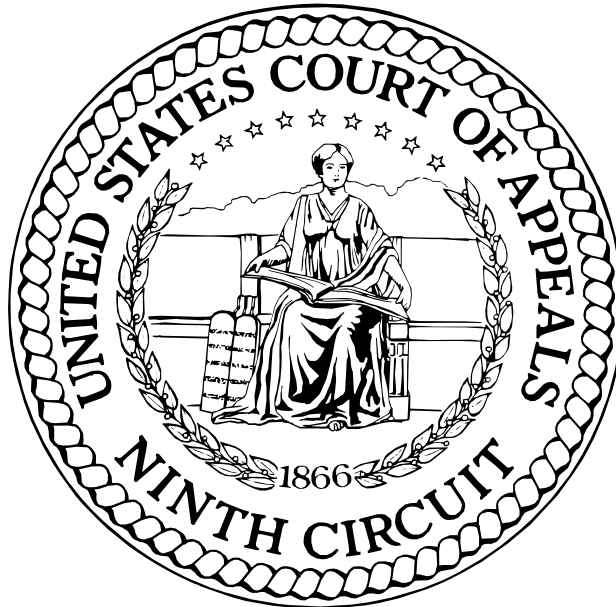


**United States Court of Appeals for the Ninth Circuit
Office of Staff Attorneys**



Section 1983 Outline

Updated 2022

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

This outline is intended for use as a starting point for research. It is not intended to express the views or opinions of the Ninth Circuit, and it may not be cited to or by the courts of this circuit.

ACKNOWLEDGMENTS

Originally written in 2002 by Kent Brintnall. Updated by the Office of Staff Attorneys.

Many thanks to the staff attorneys and others who have reviewed sections of this outline, and have contributed valuable comments and corrections.

Corrections and comments should be e-mailed to Outlines@ca9.uscourts.gov.

Table of Contents

I. GENERAL § 1983 PRINCIPLES	1
A. Elements of a § 1983 Action	1
1. Person.....	2
a. States	2
b. Territories.....	2
c. Local Governmental Units.....	2
(1) Status as Persons	3
(2) Theory of Liability.....	4
(a) Municipal Policy.....	5
(b) Municipal Custom	7
(c) Municipality’s Failure to Train.....	8
(d) Pleading Standard	10
d. Agencies.....	11
e. State Officials.....	13
(1) Official Capacity	13
(2) Personal Capacity.....	14
(3) Determining Capacity	14
f. Federal Officials.....	15
2. Acting under Color of State Law	15
a. General Principles.....	15
b. Applications	17
(1) State Employees.....	17

(2)	Police Officers	18
(3)	Prison Officials	18
(4)	Prison Physicians	19
(5)	Public Defenders	19
(6)	Private Parties	20
(7)	Federal Employees.....	21
3.	Deprivation of a Right.....	21
a.	Rights Guaranteed by the Constitution.....	21
b.	Rights Guaranteed by Federal Statutes.....	22
c.	Rights Guaranteed by State Law	23
B.	State-of-Mind Requirement.....	24
C.	Causation	24
1.	General Principles	24
2.	Supervisory Liability.....	25
3.	Local Governmental Unit Liability.....	27
4.	Relationship to Relief Sought	27
5.	Pleading Standards	27
D.	Immunities	27
1.	Absolute Immunity	27
a.	Basic Principles.....	28
(1)	Determining Eligibility for Absolute Immunity	28
(2)	Burden of Proof Regarding Eligibility for Absolute Immunity	29
(3)	Effect of Absolute Immunity	30

(4)	Application to <i>Bivens</i> Actions	30
b.	Judicial Immunity	30
(1)	Basic Principles.....	30
(2)	Eligibility	31
(a)	Judges.....	31
(b)	Magistrate Judges	33
(c)	Administrative Agency Hearing Officers.....	33
(d)	Court Mediators.....	33
(e)	Court-Appointed Psychiatrists.....	33
(f)	Court Employees / Courtroom Officials	33
(g)	Parole Board Officials	34
(h)	Probation Officers / Parole Officers.....	35
c.	Prosecutorial Immunity.....	36
(1)	Basic Principles.....	36
(2)	Eligibility	40
(a)	Attorneys.....	40
(b)	Agency Officials.....	41
(c)	Social Workers.....	41
d.	Presidential Immunity	42
e.	Legislative Immunity	42
f.	Witness Immunity.....	43
g.	Ineligibility.....	43
(1)	Local Governmental Units.....	43

(2) Prison Officials	43
(3) Defense Counsel	44
(4) Police Officers	44
(5) Court Reporters	44
(6) Executive Officials.....	45
(7) Social Workers	45
2. Qualified Immunity.....	46
a. Basic Principles.....	47
(1) Eligibility	47
(a) Identifying the Right.....	50
(b) Clearly Established Right.....	50
(2) Ineligibility.....	54
(a) Local Governmental Units.....	54
(b) Municipal Employees	54
(c) Private Individuals	54
(d) Municipality.....	55
b. Pleading: Plaintiff’s Allegations.....	55
c. Pleading: Affirmative Defense	56
d. Burdens of Proof.....	57
e. Discovery	57
f. Dismissal.....	58
g. Summary Judgment	59
h. Interlocutory Appeals.....	59

3.	Eleventh Amendment Immunity	60
a.	Basic Principles.....	61
b.	Inapplicability of Amendment.....	62
(1)	Local Governmental Units.....	62
(2)	State Officials.....	62
(a)	Official Capacity.....	62
(b)	Personal Capacity	64
c.	Abrogation	64
d.	Waiver.....	65
e.	Violations of State Law	66
f.	Burden of Proof.....	67
g.	Interlocutory Appeals.....	67
E.	Remedies.....	68
1.	Damages.....	68
a.	Compensatory	68
b.	Punitive	69
c.	Presumed.....	70
d.	Nominal.....	70
2.	Injunctive Relief.....	71
a.	Law Prior to Enactment of the Prison Litigation Reform Act.....	71
b.	Law after Enactment of the Prison Litigation Reform Act	72
3.	Declaratory Relief.....	73
F.	Exhaustion of Remedies	73

1. State Remedies	73
2. Prison Administrative Remedies.....	74
G. Statute of Limitations	79
1. General Principles	79
2. States’ Personal-Injury Statutes of Limitations	81
3. Dismissal	83
H. Attorney’s Fees.....	83
1. Prison Litigation Reform Act (42 U.S.C. § 1997e(d)).....	83
2. 42 U.S.C. § 1988	84
a. General Principles.....	84
b. Determining when a Plaintiff is a “Prevailing Party”.....	85
c. Determining the Amount of the Fee Award	88
d. Awarding Attorney’s Fees to Defendants.....	90
e. Awarding Attorney’s Fees to Pro Se Litigants	91
f. Immunity and Fee Awards.....	91
g. Other Work Entitling Attorney to Fees	91
3. Equal Access to Justice Act (28 U.S.C. § 2412).....	92
I. Costs.....	93
J. Relationship to Habeas Corpus Proceedings.....	93
K. <i>Bivens</i> Actions	97
II. PROCEDURAL ISSUES CONCERNING PRO SE COMPLAINTS	101
A. General Considerations.....	101
1. Pleadings	101

a.	Liberal Construction	101
b.	Exceptions.....	103
(1)	Pleading Requirements	103
(2)	Procedural Rules	105
2.	Time Limits.....	106
3.	Representing Others	107
4.	Competency Hearings	107
5.	Presence at Hearings	108
B.	Processing and Resolving Cases.....	108
1.	Applications for In Forma Pauperis Status	108
a.	Application Requirements (28 U.S.C. § 1915(a))	108
b.	Evaluation of Application.....	109
c.	Payment of Fee (28 U.S.C. § 1915(b)–(c)).....	109
d.	Prior Litigation History (28 U.S.C. § 1915(g))	110
e.	Accompanying Rights.....	111
(1)	Service of Process (28 U.S.C. § 1915(d)).....	111
(2)	Appointment of Counsel (28 U.S.C. § 1915(e)(1)).....	112
2.	Screening of Complaints (28 U.S.C. § 1915A)	113
3.	Frivolousness (28 U.S.C. § 1915(e)(2)(B)(i)).....	113
a.	Sua Sponte Dismissal.....	113
b.	Standard	113
c.	Leave to Amend.....	114
d.	Review on Appeal.....	115

4. Failure to State a Claim (28 U.S.C. § 1915(e)(2)(B)(ii)).....	115
a. Sua Sponte Dismissal.....	115
b. Standard	116
c. Materials to be Considered	116
d. Leave to Amend.....	117
e. Effect of Amendment.....	117
f. Review on Appeal.....	117
5. Summary Judgment (Fed. R. Civ. P. 56)	118
a. Sua Sponte Entry of Summary Judgment.....	118
b. Standard	119
c. Informing Pro Se Litigants about Summary Judgment Requirements	120
d. Materials Submitted in Opposition to Summary Judgment Motion....	123
e. Conversion of Motion to Dismiss.....	124
f. Requests for Additional Discovery Prior to Summary Judgment (Fed. R. Civ. P. 56(d)).....	125
g. Local Rules Concerning Summary Judgment	127
h. Review on Appeal.....	128
6. Other Kinds of Dismissal.....	128
a. Subject-Matter Jurisdiction.....	128
b. Personal Jurisdiction	128
c. Service of Process (Fed. R. Civ. P. 4(m)).....	128
d. Short and Plain Statement (Fed. R. Civ. P. 8(a)).....	130
e. Voluntary Dismissal (Fed. R. Civ. P. 41(a)).....	130

f.	Involuntary Dismissal (Fed. R. Civ. P. 41(b)).....	132
g.	Default Judgments (Fed. R. Civ. P. 55(b))	133
C.	Disciplining Pro Se Litigants.....	134
1.	Vexatious Litigant Orders.....	134
2.	Sanctions	134
D.	Using Magistrate Judges.....	135
E.	Recusal/Disqualification of Judges	138
F.	Considerations on Appeal.....	139
1.	Granting In Forma Pauperis Status	139
2.	Appointment of Counsel	139
3.	Transcripts.....	139
III.	ANALYSIS OF SUBSTANTIVE LAW	141
A.	Constitutional Claims	141
1.	First Amendment.....	142
a.	Speech Claims.....	142
(1)	General Principles.....	142
(2)	Applications	144
(a)	Personal Correspondence.....	144
(b)	Legal Correspondence	145
(c)	Publications.....	146
(d)	Telephones.....	148
(e)	Access to Media.....	149
(f)	Associational Rights.....	149

(g)	Jailhouse Lawyers.....	149
(h)	Prison Grievances	149
b.	Religion Claims	150
(1)	Free Exercise Clause.....	150
(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	153
2.	Fourth Amendment	156
a.	General Principles.....	156
b.	Cell Searches.....	156
c.	Body Searches.....	156
d.	Phone-Call Monitoring	158
3.	Sixth Amendment.....	159
4.	Eighth Amendment	159
a.	General Principles.....	159
b.	Safety	163
c.	Medical Needs	165
(1)	General Principles.....	165
(2)	Denial of, Delay of, or Interference with Treatment	167
(3)	Qualified Medical Personnel	168
(4)	Informing Medical Personnel of Medical Problems.....	168
(5)	Negligence/Medical Malpractice	169
(6)	Difference of Opinion about Medical Treatment	169
(7)	Fees for Medical Services.....	170

(8) Transfers	170
d. Conditions of Confinement.....	171
(1) General Principles.....	171
(2) Specific Conditions.....	172
(a) Crowding.....	172
(b) Sanitation	172
(c) Food	172
(d) Noise.....	172
(e) Exercise.....	173
(f) Vocational and Rehabilitative Programs.....	174
(g) Temperature of Cells	174
(h) Ventilation	174
(i) Lighting	175
(j) Environmental Tobacco Smoke	175
(k) Asbestos.....	175
(l) Personal Hygiene.....	175
(m) Clothing	176
(n) Searches.....	176
(o) Verbal Harassment	176
(p) Safety Cell	176
e. Excessive Force	176
f. Capital Punishment.....	178
5. Fourteenth Amendment.....	179

a.	Equal Protection Claims	179
b.	Procedural Due Process Claims.....	180
(1)	Defining Liberty Interests.....	180
(a)	Interests Protected by the Constitution.....	180
(b)	Interests Protected by State Law	181
(2)	Defining Property Interests.....	183
(3)	Procedural Guarantees	184
(a)	Administrative Segregation	184
(b)	Disciplinary Hearings.....	186
(4)	Effect of State Remedies.....	188
(5)	State-of-Mind Requirement.....	189
c.	Substantive Due Process Claims.....	189
d.	Vagueness Claims.....	190
6.	Access to Court Claims.....	190
7.	Miscellaneous Constitutional Claims	193
a.	Classification.....	193
b.	Transfers.....	193
c.	Visitation.....	193
d.	Verbal Harassment.....	194
e.	Vocational and Rehabilitative Programs	195
f.	Right to Marry/Procreate	195
g.	Takings.....	195
B.	Statutory Claims	195

1. 42 U.S.C. § 1981	195
2. 42 U.S.C. § 1985(3)	196
3. 42 U.S.C. § 1986	197
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	197
5. Fair Labor Standards Act (29 U.S.C. §§ 201–19)	198
6. Rehabilitation Act (29 U.S.C. §§ 701–97b); Americans with Disabilities Act (42 U.S.C. §§ 12101–12213)	198
7. Title VII (42 U.S.C. §§ 2000e to 2000e–17)	199
8. Title IX (20 U.S.C. §§ 1681–88)	199
9. Federal Tort Claims Act (28 U.S.C. §§ 2671–2680)	200
C. Parole/Probation	201
D. Rights of Pretrial Detainees	204
IV. PRISON LITIGATION REFORM ACT	208
A. Application of the In Forma Pauperis Provisions (28 U.S.C. §§ 1915 & 1915A)	208
B. Fee Provisions (28 U.S.C. § 1915(a)(2)–(3), (b))	210
C. Procedural Aspects of §§ 1915 and 1915A	213
D. Three-Strikes Provision (28 U.S.C. § 1915(g))	215
E. Exhaustion Requirement (42 U.S.C. § 1997e(a))	218
F. Physical-Injury Requirement (42 U.S.C. § 1997e(e))	223
G. Injunctive Relief (18 U.S.C. § 3626)	223
H. Special Masters (18 U.S.C. § 3626(f))	225
I. Attorney’s Fees (42 U.S.C. § 1997e(d))	225

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); *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep’t of Child. & Fam. Servs.*, 974 F.3d 1012, 1018 (9th Cir. 2020); *Tatum v. Moody*, 768 F.3d 806, 814 (9th Cir. 2014); *Hall v. City of Los Angeles*, 697 F.3d 1059, 1068 (9th Cir. 2012); *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.” *Crompton 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 *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1144 (9th Cir. 2021); *Pistor v. Garcia*, 791 F. 3d 1104, 1114 (9th Cir. 2015); *Long v. Cnty. 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).

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); *Cornel v. Hawaii*, 37 F.4th 527, 531 (9th Cir. 2022) (stating that “States or governmental entities that are considered ‘arms of the State’ for Eleventh Amendment purposes are not ‘persons’ under § 1983.” (citation omitted)); *Stilwell v. City of Williams*, 831 F.3d 1234, 1245 (9th Cir. 2016) (explaining § 1983 did not abrogate states’ Eleventh Amendment immunity and therefore does not allow suits against states themselves); *Jackson v. Barnes*, 749 F.3d 755, 764 (9th Cir. 2014); *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *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.

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). However, territorial officers acting in their official capacity are persons that could be subject to suit under § 1983 when sued for prospective relief. See *Paeste v. Gov’t of Guam*, 798 F.3d 1228, 1235–40 (9th Cir. 2015) (discussing distinction between suits seeking damages and suits seeking prospective relief). See also *Crawford v. Antonio B. Won Pat Int’l Airport Auth.*, 917 F.3d 1081, 1089 n.8 (9th Cir. 2019) (“A Guam official is a ‘person’ for purposes of § 1983 when the official is sued, in his official capacity, for prospective relief.”).

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 Cnty. Comm’rs v. Brown*, 520 U.S. 397, 403 (1997); *Hyun Ju Park v. City & Cnty. of Honolulu*, 952 F.3d 1136, 1141 (9th Cir. 2020) (“A municipality may be held liable as a ‘person’ under 42 U.S.C. § 1983 when it maintains a policy or custom that causes the deprivation of a plaintiff’s federally protected rights.”); *Edgerly v. City & Cnty. of San Francisco*, 599 F.3d 946, 960 (9th Cir. 2010); *Waggy v. Spokane Cnty. Wash.*, 594 F.3d 707, 713 (9th Cir. 2010); *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir. 2008); *Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006); *Cortez v. Cnty. 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. 2014) (“[W]hen a California sheriff’s department performs the function of conducting criminal investigations, it is a county actor subject to suit under § 1983”); *Miranda v. Clark Cnty., Nev.*, 319 F.3d 465, 469 (9th Cir. 2003) (en banc); see also *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1066 n.2 (9th Cir. 2016) (en banc) (rejecting the County’s claim that the Eleventh Amendment barred the suit). Municipal government officials are also persons for purposes of § 1983. See *Monell*, 436 U.S. at 691 n.55.

“A county is subject to Section 1983 liability ‘if its policies, whether set by the government’s lawmakers or by those whose edicts or acts ... may fairly be said to represent official policy, caused the particular constitutional violation at issue.’” *King v. Cnty. of Los Angeles*, 885 F.3d 548, 558 (9th Cir. 2018) (quoting *Streit v. Cnty. of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001)); see also *Hardwick v. Cnty. of Orange*, 980 F.3d 733, 742 (9th Cir. 2020); *Rivera v. Cnty. of Los Angeles*, 745 F.3d 384, 389 (9th Cir. 2014) (“[M]unicipalities, including counties and their sheriff’s departments, can only be liable under § 1983 if an unconstitutional action ‘implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.’” (quoting *Monell*, 436 U.S. at 690)).

(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 Cnty. 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); *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1153 (9th Cir. 2021) (“[A] municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.”) (quoting *Monell*, 436 U.S. at 691)); *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1171–72 (9th Cir.), *cert. denied*, 142 S. Ct. 337 (2021); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1073 (9th Cir. 2016) (en banc); *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir. 2008); *Webb v. Sloan*, 330 F.3d 1158, 1163–64 (9th Cir. 2003); *Hopper v. City of Pasco*, 241 F.3d 1067, 1082 (9th Cir. 2001).

Municipal liability claims under § 1983 require a plaintiff to show an underlying constitutional violation. See *Lockett v. Cnty. of Los Angeles*, 977 F.3d 737, 741 (9th Cir. 2020). 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.”); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017) (explaining a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others; its purpose being to deter the officer); *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; *Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 793 (9th Cir. 2016) (en banc) (“To [prevail on a claim against a municipal entity for a constitutional violation], 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.”); *Pasadena Republican Club*, 985 F.3d at 1172 (“To establish *Monell* liability under § 1983,

the constitutional violation must be caused by a municipality’s ‘policy, practice, or custom’ or be ordered by a policy-making official.”); *Fogel*, 531 F.3d at 834; *Webb*, 330 F.3d at 1164; *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); *Garmon v. Cnty. of Los Angeles*, 828 F.3d 837, 845 (9th Cir. 2016) (same); *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 Cnty., Cal. v. Humphries*, 562 U.S. 29, 34 (2010).

(a) Municipal Policy

“In order to establish municipal liability, a plaintiff must show that a ‘policy or custom’ led to the plaintiff’s injury.” *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1073 (9th Cir. 2016) (en banc) (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978)); see also *J. K. J. v. City of San Diego*, 42 F.4th 990, 998 (9th Cir. 2021) (as amended); *Endy v. Cnty. Of Los Angeles*, 975 F.3d 757, 769 (9th Cir. 2020); *Garmon v. Cnty. of Los Angeles*, 828 F.3d 837, 845 (9th Cir. 2016) (“[P]laintiffs who seek to impose liability on local governments under § 1983 must prove that action pursuant to official municipal policy caused their injury.” (internal quotation marks and citations omitted)). “The custom or policy must be a ‘deliberate choice to follow a course of action ... made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.’” *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1153 (9th Cir. 2021) (quoting *Castro*, 833 F.3d at 1075).

“The [Supreme] Court has further required that the plaintiff demonstrate that the policy or custom of a municipality ‘reflects deliberate indifference to the constitutional rights of its inhabitants.’” *Castro*, 833 F.3d at 1060 (quoting *City of Canton v. Harris*, 489 U.S. 378, 392 (1989)). The deliberate indifference standard

for municipal liability under § 1983 is an objective inquiry. *Castro*, 833 F.3d at 1076 (overruling *Gibson v. Cnty. of Washoe*, 290 F.3d 1175 (9th Cir. 2002)).

“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); *Endy*, 975 F.3d at 769. 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 & Cnty. 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 *Hyun Ju Park v. City & Cnty. of Honolulu*, 952 F.3d 1136, 1141 (9th Cir. 2020); *Brown v. Lynch*, 831 F.3d 1146, 1152 (9th Cir. 2016); *Waggy v. Spokane Cnty. Wash.*, 594 F.3d 707, 713 (9th Cir. 2010); *Long v. Cnty. 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). See also *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 604 (9th Cir. 2019) (“[C]onstitutional deprivations may occur not ... as a result of actions of the individual officers, but as a result of the collective inaction of the municipal defendant.” (internal quotation marks and citation omitted)).

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); *Brown v. Lynch*, 831 F.3d 1146, 1152 (9th Cir. 2016); *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; 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.”); *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. Cnty. 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; *Gordon v. Cnty. of Orange*, 6 F.4th 961, 974 (9th Cir. 2021); *Trevino v. Gates*, 99 F.3d 911, 920–21 (9th Cir. 1996). “[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 v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992). *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 that gave rise to the alleged constitutional violation. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Gordon v. Cnty. of Orange*, 6 F.4th 961, 974 (9th Cir. 2021) (“An unconstitutional policy need not be formal or written to create municipal liability under Section 1983; however, it must be so permanent and well settled as to constitute a custom or usage with the force of law.” (internal quotation marks and citation omitted)); *Navarro v. Block*, 72 F.3d 712, 714–15 (9th Cir. 1996). Allegations of random acts, or single instances of misconduct, however, are insufficient to establish a municipal custom. See *Gordon*, 6 F.4th at 974 (“Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out

policy.” (quoting *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996)); *Navarro*, 72 F.3d at 714. 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; see also *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1234 n.9 (9th Cir. 2011). 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); *Garmon v. Cnty. of Los Angeles*, 828 F.3d 837, 846 (9th Cir. 2016); *Flores v. Cnty. of Los Angeles*, 758 F.3d 1154, 1158 (9th Cir. 2014); *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. Cnty. 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 Cnty., Nev.*, 319 F.3d 465, 471 (9th Cir. 2003) (en banc); *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002) (per curiam); see especially *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 409–10 (1997) (discussing limited scope of such a claim). “A municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.” *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (citation omitted). See also *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1153–54 (9th Cir. 2021).

To allege a failure to train, a plaintiff must include sufficient facts to support a reasonable inference (1) of a constitutional violation; (2) of a municipal training policy that amounts to a deliberate indifference to constitutional rights; and (3) that the constitutional injury would not have resulted if the municipality properly trained their employees.

Benavidez, 993 F.3d at 1153–54.

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. Cnty. of Los Angeles*, 875 F.2d 765, 770 (9th Cir. 1989) (internal citations omitted); see also *Connick*, 563 U.S. at 61 (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 *City of Canton*, 489 U.S. at 388)); *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir. 2007); *Merritt*, 875 F.2d at 770.

"Under this standard, a municipal defendant can be held liable because of a failure to properly train its employees only if the failure reflects a "conscious" choice by the government." *Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 793 (9th Cir. 2016) (en banc). 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. Cnty. of Shasta*, 137 F.3d 1372, 1372 (9th Cir. 1998) (order) (amending originally filed 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); see also *Kirkpatrick*, 843 F.3d at 794. 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); *Oviatt*, 954 F.2d at 1478. "Satisfying this standard requires proof that the municipality had actual or constructive notice that a particular omission in their training program will cause municipal employees to violate citizens' constitutional rights." *Kirkpatrick*, 843 F.3d at 794 (internal quotation marks, alterations and citations omitted). In order "to demonstrate that the municipality was on notice of a constitutionally significant gap in its training, it is ordinarily necessary for a plaintiff to demonstrate a pattern of similar constitutional violations by untrained employees." *Id.* (internal quotations marks omitted). The deliberate indifference standard for municipal liability under § 1983 is an objective inquiry. *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1076 (9th Cir. 2016) (en banc) (overruling *Gibson v. Cnty. of Washoe*, 290 F.3d 1175 (9th Cir. 2002)).

(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 Cnty. 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. Cnty. 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).

Prior to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), this court 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. Cnty. 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.”).

The Supreme Court’s decisions in *Twombly* and *Iqbal* established a more demanding pleading standard. In *Twombly*, the Supreme Court held that a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. In *Iqbal*, the Supreme Court held that “bare assertions” that “amount to nothing more than a formulaic recitation of the elements of a [] claim” are not entitled to “presumption of truth,” and that the district court, after disregarding “bare assertions” and conclusions, must “consider the factual allegations in [a] complaint to determine if they plausibly suggest an entitlement to relief” as opposed to a claim that is merely “conceivable.” *Iqbal*, 556 U.S. 679–80.

After *Twombly* and *Iqbal*, the court in *Starr v. Baca*, 652 F.3d 1202, 1212–16 (9th Cir. 2011), identified and addressed conflicts in the Supreme Court’s jurisprudence on the pleading requirements applicable to civil actions. The court held that whatever the differences between the Supreme Court cases, there were two principles common to all:

First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying

facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). In *AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012), this court held that the *Starr* standard applied to pleading policy or custom for claims against municipal entities.

Although the standard for stating a claim became stricter after *Twombly* and *Iqbal*, the filings and motions of pro se inmates continue to be construed liberally. See *Hebbe v. Pliker*, 627 F.3d 338, 342 (9th Cir. 2010) (as amended) (explaining that *Twombly* and *Iqbal* “did not alter the courts’ treatment of *pro se* filings,” and stating, “[w]hile the standard is higher [under *Iqbal*], our obligation remains, where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” (internal citation omitted)).

For discussion of the 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); *Sato v. Orange Cnty. Dep’t of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017) (explaining agencies of the state are immune under the Eleventh Amendment from private damages or suits for injunctive relief brought in federal court); *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), *abrogated on other grounds as recognized by Walden v. Nevada*, 945 F.3d 1088, 1094 n.2 (9th Cir. 2019); *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 following factors must be examined: 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 the name of the state, and the corporate status of the entity.

Mitchell v. Los Angeles Cmty. Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988). See also *Crowe v. Oregon State Bar*, 989 F.3d 714, 731 (9th Cir.), cert. denied sub nom. *Gruber v. Oregon State Bar*, 142 S. Ct. 78 (2021), and cert. denied, 142 S. Ct. 79 (2021); *Ray v. Cnty. of Los Angeles*, 935 F.3d 703, 709 (9th Cir. 2019); *Del Campo v. Kennedy*, 517 F.3d 1070, 1077 (9th Cir. 2008); *Beentjes v. Placer Cnty. 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. Cnty. of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2001).

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. “Moreover, the second ... factor inquiry must be guided by ‘[t]he treatment of the entity under state law.’” *Crowe*, 989 F.3d at 732 (quoting *Durning*, 950 F.2d at 1426).

The third factor of the test is entitled to less weight than the first two factors. See *Crowe*, 989 F.3d at 733; *Holz*, 347 F.3d at 1187–88; *Aguon*, 316 F.3d at 903.

e. State Officials

There are ... two situations in which a state official might be liable to suit under the statute. First, plaintiffs may seek damages against a state official in his personal capacity. *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016). Second, state officials are “persons” under § 1983 when sued for prospective injunctive relief. [*Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 n.10 (1989)]. This exception for prospective injunctive relief, called the *Ex parte Young* doctrine, applies where a plaintiff “alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective.” [*Doe v. Lawrence Livermore Nat’l Lab’y*, 131 F.3d 836, 839 (9th Cir. 1997) (quoting *Idaho v. Coeur d’Alene Tribe*, [521 U.S. 261, 294 (1997) (O’Connor, J., concurring)]).

Cornel v. Hawaii, 37 F.4th 527, 531 (9th Cir. 2022).

(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); *Cornel v. Hawaii*, 37 F.4th 527, 531 (9th Cir. 2022) (“*Cornel* cannot seek damages from Hawai’i and the parole office because they are not ‘persons’ under § 1983.”); *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 prospective injunctive relief, however, are persons for purposes of § 1983. See *Will*, 491 U.S. at 71 n.10; *Cornel*, 37 F.4th at 531 (stating that “state officials are ‘persons’ under § 1983 when sued for prospective injunctive relief”); *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 *Paeste v. Gov’t of Guam*, 798 F.3d 1228, 1235–40 (9th Cir. 2015) (discussing distinction between suits seeking damages and suits seeking prospective relief); *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

“By its essential nature, an individual or personal capacity suit against an officer seeks to hold the officer personally liable for wrongful conduct taken in the course of her official duties.” *Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015). State officials sued in their personal capacity are persons for purposes of § 1983. See *Cornel v. Hawaii*, 37 F.4th 527, 531 (9th Cir. 2022) (stating that “plaintiffs may seek damages against a state official in his personal capacity.”); *Hafer v. Melo*, 502 U.S. 21, 31 (1991); *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016) (explaining the Eleventh Amendment does not bar claims for damages against state officials in their personal capacities); *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 *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016); *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.(6). 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

“There is no ‘rigid formula’ for determining whether a state or local law official is acting under color of state law.” *Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006). “The Supreme Court has developed four different tests that ‘aid ... in identifying state action: ‘(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.’” *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1167 (9th Cir.), *cert. denied*, 142 S. Ct. 337 (2021) (quoting *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747–48 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 69 (2021)). “[S]atisfaction of any one test is sufficient to find state action” *Pasadena*

Republican Club, 985 F.3d at 1167 (internal quotation marks and citation omitted). See also *Rawson*, 975 F.3d at 747.

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 *Pasadena Republican Club*, 985 F.3d at 1167 (explaining that to determine whether a private person or corporation acts under color of state law, the courts must engage in sifting facts and weighing circumstances to answer what is necessarily a fact-bound inquiry); *Brunette v. Humane Soc’y of Ventura Cnty.*, 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 Cnty. v. Dodson*, 454 U.S. 312, 317–18 (1981); *Pasadena Republican Club*, 985 F.3d at 1167; *Rawson*, 975 F.3d at 748 (9th Cir. 2020); *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). “The Supreme Court has ... held that private parties may act under color of state law when they perform actions under which the state owes constitutional obligations to those affected.” *Rawson*, 975 F.3d at 753 (discussing *West*, 487 U.S. at 54–55).

“Actions taken pursuant to a municipal ordinance are made ‘under color of state law.’” See *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 926 (9th Cir. 1991), overruled on other grounds by *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019) (en banc).

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. Cnty. 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. Cnty. of Los Angeles*, 147 F.3d 1054, 1058 (9th Cir. 1998); *Johnson*, 113 F.3d at 1117–18. In other words, “a government employee does not act under color of state law when he pursues private goals via private actions.” *Naffe v. Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015).

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); *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015) (explaining that a state employee generally acts under the color of state law when the employee “wrongs someone while acting in his official capacity or while exercising his responsibilities pursuant to state law”) (internal quotation marks and citation omitted); *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).

“[W]hen the state employee is off duty, whether he or she is acting under color of state law turns on the nature and circumstances of the [employee’s] ... conduct and the relationship of that conduct to the performance of his official duties.” *Naffe*, 789 F.3d at 1036 (alterations in original) (internal quotation marks and citation omitted).

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) Police Officers

[The Ninth Circuit] has developed a three-part test for determining when a police officer, although not on duty, has acted under color of state law. The officer must have: (1) acted or pretended to act in the performance of his official duties; (2) invoked his status as a law enforcement officer with the purpose and effect of influencing the behavior of others; and (3) engaged in conduct that “related in some meaningful way either to the officer’s governmental status or to the performance of his duties.” *Anderson v. Warner*, 451 F.3d 1063, 1068–69 (9th Cir. 2006) (internal quotation marks omitted).

Hyun Ju Park v. City & Cnty. of Honolulu, 952 F.3d 1136, 1140 (9th Cir. 2020). “[T]he critical question is not whether the officers were technically on or off duty, but instead whether they exhibited sufficient indicia of state authority ... to conclude that they were acting in an official capacity.” *Id.* at 1140–41 (holding that officers were not acting under color of state law when they failed to stop fellow officer from recklessly attempting to load his already-loaded firearm while intoxicated).

(3) 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 *Minnecci v. Pollard*, 565 U.S. 118, 120, 132 n.* (2012) (holding that prisoner could not assert an Eighth Amendment *Bivens* claim for damages against private prison employees; note that Justice Ginsberg’s dissent noted that petitioners did not seek Supreme Court review of the Ninth Circuit’s determination that petitioners acted under color of federal law).

“[P]rison officials charged with executing facially valid court orders enjoy absolute immunity from section 1983 liability for conduct prescribed by those

orders.” *Engebretson v. Mahoney*, 724 F.3d 1034, 1039 (9th Cir. 2013). However, if the prison official fails to strictly comply with the order, the immunity does not apply. See *Garcia v. Cnty. of Riverside*, 817 F.3d 635, 644 (9th Cir. 2016).

(4) 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). See also *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 757 (9th Cir. 2020), cert. denied, 142 S. Ct. 69 (2021) (determining that private mental hospital and hospital personnel that allegedly wrongfully detained patient who was involuntarily committed, and forcibly injected him with antipsychotic medications acted under color of state law, as required to support § 1983 due process claim).

(5) 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 Cnty. v. Dodson*, 454 U.S. 312, 320–25 (1981); *Jackson v. Brown*, 513 F.3d 1057, 1079 (9th Cir. 2008); *Miranda v. Clark Cnty., 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 Cnty.* 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 Cnty.* 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 Cnty.*, 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 Cnty.*, 454 U.S. at 323 n.13)), *abrogated by Filarsky v. Delia*, 566 U.S. 377, 393–94 (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 Cnty.*, 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).

(6) 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 Cnty. 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).

“[P]rivate parties may act under color of state law when the state significantly involves itself in the private parties’ actions and decisionmaking at issue.” *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 69 (2021).

A private individual’s actions can only be considered state action if a “sufficiently close nexus” makes private action “treat[able] as that of the [government entity] itself.” *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L.Ed.2d 534 (1982) (citation omitted). Merely “authoriz[ing],” “approv[ing,] or acquiesc[ing]” to private action—such as the “creation or modification of any legal remedy”—is not enough to show state action. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52–53, 119 S. Ct. 977, 143 L.Ed.2d 130 (1999) (citations omitted). And an “[a]ction by a private party pursuant to [a] statute, without something more, [is] not sufficient to justify a characterization of that party as a ‘state actor.’” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982).

Ballinger v. City of Oakland, 24 F.4th 1287, 1300 (9th Cir.), *cert. denied sub nom. Ballinger v. City of Oakland, California*, 142 S. Ct. 2777 (2022).

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. Cnty. 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 Evt'l Ctr. v. Mendocino Cnty.*, 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 pleading requirements, see *infra* I.D.2.b and II.A.1.b.(1).

(7) 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.(6).

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 *Torres v. Madrid*, 141 S. Ct. 989, 994 (2021); *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); *Polk v. Yee*, 36 F.4th 939, 942 (9th Cir. 2022) (explaining that although 42 U.S.C. § 1983 makes state actors liable for violating federal rights, not every federal law gives rise to a federal right that private parties can enforce under § 1983); *Anderson v. Ghaly*, 930 F.3d 1066, 1073 (9th Cir. 2019) (recognizing that under 42 U.S.C. § 1983, plaintiffs may sue state actors for violations of federal statutory as well as constitutional law); *Henry A. v. Willden*, 678 F.3d 991, 1005 (9th Cir. 2012); *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). For a federal statute to confer a right, “Congress must have intended that the provision in question benefit the plaintiff.” *Polk*, 36 F.4th 939 (quoting *Blessing*, 520 U.S. at 340); *Henry A.*, 678 F.3d at 1005 (“For a statutory provision to be privately enforceable, . . . , it must create an individual right.”).

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; *Anderson v. Ghaly*, 930 F.3d 1066, 1079 (9th Cir. 2019) (“Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983.” (quoting *Blessing*, 520 U.S. at 341)); *Dittman v. California*, 191 F.3d 1020, 1027–28 (9th Cir. 1999); *Arnett*, 114 F.3d at 138.

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; *Polk*, 36 F.4th at 944; *Anderson*, 930 F.3d at 1073; *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).

“If all three prongs are satisfied, ‘the right is presumptively enforceable’ through § 1983.” *Planned Parenthood Arizona Inc. v. Betlach*, 727 F.3d 960, 966 (9th Cir. 2013) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002)); see also *Polk*, 36 F.4th at 944; *Anderson*, 930 F.3d at 1079 (“Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983.” (quoting *Blessing*, 520 U.S. at 341)).

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); see also *Anderson*, 930 F.3d at 1079; *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

Where a violation of state law is also a violation of a constitutional right, § 1983 provides a cause of action. See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996); *Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir. 1986); see also *Weilburg v. Shapiro*, 488 F.3d 1202, 1207 (9th Cir. 2007). However,

although “violation of state law causing the deprivation of a federally protected right may form the basis of a § 1983 action[,] ... this rule does not apply where, ... , the state-created protections reach beyond that guaranteed by federal law.” *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 933 (9th Cir. 2017); *Crowley v. Nevada ex rel. Nevada Sec’y of State*, 678 F.3d 730, 736 (9th Cir. 2012); *Galen v. Cnty. of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007) (“Section 1983 requires Galen to demonstrate a violation of federal law, not state law.”); *Ove v. Gwinn*, 264 F.3d 817, 824 (9th Cir. 2001); *Sweaney v. Ada Cnty., Idaho*, 119 F.3d 1385, 1391 (9th Cir. 1997); *Lovell*, 90 F.3d at 370; *Ybarra v. Bastian*, 647 F.2d 891, 892 (9th Cir. 1981) (“Only federal rights, privileges, or immunities are protected by the section [1983]. Violations of state law alone are insufficient.”).

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 *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018); *OSU Student All. v. Ray*, 699 F.3d 1053, 1071 (9th Cir. 2012); *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 Cnty. 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 *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 915 (9th Cir. 2012) (en banc); *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 *Vazquez v. Cnty. of Kern*, 949 F.3d 1153, 1166 (9th Cir. 2020); *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 798 (9th Cir. 2018); *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). 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.”); *Hyde v. City of Willcox*, 23 F.4th 863, 874 (9th Cir. 2022) (“[S]upervisors can be held liable for: 1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others.” (internal quotation marks and citation omitted)); *Felarca v. Birgeneau*, 891 F.3d 809, 819–20 (9th Cir. 2018) (“An official may be liable as a supervisor only if either (1) he or she was personally involved in the constitutional deprivation, or (2) a sufficient causal connection exists between the supervisor’s wrongful conduct and the constitutional violation.”); *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 798 (9th Cir. 2018) (explaining a supervisory official is liable under § 1983 “if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.” (quotation marks and citation omitted)); *King v. Cnty. of Los Angeles*, 885 F.3d 548, 559 (9th Cir. 2018) (same); *Keates v. Koile*, 883 F.3d 1228, 1242–43 (9th Cir. 2018) (same).

“The requisite causal connection can be established ... by setting in motion a series of acts by others or by knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury.” *Rodriguez*, 891 F.3d at 798 (quoting *Starr*

v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011); *see also Vazquez v. Cnty. of Kern*, 949 F.3d 1153, 1166 (9th Cir. 2020); *King*, 885 F.3d at 559.

Because “[t]here is no respondeat superior liability under section 1983 ... [o]fficers may not be held liable merely for being present at the scene of a constitutional violation or for being a member of the same operational unit as a wrongdoer.” *Felarca*, 891 F.3d at 820.

See also Pasadena Republican Club v. W. Just. Ctr., 985 F.3d 1161, 1171–72 (9th Cir.), *cert. denied*, 142 S. Ct. 337 (2021) (“A municipality may be sued for constitutional violations under § 1983, but ‘claims cannot predicate municipal liability for constitutional violations of its officers under the theory of respondeat superior.’” (quoting *Lockett v. Cnty. of Los Angeles*, 977 F.3d 737, 741 (9th Cir. 2020))); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1073 (9th Cir. 2016) (en banc) (“[A] municipality may not be held liable for a § 1983 violation under a theory of respondeat superior for the actions of its subordinates.”); *Maxwell v. Cnty. 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 Cnty. 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. Cnty., 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. Cnty. 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, 1206–07 (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”).

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); *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1172 (9th Cir.), *cert. denied*, 142 S. Ct. 337 (2021); *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1247 (9th Cir. 2016); *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); *Procurier*, 434 U.S. at 561; *Miller*, 335 F.3d at 896.

“Absolute immunity ‘is an extreme remedy, and it is justified only where any lesser degree of immunity could impair the judicial process itself.’” *Garmon v. Cnty. of Los Angeles*, 828 F.3d 837, 843 (9th Cir. 2016) (quoting *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 912 (9th Cir. 2012) (en banc)). See also *Brooks v. Clark Cnty.*, 828 F.3d 910, 915–16 (9th Cir. 2016) (discussing absolute immunity).

“The ‘official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.’” *Garmon*, 828 F.3d at 843 (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991)).

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. Procurier*, 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 *Brooks v. Clark Cnty.*, 828 F.3d 910, 917–18 (9th Cir. 2016) (concluding “neither precedent nor first principles justify giving courtroom officials absolute

immunity when they allegedly use force in excess of what their judge commanded and the Constitution allows.”); *Burton v. Infinity Capital Mgmt.*, 862 F.3d 740, 747–48 (9th Cir. 2017) (applying functional approach); *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); *Jones v. Allison*, 9 F.4th 1136, 1140 (9th Cir. 2021) (“[L]egislative immunity does not depend on the actor so much as the functional nature of the act itself.”); *Patterson v. Van Arsdel*, 883 F.3d 826, 830 (9th Cir. 2018) (“Immunity flows from ‘the nature of the function performed, not the identity of the actor who performed it.’” (internal citation omitted)); *Waggy v. Spokane Cnty. 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); *Patterson v. Van Arsdel*, 883 F.3d 826, 830 (9th Cir. 2018) (“An official seeking absolute immunity bears the burden of showing that such immunity is essential for the function in question.”); *Brooks v. Clark Cnty.*, 828 F.3d 910, 915–16 (9th Cir. 2016); *Garmon v. Cnty. of Los Angeles*, 828 F.3d 837, 843 (9th Cir. 2016) (“The ‘official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.’” *Garmon*, 828 F.3d at 843 (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991))); *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005); *Genzler v. Longanbach*, 410 F.3d 630, 636 (9th Cir. 2005). “The justification must take care to explain why the official hoping to secure absolute immunity would not be sufficiently shielded by qualified immunity, which already affords officials considerable leeway to perform their jobs without fear of personal liability.” *Brooks*, 828 F.3d at 916 (concluding courtroom marshal was not entitled to absolute immunity).

“[A]bsolute freedom from the threat of unfounded lawsuits ... is the rare exception to the rule.” *Meyers v. Contra Costa Cnty. 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. Proconier*, 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

“[J]udicial immunity ensures that challenges to judicial rulings are funneled through more efficient channels for review like the appellate process.” *Lund v. Cowan*, 5 F.4th 964, 971 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 900 (2022). “Judicial immunity only applies to judicial acts, and not to ‘the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform.’” *Lund*, 5 F.4th at 971.

“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 Cnty.*, 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) (superseded by statute on other grounds) (“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); *Lund v. Cowan*, 5 F.4th 964, 970 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 900 (2022) (“It is well settled that judges are generally immune from suit for money damages.” (internal quotation marks and citation omitted)); *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 937 n.1 (9th Cir. 2020) (“Judges are also entitled to absolute immunity from damages suits.”); *Brooks v. Clark Cnty.*, 828 F.3d 910, 916 & n.3 (9th Cir. 2016); *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. Cnty. 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.”). “Absolute judicial immunity insulates judges from charges of erroneous acts or irregular action.” *Reynaga Hernandez*, 969 F.3d at 937 n.1 (internal quotation marks and citation omitted).

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 whether an act is judicial, we consider these factors: 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.”

Lund, 5 F.4th at 971 (9th Cir. 2021) (citing *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001)). See also *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.3d 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. See also *Lund*, 5 F.4th at 972 (“[A] judicial act does not stop being a judicial act even if the judge acted with “malice or corruption of motive.”). “[J]udicial immunity applies when a judge makes a statement from the bench during an in-court proceeding in a case before the judge.” *Lund*, 5 F.4th at, 972 (holding that judge was entitled to judicial immunity for comment suggesting that he had Down syndrome).

(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 Cnty.*, 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 Cnty. 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 / Courtroom Officials

“The need to ‘free [] the judicial process of harassment or intimidation’ has led courts to extend absolute judicial immunity beyond the judges themselves, including ‘to Executive Branch officials who perform quasi-judicial functions.’ *Brooks v. Clark Cnty.*, 828 F.3d 910, 916 (9th Cir. 2016) (quoting *Forrester v. White*, 484 U.S. 219, 225–26 (1988)). “In all cases, the Supreme Court has emphasized that immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.” *Brooks*, 828 F.3d at 916 (concluding that neither precedent nor first principles justify giving courtroom

officials absolute immunity when they allegedly use force in excess of what their judge commanded and the Constitution allows).

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. Cnty. 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) (superseded by statute on other grounds) (same), with *Pomerantz v. Cnty. of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir. 1982) (concluding employees involved in jury-selection process were entitled to quasi-judicial immunity). However, the Ninth Circuit has found that a courtroom marshal was not entitled to absolute immunity when he allegedly used force in excess of what his judge commanded and the Constitution allows. *See Brooks*, 828 F.3d at 916–19.

“Court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process.” *Acres Bonusing, Inc v. Marston*, 17 F.4th 901, 916 (9th Cir. 2021), *cert. denied sub nom. Acres Bonusing, Inc. v. Martson*, 142 S. Ct. 2836 (2022).

Absolute immunity has been extended to certain others who perform functions closely associated with the judicial process, including attorneys functioning as law clerks to a judge. *Id.*

(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. Procnier*, 641 F.2d 1295, 1302 (9th Cir. 1981); *see also Patterson v. Van Arsdell*, 883 F.3d 826, 830 (9th Cir. 2018); *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](#)).

The court has generally afforded “immunity to parole officials for the imposition of parole conditions and the execution of parole revocation procedures, tasks integrally related to an official’s decision to grant or revoke parole.” *Chavez v. Robinson*, 12 F.4th 978, 997 (9th Cir. 2021) (internal quotation marks and citation omitted). “However, parole officers, when responsible for investigating potential parole violations and submitting recommendations regarding revocation,

have only qualified immunity.” *Patterson v. Van Arsdel*, 883 F.3d 826, 830 (9th Cir. 2018).

c. Prosecutorial Immunity

(1) Basic Principles

Prosecutorial immunity applies to § 1983 claims. [*Imbler v. Pachtman*, 424 U.S. 409, 427 (1976)]. State prosecutors are absolutely immune from § 1983 actions when performing functions “intimately associated with the judicial phase of the criminal process,” *id.* at 430, 96 S. Ct. 984, or, phrased differently, “when performing the traditional functions of an advocate.” *Kalina v. Fletcher*, 522 U.S. 118, 131, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997).

Garmon v. Cnty. of Los Angeles, 828 F.3d 837, 842–43 (9th Cir. 2016). *See also Imbler*, 424 U.S. at 430; *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); *Ray v. Lara*, 31 F.4th 692, 699 (9th Cir. 2022) (“It has long been established that prosecutors enjoy absolute immunity from damages suits under § 1983 for activities that are ‘intimately associated with the judicial phase of the criminal process.’”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 912–13 (9th Cir. 2012) (en banc); *Ewing v. City of Stockton*, 588 F.3d 1218, 1232–33 (9th Cir. 2009); *Kalina*, 522 U.S. at 124–26; *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); *see also Patterson v. Van Arsdel*, 883 F.3d 826, 830 (9th Cir. 2018) (“We take a functional approach when determining whether a given action is protected by prosecutorial immunity.”). “In applying this approach, [the court] distinguish[es] between acts of advocacy, which are entitled to absolute immunity, and administrative and ‘police-type’ investigative acts which are not. To qualify as advocacy, an act must be ‘intimately associated with the judicial phase of the criminal process.’” *Patterson*, 883 F.3d at 830. *See also 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 Cnty. 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. When performing “administrative functions,” or “investigative functions normally performed by a detective or police officer,” qualified immunity, rather than absolute immunity, applies. *Garmon*, 828 F.3d at 843. Note, application of the functional approach means that absolute immunity may extend to some acts but not to others, “even though all of plaintiffs’ claims are predicated on the same constitutional violation.” *Torres v. Goddard*, 793 F.3d 1046, 1056 (9th Cir. 2015).

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 Cnty.*, 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*, 693 F.3d at 931 (“Decisions related to appointments and removals in a particular matter will generally fall within the exercise of the judge’s or prosecutor’s judicial and quasi-judicial roles and are shielded from suit by absolute immunity.”);
- 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 341–43; *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;
- 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);
- preparing warrants, warrant applications and factual affidavits, *see Torres*, 793 F.3d at 1053–54; and
- issuing subpoena duces tecum, where “it was issued in preparation for evaluating and countering a defense witness’s testimony,” and it was clear the subpoena “subpoena was directed at obtaining evidence in preparation for trial, *see Garmon*, 828 F.3d at 844.
- Lawyers have immunity for comments made during litigation. *Lund v. Cowan*, 5 F.4th 964, 972 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 900 (2022).

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); *Torres*, 793 F.3d at 1055–56 (serving and executing seizure warrants); *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 Cnty.*, 279 F.3d 1064, 1067 (9th Cir. 2002); *see also Garmon*, 828 F.3d at 844–45 (not entitled to absolute immunity for presenting a false statement in a declaration supporting application for the subpoena duces tecum);
- 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.

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

“[A]bsolute immunity is available to prosecutors in the context of civil forfeiture proceedings.” *Torres v. Goddard*, 793 F.3d 1046, 1052 (9th Cir. 2015).

“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.

“An attorney supervising a trial prosecutor who is absolutely immune is also absolutely immune. ... So are prosecutors who conducted *general* office

supervision or office training.” *Garmon*, 828 F.3d at 845. However, the supervising attorney will only be immune to the same extent as those he is supervising. *Id.* (explaining that nothing permits the court to grant a supervising prosecutor absolute immunity for supervising an activity that’s *not* protected by absolute immunity).

The court has held that a state pretrial release officer was not entitled to absolute prosecutorial immunity for submitting a bare unsigned warrant for arrest in 1983 action. *Patterson v. Van Arsdell*, 883 F.3d 826, 830–31 (9th Cir. 2018).

(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 Cnty. 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).

“Prosecutors enjoy immunity when they take ‘action that only a legal representative of the government could take.’” *Burton v. Infinity Capital Mgmt.*, 862 F.3d 740, 748 (9th Cir. 2017) (quoting *Stapley v. Pestalozzi*, 733 F.3d 804, 812 (9th Cir. 2013)). Note the Supreme Court has not extended immunity beyond the prosecutorial function. *Burton*, 862 F.3d at 748. For example, “[e]ven court-appointed defense attorneys do not enjoy immunity because, despite being ‘officers’ of the court, ‘attorneys [are not] in the same category as marshals, bailiffs, court clerks or judges.’” *Burton*, 862 F.3d at 748 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 202 n.19 (1979)). See also *Tennison v. City & Cnty. 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).

(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

“Absolute immunity from private lawsuits covers the official activities of social workers only when they perform quasi-prosecutorial or quasi-judicial functions in juvenile dependency court.” *Cox v. Dep’t of Soc. & Health Servs.*, 913 F.3d 831, 837 (9th Cir. 2019) (internal quotation marks and citation omitted) (holding that social workers were not entitled to absolute immunity regarding reports to dependency court and supervision of visits at father’s residence). Absolute immunity is available only if the social worker’s “activity or ‘function’ ... was ... part and parcel of presenting the state’s case as a generic advocate.” *Id.*

“[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 Cnty.*, 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 Cnty. 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 *Hardwick v. Cnty. of Orange*, 844 F.3d 1112, 1116 (9th Cir. 2017) (concluding that social workers were not entitled to absolute immunity); *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).

“[S]ocial workers are not afforded absolute immunity for their investigatory conduct, discretionary decisions or recommendations.” *Cox*, 913 F.3d at 837.

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

“Under the doctrine of legislative immunity, members of Congress and state legislators are entitled to absolute immunity from civil damages for their performance of lawmaking functions.” *Jones v. Allison*, 9 F.4th 1136, 1139–40 (9th Cir. 2021). See also *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 Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Cnty. 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. Cnty. 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).

“Congressional representatives enjoy immunity for comments made on the congressional floor.” *Lund v. Cowan*, 5 F.4th 964, 972 (9th Cir. 2021), cert. denied, 142 S. Ct. 900 (2022). However, “legislative immunity does not depend on the actor so much as the functional nature of the act itself.” *Jones*, 9 F.4th at 1140. To assess a government official's asserted defense of legislative immunity, the court looks “to the purpose and effect of the challenged acts when deciding whether they are legislative in nature.” *Jones*, 9 F.4th at 1141 (holding that state executive officials of the California Department of Corrections and Rehabilitation were immune from claims brought under 42 U.S.C. § 1983 for damages stemming from the CDCR's adoption of regulations pursuant to the authority delegated to it by the California Constitution).

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); *Cnty. 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); *Meyers v. Contra Costa Cnty. 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. Cnty. 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 Cnty.*, 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 Cnty. 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

[T]he Supreme Court has emphasized [the] functional approach for determining when public officials may claim absolute immunity under § 1983. An official must be “performing a duty functionally comparable to one for which officials were rendered immune at common law,” and “it is only the specific function performed, and not the role or title of the official, that is the touchstone of absolute immunity.

Engebretson v. Mahoney, 724 F.3d 1034, 1039 (9th Cir. 2013) (as amended). In *Engebretson*, the court held that “prison officials charged with executing facially

valid court orders enjoy absolute immunity from § 1983 liability for conduct prescribed by those orders.” *Id.* In contrast, absolute immunity has not been extended to prison officials acting in non-judicial capacities, acting outside his or her authority, or to those who failed to strictly comply with court orders. *See Proconier v. Navarette*, 434 U.S. 555, 561 (1978); *Garcia v. Cnty. of Riverside*, 817 F.3d 635, 644 (9th Cir. 2016); *Engbretson*, 724 F.3d at 1038 n.2 (identifying cases where the court has declined to extend absolute immunity to judges and prison, school, and executive officials). 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.(3).

(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. Proconier*, 641 F.2d 1295, 1299 n.7 (9th Cir. 1981). *See also Burton v. Infinity Capital Mgmt.*, 862 F.3d 740, 748 (9th Cir. 2017) (explaining that “[e]ven court-appointed defense attorneys do not enjoy immunity because, despite being ‘officers’ of the court, ‘attorneys [are not] in the same category as marshals, bailiffs, court clerks or judges.’”) (*Ferri v. Ackerman*, 444 U.S. 193, 202 n.19 (1979)). For a discussion of public defenders not acting under color of state law for purposes of § 1983, see *supra* I.A.2.b.(5).

(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). *Cf. Tennison v. City & Cnty. of San Francisco*, 570 F.3d 1078, 1092 (9th Cir. 2009) (analyzing (and ultimately rejecting) investigative law enforcement officers’ contention that they were entitled to absolute immunity under the functional approach; although doubting the officers would ever be entitled to absolute immunity, the court assumed the application of absolute immunity was not barred as a matter of law).

(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. Cnty. 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).

(7) Social Workers

“To the extent, . . . , that social workers . . . make discretionary decisions and recommendations that are not functionally similar to prosecutorial or judicial functions, only qualified, not absolute immunity, is available.” *Miller v. Gammie*, 335 F.3d 889, 898 (9th Cir. 2003) (en banc); *see also Hardwick v. Cnty. of Orange*, 844 F.3d 1112, 1116 (9th Cir. 2017) (concluding that social workers were not entitled to absolute immunity); *Costanich v. Dep’t of Soc. & Health Servs.*, 627 F.3d 1101, 1109 (9th Cir. 2010) (concluding that state social worker not entitled to absolute immunity for investigating charges or for filing declaration in support of guardianship termination proceedings); *Beltran v. Santa Clara Cnty.*, 514 F.3d 906, 908–09 (9th Cir. 2008) (en banc) (per curiam) (concluding that social workers are not entitled to absolute immunity for their investigatory conduct). “[S]ocial workers are not afforded absolute immunity for their investigatory conduct, discretionary decisions or recommendations.” *Cox v. Dep’t of Soc. & Health Servs.*, 913 F.3d 831, 837 (9th Cir. 2019).

Absolute immunity is available only if the social worker’s “activity or ‘function’ ... was ... part and parcel of presenting the state’s case as a generic advocate.” *Cox*, 913 F.3d at 837 (internal quotation marks and citation omitted) (holding that social workers were not entitled to absolute immunity regarding reports to dependency court and supervision of visits at father’s residence).

2. Qualified Immunity

“Qualified immunity ‘protects all but the plainly incompetent or those who knowingly violate the law.’” *Gordon v. Cnty. of Orange*, 6 F.4th 961, 968 (9th Cir. 2021) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). “In § 1983 actions, qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1018 (9th Cir. 2020) (internal quotation marks and citations omitted). See also *Ballentine v. Tucker*, 28 F.4th 54, 61 (9th Cir. 2022).

“[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*, 572 U.S. 744, 757 (2014) (“The doctrine of qualified immunity protects government officials from liability for civil damages”); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018); *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 attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)); *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018) (per curiam); *Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1037 (9th Cir. 2018). The reasonableness of the officer’s conduct is “judged against the backdrop of the law at the time of the conduct.” *Kisela*, 138 S. Ct. at 1152 (quotation marks and citation omitted).

“Qualified immunity, however, is a defense available only to government officials sued in their individual capacities. It is *not* available to those sued only in their official capacities.” *Cnty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 965 (9th Cir. 2010).

Qualified immunity is only an immunity from suit for damages, it is not an immunity from suit for declaratory or injunctive relief. See *Hydrick v. Hunter*, 669 F.3d 937, 940–41 (9th Cir. 2012); *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); see also *Ioane v. Hodges*, 939 F.3d 945, 950 (9th Cir. 2018) (as amended). 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*, 555 U.S. at 236.

“[I]n deciding whether qualified immunity applies, [the court] ask[s] two questions: (1) did the officer violate a constitutional right, and (2) was that right clearly established at the time of the events at issue?” *Seidner v. de Vries*, 39 F.4th 591, 595 (9th Cir. 2022) (internal quotation marks omitted).

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); *Seidner*, 39 F.4th at 595; *Ballentine v. Tucker*, 28 F.4th 54, 61 (9th Cir. 2022); *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep’t of Child. & Fam. Servs.*, 974 F.3d 1012, 1018 (9th Cir. 2020); *Ioane*, 939 F.3d at 950; *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); *Sorreles v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). “If there is no constitutional violation, the inquiry ends and the officer is entitled to qualified immunity.” *Ioane*, 939 F.3d at 950.

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*, 572 U.S. 744, 757 (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*, 563 U.S. 731, 735 (2011)); *Brosseau*, 543 U.S. at 199–201; *Hope*, 536 U.S. at 739; *Seidner*, 39 F.4th at 595; *Ballentine*, 28 F.4th at 61; *Sampson*, 974 F.3d at 1018; *Ioane*, 939 F.3d at 950; *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018); *Garcia v. Cnty. of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011); *Rodis v. City & Cnty. 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. “When this test is properly applied, it protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Hernandez*, 897 F.3d at 1132–33 (quoting *Ashcroft v. al-Kidd*, 563 U.S. at 743); see also *Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1037 (9th Cir. 2018). 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.* See also *Ballentine*, 28 F.4th at 61 (“The two elements do not need to be analyzed in any specific order, and courts are permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.” (internal quotation marks and citation omitted); *Gordon v. Cnty. of Orange*, 6 F.4th 961, 968 (9th Cir. 2021) (“Either question may be addressed first, and if the answer to either is ‘no,’ then the state actor cannot be held liable for damages.”); *Sampson*, 974 F.3d 1012, 1018 (9th Cir. 2020) (“Lower courts have discretion to address the questions in reverse order.”). 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, 572 U.S. 765, 774 (2014); *Ioane*, 939 F.3d at 951 (“While we have discretion to begin our analysis with either part of the test, *Pearson*, 555 U.S. at 236, [], it is nevertheless beneficial to begin with the first part of the test”); *Scott v. Cnty. of San Bernardino*, 903 F.3d 943, 948 (9th Cir. 2018) (“These two prongs of the analysis need not be considered in any particular order, and both prongs must be satisfied for a plaintiff to overcome a qualified immunity defense.” (quoting *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110, 1115 (9th Cir. 2017))); *Bardzik v. Cnty. 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).

“[W]hether a constitutional right was violated ... is a question of fact.” *Tortu v. Las Vegas Metro. Police Dep’t*, 556 F.3d 1075, 1085 (9th Cir. 2009). *See also Ballentine*, 28 F.4th at 61 (in assessing whether a constitutional right was violated, the court considers whether the facts show a violation of a constitutional right).

“[T]he ‘clearly established’ inquiry is a question of law that only a judge can decide.” *Morales v. Fry*, 873 F.3d 817, 821 (9th Cir. 2017); *see also Gordon*, 6 F.4th at 968; *Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1037 (9th Cir. 2018); *Tortu*, 556 F.3d at 1085 (explaining that “whether a constitutional right was violated ... is a question of fact” for the jury, while “whether the right was clearly established ... is a question of law” for the judge); *Serrano v. Francis*, 345 F.3d 1071, 1080 (9th Cir. 2003) (whether the law at the time of the alleged constitutional violation was clearly established is a “purely legal” issue). However, a “bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved.” *Reese*, 888 F.3d at 1037 (internal quotation marks and citation omitted).

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 *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (“Whether qualified immunity can be invoked turns on the ‘objective legal reasonableness’ of the official’s acts.”); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (stating objective reasonableness turns on the “facts and circumstances of each particular case.”); *Plumhoff*, 572 U.S. at 775–76.

(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); *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

“To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Taylor v. Barkes*, 575 U.S. 822, 135 S. Ct. 2042, 2044, 192 L.Ed.2d 78 (2015) (per curiam). A case directly on point is unnecessary but the constitutional question must be “beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L.Ed.2d 1149 (2011).

Stewart v. Aranas, 32 F.4th 1192, 1195 (9th Cir. 2022) (prison officials not entitled to qualified immunity in § 1983 action alleging Eighth Amendment deliberate indifference to serious medical needs).

“For a constitutional right to be clearly established, a court must define the right at issue with specificity and not at a high level of generality.” *Gordon v. Cnty. of Orange*, 6 F.4th 961, 968 (9th Cir. 2021) (internal quotation marks and alternations omitted) (quoting *City of Escondido v. Emmons*, 139 S. Ct. 500, 503,

(2019) (per curiam) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam))). “A constitutional right is clearly established if every reasonable official would have understood that what he is doing violates that right at the time of his conduct.” *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep’t of Child. & Fam. Servs.*, 974 F.3d 1012, 1018–19 (9th Cir. 2020) (internal quotation marks and citation omitted).

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, not as a broad general proposition.” *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *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 *S.B. v. Cnty. of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017); *Nelson v. City of Davis*, 685 F.3d 867, 883 (9th Cir. 2012). 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 *Mullenix*, 577 U.S. at 12; *City & Cnty. of San Francisco, Cal. v. Sheehan*, 575 U.S. 600, 611 (2015); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018) (as amended); *Rodis v. City & Cnty. 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); *Sorreles v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002).

“[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established” *Gordon*, 6 F.4th at 969 (internal quotation marks and citation omitted); see also *Ioane*, 939 F.3d at 956; *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; *Ioane*, 939 F.3d at 956 (the court “need not identify a prior identical action to conclude that the right is clearly established”); *Scott v. Cnty. of San Bernardino*, 903 F.3d 943, 951 (9th Cir. 2018) (explaining that although the constitutional right must be clearly established, there need not be a case dealing with the particular facts to find the officer’s conduct unreasonable); *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 *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996)); see also *Ioane*, 939 F.3d at 956. 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 *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014); *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 Cnty.*, 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).

Although there need not be “a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.” *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir.

2018) (per curiam) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)). The court may not “define clearly established law at a high level of generality.” *Kisela*, 138 S. Ct. at 1152. “Rather, the clearly established law at issue ‘must be particularized to the facts of the case.’” *Foster*, 908 F.3d at 1210 (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)); see also *Ioane*, 939 F.3d at 956 (explaining that the right must be established in a “more particularized” and “more relevant” sense). The “high standard is intended to give officers breathing room to make reasonable but mistaken judgments about open legal questions.” *Ioane*, 939 F.3d at 956 (internal quotation marks and citation omitted).

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

[T]he “clearly established” prong of the qualified immunity analysis is a matter of law to be decided by a judge. *Morales v. Fry*, 873 F.3d 817, 824–25 (9th Cir. 2017). In *Morales*, we recognized that “the question of whether a particular constitutional right is ‘clearly established’ is one that the Supreme Court has increasingly emphasized is within the province of the judge.” *Id.* at 822. “[C]omparing a given case with existing statutory or constitutional

precedent is quintessentially a question of law for the judge, not the jury.” *Id.* at 823. We recognized, however, that “[a] bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved.”

Reese v. Cnty. of Sacramento, 888 F.3d 1030, 1037 (9th Cir. 2018).

(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

“[Q]ualified immunity covers only defendants in their individual capacities.” *Cnty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 966 (9th Cir. 2010). As such, 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 Cnty.*, 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).

Qualified immunity is not generally available to off-duty police officers acting as private security guards. See *Bracken v. Okura*, 869 F.3d 771, 775, 777–78 (9th Cir. 2017) (applying *Richardson*, and holding that qualified immunity was not available to off-duty police officer who was hired and paid by hotel to provide security, because he was not serving a public, governmental function while being paid by the hotel to provide private security).

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.(6).

(d) Municipality

“A municipality is not entitled to assert the defense of qualified immunity.” *Hernandez v. City of San Jose*, 897 F.3d 1125, 1139 (9th Cir. 2018) (quoting *Huskey v. City of San Jose*, 204 F.3d 893, 902 (9th Cir. 2000)). See also *Andrews v. City of Henderson*, 35 F.4th 710, 720 (9th Cir. 2022) (stating that a municipality is not entitled to assert the defense of qualified immunity and explaining that the rule that individual defendants can appeal from denial of motion for summary judgment to obtain review of merits of their qualified immunity defense does not empower a federal court to consider denial of municipality’s motion for summary judgment in § 1983 action).

b. Pleading: Plaintiff’s Allegations

In *Leatherman v. Tarrant Cnty. 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. Cnty. 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 Cnty., Nev.*, 319 F.3d 465, 470 (9th Cir. 2003) (en banc) (same). However, after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a “bald allegation of impermissible motive,” would not be sufficient. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) (discussing *Twombly* and *Iqbal*). The factual content contained within the complaint must allow a reasonable inference of an improper motive to satisfy *Twombly* and *Iqbal*. See *Moss*, 572 F.3d at 972.

“In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss*, 572 F.3d at 969 (reviewing motion to dismiss on qualified immunity, and explaining the pleading standard after *Twombly* and *Iqbal*).

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); *Tan Lam v. City of Los Banos*, 976 F.3d 986, 997 (9th Cir. 2020), cert. denied sub nom. *Acosta v. Lam*, 142 S. Ct. 77 (2021); *Frudden v. Pilling*, 877 F.3d 821, 831 (9th Cir. 2017) (“Qualified immunity is an affirmative

defense that the government has the burden of pleading and proving.”); *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). 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. *See Gordon v. Cnty. of Orange*, 6 F.4th 961, 969 (9th Cir. 2021); *Shooter v. Arizona*, 4 F.4th 955, 961 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 898 (2022); *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017). 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 Kramer v. Cullinan*, 878 F.3d 1156, 1164 (9th Cir. 2018) (“The plaintiff bears the burden of demonstrating that the right at issue was clearly established.”); *Frudden v. Pilling*, 877 F.3d 821, 831 (9th Cir. 2017) (“Qualified immunity is an affirmative defense that the government has the burden of pleading and proving.”); *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 Cnty.*, 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.

“[A] district court may dismiss a claim on qualified immunity grounds under 28 U.S.C. § 1915(e)(2)(B)(iii), but only if it is clear from the complaint that the plaintiff can present no evidence that could overcome a defense of qualified immunity.” *Chavez v. Robinson*, 817 F.3d 1162, 1169 (9th Cir. 2016), as amended *on reh’g* (Apr. 15, 2016). Cf. *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (stating that a pro se complaint can be dismissed only “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” (citation omitted)). However, the court has cautioned that “pre-service dismissal on the basis of qualified immunity is appropriate only in limited circumstances.” *Chavez*, 817 F.3d at 1169 (explaining that pro se complaints frequently lack sufficient information for a judge to make a qualified immunity determination without the benefit of a responsive pleading, and concluding that pro se complaint did not *clearly show* that he would be unable to overcome qualified immunity).

“Claims for injunctive and declaratory relief are unaffected by qualified immunity.” *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012) (stating plaintiffs could proceed with claims for declaratory and injunctive relief, notwithstanding the court’s holding on qualified immunity). See also *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 616 (9th Cir. 2018) (“[Q]ualified immunity applies only to liability for money damages—not injunctive or declaratory relief.”).

g. Summary Judgment

“Summary judgment is appropriate if ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Reed v. Lieurance*, 863 F.3d 1196, 1204 (9th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)). 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 *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011) (“Where the objective reasonableness of an officer’s conduct turns on disputed issues of material fact, it is a question of fact best resolved by a jury, . . . , only in the absence of material disputes is it a pure question of law.” (internal quotation marks and citations omitted)); *Lolli v. Cnty. 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). See also *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (*per curiam*) (holding officer entitled to qualified immunity and summary judgment, where officer’s use of force did not violate clearly established law).

h. Interlocutory Appeals

“Under the collateral order doctrine, [the court has] jurisdiction over interlocutory appeals from denials of qualified immunity.” *Andrews v. City of Henderson*, 35 F.4th 710, 715 (9th Cir. 2022). See also *Isayeva v. Sacramento Sheriff’s Dep’t*, 872 F.3d 938, 944–45 (9th Cir. 2017). “This exception exists because qualified immunity is immunity from suit, not just a defense to liability, and the immunity is effectively lost if a case is erroneously permitted to go to trial.” *David v. Kaulukukui*, 38 F.4th 792, 799 (9th Cir. 2022); (internal quotation marks and citation omitted).

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); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018); *Wilkinson v. Torres*, 610 F.3d 546, 549–50 (9th Cir. 2010); *Cnty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 968 (9th Cir. 2010); *Rodis v. City & Cnty. 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 *Cnty. 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 Cnty. 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). See also *Sato v. Orange Cnty. Dep’t of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017)

(explaining agencies of the state are immune under the Eleventh Amendment from private damages or suits for injunctive relief); *Stilwell v. City of Williams*, 831 F.3d 1234, 1245 (9th Cir. 2016) (section 1983 did not abrogate States' Eleventh Amendment immunity).

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 N. E. Med. Servs., Inc. v. Cal. Dep't of Health Care Servs., Health & Human Servs. Agency, Cal.*, 712 F.3d 461, 466 (9th Cir. 2013); *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 Cnty. 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); (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”). 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); *N. E. Med. Servs., Inc.*, 712

F.3d at 466 (stating “the Eleventh Amendment generally does not bar suits for prospective, non-monetary relief against state officers); *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).

“The Eleventh Amendment bars individuals from bringing lawsuits against a state for money damages or other retrospective relief.” *Lund v. Cowan*, 5 F.4th 964, 969 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 900 (2022).

“[A]n entity invoking Eleventh Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense.” *Sato*, 861 F.3d at 928.

b. Inapplicability of Amendment

(1) Local Governmental Units

State sovereign immunity does not extend to county and municipal governments, unless state law treats them as arms of the state. *See Sato v. Orange Cnty. Dep’t of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017); *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 Cnty. 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); *Cornel v. Hawaii*, 37 F.4th 527, 531 (9th Cir. 2022) (“[T]he *Ex parte Young* doctrine, applies where a plaintiff “alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective.”); *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) (“[U]nder *Ex parte Young*, [Eleventh Amendment] immunity is subject to an

exception for actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law so long as the state officer has some connection with enforcement of the act.” (internal quotation marks and citation omitted)); *Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1153 (9th Cir. 2018) (“Under the *Ex parte Young* exception to that Eleventh Amendment bar, a party may seek prospective injunctive relief against an individual state officer in her official capacity.”); *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016) (“The Eleventh Amendment bars claims for damages against a state official acting in his or her official capacity.”); *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).

“An *Ex Parte Young* suit against a state officer in her official capacity is for all practical purposes, brought against the State.” *Buffin v. California*, 23 F.4th 951, 961 (9th Cir. 2022) (internal quotation marks omitted).

“[T]he *Young* exception does not apply when a suit seeks relief under state law, even if the plaintiff names an individual state official rather than a state instrumentality as the defendant.” *Regents of the Univ. of Cal.*, 891 F.3d at 1153 (citing *Pennhurst*, 465 U.S. at 117).

“[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 *Cornel v. Hawaii*, 37 F.4th 527, 531 (9th Cir. 2022) (“[P]laintiffs may seek damages against a state official in his personal capacity.”); *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991); *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016) (stating the Eleventh Amendment does not “bar claims for damages against state officials in their *personal* capacities”); *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). “[W]hen a plaintiff sues a defendant for damages, there is a presumption that he is seeking damages against the defendant in his personal capacity.” *Mitchell*, 818 F.3d at 442 (citing *Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir. 1999)).

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

c. Abrogation

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); *N. E. Med. Servs., Inc. v. Cal. Dep’t of Health Care Servs., Health & Human Servs. Agency, Cal.*, 712 F.3d 461, 467 (9th Cir. 2013) (stating a “clear statement” is required to demonstrate Congress’s intent to abrogate the state’s sovereign immunity); *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). Note, however, the power is limited. 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); *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 *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2262 (2021) (“When a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.”); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305–06 (1990); *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). “A state generally waives its immunity when it voluntarily invokes federal jurisdiction or ... makes a clear declaration that it intends to submit itself to federal jurisdiction.” *Aholelei*, 488 F.3d at 1147 (internal quotation marks, alterations, and citation omitted). “Express waiver is not required; a state waives its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.” *Id.* (internal quotation marks, alterations, and citation omitted).

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).

“Removal waives Eleventh Amendment immunity.” *Embury v. King*, 361 F.3d 562, 565–66 (9th Cir. 2004) (applying *Lapides v. Bd. of Regents*, 535 U.S. 613, 616 (2002)). See also *Lapides*, 535 U.S. at 624 (concluding that a State that statutorily waives its immunity from suit on state-law claims in state court also waives its Eleventh Amendment immunity from suit on the same state-law claims when it voluntarily removes a state-law-claim case to federal court); *Walden v. Nevada*, 945 F.3d 1088, 1094 (9th Cir. 2019) (holding removal waives Eleventh Amendment immunity from all federal claims); *Bank of Lake Tahoe v. Bank of Am.*, 318 F.3d 914, 918–19 (9th Cir. 2003). Note that *Embury* “did ‘not decide whether a removing State defendant remains immunized from federal claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity.’” *Walden v. Nevada*, 945 F.3d 1088, 1093 (9th Cir. 2019) (quoting *Embury*, 361 F.3d at 566 n.20. However, relying on the reasoning of *Embury* and *Lapides*, in *Walden*, the court held that “a State defendant that removes a case to federal court waives its immunity from suit on all federal-law claims in the case, including those claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity.” *Walden*, 945 F.3d at 1093.

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) (“[T]he Eleventh Amendment ... precludes the adjudication of pendent state law claims against nonconsenting state defendants in federal courts.”); *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 *Crowe v. Oregon State Bar*, 989 F.3d 714, 731 (9th Cir.), cert. denied sub nom. *Gruber v. Oregon State Bar*, 142 S. Ct. 78 (2021), and cert. denied, 142 S. Ct. 79 (2021); *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017) (“[A]n entity invoking Eleventh Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense.”) (quoting *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

“Under the collateral order doctrine, [the court has] appellate jurisdiction under § 1291 to consider a State’s claims of immunity from suit, but there is no such appellate jurisdiction to consider claims of immunity from liability. *Walden v. Nevada*, 945 F.3d 1088, 1091 (9th Cir. 2019). See also *Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1152 (9th Cir. 2018) (exercising jurisdiction over an interlocutory appeal from the denial of Eleventh Amendment immunity under the collateral order doctrine); *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)); *Alaska v. United States*, 64 F.3d 1352, 1354 (9th Cir. 1995) (“It is settled that immediate appeals may be taken from orders denying claims of ... sovereign immunity granted to the states under the Eleventh Amendment[.]”).

“[A]n ordinary claim of Eleventh Amendment immunity encompasses a claim of immunity from suit. But when a State defendant asserting immunity declares that ‘it was asserting only immunity from liability,’ then the collateral-order doctrine of § 1291 does not apply and there is no appellate jurisdiction.” *Walden*, 945 F.3d at 1091 (concluding the court had appellate jurisdiction where state asserted both immunity from liability and immunity from suit).

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).

The Supreme Court has held that entitlement to compensatory damages in a civil rights action is not a matter of discretion:

“Compensatory damages ... are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.” *Smith v. Wade*, 461 U.S. 30, 52, 103 S. Ct. 1625, 75 L.Ed.2d 632 (1983) (emphasis added).

Hazle v. Crofoot, 727 F.3d 983, 992 (9th Cir. 2013) (“[W]hen a plaintiff has indisputably suffered an actual injury in a case ... an award of compensatory damages is mandatory.”).

Compensatory damages include actual losses, mental anguish and humiliation, impairment of reputation, and out-of-pocket losses. *See Stilwell v. City of Williams*, 831 F.3d 1234, 1247 (9th Cir. 2016) (stating that compensatory damages in § 1983 suits may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation, personal humiliation, and mental anguish and suffering); *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.

In *Jackson v. Barnes*, 749 F.3d 755, 762 (9th Cir. 2014), the court concluded that in that § 1983 action, the plaintiff was “not entitled to compensatory damages for any time he spent in prison” because he was “not imprisoned for any additional time as a result of his first, illegal conviction.” Building on the general principle, the court in *Taylor v. Cnty. of Pima*, 913 F.3d 930 (9th Cir. 2019), explained that “when a valid, unchallenged conviction and sentence justify the plaintiff’s period of imprisonment, then the plaintiff cannot prove that the challenged conviction and sentence caused his imprisonment and any resulting damages.” *Id.* at 935–36 (“A plaintiff in a § 1983 action may not recover incarceration-related damages for any period of incarceration supported by a valid, unchallenged conviction and sentence.”).

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); *Jackson v. Barnes*, 749 F.3d 755, 762 (9th Cir. 2014) (“[P]unitive damages may be recovered in appropriate circumstances under § 1983.”); *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 Cnty.*, 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. *See also Olivier v. Baca*, 913 F.3d 852, 861 (9th Cir. 2019) (recognizing that punitive damages are not available in a § 1983 claim against a public official in his official capacity.).

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); *Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014) (recognizing that success on the merits of a constitutional claim entitles the § 1983 plaintiff to at least an award of nominal damages); *Hazel v. Crofoot*, 727 F.3d 983, 991–92 n.6 (9th Cir. 2013) (“Nominal damages must be awarded in cases in which the plaintiff is not entitled to compensatory damages, such as cases in which no actual injury is incurred or can be proven.”); *Cummings v. Connell*, 402 F.3d 936, 942–46 (9th Cir. 2005); *Schneider v. Cnty. 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 the 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). “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. Cnty. Bar Ass’n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992). 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). See also *Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (noting that, generally, exhaustion is not a prerequisite to an action under § 1983, but explaining that the Prison

Litigation Reform Act created an exhaustion requirement for suits brought by prisoners under [42 U.S.C. § 1983](#) with respect to prison conditions).

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 Prison Litigation Reform Act (“PLRA”), “[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 [Merch. v. Corizon Health, Inc.](#), 993 F.3d 733, 742 (9th Cir. 2021) (“Before challenging prison conditions under [Section 1983](#), a prisoner must exhaust ‘such administrative remedies as are available.’” (quoting [42 U.S.C. § 1997e\(a\)](#))). *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). “Courts may not engraft an unwritten ‘special circumstances’ exception onto the PLRA’s exhaustion requirement. The only limit to [§ 1997e\(a\)](#)’s mandate is the one baked into its text: An inmate need exhaust only such administrative remedies as are ‘available.’” [Ross v. Blake](#), 578 U.S. 632, 648 (2016). “Exhaustion should be decided, if feasible, before reaching the merits of a prisoner’s claim.” [Albino v. Baca](#), 747 F.3d 1162, 1170 (9th Cir. 2014) (*en banc*).

“The PLRA slows down the processing of claims until administrative remedies are exhausted; it does not foreclose available remedies after exhaustion is complete, nor is it plausibly read as suggesting that possibility.” [Hoffman v. Preston](#), 26 F.4th 1059, 1071 (9th Cir. 2022).

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 Nettles v. Grounds*, 830 F.3d 922, 932 (9th Cir. 2016) (en banc); *Roles v. Maddox*, 439 F.3d 1016, 1018 (9th Cir. 2006).

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 Corizon Health, Inc.*, 993 F.3d at 742 (“Before challenging prison conditions under Section 1983, a prisoner must exhaust ‘such administrative remedies as are available.’” (quoting 42 U.S.C. § 1997e(a))); *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 exhaustion requirement, however, does not apply to non-prisoners.” *Jackson v. Fong*, 870 F.3d 928, 933 (9th Cir. 2017) (holding PLRA exhaustion requirement did not apply to plaintiff who was not a prisoner at the time of his operative complaint). *See also Saddozai v. Davis*, 35 F.4th 705, 709–10 (9th Cir. 2022) (holding that PLRA exhaustion requirement did not bar state prisoner’s civil rights claim where controlling complaint was filed after fully exhausting administrative remedies, even though prisoner had not satisfied exhaustion requirement at time he filed original complaint).

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; *Saddozai*, 35 F.4th at 709 (“A lack of PLRA exhaustion is a non-jurisdictional affirmative defense.”). 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); *Saddozai*, 35 F.4th at 709 (“A lack of PLRA exhaustion is a non-jurisdictional affirmative defense.”); *Jackson v. Fong*, 870 F.3d 928, 933 (9th Cir. 2017); *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc); *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). As such, “a defendant must first prove that there was an available administrative remedy and that the prisoner did not exhaust that available remedy. . . . Then, the burden shifts to the plaintiff, who must show that there is something particular in his case that made the existing and generally available administrative remedies effectively unavailable to him by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. . . . The ultimate burden of proof, however, remains with the defendants.” *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (internal quotation marks and citation omitted).

“[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). *See also Saddozai*, 35 F.4th at 708 (“[E]xhaustion requirements apply based on when a plaintiff files the operative complaint, in accordance with the Federal Rules of Civil Procedure.” (quoting *Jackson*, 870 F.3d at 934)).

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.

“[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 v. Leyva*, 575 F.3d 1021, 1024 (9th Cir. 2009) (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).

“A plaintiff who was a prisoner at the time of filing his suit but was not a prisoner at the time of his operative complaint is not subject to a PLRA exhaustion defense.” *Jackson*, 870 F.3d at 937.

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). “In PLRA cases, amended pleadings may supersede earlier pleadings.” *Jackson*, 870 F.3d at 934; see also *Rhodes* 621 F.3d at 1005. Accordingly, “[e]xhaustion requirements apply based on when a plaintiff files the operative complaint, in accordance with the Federal Rules of Civil Procedure.” *Jackson*, 870 F.3d at 935 (citing *Jones*, 549 U.S. at 212) (holding that the third amended complaint was the operative complaint); see also *Rhodes*, 621 F.3d at 1005–06 (concluding that the amended complaint controlled the PLRA exhaustion analysis).

“A prisoner who has fully complied with the PLRA’s exhaustion requirement need not file an entirely new federal case simply because he had not exhausted when he filed his original federal complaint.” *Saddozai*, 35 F.4th at 706.

“[T]he PLRA exhaustion requirement requires proper exhaustion.” *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); see also *Corizon Health, Inc.*, 993 F.3d at 742; *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 *Corizon Health, Inc.*, 993 F.3d at 742; *Sapp*, 623 F.3d at 821–27 (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). “[I]t is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.” *Reyes v. Smith*, 810 F.3d 654, 657 (9th Cir. 2016) (quoting *Jones v. Bock*, 549 U.S. 199, 218 (2007)); see also *Fuqua v. Ryan*, 890 F.3d 838, 845 (9th Cir. 2018) (explaining “[t]he level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.” (quoting *Jones*, 549 U.S. at 218)); *Manley v. Rowley*, 847 F.3d 705, 711–12 (9th Cir. 2017); *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014).

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*, 807 F.3d 982, 987 (9th Cir. 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”). “[R]emedies are not considered ‘available’ if, for example, prison officials do not provide the required forms to the prisoner or if officials threaten retaliation for filing a grievance.” *Draper v. Rosario*, 836 F.3d 1072, 1078 (9th Cir. 2016).

In *Ross v. Blake*, [578 U.S. 632 (2016),] the Supreme Court [held] that § 1997e(a) requires an inmate to exhaust only those grievance procedures “that are capable of use to obtain some relief for the action complained of.” By way of a non-exhaustive list, the Court recognized three circumstances in which an administrative remedy was not capable of use to obtain relief despite being officially available to the inmate: (1) when the administrative procedure “operates as a simple dead end” because officers are “unable or consistently unwilling to provide any relief to aggrieved inmates”; (2) when the administrative scheme is “so opaque that it becomes, practically speaking, incapable of use” because “no ordinary prisoner can discern or navigate it”; and (3) when prison administrators “thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Id.* at 1859–60.

Andres v. Marshall, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam) (as amended) (explaining that when “prison officials improperly fail to process a prisoner’s grievance, the prisoner is deemed to have exhausted available administrative remedies”).

“[W]here inmates take reasonably appropriate steps to exhaust but are precluded from doing so by a prison’s erroneous failure to process the grievance, [the court has] deemed the exhaustion requirement satisfied.” *Fordley v. Lizarraga*, 18 F.4th 344, 352 (9th Cir. 2021).

A “prisoner exhausts ‘such administrative remedies as are available,’ ... , under the PLRA despite failing to comply with a procedural rule if prison officials ignore the procedural problem and render a decision on the merits of the grievance at each available step of the administrative process.” *Reyes*, 810 F.3d at 658 (citation omitted). However, 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).

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

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*, 575 F.3d at 1023–24.

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.

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

G. Statute of Limitations

1. General Principles

“Section 1983 does not contain its own statute of limitations.” *Flynt v. Shimazu*, 940 F.3d 457, 461 (9th Cir. 2019) (internal quotation marks and citation omitted). Because § 1983 contains no specific statute of limitations, federal courts borrow state statutes of limitations for personal injury actions in § 1983 suits. See

Nance v. Ward, 142 S. Ct. 2214, 2225 (2022) (“[A]ll § 1983 suits must be brought within a State’s statute of limitations for personal-injury actions.”); *Wallace v. Kato*, 549 U.S. 384, 387 (2007); *Flynt*, 940 F.3d at 461; *Soto v. Sweetman*, 882 F.3d 865, 871 (9th Cir. 2018) (“Federal courts in § 1983 actions apply the state statute of limitations from personal-injury claims and borrow the state’s tolling rules.”); *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.”); *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132–33 (9th Cir. 2007); *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); 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); *Lockett v. Cnty. of Los Angeles*, 977 F.3d 737, 740 (9th Cir. 2020) (“Federal courts borrow from state law to determine any applicable statute of limitations for § 1983 claims, including tolling provisions.”); *Mills v. City of Covina*, 921 F.3d 1161, 1166 (9th Cir. 2019) (applying California’s law regarding tolling); *Canatella*, 486 F.3d at 1132; *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 694 (9th Cir. 2003); *Sain*, 309 F.3d at 1138; . 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); see also *Soto*, 882 F.3d at 872 (“This circuit has, with other circuits, adopted a mandatory tolling provision for claims subject to the Prison Litigation Reform Act.”).

“[T]he accrual date of a § 1983 cause of action is a question of federal law.” *Mills*, 921 F.3d at 1166 (quoting *Wallace*, 549 U.S. at 388); see also *Bird v. Dep’t of Hum. Servs.*, 935 F.3d 738, 743 (9th Cir. 2019). “[A]ccrual occurs when the plaintiff has a complete and present cause of action, ... that is, when the plaintiff can file suit and obtain relief.” *Mills*, 921 F.3d at 1166 (quoting *Wallace*, 549 U.S. at 388). “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; *Bird*, 935 F.3d at 743; *Soto*, 882 F.3d at 870; *Belanus v. Clark*, 796 F.3d 1021, 1025 (9th Cir. 2015); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 895 (9th Cir. 2014); *Canatella*, 486

F.3d at 1133; *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 926–27 (9th Cir. 2004); 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 v. Lewis*, 174 F.3d 987, 993–96 (9th Cir. 1999).

2. States’ Personal-Injury Statutes of Limitations

- Alaska: two years, see *DeNardo v. Murphy*, 781 F.2d 1345, 1347 (9th Cir. 1986) (citing Alaska Stat. Ann. § 09.10.070).
- Arizona: two years, see *Bonelli v. Grand Canyon Univ.*, 28 F.4th 948, 952 (9th Cir. 2022) (citing Ariz. Rev. Stat. § 12-542); *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1271 (9th Cir. 2022); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir. 2004) (citing Ariz. Rev. Stat. § 12–542); *De Luna v. Farris*, 841 F.2d 312, 313 (9th Cir. 1988). See also *Soto v. Sweetman*, 882 F.3d 865, 871 (9th Cir. 2018).
- California: two years, see *Lockett v. Cnty. of Los Angeles*, 977 F.3d 737, 739 (9th Cir. 2020) (considering tolling issue to determine if claim survived California’s two-year statute of limitations for filing a civil action); *Flynt v. Shimazu*, 940 F.3d 457, 461 (9th Cir. 2019); *Mills v. City of Covina*, 921 F.3d 1161, 1166 (9th Cir. 2019) (citing Cal. Civ. Proc. Code § 335.1); *Jackson v. Barnes*, 749 F.3d 755, 761 (9th Cir. 2014)

- (citing Cal. Civ. Proc. Code § 335.1); *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.”); *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), *abrogated on other grounds as recognized by Paeste v. Gov’t of Guam*, 798 F.3d 1228, 1237 (9th Cir. 2015). *See also* 7 Guam Code Annotated § 11306.
 - Hawaii: two years, *see Haw. Rev. Stat. § 657-7; Bird v. Dep’t of Hum. Servs.*, 935 F.3d 738, 743 (9th Cir. 2019) (citing 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 Belanus v. Clark*, 796 F.3d 1021, 1025 (9th Cir. 2015) (citing Mont. Code Ann. § 27-2-204(1)); *Harvey v. Waldron*, 210 F.3d 1008, 1013 (9th Cir. 2000) (same), *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) (citing Or. Rev. Stat. § 12.110(1)); *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 Whidbee v. Pierce Cnty.*, 857 F.3d 1019, 1022 (9th Cir. 2017); *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) (citing Wash. Rev. Code Ann. § 4.16.080(2)).

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) (superseded by statute); *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. Cnty. 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); *see also Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 808 (9th Cir. 2018) (explaining “[t]he PLRA limits recovery of attorney’s fees ‘in any action brought by a prisoner ... in which attorney’s fees are authorized under [42 U.S.C. § 1988].’”); *Kelly v. Wengler*, 822 F.3d 1085, 1099–1100 (9th Cir. 2016) (discussing how the PLRA alters the lodestar method in prisoner civil rights cases). 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); *see also Murphy v. Smith*, 138 S. Ct. 784 (2018) (interpreting § 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.* § 1997e(d)(2). 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]." 42 U.S.C. § 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). Note that the PLRA attorney's fees cap does not apply to fees incurred by a prisoner in successfully defending the judgment on appeal. *Woods v. Carey*, 722 F.3d 1177, 1182 (9th Cir. 2013).

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 Cnty.*, 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.1.

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); *Senn v. Smith*, 35 F.4th 1223, 1224 (9th Cir. 2022) (order) (noting 42 U.S.C. § 1988(b) "generally grants courts discretion to award a reasonable attorney's fee to a prevailing party" in a § 1983 action, and reaffirming that "a plaintiff who accomplishes no more than to defeat a defendant's motion for qualified immunity is not entitled to fees pursuant to § 1988(b), because the plaintiff has not yet prevailed on any claim"); *Roberts v. City of Honolulu*, 938 F.3d 1020, 1023 (9th Cir. 2019) ("In an action brought under 42 U.S.C. § 1983, a prevailing plaintiff is entitled to reasonable attorney's fees."); *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).

"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. Kolodziejczak*, 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); *Roberts v. City of Honolulu*, 938 F.3d 1020, 1023 (9th Cir. 2019) (“A plaintiff prevails for purposes of § 1988 when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” (internal quotation marks and citation omitted)); *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. Kolodziejczak*, 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. Cnty. 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; *Klein v. City of Laguna Beach*, 810 F.3d 693, 699–700 (9th Cir. 2016) (recovery of nominal damages by activist who sought no compensatory damages, did not preclude attorney fee award); *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); *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 Lake*

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 Cnty. 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.

The court has “explained that ‘[s]ection 1988 vests the right to seek attorney’s fees in the prevailing party, not her attorney.’” *Vargas v. Howell*, 949 F.3d 1188, 1198 (9th Cir. 2020) (quoting *Pony v. Cnty. of Los Angeles*, 433 F.3d 1138, 1142 (9th Cir. 2006) (emphasis added)).

“[A] plaintiff who accomplishes no more than to defeat a defendant’s motion for qualified immunity is not entitled to fees pursuant to § 1988(b), because the plaintiff has not yet prevailed on any claim.” *Senn v. Smith*, 35 F.4th 1223, 1224 (9th Cir. 2022) (order).

Because a prevailing § 1983 plaintiff may ordinarily receive “a reasonable attorney’s fee as part of the costs,” 42 U.S.C. § 1988(b), attorney’s fees in a § 1983 suit “are subject to the cost-shifting provision of Rule 68.” *Marek v. Chesny*, 473 U.S. 1, 9, 105 S. Ct. 3012, 87 L.Ed.2d 1 (1985). So if a § 1983 plaintiff turns down a Rule 68 offer, goes to trial, and wins a judgment less favorable than the

rejected offer, he loses his entitlement to attorney’s fees as of the date of the offer. *See id.* at 12, 105 S. Ct. 3012.

Kubiak v. Cnty. of Ravalli, 32 F.4th 1182, 1187 (9th Cir. 2022).

c. Determining the Amount of the Fee Award

“Once a party is found eligible for fees, the district court must then determine what fees are reasonable.” *Klein v. City of Laguna Beach*, 810 F.3d 693, 698 (9th Cir. 2016) (citation omitted). *See also Roberts v. City of Honolulu*, 938 F.3d 1020, 1023 (9th Cir. 2019).

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); *Roberts*, 938 F.3d at 1023–24 (discussing lodestar method); *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. Kolodziejczak*, 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. “At bottom, the goal of the lodestar figure is to roughly approximate the fee the prevailing attorney would have received from a paying client.” *Roberts*, 938 F.3d at 1024.

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. Cnty. 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); *Dannenbergh 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 Cnty.*, 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. See also *Roberts*, 938 F.3d at 1024 (“It is the responsibility of the attorney seeking fees to submit evidence to support the requested hourly rate.”). “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 Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016) (“Section 1988 is asymmetrical, awarding attorney’s fees to civil rights plaintiffs if they are prevailing parties, but awarding attorney’s fees to prevailing civil rights defendants only if plaintiffs’ claims are frivolous.”); *Manufactured Home Cmty. 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. Cnty. 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 Cnty. Superior Court*, 631 F.3d 963, 971–72 (9th Cir. 2011); *Edgerly v. City & Cnty. 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. Cnty. 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 Cmty. Inc.*, 420 F.3d at 1036; *Thomas v. City of Tacoma*, 410 F.3d 644, 647–48 (9th Cir. 2005). “[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. Cnty. Bd. of Educ.*, 827 F.2d 617, 620 (9th Cir. 1987).

Attorney fee awards under § 1988 to defendants winning *Younger*-based dismissals of § 1983 claims are not barred outright. *Citizens for Free Speech, LLC v. Cnty. of Alameda*, 953 F.3d 655, 659 (9th Cir. 2020) (holding that defendants winning *Younger*-based dismissals are not barred outright from fee awards, abrogating *Elwood v. Drescher*, 456 F. 3d 943, 948 (9th Cir. 2006)). The court noted, however, that a dismissal of a damages claim under *Younger* may not always materially alter the parties’ legal relationship. *See Citizens for Free Speech, LLC*, 953 F.3d at 659.

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), *superseded by statute on other grounds*; *Gonzalez v. Kangas*, 814 F.2d 1411, 1412 (9th Cir. 1987).

“In [*Kay v. Ehrler*, 499 U.S. 432, 437–38 (1991)], the Supreme Court held that § 1988 does not permit awards of attorney’s fees to pro se plaintiffs who, being attorneys, represent themselves in successful civil rights actions.” *Rickley v. Cnty. of Los Angeles*, 654 F.3d 950, 953 (9th Cir. 2011), *as amended on denial of reh’g and reh’g en banc* (Oct. 4, 2011) (explaining that the Court adopted a per se rule, categorically precluding an award of attorney’s fees under § 1988 to a pro se attorney-plaintiff).

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).

“[A] plaintiff who accomplishes no more than to defeat a defendant’s motion for qualified immunity is not entitled to fees pursuant to § 1988(b), because the plaintiff has not yet prevailed on any claim.” *Senn v. Smith*, 35 F.4th 1223, 1224 (9th Cir. 2022) (order).

“[A] county official who enjoys Eleventh Amendment damages immunity and acts as a discretion-less instrument of the State is a state official. If plaintiffs prove that such an official acted unconstitutionally at the State’s command[,] ... the State can face § 1988 fees liability.” *Buffin v. California*, 23 F.4th 951, 966 (9th Cir. 2022).

g. Other Work Entitling Attorney to Fees

“Work performed on a motion for fees under § 1988(b) is compensable.” *McGrath v. Cnty. of Nevada*, 67 F.3d 248, 253 (9th Cir. 1995); *see also Harris v. Maricopa Cnty. 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 Medina Tovar v. Zuchowski*, 41 F.4th 1085, 1089 (9th Cir. 2022); *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); *Medina Tovar*, 41 F.4th at 1089; *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); *Medina Tovar*, 41 F.4th at 1089; *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); *see also Nat’l Fam. Farm Coal. v. U.S. Env’t Prot. Agency*, 29 F.4th 509, 511 (9th Cir. 2022). These circumstances include special expertise of counsel, difficulty in obtaining competent counsel, and increases in the cost of living. *See* 28 U.S.C. § 2412(d)(2)(A); *Pierce*, 487 U.S. at 571–72; *Nat’l Fam. Farm Coal.*, 29 F.4th at 511; *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 Draper v. Rosario*, 836 F.3d 1072, 1087 (9th Cir. 2016); *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

“[H]abeas relief is available only for state prisoner claims that lie at the core of habeas and ... an action pursuant to 42 U.S.C. § 1983 ‘is the exclusive vehicle for claims that are not within the core of habeas.’” *Bean v. Matteucci*, 986 F.3d

1128, 1132 (9th Cir. 2021) (quoting *Nettles v. Grounds*, 830 F.3d 922, 930, 931 (9th Cir. 2016) (en banc)).

“[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); *Nettles*, 830 F.3d at 933; *Simpson v. Thomas*, 528 F.3d 685, 692–93 (9th Cir. 2008); *Ramirez v. Galaza*, 334 F.3d 850, 855–56 (9th Cir. 2003); *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.”).

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); *Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1045–46 (9th Cir. 2018) (explaining that when a plaintiff “who has been convicted of a crime under state law seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence”); *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[ie]d 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).

“[W]here all convictions underlying § 1983 claims are vacated and no outstanding criminal judgments remain, *Heck* does not bar plaintiffs from seeking relief under § 1983.” *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1193 (9th Cir. 2020), *cert. denied sub nom. City of Fairbanks, Alaska v. Roberts*, 141 S. Ct. 1515 (2021).

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); *Reese*, 888 F.3d at 1045–46 (concluding *Heck* doctrine did

not bar § 1983 claim alleging excessive force); *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. Cnty. 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 Reese*, 888 F.3d at 1045–46 (concluding § 1983 claim alleging excessive force did not necessarily imply the invalidity of the conviction); *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 v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997); *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); *Vega v. United States*, 881 F.3d 1146, 1152 (9th Cir. 2018); *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006

(2017) (per curiam) (“In *Bivens*, this Court recognized for the first time an implied right of action for damages against federal officers alleged to have violated a citizen’s constitutional rights.” (internal quotation marks and citation omitted)); *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* remedy is not available, however, where there are special factors counselling hesitation in the absence of affirmative action by Congress.” *Hernandez*, 137 S. Ct. at 2006 (internal quotation marks and citation omitted).

In *Bivens*, the Supreme Court recognized, for the first time, an implied cause of action arising directly under the Constitution for damages against federal officers alleged to have violated a plaintiff’s constitutional rights. [403 U.S. at 389]. The *Bivens* Court specifically held that damages were recoverable against federal officers who violated the Fourth Amendment’s prohibition against unreasonable searches and seizures. *Id.* In the following decade, the Court explicitly extended the *Bivens* remedy in two other cases: *Davis [v. Passman]*, 442 U.S. 228, 230 (1979) recognized an implied damages claim under the Fifth Amendment’s due process clause for gender discrimination by a member of the United States Congress, ...; and *Carlson [v. Green]*, 446 U.S. 14, 16–18 & n.1 (1980) recognized an implied claim under the Eighth Amendment’s cruel and unusual punishment clause for prison officials’ failure to provide adequate medical care,

Hoffman v. Preston, 26 F.4th 1059, 1064 (9th Cir. 2022).

The Supreme Court has expressed that expansion of *Bivens* is disfavored. *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020). However, the Ninth Circuit has recognized that although “the Supreme Court has ‘made clear that expanding the *Bivens* remedy is now a “‘disfavored’” judicial activity,’ the Court has also made clear that a remedy may be available for a case arising in a new *Bivens* context, so long as ‘special factors [do not] counsel[] hesitation.’” *Hoffman*, 26 F.4th at 1061 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 1859, 1865 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675, (2009))).

“[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*, 462 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 *Minnecci v. Pollard*, 565 U.S. 118, 131 (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).

In *Hoffman v. Preston*, 26 F.4th 1059 (9th Cir. 2022), the court held that as matter of first impression, *Bivens* remedy was available for prisoner’s claim that correctional officer violated his Eighth Amendment rights by labeling him a snitch

to other prisoners, offering a bounty to other prisoners to assault him, and failing to protect him from predictable assault by another prisoner.

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); *Hoffman v. Preston*, 26 F.4th 1059, 1063 (9th Cir. 2022) (“We construe pro se complaints liberally and afford the petitioner the benefit of any doubt.”); *Wilk v. Neven*, 956 F.3d 1143, 1147 (9th Cir. 2020); *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). “[A] liberal interpretation of a pro se civil rights complaint may not supply essential elements of the claim that were not initially pled.” *Litmon v. Harris*, 768 F.3d 1237, 1241 (9th Cir. 2014).

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Before 2007, in determining the sufficiency of a pleading, courts applied a liberal rule announced in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) that a complaint should not be dismissed unless it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” See *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court established a more demanding pleading standard. In *Twombly*, the Supreme Court held that a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. In *Iqbal*, the Supreme Court held that “bare assertions” that “amount to nothing more than a formulaic recitation of the

elements of a [] claim” are not entitled to “presumption of truth,” and that the district court, after disregarding “bare assertions” and conclusions, must “consider the factual allegations in [a] complaint to determine if they plausibly suggest an entitlement to relief” as opposed to a claim that is merely “conceivable.” *Iqbal*, 556 U.S. 679–80.

Although the standard for stating a claim became stricter after *Twombly* and *Iqbal*, the filings and motions of pro se inmates continue to be construed liberally. See *Al Saud v. Days*, 36 F.4th 949, 952 (9th Cir. 2022); *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (as amended) (explaining that *Twombly* and *Iqbal* “did not alter the courts’ treatment of *pro se* filings,” and stating, “[w]hile the standard is higher [under *Iqbal*], our obligation remains, where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” (internal citation omitted)); *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (differentiating between the procedural burden place on ordinary pro se litigants and the procedural burden placed on pro se inmates, and explaining that courts should construe liberally the filings and motions of a pro se inmate in a civil suit, and avoid applying summary judgment rules strictly); cf. *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (stating pro se complaints are construed liberally and “may only be dismissed if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” which is a pre-*Twombly* pleading standard); *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012) (stating that pro se complaints could be dismissed for failure to state a claim only “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” which is a pre-*Twombly* notice pleading standard).

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 *Litmon*, 768 F.3d at 1241; *Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2013) (“Courts in this circuit have an obligation to give a liberal construction to the filings of pro se litigants, especially when they are civil rights claims by inmates.”); *Pouncil v. Tilton*, 704 F.3d 568, 574 (9th Cir. 2012) (pro se state prisoner); *Johnson*, 207 F.3d at 653 (pro se state inmate).

Liberal construction means that pro se litigants are “relieved from the strict application of procedural rules and demands that courts not hold missing or inaccurate legal terminology or muddled draftsmanship against them.” *Blaisdell*, 729 F.3d at 1241. However, liberal construction does not mean that the court is required to supply essential elements of the claim that were not initially pled. See

Litmon, 768 F.3d at 1241; *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1140 (9th Cir. 2011) (citing *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (per curiam)) (pretrial detainee).

b. Exceptions

(1) 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) (*Bivens* action); *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 Cnty. 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.(6).

However, “[t]he *Twombly* plausibility standard ... does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible.” See *Soo Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017) (citation omitted) (discussing sufficiency of pleading civil conspiracy under § 1983, in § 1983 action brought by a defendant in a murder trial).

In *Leatherman v. Tarrant Cnty. 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. Cnty. 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 Cnty., Nev.*, 319 F.3d 465, 470 (9th Cir. 2003) (en banc) (same). However, after *Twombly* and *Iqbal*, a “bald allegation of impermissible motive,” would not be sufficient. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) (discussing *Twombly* and *Iqbal*). The factual content contained within the complaint must allow a reasonable inference of an improper motive to satisfy *Twombly* and *Iqbal*. *See Moss*, 572 F.3d at 972.

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).

Prior to *Twombly* and *Iqbal*, this court 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. Cnty. 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.”). After *Twombly* and *Iqbal*, the court in *Starr v. Baca*, 652 F.3d 1202, 1212–16 (9th Cir. 2011), identified and addressed conflicts in the Supreme Court’s jurisprudence on the pleading requirements applicable to civil actions. The court held that whatever the differences between the Supreme Court cases, there were two principles common to all:

First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend

itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). In *AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012), this court held that the *Starr* standard applied to pleading policy or custom for claims against municipal entities.

For a discussion of the 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 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 Cnty.*, 693 F.3d 896 (9th Cir. 2012); *see also Soto v. Sweetman*, 882 F.3d 865, 872 (9th Cir. 2018) (explaining that while pro se inmates may be exempted from strict compliance with the summary judgment rules, they are not exempt from all compliance); *Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2013) (“[The liberal construction of pro se pleadings] rule relieves pro se litigants from the *strict* application of procedural rules and demands that courts not hold missing or inaccurate legal terminology or muddled draftsmanship against them.” (emphasis added)); *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) (rules on appeal); *see also Solis v. Cnty. 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) (“[T]his court has long sought to ensure that pro se litigants do not unwittingly fall victim to procedural requirements that they may, with some assistance from the court, be able to satisfy.”); *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). This is also known as the “prison mailbox rule.”

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); see also *Hernandez v. Spearman*, 764 F.3d 1071, 1074 (9th Cir. 2014) (discussing circumstances in which courts refused to apply the prison mailbox rule).

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)(1)(A)(i) (stating that a timely 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. Cnty. 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.” See also *Harris v. Mangum*, 863 F.3d 1133, 1138 (9th Cir. 2017). “The purpose of Rule 17(c) is to protect an incompetent person’s interests in prosecuting or defending a lawsuit.” *Davis v. Walker*, 745 F.3d 1303, 1310 (9th Cir. 2014). See also *Harris*, 863 F.3d at 1138.

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 *Harris*, 863 F.3d at 1138; *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), *abrogated on other grounds by Neitzke v. Williams*, 490 U.S. 319 (1989); *see also Andrews v. King*, 398 F.3d 1113, 1123 (9th Cir. 2005) (Fernandez, J., concurring); *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), abrogated on other grounds by *Neitzke v. Williams*, 490 U.S. 319 (1989); *Brown v. Schneekloth*, 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.C.

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* *Bruce v. Samuels*, 577 U.S. 82, 84 (2016); *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.”). *See also* *Bruce*, 577 U.S. at 84. “[T]he initial partial filing fee is to be assessed on a per-case basis, *i.e.*, each time the prisoner files a lawsuit.” *Bruce*, 577 U.S. at 84. Additionally, “monthly installment payments, like the initial partial payment, are to be assessed on a per-case basis.” *Id.* at 85.

“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.” 28 U.S.C. § 1915(b)(4); *Bruce*, 577 U.S. at 84–85; *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.

Typically it is not until a defendant “challenge[s] a prisoner-plaintiff’s IFP status,” [*Andrews*, 398 F.3d at 1120], that a backwards-looking inquiry is done to assess whether “on 3 or more occasions,” the prisoner-plaintiff’s suit was “dismissed on the grounds that it [wa]s frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted,” 28 U.S.C. § 1915(g).

Furnace v. Giurbino, 838 F.3d 1019, 1029 (9th Cir. 2016).

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); *Chavez v. Robinson*, 817 F.3d 1162, 1166 n.2 (9th Cir. 2016), as amended on reh’g (Apr. 15, 2016) (“[Section] 1915(d) provides that when a plaintiff is proceeding IFP, ‘the officers of the court shall issue and serve all process.’”); *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 Byrd v. Maricopa Cnty. Bd. of Supervisors*, 845 F.3d 919, 925 (9th Cir. 2017) (remanding for district court to appoint counsel where exceptional circumstances existed, “as evidenced by Byrd’s limited ability to articulate his claims pro se, the complexity of the legal issues involved, and the possible merit of his claims); *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. Cnty. of King*, 883 F.2d 819, 824 (9th Cir. 1989) (per curiam) (§ 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 Harrington v. Scribner*, 785 F.3d 1299, 1309 (9th Cir. 2015); *Cano v. Taylor*, 739 F.3d 1214, 1218 (9th Cir. 2014); *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 Cano*, 739 F.3d at 1218; *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), *abrogated on other grounds by Neitzke v. Williams*, 490 U.S. 319 (1989). *See also Washington v. Los Angeles Cnty. Sheriff’s Dep’t*, 833 F.3d 1048, 1055–56 (9th Cir. 2016) (holding “that *Heck* dismissals may constitute Rule 12(b)(6) dismissals for failure to state a claim when the pleadings present an ‘obvious bar to securing relief’ under *Heck*.”)

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).

There is “an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Byrd v. Phoenix Police Dep’t*, 885 F.3d 639, 642 (9th Cir. 2018) (section 1915A dismissal).

c. Leave to Amend

“A district court should not dismiss a pro se complaint without leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (internal quotation marks and citation omitted); *see also Rodriguez v. Steck*, 795

F.3d 1187, 1188 (9th Cir. 2015) (order); *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

“The standard for determining whether a plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). “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). “Dismissal is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him to relief.” *Watison*, 668 F.3d at 1112. There is “an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Byrd v. Phoenix Police Dep’t*, 885 F.3d 639, 642 (9th Cir. 2018) (section 1915A dismissal); see also *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (motion to dismiss).

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 *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012); *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 *Akhtar*, 698 F.3d at 1212; *United States v. 14.02 Acres of Land More or Less in Fresno Cnty.*, 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); *Walker v. Beard*, 789 F.3d 1125, 1139 (9th Cir. 2015); *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); *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 Cnty.*, 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

Hoffman v. Preston, 26 F.4th 1059, 1063 (9th Cir. 2022) (prisoner *Bivens* action); *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 *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012); *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 *Byrd v. Phoenix Police Dep’t*, 885 F.3d 639, 640 (9th Cir. 2018) (per curiam); *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014); *Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). Note, there is “an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Byrd*, 885 F.3d at 642. See also *Hoffman*, 26 F.4th at 1063 (“We construe *pro se* complaints liberally and afford the petitioner the benefit of any doubt.”).

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). “Before *sua sponte* summary judgment against a party is proper, that party must be given reasonable notice that the sufficiency of his or her claim will be in issue: Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment.” *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (en banc) (directing sua sponte that summary judgment be granted to Albino on the issue of exhaustion).

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 *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017); *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; *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (in reviewing district court's grant of summary judgment the court determines "whether, viewing the evidence in the light most favorable to the non-moving party, there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law"); *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).

"[C]ourts should construe liberally motion papers and pleadings filed by pro se inmates and should avoid applying summary judgment rules strictly." *Wilk v. Neven*, 956 F.3d 1143, 1147 (9th Cir. 2020) (quoting *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010)).

"[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).

Because pro se plaintiffs—especially pro se prisoner plaintiffs—“cannot be expected to anticipate and prospectively oppose arguments that an opposing defendant does not make,” *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 990 (9th Cir. 2008), boilerplate language requesting summary judgment on all claims does not provide sufficient notice that an unmentioned claim is at issue on summary judgment.

Hoard v. Hartman, 904 F.3d 780, 792–93 (9th Cir. 2018).

“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). 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); *Zetwick*, 850 F.3d at 441; *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) (as amended); *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); *Klinge v. Eikenberry*, 849 F.2d 409, 411–12 (9th Cir. 1988). The notice requirement “effectuates the purpose of the Federal Rules to eliminate procedural booby traps which could prevent unsophisticated litigants from ever having their day in court.” *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013). 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); *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.” *See also Labatad v. Corr. Corp. of Am.*, 714 F.3d 1155, 1159 (9th Cir. 2013) (per curiam) (explaining “[t]he *Rand* notice must issue so that the litigant will receive the motion and the notice reasonably contemporaneously” and holding that although there was a delay in sending the *Rand* notice, it was harmless error).

If the district court will consider material beyond the pleadings when ruling on a defendant’s motion to dismiss for failure to exhaust administrative remedies, the pro se prisoner must receive notice similar to the notice describe in *Rand*. *See Stratton v. Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012). The court has explained:

The notice must explain that: the motion to dismiss for failure to exhaust administrative remedies is similar to a motion for a summary judgment in that the district court will consider materials beyond the pleadings; the plaintiff has a “right to file counter-affidavits or other responsive evidentiary materials”; and the effect of losing the motion. *See Rand*, 154 F.3d at 960. The notice “must be phrased in ordinary, understandable language calculated to apprise an unsophisticated prisoner of his or her rights and obligations” under *Rule 12*. *See id.*

Stratton, 697 F.3d at 1008. *See also Akhtar v. Mesa*, 698 F.3d 1202, 1214 (9th Cir. 2012) (recognizing that *Rand* notice requirements have been extended to motions to dismiss for failure to exhaust administrative remedies and holding district court erred in failing to provide Akhtar with the notice pursuant to *Rand* at the time Appellees filed their motion to dismiss).

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 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

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 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).

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. Cnty. of Los Angeles*, 514 F.3d 946, 952 (9th Cir. 2008).

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 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 Labatad*, 714 F.3d at 1159; *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. *Labatad v. Corrections Corporation of America*, is an example of the unusual case in which the record demonstrated the harmlessness of the failure to give the required notice. 714 F.3d at 1159. In *Labatad*, the court held that where the *Rand* notice was not sent until approximately a month after the defendants filed their motion and a day after *Labatad* filed his response, the error was harmless. *See id. at 1159–60*. *Labatad* did not suffer deprivation of substantial rights, and his response demonstrated that he understood the nature of summary judgment and complied with the requirements of Rule 56. *See id. at 1160*.

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.” See also *Shepard v. Quillen*, 840 F.3d 686, 687 n.1 (9th Cir. 2016).

Relying on a prior version of Rule 56, this court held that “unauthenticated documents cannot be considered on a motion for summary judgment. 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).

“A court may take judicial notice of ‘matters of public record’ without converting a motion to dismiss into a motion for summary judgment.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

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); *Klinge 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 to conduct additional discovery. See *Fed. R. Civ. P. 56(d)*. “Rule 56(d) provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence.” *Stevens v.*

² “Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).” *Fed. R. Civ. P. 56* advisory committee’s note (2010).

Corelogic, Inc., 899 F.3d 666, 678 (9th Cir. 2018) (internal quotation marks and citation omitted).

Rule 56(d) provides that “[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d). To prevail on a request for additional discovery under Rule 56(d), a party must show that: “(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment.” *Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 619–20 (9th Cir. 2017) (citation omitted).

InteliClear, LLC v. ETC Glob. Holdings, Inc., 978 F.3d 653, 661–62 (9th Cir. 2020) (holding that the district court abused its discretion in denying discovery under Rule 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). “In particular, ‘[t]he requesting party must show [that]: (1) it has set forth in affidavit form *the specific facts* it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment.” *Stevens*, 899 F.3d at 678 (quoting *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (emphasis added)). See also *Henry v. Adventist Health Castle Med. Ctr.*, 970 F.3d 1126, 1133 n.5 (9th Cir. 2020), cert. denied sub nom. *Henry v. Castle Med. Ctr.*, 142 S. Ct. 67 (2021) (holding the district court did not abuse its discretion in denying Henry’s request for a continuance to conduct further discovery and/or supplement the record under Rule 56(d) and (e), as Henry failed to identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment); *Sec. & Exch. Comm’n v. Stein*, 906 F.3d 823, 833 (9th Cir. 2018) (concluding that Stein did not satisfy Rule 56(d)

where he failed to identify with specificity facts likely to be discovered that would justify additional discovery).

The party seeking additional discovery must 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) (as amended), 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 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); [Ghazali v. Moran](#), 46 F.3d 52, 54 (9th Cir. 1995) (per curiam); [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 *Fordley v. Lizarraga*, 18 F.4th 344, 350 (9th Cir. 2021) (reviewing de novo a district court's summary judgment ruling that an inmate had not exhausted his claims within the meaning of the PLRA); *Fuqua v. Ryan*, 890 F.3d 838, 844 (9th Cir. 2018) (reviewing de novo district court's order granting summary judgment based on failure to exhaust); *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc); *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. Seacock*, 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

“In general, dismissal for lack of subject matter jurisdiction is without prejudice.” *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017); *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). “The theory undergirding the general rule is that the merits have not been considered’ before dismissal.” *Missouri ex rel. Koster*, 847 F.3d at 656. 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

If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must

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) changed from 120 days to 90 days.

dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. . . .

Fed. R. Civ. P. 4(m). *See also Whidbee v. Pierce Cnty.*, 857 F.3d 1019, 1023 (9th Cir. 2017); *Crowley v. Bannister*, 734 F.3d 967, 975 (9th Cir. 2013); *De Tie v. Orange Cnty.*, 152 F.3d 1109, 1111 (9th Cir. 1998); *Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir. 1992) (prior Fed. R. Civ. P. 4(j), *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) (prior Fed. R. Civ. P. 4(j)); *Townsel v. Cnty. of Contra Costa, Cal.*, 820 F.2d 319, 320 (9th Cir. 1987) (prior Fed. R. Civ. P. 4(j)).

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

It is an abuse of discretion for a district court to dismiss “a complaint *sua sponte* for lack of service without first giving notice to the plaintiff and providing an opportunity for [the plaintiff] to show good cause for the failure to effect timely service.” *Crowley*, 734 F.3d at 975.

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 leading must contain ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’ ... ‘A complaint guides the parties’ discovery, putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff’s allegations.” *Smith v. City & Cnty. of Honolulu*, 887 F.3d 944, 951 (9th Cir. 2018) (quoting Fed. R. Civ. P. 8(a)(2) and *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000)).

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, 562 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)). For additional discussion, see *supra* II.A.1.

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 Zanowick v. Baxter Healthcare Corp.*, 850 F.3d 1090, 1093 (9th Cir. 2017); *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; *see also Zanowick*, 850 F.3d at 1093. The expense of having defended the lawsuit is not legal prejudice. *See Westlands*, 100 F.3d at 97; *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. Kaempfen*, 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 *Tillman v. Tillman*, 825 F.3d 1069, 1074 (9th Cir. 2016); *Hearns v. San Bernardino Police Dep’t*, 530 F.3d 1124, 1132 (9th Cir. 2008) (vacating dismissal order); *Bautista v. Los Angeles Cnty.*, 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 *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. Kaempfen*, 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). “The record supporting such an order ‘needs to show, in some manner, that the litigant’s activities were numerous or abusive.’” *Harris v. Mangum*, 863 F.3d 1133, 1143 (9th Cir. 2017) (quoting *De Long*, 912 F.2d at 1147). “[S]uch pre-filing review orders should rarely be filed.” *De Long*, 912 F.2d at 1147; *see also Ringgold-Lockhart v. Cty. of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014); *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 Ringgold-Lockhart*, 761 F.3d at 1062; *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)). *See also Mitchell v. Valenzuela*, 791 F.3d 1166, 1168 (9th Cir. 2015) (explaining that “[p]ursuant to section 636, magistrate judges may hear and determine nondispositive matters, but not dispositive matters, in § 2254 proceedings).

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). Note this court has stated that the “cases discussing the effects of failure to object to a report and recommendation are perhaps best understood as an application of the doctrine of forfeiture, not waiver.” *Bastidas v. Chappell*, 791 F.3d 1155, 1159 n.1 (9th Cir. 2015).

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

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

“While ‘failure to object to a magistrate judge’s factual findings waives the right to challenge those findings, [i]t is well settled law in this circuit that failure to file objections ... does not [automatically] waive the right to appeal the district court’s conclusions of law,’ but is rather ‘a factor to be weighed in considering the propriety of finding waiver of an issue on appeal.’” *Bastidas* 791 F.3d at 1159 (quoting *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (alterations in original) (internal quotation marks omitted)). See also *Loher v. Thomas*, 825 F.3d 1103, 1121 (9th Cir. 2016); *Robbins v. Carey*, 481 F.3d 1143, 1146–47 (9th Cir. 2007); *In re Grand Jury Subpoena (Mark Torf/Torf Env’t Mgmt.)*, 357 F.3d 900, 903 (9th Cir. 2004) (as amended); *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); see also *Allen v. Meyer*, 755 F.3d 866, 868 (9th Cir. 2014) (magistrate judge had no jurisdiction where there was neither express or implied consent). If the parties consent, a magistrate judge “may conduct any or all 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 *Wilhelm 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 v. Woodcreek Venture Ltd.*, 351 F.3d 911, 918–19 (9th Cir. 2003).

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 *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 628–29 (9th

magistrate judge orders in conditions-of-confinement cases, contains no similar language.

Cir. 2016); *Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.*, 539 F.3d 1039, 1042 (9th Cir. 2008) and *Bingman*, 100 F.3d at 656.

E. Recusal/Disqualification of Judges

“[R]ecusal is appropriate where ‘a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned.’” *United States v. Carey*, 929 F.3d 1092, 1104 (9th Cir. 2019) (quoting *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993)). “Under § 455(a), impartiality must be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance.” *Carey*, 929 F.3d at 626 (internal quotation marks and citation omitted). “The goal of section 455(a) is to avoid even the appearance of partiality.” *United States v. Mikhel*, 889 F.3d 1003, 1027 (9th Cir. 2018) (internal quotation marks and citation omitted).

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 United States v. McChesney*, 871 F.3d 801, 807 (9th Cir. 2017); *Blixseth v. Yellowstone Mountain Club, LLC*, 742 F.3d 1215, 1220 (9th Cir. 2014) (per curiam); *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). *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 v. Arsenault*, 543 F.3d 1038, 1043 (9th Cir. 2008), *abrogated on other grounds by Simmons v. Himmelreich*,

578 U.S. 621 (2016); *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); *Jones v. Slade*, 23 F.4th 1124, 1134 (9th Cir. 2022); *Cates v. Stroud*, 976 F.3d 972, 979 (9th Cir. 2020) (“It is well-established that prisoners do not shed all constitutional rights at the prison gate, though these rights may be limited or restricted.”), *cert. denied*, 142 S. Ct. 335 (2021); *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017); *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 972 (9th Cir. 2010) (en banc); *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009); *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004); *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); *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 right” *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); *Turner*, 482 U.S. at 84–85; *Jones*, 23 F.4th at 1134 (“We apply a deferential standard of review to challenges regarding prison regulations derived from *Turner*.” (internal citations and quotation marks omitted)); *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. Cnty. 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) (as

amended) (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 *Turner*, 482 U.S. at 84; *Morrison*, 261 F.3d at 901; *Mauro*, 188 F.3d at 1058. See also *Shorter v. Baca*, 895 F.3d 1176, 1189 (9th Cir. 2018) (readily acknowledging the deference due prison officials engaged in the admittedly difficult task of administering inmate populations, but explaining that deference does not extend to sanctioning a clear violation of an inmate’s constitutional rights).

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. Slade*, 23 F.4th 1124, 1134 (9th Cir. 2022); *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; *Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 972 (9th Cir. 2017); *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.

Review “is highly deferential, and it often requires [the court] to uphold rules that, in contexts not involving prisons, would plainly violate the First Amendment.” *Prison Legal News v. Ryan*, 39 F.4th 1121, 1128 (9th Cir. 2022)

The first of these factors is the most important. *See Jones*, 23 F.4th at 1135; *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); *Crime Justice & Am., Inc.*, 876 F.3d at 975 (“Maintaining security in a jail is inarguably a legitimate government interest.”); *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; *Jones*, 23 F.4th at 1135–36 (explaining *Turner*’s neutrality requirement); *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 receive information while incarcerated.” *Jones v. Slade*, 23 F.4th 1124, 1134 (9th Cir. 2022). Prisoners have “a First Amendment right to send and receive mail.” *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam); *see also Nordstrom v. Ryan*, 856 F.3d 1265, 1271 (9th Cir. 2017). 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, and 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 Procnier*, 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). *See also Nordstrom*, 856 F.3d at 1272 (“Legitimate penological interests that justify regulation of outgoing legal mail include ‘the prevention of criminal activity and the maintenance of prison security.’” (quoting *O’Keefe v. Van Boening*, 82 F.3d 322, 326 (9th Cir. 1996))).

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).

“[P]risoners have a protected First Amendment interest in having properly marked legal mail opened only in their presence.” *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1211 (9th Cir. 2017) (concluding the protected First Amendment interest extends to civil legal mail). Consistent with the First Amendment, prison officials may, (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). *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); *see also Hayes*, 849 F.3d at 1211 (explaining the First

Amendment does not prohibit opening mail from the courts outside the recipient's presence). 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).

Note that in addition to a First Amendment right to send and receive mail while incarcerated, the Sixth Amendment right to assistance of counsel may also be implicated if a prison's policy regarding outgoing legal mail interferes with the relationship between a criminal defendant and defense counsel. See *Nordstrom v. Ryan (Nordstrom II)*, 856 F.3d 1265, 1271–74 (9th Cir. 2017) (explaining that “prison officials may *inspect*, but may not *read*, an inmate's outgoing legal mail in his presence” and holding that prison's policy violated inmate's First and Sixth Amendment rights). See also *Mangiaracina v. Penzone*, 849 F.3d 1191, 1197 (9th Cir. 2017) (recognizing “that prisoners have a Sixth Amendment right to confer privately with counsel and that the practice of opening legal mail in the prisoner's presence is specifically designed to protect that right”); *Nordstrom v. Ryan (Nordstrom I)*, 762 F.3d 903, 909 (9th Cir. 2014) (recognizing that prisoners have a Sixth Amendment right to be present when legal mail related to a criminal matter is inspected).

(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) (suggesting a publisher-only rule as applied to softback books and magazines may violate the First Amendment); *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) (finding prisoner’s complaint challenging prison’s publisher-only rule for books, including softcover legal materials, was not frivolous).

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.

The court has upheld the “constitutionality of prison rules that restrict the ingress and possession of sexually explicit materials.” *Prison Legal News v. Ryan*, 39 F.4th 1121, 1129 (9th Cir. 2022) (citing example cases).

Considering 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).

A county’s “ban on inmates’ receipt of unsolicited commercial mail” has been found to not violate the First Amendment. See *Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 978 (9th Cir. 2017). The court determined that the ban, which reduced inmate access to paper they were likely to misuse, was reasonably related to a legitimate penological objective of jail security, that there were sufficient alternative means of exercising the right that remained available to prison inmates, that the impact of accommodating the publisher would have significant impact on jail resources, and that the ban on the unsolicited commercial mail was not an exaggerated response to the problems posed by paper in the jail. See *id.* at 973–78.

In *Prison Legal News v. Ryan*, 39 F.4th 1121 (9th Cir. 2022), the court held that an order issued by state Department of Corrections prohibiting inmates from sending, receiving, or possessing sexually explicit material left inmates and publisher of monthly journal for prison inmates with ample alternative means to receive and provide information, and, with one exception, did not violate the First Amendment.

(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).

(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 Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017) (“The most fundamental of the constitutional protections that prisoners retain are the First Amendment rights to file prison grievances.”); *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)); see also *Shepard v. Quillen*, 840 F.3d 686, 688 (9th Cir. 2016) (recognizing that “a corrections officer may not retaliate against a prisoner for exercising his First Amendment right to report staff misconduct”). 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 *Shepard*, 840 F.3d at 688 (determining that fact issues remained as to whether officer retaliated against inmate); *Jones*, 791 F.3d at 1035–36 (concluding that Jones made a showing in support of his retaliation claim sufficient to overcome summary judgment); *Wood v. Yordy*, 753 F.3d 899, 904–05 (9th Cir. 2014) (holding inmate failed to establish prison officials retaliated against him).

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); *Al Saud v. Days*, 36 F.4th 949, 957 (9th Cir. 2022) (“Prisoners have First Amendment protection, but their rights under the Free Exercise Clause are necessarily limited by institutional objectives and by the loss of freedom concomitant with incarceration.” (internal quotation marks and citation omitted)); *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. Kolodziejczak*, 923 F.2d 126, 127 (9th Cir. 1991). To implicate the Free Exercise Clause, the prisoner’s belief must be both sincerely held and rooted in religious belief. See *Al Saud*, 36 F.4th at 957; *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). “[A] prisoner’s Free Exercise Clause claim will fail if the state shows that the challenged action is reasonably related to legitimate penological interests.” *Al Saud*, 36 F.4th at 957 (internal quotation marks and citation omitted).

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; *Al Saud*, 36 F.4th at 957; *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); *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), *superseded by statute on other grounds*; 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. Cnty. of Orange*, 639 F.3d 898, 900 (9th Cir. 2011) (en banc). “RLUIPA thus allows prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA.” *Holt v. Hobbs*, 574 U.S. 352, 358 (2015) (internal quotation marks and citation omitted).

The “RLUIPA provides that ‘[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,’ unless the government can demonstrate that the burden ‘is in furtherance of a compelling governmental interest’ and ‘the least restrictive means of furthering that compelling governmental interest.’” *Jones v. Slade*, 23 F.4th 1124, 1139 (9th Cir. 2022) (quoting 42 U.S.C. § 2000cc-1(a)). 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 *Holt*, 574 U.S. at 358; *Cutter*, 544 U.S. at 715; *Jones*, 23 F.4th at 1140. This concept is to be construed “‘in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.’ ... Congress stated that RLUIPA ‘may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.’” *Holt*, 574 U.S. at 358 (quoting § 2000cc-3(g)).

“RLUIPA’s requirements are not unlimited. If inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, a prison system may resist the imposition.” *Fuqua v. Ryan*, 890 F.3d 838, 844 (9th Cir. 2018).

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 Cnty. Jail*, 513 F.3d 982, 986 (9th Cir. 2008) (citation and internal quotation marks omitted); *see also Holt*, 135 S. Ct. at 860; *Alvarez v. Hill*, 518 F.3d 1152, 1156–57 (9th Cir. 2008).

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 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.”).

“RLUIPA incorporates the administrative exhaustion requirements of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a).” *Fuqua*, 890 F.3d at 844.

For cases applying RLUIPA to prisoners’ free exercise claims, *see Holt v. Hobbs*, 574 U.S. 352, 356–58 (2015) (grooming policy substantially burdened prisoner’s exercise of religion); *Fuqua v. Ryan*, 890 F.3d 838, 844–50 (9th Cir. 2018); *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).

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). To determine if a policy violates the Fourth Amendment right to be free from unreasonable searches, the court considers “(1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the justification for initiating it, and (4) the place in which it is conducted.” *Byrd v. Maricopa Cnty. Bd. of Supervisors*, 845 F.3d 919, 922 (9th Cir. 2017) (quotation marks and citation omitted). Prison officials must present evidence that a search served a legitimate penological interest. *See Walker*, 917 F.2d at 386–88. Note that each case “requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

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

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, the Ninth Circuit determined in *Byrd v. Maricopa Cnty. Sheriff’s Department*, 629 F.3d 1135, 1142 (9th Cir. 2011) (en banc), 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.

The Supreme Court in *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 322–23 (2012), addressed the practice of strip searches of detainees at jails, concluding that the searches at issue did not violate the Fourth Amendment. In so holding, the Court “instructed courts to ‘defer to the judgment of correctional officials’ when the officials conduct ‘strip searches’ of detainees admitted to the general population of a jail facility.” *Shorter v. Baca*, 895 F.3d 1176, 1187 (9th Cir. 2018) (quoting *Florence*, 566 U.S. at 322–23); see also *Florence*, 566 U.S. at 322–23 (no violation where detainees passed through metal detector, were instructed to remove clothing while an officer looked for body markings, wounds, and contraband, and were required to lift genitals, turn around, and cough in a squatting position as part of the process). However, the Ninth Circuit concluded that deference to jail officials is unwarranted where search methods are unreasonable. See *Shorter*, 895 F.3d at 1189 (concluding that the search procedure that required noncompliant pretrial detainees to be chained to their cell doors for hours at a time, virtually unclothed, without access to meals, water, or clothing, and visible to guards on patrol, was humiliating and an extreme invasion of privacy, and thus, that deference was not due to the jail officials).

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) (holding prison policy of requiring male guards to conduct random, suspicionless clothed body searches on female prisoners violated *Eighth* Amendment); *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985). However, in *Byrd v. Maricopa Cnty. 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.

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. Avanti*, 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). See also *Evans v. Skolnik*, 997 F.3d 1060 (9th Cir. 2021)

(concluding that officer was entitled to qualified immunity for conduct in screening and occasionally checking in on prisoner’s telephone calls with attorney representing prisoner in civil matter, because there was no binding precedent that such conduct violated prisoner’s Fourth Amendment rights, and no consensus of authority demonstrated that such conduct violated Fourth Amendment).

3. Sixth Amendment

“The Sixth Amendment provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.’” *Nordstrom v. Ryan (Nordstrom I)*, 762 F.3d 903, 909 (9th Cir. 2014) (quoting U.S. Const. amend. VI). Deliberate government interference with the confidential relationship between a criminal defendant and defense counsel violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant.” *Nordstrom I*, 762 F.3d at 909.

“[P]risoners have a Sixth Amendment right to be present when legal mail related to a criminal matter is inspected.” *Mangiaracina v. Penzone*, 849 F.3d 1191, 1196 (9th Cir. 2017). “[T]he practice of requiring an inmate to be present when his legal mail is opened is a measure designed to *prevent* officials from reading the mail,” protecting an inmate’s Sixth Amendment right to confer privately with counsel. *Nordstrom*, 762 F.3d at 910; *see also Mangiaracina*, 849 F.3d at 1196. *Nordstrom I*, held that while prison officials may inspect legal-outgoing mail in the inmate’s presence, prison officials may not read it. 762 F.3d at 910. As explained in *Nordstrom v. Ryan (Nordstrom II)*, 856 F.3d 1265, 1272 (9th Cir. 2017), “a proper inspection entails looking at a letter to confirm that it does not include suspicious features such as maps, and making sure that illegal goods or items that pose a security threat are not hidden in the envelope.” A policy that required prison staff to “inspect mail page-by-page to ensure that a letter concerns only legal subjects” goes beyond the level of inspection approved in *Nordstrom I*. *Nordstrom II*, 856 F.3d at 1271–72 (holding that policy and practice of scanning inmate’s outgoing legal mail violated Sixth Amendment right to counsel). *See also Mangiaracina*, 849 F.3d at 1196–97 (concluding pretrial detainee alleged sufficient fact to state claim for improper opening of legal mail).

4. 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. Proconier*, 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)).

“[T]he Eighth Amendment applies equally to convicted prisoners inside or outside the walls of the penal institution.” *Hughes v. Rodriguez*, 31 F.4th 1211, 1221 (9th Cir. 2022) (case concerning escaped convict).

“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). The Eighth Amendment is also not a mandate for broad prison reform or excessive federal judicial involvement. *See Hallett*, 296 F.3d at 745.

[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); *Lemire v. Cal. Dep’t of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (“For an inmate to bring a valid § 1983 claim against a prison official for a violation of the Eighth Amendment, he must [] objectively show that he was deprived of something sufficiently serious [and] make a subjective showing that the deprivation occurred with deliberate indifference to the inmate’s health or safety.”); *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. Cnty. 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) (“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))).

To prove deliberate indifference, subjective recklessness is required, that is, an official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or 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 he must also draw the inference.

Harrington v. Scribner, 785 F.3d 1299, 1304 (9th Cir. 2015) (quotation marks and citation omitted).

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); *Grenning v. Miller-Stout*, 739 F.3d 1235, 1240 (9th Cir. 2014); *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); *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 Federal Tort Claims Act. See 28 U.S.C. § 1346(b)(2). For further discussion of these provisions, see *infra* IV.F.

Note “Eighth Amendment protections apply only once a prisoner has been convicted of a crime, while pretrial detainees are entitled to the potentially more expansive protections of the Due Process Clause of the Fourteenth Amendment.” *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1246 n.5 (9th Cir. 2016); see also *Byrd v. Maricopa Cnty. Bd. of Supervisors*, 845 F.3d 919, 924 n.2 (9th Cir. 2017) (“The Fourteenth Amendment, and not the Eighth Amendment, governs cruel and unusual punishment claims of pretrial detainees.”). While the Eighth Amendment standard to prove deliberate indifference is clear (the official must have a subjective awareness of the risk of harm), the deliberate indifference standard under the Fourteenth Amendment is less clear. See *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016). In *Castro*, the Ninth Circuit addressed the Supreme Court’s decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), which applied an *objective* deliberate indifference standard to the excessive force claim of a pretrial detainee. *Castro*, 833 F.3d at 1068–70. As explained in *Castro*, *Kingsley* “rejected the notion that there exists a single ‘deliberate indifference’ standard applicable to *all* § 1983 claims, whether brought by pretrial detainees or by convicted prisoners.” *Castro*, 833 F.3d at 1069 (recognizing that *Kingsley* did not limit its holding to “force,” and applying objective standard to “failure-to-protect” claim of pretrial detainee, overruling prior precedent that identified a single deliberate indifference standard for all § 1983 claims).

“Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and post-conviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions.” *Shorter v. Baca*, 895 F.3d 1176, 1182 n.4 (9th Cir. 2018); see also *Fierro v. Smith*, 39 F.4th 640, 649 n.6 (9th Cir. 2022).

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 Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (explaining that subjective deliberate indifference standard under the Eighth Amendment is well established); *Jeffers v. Gomez*, 267 F.3d 895, 913 (9th Cir. 2001) (per curiam); *Anderson v. Cnty. 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). Note that “[w]hile a claim of deliberate indifference against a prison official employs a subjective standard, *Farmer*, 511 U.S. at 837, 114 S. Ct. 1970, ... an objective standard applies to municipalities ‘for the practical reason that government entities, unlike individuals, do not themselves have states of mind,’ *Castro*, 833 F.3d at 1076 [].” *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1248–49 (9th Cir. 2016).

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.4.c.(1) and III.A.4.d.(2).

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.

Prison officials may, however, avoid liability by presenting evidence that they lacked knowledge of the risk. See *Farmer*, 511 U.S. at 844; *Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1187–88 (9th Cir. 2002), *overruled on other grounds* by *Castro*, 833 F.3d at 1076. 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); see also *Redman v. Cnty. 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) *abrogated by Farmer v. Brennan*, 511 U.S. 825 (1994).

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

The government has an “obligation to provide medical care for those whom it is punishing by incarceration,” and failure to meet that obligation can constitute an Eighth Amendment violation cognizable under § 1983. [*Estelle v. Gamble*, 429 U.S. 97, 103–05 (1976)]. In order to prevail on an Eighth Amendment claim for inadequate medical care, a plaintiff must show “deliberate indifference” to his “serious medical needs.” [*Id.* at 104.] This includes “both an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference.” *Snow v. McDaniel*, [681 F.3d 978, 985 (9th Cir. 2012), overruled in part on other grounds by *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (en banc)].

Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014). See also *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (“[D]eliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.”); *Simmons v. G. Arnett*, No. 20-55043, 2022 WL 3906207, at *5 (9th Cir. Aug. 31, 2022) (“[A]n inadvertent failure to provide adequate medical care, differences of opinion in medical treatment, and harmless delays in treatment are not enough to sustain an Eighth Amendment claim.”); *Balla v. Idaho*, 29 F.4th 1019, 1025 (9th Cir. 2022); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *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) *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995). “Serious medical needs can relate to physical, dental and mental health.” *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) (internal quotation marks and citation omitted); 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 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) (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.4.a.

“[T]o show deliberate indifference, the plaintiff must show that the course of treatment the doctors chose was medically unacceptable under the circumstances and that the defendants chose this course in conscious disregard of an excessive risk to the plaintiff’s health.” *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016) (internal quotation marks and citation omitted). “Deliberate indifference is a high legal standard. A showing of medical malpractice or negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment” *Id.* (internal quotation marks and citation omitted).

“To establish a claim of inadequate medical care, a prisoner must first show a serious medical need by demonstrating that failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain.” *Edmo*, 935 F.3d at 785 (internal quotation marks and citation omitted); see also *Jett*, 439 F.3d at 1096; *Clement*, 298 F.3d at 904; *Doty v. Cnty. 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.

“[C]laims for violations of the right to adequate medical care brought by *pretrial detainees* against individual defendants under the *Fourteenth Amendment* must be evaluated under an objective deliberate indifference standard.” *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1122–25 (9th Cir. 2018) (emphasis added) (relying on *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc), and concluding that the subjective deliberate indifference standard under the Eighth Amendment did not apply to pretrial detainee’s inadequate medical care claim under the Fourteenth Amendment).

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

“Our cases make clear that prison officials violate the Constitution when they ‘deny, delay or intentionally interfere’ with needed medical treatment.” *Sandoval v. Cnty. Of San Diego*, 985 F.3d 657, 679 (9th Cir. 2021) (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)), cert. denied sub nom. *San Diego Cnty. v. Sandoval*, 142 S. Ct. 711 (2021). See also *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).

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; *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; *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.

In *Edmo v. Corizon, Inc.*, 935 F.3d 757, 803 (9th Cir. 2019), the court held that where “the record shows that the medically necessary treatment for a prisoner’s gender dysphoria is gender confirmation surgery, and responsible prison officials deny such treatment with full awareness of the prisoner’s suffering, those officials violate the Eighth Amendment’s prohibition on cruel and unusual punishment.”

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. Cnty. of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).

Isolated occurrences of neglect do not constitute deliberate indifference to serious medical needs. *See Jett*, 439 F.3d at 1096; *18 Unnamed “John Smith” Prisoners v. Meese*, 871 F.2d 881, 883 n.1 (9th Cir. 1989). 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), *overruled in part on other grounds by Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014)); *see also Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 679 (9th Cir. 2021) (“Our cases make clear that prison officials violate the Constitution when they ‘deny, delay or intentionally interfere’ with needed medical treatment. . . . The same is true when prison officials choose a course of treatment that is ‘medically unacceptable under the circumstances.’”) (internal citations omitted), *cert. denied sub nom. San Diego Cnty. v. Sandoval*, 142 S. Ct. 711 (2021); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 786 (9th Cir. 2019) (“Typically, ‘[a] difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.’ . . . But that is true only if

the dueling opinions are medically acceptable under the circumstances.” (citations omitted)); *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016); *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).

Typically, 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 Edmo*, 935 F.3d at 786; *Hamby*, 821 F.3d at 1092 (“Eighth Amendment doctrine makes clear that ‘[a] difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.’” (citation omitted)); *Toguchi*, 391 F.3d at 1058; *Franklin v. Or., State Welfare Div.*, 662 F.2d 1337, 1344 (9th Cir. 1981). “But that is true only if the dueling opinions are medically acceptable under the circumstances.” *Edmo*, 935 F.3d at 786.

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.4.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. Cnty. 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 *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1259–60 (9th Cir. 2016) (concluding that county’s nutrition policy for pregnant prisoners did not violate the Eighth Amendment); *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). *See also Rico v. Ducart*, 980 F.3d 1292, 1298 (9th Cir. 2020) (noting that existing precedent recognizes general rights against excess noise and prison conditions that deprive inmates of identifiable human needs, such as sleep). The court has stated that *Keenan* “did not put ‘beyond debate’ the lawfulness of periodic noise resulting from court-ordered suicide-prevention checks and the immutable characteristics of a solitary confinement unit deliberately constructed in a maximum-security prison not conducive to these kinds of activities.” *Rico*, 980 F.3d at 1300.

(e) Exercise

The court has “recognized that exercise is one of the basic human necessities protected by the Eighth Amendment.” *Norbert v. City & Cnty. of San Francisco*, 10 F.4th 918, 928–29 (9th Cir. 2021) (internal quotation marks and citation omitted). “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. Procnier*, 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).

However, the court has not “held that all deprivations of outdoor exercise are per se unconstitutional.” *Norbert*, 10 F.4th at 929. “[T]he constitutionality of conditions for inmate exercise must be evaluated based on the full extent of the available recreational opportunities.” *Id.* at 930.

“[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*, 646 F.3d 1138, 1142–43 (9th Cir. 2011) (as amended) (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). “One measure of an inadequate, as opposed to merely uncomfortable, temperature is that it poses ‘a substantial risk of serious harm.’” *Graves*, 623 F.3d at 1049 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

(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) (holding there was a triable issue of fact on a continuous lighting claim where prisoner was subjected to two large fluorescent lights that were kept on 24 hours a day for six months, and prisoner claimed that the lighting caused him grave sleeping problems and other and psychological problems), *amended by* 135 F.3d 1318 (9th Cir. 1998); *see also Grenning v. Miller-Stout*, 739 F.3d 1235, 1238–41 (9th Cir. 2014) (concluding material issues of fact regarding the brightness of the continuous lighting in prisoner’s cell, the effect it had on the prisoner, and whether officials were deliberately indifferent precluded summary judgment).

(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. Cnty. of Kern*, 45 F.3d 1310, 1313–15 (9th Cir. 1995).

e. Excessive Force

“[W]henver 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); *Hughes v. Rodriguez*, 31 F.4th 1211, 1221 (9th Cir. 2022) (“In excessive force cases brought under the Eighth Amendment, the relevant inquiry is whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”); *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 795 (9th Cir. 2018); *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). Proof of sadism is *not* required for excessive force claims. See *Hoard v. Hartman*, 904 F.3d 780, 789 (9th Cir. 2018).

“[S]ubjective intent is critical in an Eighth Amendment analysis. More than de minimis force applied for no good faith law enforcement purpose violates the Eighth Amendment.” *Rodriguez*, 891 F.3d at 797 (citing *Whitley*, 475 U.S. at 320–21). In contrast, subjective intent plays no role in the Fourth Amendment analysis of excessive force claims, which instead look at the objective reasonableness of the force used. *Rodriguez*, 891 F.3d at 797. However, “[o]bjective reasonableness may inform the Eighth Amendment inquiry, providing evidence of good faith or of malice.” *Id.* (concluding that sheriff’s department employees were not entitled to qualified immunity where, during a prison disturbance, they electrically shocked prisoners with stun guns for purpose of causing harm). See also *Hoard*, 904 F.3d at 790 (the core inquiry is whether the defendant officers acted in bad faith or with the intent to harm the inmate).

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; *Rodriguez*, 891 F.3d at 796 (9th Cir. 2018) (“A plaintiff cannot prove an Eighth Amendment violation without showing that force was employed ‘maliciously and sadistically’ for the purpose of causing harm.”); *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 Hughes*, 31 F.4th at 1221–23 (concluding that the initial use of the police dog was proportional to the threats to the safety of the officers, but that factual issues precluded summary judgment based on qualified immunity for dog’s handling officer as to alleged post-handcuff beating and dog bites); *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).

5. Fourteenth Amendment

a. Equal Protection Claims

“To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.” *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (quotation marks and citation omitted) (rejecting equal protection claim where inmate failed to show that he was treated differently than any other inmates in the relevant class).

“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); *see also Harrington v. Scribner*, 785 F.3d 1299, 1305–08 (9th Cir. 2015) (discussing *Johnson v. California*).

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.

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). “[L]awfully incarcerated persons retain only a narrow range of protected liberty interests.” *Chappell v. Mandeville*, 706 F.3d 1052, 1062–63 (9th Cir. 2013) (quoting *Hewitt v. Helms*, 459 U.S. 460, 467 (1983) (concluding that temporary contraband watch did not give rise to a liberty interest under the Due Process Clause of the Fourteenth Amendment)).

(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); *Meachum v. Fano*, 427 U.S. 215, 224–27 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974); *Chappell v. Mandeville*, 706 F.3d 1052, 1062 (9th Cir. 2013); *Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1155 (9th Cir. 2012); *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*, 562 U.S. 216 (2011) (per curiam); *Carver v. Lehman*, 558 F.3d 869, 872 (9th Cir. 2009) (as amended); *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). *See also Chappell v. Mandeville*, 706 F.3d 1052, 1062–63 (9th Cir. 2013) (concluding that temporary contraband watch did not give rise to a liberty interest under the Due Process Clause of the Fourteenth Amendment). 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

“A state may create a liberty interest through statutes, prison regulations, and policies.” *Chappell v. Mandeville*, 706 F.3d 1052, 1063 (9th Cir. 2013). 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).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).

⁶ Although the Ninth Circuit has stated that *Sandin* “overruled” cases using the “mandatory language” approach to defining liberty interests, *Mujahid v. Meyer*,

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).

“[T]o find a violation of a state-created liberty interest the hardship imposed on the prisoner must be ‘atypical and significant . . . in relation to the ordinary incidents of prison life.’” *Chappell v. Mandeville*, 706 F.3d 1052, 1064 (9th Cir. 2013) (quoting *Sandin*, 515 U.S. at 483–84). 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 *Brown v. Oregon Dep’t of Corr.*, 751 F.3d 983, 987 (9th Cir. 2014); *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 away from the prisoner. See *Carlo v. City of Chino*, 105 F.3d 493, 499 (9th Cir. 1997). See also *Brown*, 751 F.3d at 987–90 (applying the “atypical and significant hardship” inquiry, and holding that 27-month confinement in the intensive management unit without meaningful review implicated a protected liberty interest, but that defendants were entitled to Eleventh Amendment and qualified immunity).

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).

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].”).

In *Neal v. Shimoda*, 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); *Gerhart v. Lake Cnty.*, 637 F.3d 1013, 1019 (9th Cir. 2011); *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); *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*

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 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 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

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

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). See also *Brown*, 751 F.3d at 987–90 (applying the “atypical and significant hardship” inquiry, and holding that 27-month confinement in the intensive management unit without meaningful review implicated a protected liberty interest, but that defendants were entitled to Eleventh Amendment and qualified immunity). See also *Brown*, 751 F.3d at 987–90 (applying the “atypical and significant hardship” inquiry, and holding that 27-month confinement in the intensive management unit without meaningful review implicated a protected liberty interest, but that defendants were entitled to Eleventh Amendment and qualified immunity).

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.

“If a prisoner must be allowed to present evidence in his defense, it necessarily follows that he must have some right to prepare for that presentation.” *Melnik v. Dzurenda*, 14 F.4th 981, 985 (9th Cir. 2021) (discussing *Wolff*). In *Melnik*, the court held that the inmate had “a constitutional right to access the envelopes used as evidence against him in the prison disciplinary hearing (or copies thereof) in preparing a defense.” 14 F.4th at 985.

To be clear, a prisoner’s right to access and prepare evidence for a disciplinary hearing is not unlimited nor unfettered. It may be limited by prison officials if they have a “legitimate penological reason.” *Koenig v. Vannelli*, 971 F.2d 422, 423 (9th Cir. 1992). If granting a prisoner access to the requested evidence would “be unduly hazardous to institutional safety or correctional goals,” access may be denied. *Wolff*, 418 U.S. at 566, 94 S. Ct. 2963.

The penological reason must be legitimate, though, not merely pretense or pretext. The denial of access may not be arbitrary as “[t]he touchstone of due process is protection of the individual against arbitrary action of government.” *Id.* at 558, 94 S. Ct. 2963.

Melnik, 14 F.4th at 986–87.

“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 *Castro v. Terhune*, 712 F.3d 1304, 1307 (9th Cir. 2013) (explaining that due process requires administrative regulations that guide prison officials in validating inmates as gang affiliates to be supported by “some evidence”); *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) (stating “inmates do not have a right to counsel in prison disciplinary proceedings”).

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. Cnty. 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. Cnty. 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 Cnty.*, 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 Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841–42 (1998).

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*, 408 U.S. 104, 108 (1972); *Castro v. Terhune*, 712 F.3d 1304, 1307 (9th Cir. 2013) (“Under the ‘void-for-vagueness’ doctrine, due process requires enactments to be written with ‘sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’” (quoting *Kolender v. Lawson*, 461 U.S. 352, 357(1983))); *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); *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996); *United States v. Ayala*, 35 F.3d 423, 424–25 (9th Cir. 1994).

6. 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; *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017) (“The most fundamental of the constitutional protections that prisoners retain are the First Amendment rights to file prison grievances and to pursue civil rights litigation in the courts, for ‘[w]ithout those bedrock constitutional guarantees, inmates would be left with no viable mechanism to remedy prison injustices.’” (quoting *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005))); *Phillips v. Hust*, 588 F.3d 652, 655 (9th Cir. 2009); *Ching v. Lewis*, 895 F.2d 608, 609–10 (9th Cir. 1990) (*per curiam*) (holding that a prisoner’s right of access to the courts includes contact visitation with his counsel).

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 *First Amend. Coal. of Arizona, Inc. v. Ryan*, 938 F.3d 1069, 1080 (9th Cir. 2019) (recognizing that the right of access to courts may be violated by the “denial of adequate law libraries and other legal assistance to prisoners, which prevents them from challenging their sentences and the conditions of their confinement”); *Phillips*, 588 F.3d at 655; *Madrid*, 190 F.3d at 995 (explaining that the right is limited, and that prisoners need only have the minimal help necessary to file legal claims). 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 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.

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.

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 Ninth Circuit has held that “prisoners have a right under the First and Fourteenth Amendments to litigate claims challenging their sentences or the conditions of their confinement to conclusion without *active interference* by prison officials.” *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011) (discussing requirements for an access-to-court claim premised on prison officials’ alleged interference with prisoner lawsuit), *overruled on other grounds as recognized by Richey v. Dahne*, 807 F.3d 1202, 1209 n.6 (9th Cir. 2015). *See also First Amend. Coal. of Arizona, Inc.*, 938 F.3d at 1080 (recognizing that the right of access to courts may be violated by “active interference with a prisoner’s right to litigate, such as seizing and withholding the prisoner’s legal files”).

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 Cnty. 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).

The access-to-court doctrine does not protect a prisoner from discipline for serving a summons and complaint on another inmates behalf. See *Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2013).

7. 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 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).

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).

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

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.

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.”); *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).

Toussaint v. McCarthy, 801 F.2d 1080, 1113–14 (9th Cir. 1986) (rejecting constitutional right to contact visitation, but noting that not all visitation 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.4.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

“An individual's property is a fundamental example of a protected interest,” and there is no question that an inmate's interest in the funds in his prison account is a protected property interest. See *Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015) (stating, “Shinault's trust account funds are within the scope of the Fourteenth Amendment.”). There is also 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)

42 U.S.C. § 1985(3) “provides a cause of action if *two or more* persons conspire to deprive an individual of his constitutional rights.” *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1171 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 337 (2021).

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). Section “1985(3) requires at least one of the wrongdoers in the alleged conspiracy to be a state actor.” *Pasadena Republican Club*, 985 F.3d at 1171.

“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.(6).

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)), *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 enacted RLUIPA, and its sister statute the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, in the aftermath of [the Supreme Court’s] decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), and *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997). See *Holt v. Hobbs*, 574 U.S. 352, 356–358, 135 S. Ct. 853, 190 L.Ed.2d 747 (2015) (discussing this history). Both statutes aim to ensure “greater protection for religious exercise than is available under the First Amendment.” *Id.*, at 357, 135 S. Ct. 853.

Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022).

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.”); *Jones v. Slade*, 23 F.4th 1124, 1140 n.3 (9th Cir. 2022) (“RLUIPA applies to the States and their subdivisions and is an exercise of congressional authority under the Spending and Commerce Clauses.”). 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), *abrogated on other grounds by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), 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); *Pierce v. Cnty. 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 Rehabilitation Act is materially identical to and the model for the ADA, except that it is limited to programs that receive federal financial assistance.” *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 908 (9th Cir. 2013) (quotation marks and citation omitted).

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

In *Castle v. Eurofresh, Inc.*, the Ninth Circuit concluded that an inmate who performed work for a private employer and had a legal obligation to work under state law, was not “employed” by the private employer within the meaning of the ADA. See *Castle*, 731 F.3d at 906–07.

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).

The judgment bar of the FTCA, which forecloses any future suit against individual employees, does not apply to cases based on the performance of a discretionary function. See *Simmons v. Himmerlriech*, 578 U.S. 621, 627 (2018).

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*, 562 U.S. 216, 219–20 (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).

“The Constitution does not, itself, guarantee a liberty interest in parole, but a state’s substantive parole scheme may create one that is enforceable under the Due Process Clause.” *Miller v. Oregon Bd. of Parole & Post Prison Supervision*, 642 F.3d 711, 714 (9th Cir. 2011). See also *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*, 642 F.3d at 714; *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). “[W]hen a State creates a liberty interest in parole, the ... due process inquiry requires federal courts to evaluate whether the state provided fair procedures for the vindication of that interest.” *Roberts v. Hartley*, 640 F.3d 1042, 1045 (9th Cir. 2011) (quotation marks and citation omitted).

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).

“[P]robable cause is not required to arrest a parolee for a violation of parole.” *Cornel v. Hawaii*, 37 F.4th 527, 532 (9th Cir. 2022) (holding that parolee’s arrest nearly seven years after alleged violation of condition of parole did not violate Fourth Amendment).

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).

Because “[r]evocation of parole is not part of a criminal prosecution,” [parolees are not extended] “the full panoply of rights” promised to people not yet convicted of a crime. [*Samson*, 547 U.S. at 883.] Although a parolee is not “at the unfettered mercy of the parole authorities, [s]he is justifiably subjected to restrictions not applicable to the population as a whole.” *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir. 1975).

Cornel, 37 F.4th at 532.

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 Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1246 n.5 (9th Cir. 2016) (“Eighth Amendment protections apply only once a prisoner has been convicted of a crime, while pretrial detainees are entitled to the potentially more expansive protections of the Due Process Clause of the Fourteenth Amendment.”); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987). “Pretrial detainees, whether or not they have been declared unfit to proceed, have not been convicted of any crime. Therefore, constitutional questions regarding the circumstances of their confinement are properly addressed under the due process clause of the Fourteenth Amendment.” *Trueblood v. Washington State Dep’t of Soc. & Health Servs.*, 822 F.3d 1037, 1043 (9th Cir. 2016) (internal quotation mark, alterations, and citations omitted).

“Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and post-conviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions.” *Shorter v. Baca*, 895 F.3d 1176, 1182 n.4 (9th Cir. 2018); *see also Fierro v. Smith*, 39 F.4th 640, 649 n.6 (9th Cir. 2022).

“[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.” *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (citation and internal quotation marks omitted). Pretrial detainees also have a due process right to be free from violence from other inmates. *See Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016). Additionally, pretrial detainees have at least the same due process right to bodily privacy as a prisoner. *See Byrd v. Maricopa Cnty. Bd. of Supervisors*, 845 F.3d 919, 923 (9th

Cir. 2017) (concluding pretrial detainee stated a claim for violation of pretrial detainee’s due process right to bodily privacy).

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 Cnty. 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, 576 U.S. at 398 (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 Supreme Court in *Kingsley* held that “the appropriate standard for a pretrial detainee’s excessive force claim is solely an objective one.” 576 U.S. at 397. See also *Hughes v. Rodriguez*, 31 F.4th 1211, 1220 (9th Cir. 2022) (“[T]he Fourteenth Amendment’s objective reasonableness standard protects pretrial detainees.”). *Kingsley* “rejected the notion that there exists a single ‘deliberate indifference’ standard applicable to all § 1983 claims, whether brought by pretrial detainees or by convicted prisoners.” *Castro*, 833 F.3d at 1069. Following *Kingsley*, the Ninth Circuit applied the objective standard to a pretrial detainee’s failure-to-protect claim. See *Castro*, 833 F.3d at 1069 (concluding there was sufficient evidence to show officers were deliberately indifferent to substantial risk of serious harm to pretrial detainee). Additionally, the court held that “claims for violations of the right to adequate medical care brought by pretrial detainees against individual defendants under the Fourteenth Amendment must be evaluated

under an objective deliberate indifference standard.” *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018).

In *Gordon v. Cnty. of Orange*, 6 F.4th 961, 973 (9th Cir. 2021), the court “extended the Supreme Court’s reasoning in *Kingsley* to claims for inadequate medical care brought by pretrial detainees. In *Gordon*, the court held that “pre-trial detainees do have a right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment.” *Id.* at 973.

Russell v. Lumitap, 31 F.4th 729, 738–39 (9th Cir. 2022).

A pretrial detainee who brings an inadequate medical care claim in a § 1983 action must prove, pursuant to objective reasonableness standard, more than negligence but less than subjective intent, which is something akin to reckless disregard. *Russell*, 31 F.4th at 738–39.

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 Cnty.*, 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 v. Cnty. of Orange*, 351 F.3d 410, 415 (9th Cir. 2003). 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. Cnty. of Ventura*, 445 F.3d 1157, 1161–62 (9th Cir. 2006); see also *Edgerly v. City & Cnty. 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 & Cnty. of San Francisco*, 595 F.3d 964, 981 (9th Cir. 2010) (en banc) (internal quotation marks and citations omitted).

In *Byrd v. Maricopa Cnty. Sheriff's Department*, 629 F.3d 1135, 1142 (9th Cir. 2011) (en banc), the 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. See also *Byrd v. Maricopa Cnty. Bd. of Supervisors*, 845 F.3d 919, 922 (9th Cir. 2017) (reversing sua sponte dismissal of complaint and concluding pretrial detainee stated a claim for violation of pretrial detainee's Fourth Amendment right to be free from unreasonable searches, where he alleged there was a cross-gender policy of allowing female guards to observe male pretrial detainees showering and using the bathroom).

The Supreme Court in *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 322–23 (2012), addressed the practice of strip searches of detainees at jails, concluding that the searches at issue did not violate the Fourth Amendment. In so holding, the Court “instructed courts to ‘defer to the judgment of correctional officials’ when the officials conduct ‘strip searches’ of detainees admitted to the general population of a jail facility.” *Shorter v. Baca*, 895 F.3d 1176, 1187 (9th Cir. 2018) (quoting *Florence*, 566 U.S. at 322–23); see also *Florence*, 566 U.S. at 322–23 (no violation where detainees passed through metal detector, were instructed to remove clothing while an officer looked for body markings, wounds, and contraband, and were required to lift genitals, turn around, and cough in a squatting position as part of the process). However, the Ninth Circuit concluded that deference to jail officials is unwarranted where search methods are unreasonable. See *Shorter*, 895 F.3d at 1189 (concluding that the search procedure that required noncompliant pretrial detainees to be chained to their cell doors for hours at a time, virtually unclothed, without access to meals, water, or clothing, and visible to guards on patrol, was humiliating and an extreme invasion of privacy, and thus, that deference was not due to the jail officials).

In *Mangiaracina v. Penzone*, 849 F.3d 1191, 1196 (9th Cir. 2017), the court clarified that prisoners have a Sixth Amendment right to be present when legal mail related to a criminal matter is inspected, and held that pre-trial detained had alleged sufficient facts to state a claim for improper opening of his incoming legal mail.

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. 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](#))

“In enacting the PLRA, Congress intended to limit a prisoner’s ability to proceed [in forma pauperis] in ‘a civil action’ or the ‘appeal [of] a judgment in a civil action or proceeding.’ [28 U.S.C. § 1915\(g\)](#).” *Washington v. Los Angeles Cnty. Sheriff’s Dep’t*, [833 F.3d 1048, 1058 \(9th Cir. 2016\)](#).

The provisions do not apply to persons who are civilly committed. *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 v. King*, [398 F.3d 1113, 1122 \(9th Cir. 2005\)](#); *Agyeman v. INS*, [296 F.3d 871, 885–86 \(9th Cir. 2002\)](#).

“Litigants who qualify for IFP status are excused from prepaying court fees and costs.” *Harris v. Harris*, [935 F.3d 670, 673 \(9th Cir. 2019\)](#).

The in forma pauperis provisions do not apply to habeas corpus proceedings. *See El-Shaddai v. Zamora*, [833 F.3d 1036, 1046 \(9th Cir. 2016\)](#); *Andrews v. King*, [398 F.3d 1113, 1122 \(9th Cir. 2005\)](#); *Naddi v. Hill*, [106 F.3d 275, 277 \(9th Cir. 1997\)](#) (order); *see also Washington v. Los Angeles Cnty. Sheriff’s Dep’t*, [833 F.3d 1048, 1058 \(9th Cir. 2016\)](#).

Petitions for a writ of mandamus cannot be squarely characterized as a ‘civil action’ or appeal within the meaning of the PLRA. *See Washington*, [833 F.3d at](#)

1058 (“Like habeas, mandamus is a common-law writ that cannot be squarely characterized as a ‘civil action’ or appeal thereof within the meaning of the PLRA.”). 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).

In *Washington v. Los Angeles Cnty. Sheriff’s Department*, persuaded by the reasoning of the Seventh Circuit in *Martin*, the court “adopted a framework for determining when a petition for writ of mandamus is civil or criminal in nature for PLRA purposes.” *El-Shaddai v. Zamora*, 833 F.3d 1036, 1047 (9th Cir. 2016) (discussing *Washington*, 833 F.3d 1048). The court held that the characterization of a mandamus petition depends on the underlying nature of the claim. *Washington*, 833 F.3d at 1059 (holding that the mandamus petitions at issue “operated like habeas claims challenging a criminal conviction and [were] outside the scope of the PLRA.”). For example,

[a] writ of mandamus against a judge presiding in the petitioner’s civil prison litigation, for instance, would function like a civil appeal and could properly be counted as a strike under the PLRA. [*Washington*,] 833 F.3d at 1057 (citing *Martin v. United States*, 96 F.3d 853, 854–55 (7th Cir. 1996)). “A petition for mandamus in a criminal proceeding,” however, “is not a form of [civil] prison litigation,” *Martin*, 96 F.3d at 854, and would not be susceptible to being counted as a strike.

El-Shaddai, 833 F.3d at 1047 (prisoner’s prior petition for writ of mandamus challenged sentence and parole terms; because it challenged the duration of his criminal sentence, it was like a habeas petition and outside of the scope of the PLRA, and did not count as a strike).

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 Cnty.*, 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) (“[P]risoners proceeding [in forma pauperis] must pay the filing fee as funds become available in their prison accounts.”). *See also Bruce v. Samuels*, 577 U.S. 82, 84 (2016). “[T]he initial partial filing fee is to be assessed on a per-case basis, *i.e.*, each time the prisoner files a lawsuit.” *Id.* Additionally, “monthly installment payments, like the initial partial payment, are to be assessed on a per-case basis.” *Id.* “Litigants who qualify for IFP status are excused from prepaying court fees and costs.” *Harris v. Harris*, 935 F.3d 670, 673 (9th Cir. 2019).

“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.” 28 U.S.C. § 1915(b)(4); *Bruce*, 577 U.S. at 84; *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002).

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 (5th Cir. 1997) (per curiam). Finally, the Fifth, Sixth and Eleventh Circuits have concluded that non-prisoners are also subject to the 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),

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](#).

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

“For certain prisoner civil rights litigation, 28 U.S.C. § 1915A(a) requires pre-answer screening of the complaint so that ‘the targets of frivolous or malicious suits need not bear the expense of responding.’” *Byrd v. Phoenix Police Dep’t*, 885 F.3d 639, 641–42 (9th Cir. 2018) (per curiam) (quoting *Nordstrom v. Ryan*, 762 F.3d 903, 908 n.1 (9th Cir. 2014)).

The PLRA changed 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). *See also Harris v. Harris*, 935 F.3d 670, 675 (9th Cir. 2019); *Byrd*, 885 F.3d at 641–42 (discussing pre-screening of a complaint under § 1915A); *Nordstrom*, 762 F.3d at 908 (same). If the district court determines that the grounds for dismissal are satisfied, “it must dismiss the case, and enter a ‘strike’ against the plaintiff prisoner. . . . Three strikes bar a prisoner from bringing a civil action or appeal *in forma pauperis*, unless he is ‘under imminent danger of serious physical injury.’ 28 U.S.C. § 1915(g).” *Byrd*, 885 F.3d at 641 (internal quotation marks and citations omitted). *See also* 28 U.S.C. § 1915(e)(2), (g); *Washington v. Los Angeles Cnty. Sheriff’s Dep’t*, 833 F.3d 1048, 1051 (9th Cir. 2016).

“[A] court may screen a complaint pursuant to 28 U.S.C. § 1915A only if, at the time the plaintiff files the complaint, he is incarcerated or detained in any facility because he is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” *Olivas v. Nevada ex rel. Dep’t of Corr.*, 856 F.3d 1281, 1284 (9th Cir. 2017) (per curiam) (quotation marks omitted). As such, “28 U.S.C. § 1915A applies only to claims brought by individuals incarcerated at the time they file their complaints.” *Olivas*, 856 F.3d at 1282 (concluding that former prisoner who had been released from custody before filing suit was not a “prisoner” under the PLRA).

Dismissal for failure to state a claim under § 1915A “incorporates the familiar standard applied in the context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).” *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012). To survive § 1915A review, a complaint must “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted)).

Nordstrom, 762 F.3d at 908.

Pro se complaints are construed liberally, and may only be dismissed if it appears beyond doubt the plaintiff can prove no set of facts in support of his claim would entitle him to relief. *Nordstrom*, 762 F.3d at 908; *see also* *Byrd*, 885 F.3d at 642 (explaining the court has “an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.”).

The Ninth Circuit has concluded that the sua sponte dismissal provisions of § 1915(e)(2) apply to appeals pending on or after April 26, 1996. *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) (explaining “the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners).

Dismissals for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(ii) shall be reviewed de novo. *See Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012); *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 Belanus v. Clark*, 796 F.3d 1021, 1024 (9th Cir. 2015); *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).

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.

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).

The PLRA’s “three strikes” provision, designed to discourage vexatious and voluminous prisoner litigation, bars a prisoner from bringing a civil action or an appeal IFP if the prisoner has three prior actions that were “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.”

Harris v. Harris, 935 F.3d 670, 673 (9th Cir. 2019) (quoting 28 U.S.C. § 1915(g) and adding emphasis).

When counting strikes, 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).

“[T]o qualify as a strike for § 1915(g), a case as a whole, not just some of its individual claims, must be dismissed for a qualifying reason.” *Hoffmann v. Pulido*, 928 F.3d 1147, 1152 (9th Cir. 2019) (explaining that “if certain claims in a

prisoner's lawsuit are dismissed as frivolous or malicious, or for failing to state a claim, that dismissal will not qualify as a PLRA strike if there are other claims that are either not dismissed or are dismissed for different, non-enumerated reasons"). "[I]f a case was not dismissed on one of the specific enumerated grounds, it does not count as a strike under § 1915(g)." *Harris*, 935 F.3d at 673; see also *Ray v. Lara*, 31 F.4th 692, 697 (9th Cir. 2022).

"A prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of an appeal." *Coleman v. Tollefson*, 575 U.S. 532, 537 (2015) (concluding that where prisoner filed multiple other lawsuits while appeal of dismissal of third complaint was pending, the prisoner was not entitled to IFP status in the successive suits). However, "a prisoner is entitled to [retain] IFP status while appealing his third-strike dismissal." *Richey v. Dahne*, 807 F.3d 1202, 1209 (9th Cir. 2015) (holding "that dismissal of the complaint in the action underlying [the] appeal does not constitute a 'prior occasion' under the PLRA").

The fact that "a prisoner pays the docket fee is no barrier to a court," issuing a strike under § 1915(g), when dismissing the case as frivolous. *Belanus v. Clark*, 796 F.3d 1021, 1028 (9th Cir. 2015).

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. The court has also concluded that "when (1) a district court dismisses a complaint on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an amended complaint, the dismissal counts as a strike under § 1915(g)." *Harris v. Mangum*, 863 F.3d 1133, 1143 (9th Cir. 2017).

"[D]ismissals for lack of jurisdiction do not fall within the scope of the PLRA's enumerated grounds." *Hoffmann v. Pulido*, 928 F.3d 1147, 1151 (9th Cir. 2019). See also *Harris v. Harris*, 935 F.3d 670, 674 (9th Cir. 2019) ("Dismissal based on a district court's decision not to exercise supplemental jurisdiction is not an enumerated ground under § 1915(g)").

“[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).”).

The court “should look to the substance of the dismissed lawsuit in order to determine whether it can be counted as a ‘strike.’” *El-Shaddai v. Zamora*, 833 F.3d 1036, 1047 (9th Cir. 2016) (explaining that some habeas petitions may be little more than 42 U.S.C. § 1983 actions mislabeled as habeas petitions, and “that the opposite can also be true: a habeas petition can be mislabeled as a § 1983 claim (either inadvertently, or as a strategy to avoid the significant substantive hurdles of our habeas jurisprudence)”).

“[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.”). *See also Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015) (“a prisoner subject to the three-strikes provision may meet the imminent danger exception and proceed in forma pauperis on appeal if he alleges an ongoing danger at the time the notice of appeal is filed”). The Ninth Circuit noted in *Andrews*, 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.” 493 F.3d at 1050.

“[T]he PLRA requires a nexus between the alleged imminent danger and the violations of law alleged in the prisoner’s complaint.” *Ray v. Lara*, 31 F.4th 692, 700 (9th Cir. 2022).

“[A] prisoner who was found by the district court to sufficiently allege an imminent danger is entitled to a presumption that the danger continues at the time of the filing of the notice of appeal.” *Williams*, 775 F.3d at 1190 (explaining that “[j]ust as the financial filings required of prisoners seeking to proceed in forma pauperis in the court of appeals are not subjected to detailed factual review and are handled administratively, [there is] no need to subject a prisoner’s allegations of imminent danger to ‘overly detailed’ review by panels of the court”).

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). “Courts may not engraft an unwritten ‘special circumstances’ exception onto the PLRA’s exhaustion requirement. The only limit to § 1997e(a)’s mandate is the one baked into its text: An inmate need exhaust only such administrative remedies as are ‘available.’” *Ross v. Blake*, 578 U.S. 632, 648 (2016); *see also Ramirez v. Collier*, 142 S. Ct. 1264, 1275 (2022); *Munoz v. United States*, 28 F.4th 973, 975 (9th Cir. 2022) (discussing *Ross*). “Exhaustion should be decided, if feasible, before reaching the merits of a prisoner’s claim.” *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014) (en banc). “Such exhaustion is mandatory under the [PLRA], 42 U.S.C. § 1997e(a), even in the execution context.” *Ramirez*, 142 S. Ct. at 1276.

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 Nettles v. Grounds*, 830 F.3d 922, 932 (9th Cir. 2016) (en banc); *Roles v. Maddox*, 439 F.3d 1016, 1018 (9th Cir. 2006).

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).

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). See also *Woodford v. Ngo*, 548 U.S. 81, 101 (2006) (explaining that § 1997e(c)(2) “serves a useful function by making it clear that the PLRA exhaustion requirement is not jurisdictional, [] thus allowing a district court to dismiss plainly meritless claims without first addressing ..., whether the prisoner did in fact properly exhaust available administrative remedies”). Moreover, failure to exhaust is an affirmative defense which defendants must raise and prove. See *Jones v. Bock*, 549 U.S. 199, 211–17 (2007); *Saddozai v. Davis*, 35 F.4th 705, 709 (9th Cir. 2022) (“A lack of PLRA exhaustion is a non-jurisdictional affirmative defense.”); *Jackson v. Fong*, 870 F.3d 928, 933 (9th Cir. 2017); *Albino*, 747 F.3d at 1171 (“The [Supreme] Court made clear in *Jones* that the defendant in a PLRA case must plead and prove nonexhaustion as an affirmative defense”); *Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010) (“lack of exhaustion must be asserted as a defense”). As such, “a defendant must first prove that there was an available administrative remedy and that the prisoner did not exhaust that available remedy. ... Then, the burden shifts to the plaintiff, who must show that there is something particular in his case that made the existing and generally available administrative remedies effectively unavailable to him by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. ... The ultimate burden of proof, however, remains with the defendants.” *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (internal quotation marks and citation omitted).

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 at 1168–69 (overruling *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003)). Rather, “[t]o the extent evidence in the record permits, the appropriate device is a motion for summary judgment under Rule 56. If summary judgment is not appropriate, the district judge may decide disputed questions of fact in a preliminary proceeding.” *Albino*, 747 F.3d at 1168.

“[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 v. Leyva*, 575 F.3d 1021, 1024 (9th Cir. 2009) (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).

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).

“In PLRA cases, amended pleadings may supersede earlier pleadings.” *Jackson*, 870 F.3d at 934; see also *Rhodes* 621 F.3d at 1005. See also *Ramirez v. Collier*, 142 S. Ct. 1264, 1276 (2022) (citing the Ninth Circuit’s decision in *Rhodes v. Robinson*, favorably in positing that “[t]he original defect” of lack of exhaustion in a prisoner’s complaint “was arguably cured by ... subsequent filings.”). Accordingly, “[e]xhaustion requirements apply based on when a plaintiff files the operative complaint, in accordance with the Federal Rules of Civil Procedure.” *Jackson*, 870 F.3d at 935 (citing *Jones*, 549 U.S. at 212) (holding that the third amended complaint was the operative complaint); see also *Saddozai v. Davis*, 35 F.4th 705, 708 (9th Cir. 2022) (discussing *Jackson*); *Rhodes*, 621 F.3d at 1005–06 (concluding that the amended complaint controlled the PLRA exhaustion analysis). “A plaintiff who was a prisoner at the time of filing his suit but was not a prisoner at the time of his operative complaint is not subject to a PLRA exhaustion defense.” *Jackson*, 870 F.3d at 937.

“[T]he PLRA exhaustion requirement requires proper exhaustion.” *Woodford v. Ngo*, 548 U.S. at 93; *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 Sapp*, 623 F.3d at 821–27 (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 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). “[I]t is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.” *Reyes v. Smith*, 810 F.3d 654, 657 (9th Cir. 2016) (quoting *Jones v. Bock*, 549 U.S. 199, 218 (2007)); *see also Fuqua v. Ryan*, 890 F.3d 838, 845 (9th Cir. 2018) (explaining “[t]he level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.” (quoting *Jones*, 549 U.S. at 218)); *Manley v. Rowley*, 847 F.3d 705, 711–12 (9th Cir. 2017); *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014).

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 (holding that Nunez’s failure to timely exhaust his administrative remedies was excused because he took reasonable and appropriate steps to exhaust his Fourth Amendment 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*, 807 F.3d 982, 986 (9th Cir. 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”); *see also Fordley v. Lizarraga*, 18 F.4th 344, 352 (9th Cir. 2021) (“[W]here inmates take reasonably appropriate steps to exhaust but are precluded from doing so by a prison’s erroneous failure to process the grievance, we have deemed the exhaustion requirement satisfied.”). “[R]emedies are not considered ‘available’ if, for example, prison officials do not provide the required forms to the prisoner or if

officials threaten retaliation for filing a grievance.” *Draper v. Rosario*, 836 F.3d 1072, 1078 (9th Cir. 2016).

In *Ross v. Blake*, [578 U.S. 632 (2016),] the Supreme Court [held] that § 1997e(a) requires an inmate to exhaust only those grievance procedures “that are capable of use to obtain some relief for the action complained of.” By way of a non-exhaustive list, the Court recognized three circumstances in which an administrative remedy was not capable of use to obtain relief despite being officially available to the inmate: (1) when the administrative procedure “operates as a simple dead end” because officers are “unable or consistently unwilling to provide any relief to aggrieved inmates”; (2) when the administrative scheme is “so opaque that it becomes, practically speaking, incapable of use” because “no ordinary prisoner can discern or navigate it”; and (3) when prison administrators “thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Id.* at 1859–60.

Andres v. Marshall, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam) (as amended) (explaining that when “prison officials improperly fail to process a prisoner’s grievance, the prisoner is deemed to have exhausted available administrative remedies”).

“[A] prisoner is excused from the exhaustion requirement in circumstances where administrative remedies are effectively unavailable, including circumstances in which a prisoner has reason to fear retaliation for reporting an incident.” *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 792 (9th Cir. 2018); see also *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015). A “prisoner exhausts ‘such administrative remedies as are available,’ . . . , under the PLRA despite failing to comply with a procedural rule if prison officials ignore the procedural problem and render a decision on the merits of the grievance at each available step of the administrative process.” *Reyes*, 810 F.3d at 658 (citation omitted). However, 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).

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

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*, 575 F.3d at 1023–24.

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 supra* III.B.6.

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 minimis.” *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002); *see also Grenning v. Miller-Stout*, 739 F.3d 1235, 1238 (9th Cir. 2014); *Pierce v. Cnty. 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 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 PLRA states that any prospective relief relating to prison conditions must be narrowly drawn, go no further than necessary, and be the least intrusive remedy. [18 U.S.C.] § 3626(a)(1)(A). The statute provides more limitations for preliminary injunctions: the injunction “shall automatically expire on the date that is 90 days after

its entry, unless the court makes the findings required under subsection (a)(1) ... and makes the order final.” *Id.* § 3626(a)(2).

Ahlman v. Barnes, 20 F.4th 489, 493 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2755 (2022). See also *Balla v. Idaho*, 29 F.4th 1019, 1024 (9th Cir. 2022); *Porretti v. Dzurenda*, 11 F.4th 1037, 1051 (9th Cir. 2021) (stating that the PLRA requires that preliminary injunctions in prison cases be narrowly drawn and the least intrusive means necessary to correct the harm).

“Under the PLRA, injunctive relief must heel close to the identified violation.” *Armstrong v. Brown*, 768 F.3d 975, 983 (9th Cir. 2014) (internal quotation marks and citation omitted). The court may “provide guidance and set clear objectives, but it may not attempt to micro manage prison administration, or order relief that would require for its enforcement the continuous supervision by the federal court over the conduct of state officers.” *Id.* (internal quotation marks and citation omitted).

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).

“The statutory text of the PLRA unambiguously states that any preliminary injunction expires automatically after 90 days unless the district court makes subsequent required findings and makes the order final.” *Ahlman*, 20 F.4th at 493.

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). *See also* *Armstrong v. Brown*, 768 F.3d 975, 988 (9th Cir. 2014) (noting that the PLRA itself provides for the appointment of a special master in any civil action in a Federal court with respect to prison conditions). 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 modified the criteria regarding the award of attorney’s fees in prisoner civil rights cases. As explained in *Kelly v. Wengler*:

The PLRA alters the lodestar method in prisoner civil rights cases in three fundamental ways. First, rather than hours reasonably expended in the litigation, hours used to determine the fee award are limited to those that are (1) directly and reasonably incurred in proving an actual violation of the plaintiff’s rights and (2) either proportionately related to court-ordered relief or directly and reasonably incurred in enforcing such relief. 42 U.S.C. § 1997e(d)(1). Second, in actions resulting in monetary judgments, the total amount of the attorney’s fees award associated with the monetary judgment is limited to 150 percent of the judgment. *Id.* § 1997e(d)(2); *see Jimenez v. Franklin*, 680 F.3d 1096, 1100 (9th Cir. 2012). This limitation does not apply to actions (or parts of actions) resulting in non-monetary relief. Third, the hourly rate used as the basis for a fee award is limited to 150 percent of the hourly rate used for paying appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A []. 42 U.S.C. § 1997e(d)(3).

Kelly v. Wengler, 822 F.3d 1085, 1099–100 (9th Cir. 2016). Note that the PLRA attorney’s fees cap does not apply to fees incurred by a prisoner in successfully defending the judgment on appeal. *Woods v. Carey*, 722 F.3d 1177, 1182 (9th Cir. 2013). *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).

“[T]he calculation required by the PLRA is not limited by the hourly rates suggested by the Judicial Conference in the Guide [to Judiciary Policy].” *Parsons v. Ryan*, 949 F.3d 443, 464 (9th Cir. 2020), cert. denied sub nom. *Shinn v. Jensen*, 141 S. Ct. 1054 (2021).

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 Cnty.*, 285 F.3d 829, 837–38 (9th Cir. 2002).

“The PLRA limits recovery of attorney’s fees ‘in any action brought by a prisoner ... in which attorney’s fees are authorized under [42 U.S.C. § 1988].” *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 808 (9th Cir. 2018) (quoting 42 U.S.C. § 1997e(d)) (explaining that attorney’s fees incurred in litigating California Civil Code § 52.1 claims are not authorized under 42 U.S.C. § 1988, and thus the PLRA’s limits do not apply).

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); see also *Rodriguez*, 891 F.3d at 808.

The PLRA states that “a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded.” 42 U.S.C. § 1997e(d)(2). Under this provision, the Supreme Court has held that compensation for a prisoner’s attorney’s fees come first from prisoner’s damages award, and that only if 25% of that award is inadequate to compensate counsel fully can defendants be responsible for balance. See *Murphy v. Smith*, 138 S. Ct. 784 (2018).

For further discussion of these provisions, see *supra* I.H.1.