevada law does not foreclose Bai’s due process claim where, as here, the state officials were “acting pursuant to an[] established state procedure.” *Zinerman v. Burch*, 494 U.S.

113, 130 (1990); *see also* *Zimmerman v. City of Oakland*, 255 F.3d 734, 738 (9th Cir. 2001) (explaining that “postdeprivation remedies [can]not save an otherwise unconstitutional act from unconstitutionality in cases in which the state officer acted pursuant to some established procedure.”).

We affirm the district court’s denial of qualified immunity as to Bai’s due process claim.

First Amendment Claim

b. Bai alleges that Defendants Holguin and Qaderi retaliated against him for filing a complaint by using “racial epithets and curses” over the cell intercom and intentionally leaving his cell light on at night. He further alleges that Qaderi turned the water off in his cell and filed a false report against him, which resulted in temporary disciplinary charges. Bai has failed to meet his burden of demonstrating that any of Holguin’s actions violated a clearly established First Amendment right. However, Bai demonstrated that Qaderi violated his First Amendment right when he filed a false report against him. *See Hines v. Gomez*, 108 F.3d 265, 267–68 (9th Cir. 1997) (upholding a jury’s finding that a prison official violated an inmate’s First Amendment right to file a prison grievance when the official filed a false report against the inmate in retaliation); *see also Watison v. Carter*, 668 F.3d 1108, 1115 (9th Cir. 2012).

Because the right of an inmate to be free from the filing of a false report by a prison official is clearly established, we affirm the district court's denial of qualified immunity as to Qaderi but reverse the district court's holding as to Holguin.

Eighth Amendment Claims

c. The district court correctly denied the motion to dismiss Bai's Eighth Amendment claim against Defendants Bean, Williams, Cabrera, and Faulkner for their alleged failure to expedite Bai's follow-up appointments. Bai alleges that these defendants "were aware of [] Bai's serious injury and need for medical care but continuously failed to take reasonable measures to ensure he received this care." Specifically, the prison officials failed to schedule necessary follow-up appointments and surgeries with an orthopedic specialist for nearly a year and a half. Bai also claimed that he repeatedly sent "kites" noting that he needed these appointments because his pain was "worsening."

This alleged constitutional violation is clearly established under our precedent. *See Jett v. Penner*, 439 F.3d 1091, 1098 (9th Cir. 2006) (holding that, because the inmate sent letters to the prison administrators detailing his medical needs, the administrators were aware of the inmate's need to see an orthopedic specialist and violated the Eighth Amendment in their failure to respond to his requests); *see also Hunt v. Dental Dep't*, 865 F.2d 198, 200–01 (9th Cir. 1989)

(holding that prison officials were deliberately indifferent when they delayed referring an inmate to a dentist for about three months but “were aware of his bleeding gums, breaking teeth and his inability to eat properly”).

We affirm the district court’s denial of qualified immunity as to this claim.²

d. Bai fails to cite to any factually analogous precedent for his remaining Eighth Amendment claims and, therefore, has not met his burden of demonstrating the violation of a clearly established right. For example, Bai claims that various Defendants failed to deliver him food in bed, improperly transferred him to a different prison and imposed a shackling order, and failed to supply him with the correct medical braces. We reverse the district court’s denial of qualified immunity as to these claims.

AFFIRMED in part, REVERSED in part, and REMANDED.³

² Bai’s Eighth Amendment claim against the unidentified defendant “Christy” was not a subject of Defendants’ motion to dismiss, was not discussed in the district court’s order denying the motion to dismiss, and was not briefed by the parties on appeal. As such, Bai’s claim against “Christy” is not properly before this court. *See Shirk v. U.S. ex. rel. Dep’t of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014).

³ The motion for judicial notice, Dkt. No. 13, is denied.

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS*Bai v. Johnson, et al.*, No. 25-2479

VANDYKE, Circuit Judge, concurring in part and dissenting in part

I agree with the majority that Bai’s state law claims, his First Amendment claim against defendant Holguin, and most of his Eighth Amendment claims should have been dismissed. I also agree that Bai’s claim against unidentified defendant “Christy” is not properly before us. But I respectfully dissent from the majority’s holding with respect to Bai’s Due Process claim and his Eighth Amendment claim that Bean, Williams, Cabrera, and Faulkner failed to expedite medical appointments because I believe both claims should have been dismissed. Finally, while I agree with the majority that, under *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997), qualified immunity does not bar Bai’s First Amendment claim against defendant Qaderi, I write separately to briefly express my view that our court should reconsider *Hines*.

On Bai’s Due Process claim, the majority rejects the defendants’ argument that the availability of a post-deprivation remedy bars Bai’s claim, citing *Zinerman v. Burch*, 494 U.S. 113 (1990), and *Zimmerman v. City of Oakland*, 255 F.3d 734 (9th Cir. 2001). In his briefing before this court, Bai did not make that argument and cited neither of those cases. Instead, he argued—wrongly—that the availability of an adequate post-deprivation remedy is a factual issue and that merely alleging “NDOC does not provide Mr. Bai any post-deprivation remedy” sufficed to prove no remedies were available. But the availability of post-deprivation remedies is a

legal question that cannot be avoided by an incorrect, conclusory allegation about what the law is. *See Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994); Nev. Rev. Stat. § 209.243(1). I would reverse and hold that Bai forfeited the argument that the majority makes for him because he failed to raise that argument on appeal. *See Nev. Dep't of Corr. v. Greene*, 648 F.3d 1014, 1020 (9th Cir. 2011) (deeming issues not supported by argument in a party's briefing to be waived); *Gallardo v. United States*, 755 F.3d 860, 865 (9th Cir. 2014).

I would also reverse the district court's denial of qualified immunity on Bai's Eighth Amendment claim that defendants Bean, Williams, Cabrera, and Faulkner did not expedite Bai's medical appointments with orthopedic specialist Dr. Wulff. Prison officials cannot be faulted for failing to provide medical assistance that would have been "impossible to provide." *Peralta v. Dillard*, 744 F.3d 1076, 1082–83 (9th Cir. 2014) (en banc). And here, Bai's allegations indicate that delays in appointments with Dr. Wulff were caused by factors beyond the defendants' control. The defendants put Bai on the waitlist for follow-up appointments, but Bai alleges no facts to support that defendants had control over Dr. Wulff's schedule such that they could force Dr. Wulff—who was not a prison employee—to see Bai on the schedule Bai wanted.¹ That distinguishes this case from *Jett v. Penner*, in which prison

¹ Bai's speculation in his complaint that the defendants "had the authority to prioritize Mr. Bai for medical appointments and ensure he was seen promptly," is

doctors failed to provide adequate medical care themselves and, without meaningful explanation or putting the plaintiff on any medical providers' waiting lists, failed to set up an appointment with an outside doctor for months. 439 F.3d 1091, 1094–95 (9th Cir. 2006). *Hunt v. Dental Department* is also distinct: that case involved only internal prison doctors rather than external medical providers over whom the defendants had no control. 865 F.2d 198, 199 (9th Cir. 1989). Because *Jett* and *Hunt* are sufficiently distinct, I would hold that they do not clearly establish that the defendants' conduct here violated Bai's Eighth Amendment rights.

Finally, I agree that *Hines*, 108 F.3d 265, defeats Qaderi's assertion of qualified immunity against Bai's First Amendment claim alleging that Qaderi filed a false report against Bai. But I'll briefly explain why *Hines* was wrongly decided.

To bring a First Amendment retaliation claim, an inmate "must allege that [an] 'official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.'" *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (quoting *Rhodes v. Robinson*, 408 F.3d 559, 568–69 (9th Cir. 2005)). That can generally be done by alleging "harm that is more than minimal." *Rhodes*, 408 F.3d at 567 n.11. *Hines* held that the nebulous chilling effect of an allegedly retaliatory disciplinary charge is enough, on its own, to support a First Amendment retaliation

unsupported by any factual allegations and is therefore "conclusory and not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

claim, regardless of whether the charge leads to any disciplinary consequences.² 108 F.3d at 269.

Here, Bai does not allege that Qaderi's false report resulted in any disciplinary consequences—per Bai's complaint, the resulting disciplinary charges were dismissed. He doesn't even allege that he had to appear at a disciplinary hearing to rebut the charges before their dismissal. And his only allegation of any chilling effect is a bare assertion that the false report, among other actions taken by Qaderi and Holguin, "chilled [Bai's] exercise of his First Amendment rights."

This case demonstrates the flaw in *Hines*'s holding. When, as here, an alleged frivolous disciplinary charge is quickly dismissed without leading to any disciplinary consequences, it does not cause an inmate "harm that is more than minimal." *Rhodes*, 408 F.3d at 567 n.11. Nor would it likely have any notable chilling effect, especially because, in the context of inmate suits, "the very status of being a prisoner necessarily means that ... actions taken which might seem chilling to non-prisoners are much more routine (and not chilling) to a prisoner of ordinary firmness." *Lyons v. Barth*, 637 F. App'x 278, 281–82 (9th Cir. 2015). If anything, the prompt dismissal

² The disciplinary charge in *Hines* did lead to disciplinary consequences—"ten-day confinement and television loss"—but "the injury asserted" in the plaintiff's First Amendment claim was "the retaliatory accusation's chilling effect on [the plaintiff's] First Amendment rights, not the additional confinement or the deprivation of the television." *Hines*, 108 F.3d at 269. Limiting its holding specifically to the chilling effect, the court concluded "that [the plaintiff's] failure to demonstrate a more substantial injury d[id] not nullify his retaliation claim." *Id.*

of frivolous disciplinary charges might lead an inmate to have *greater* confidence in his ability to use a prison's administrative grievance system free from prison officials' interference.

Recognizing this, several other circuit courts have concluded that a mere dismissed disciplinary charge standing alone is too minimal to support a First Amendment claim—notwithstanding that such a charge could always be claimed, as in this case, to have some general “chilling effect.” *Bridges v. Gilbert*, 557 F.3d 541, 555 (7th Cir. 2009) (“A single retaliatory disciplinary charge that is later dismissed is insufficient to serve as the basis of a § 1983 action.”); *Pope v. Bernard*, No. 10-1443, 2011 WL 478055, at *2 (1st Cir. 2011) (“[T]he filing of a single, later-dismissed disciplinary charge against an inmate, even if taken with a retaliatory motive, is *insufficient* to qualify as *more than de minimis*.”); *Starr v. Dube*, 334 F. App'x 341, 342 (1st Cir. 2009) (same).

Our sister circuits are right, and *Hines* was wrong to conclude that a frivolous, dismissed disciplinary charge can, without causing further harm, support a First Amendment retaliation claim. Our court should reconsider *Hines*'s erroneous holding. But because we are bound by *Hines*, I concur with the majority's conclusion that qualified immunity does not defeat Bai's First Amendment claim against Qaderi.

Accordingly, I concur in the majority's holding with respect to Bai's state law claims, his First Amendment claims, and all his Eighth Amendment claims except the alleged failure to expedite medical appointments. I respectfully dissent from the majority's holding that Bai's Due Process claim and Eighth Amendment claim about failure to expedite medical appointments may proceed.